DECISIONS OF THE FEDERAL MARITIME COMMISSION

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The Federal Maritime Commission makes decisions in cases brought by parties who claim they have been harmed because of a violation of the legal prohibitions in the Shipping Act of 1984, as amended, 46 U.S.C. Chapters 401-413. The Commission can also determine to investigate a possible violation of the same law. In the first instance, these claims are heard by an Administrative Law Judge who issues an Initial Decision. That Initial Decision may become the final decision of the Commission 30 days later. However, the Initial Decision can be appealed by the parties to the proceedings, or any Commissioner can ask to review the Initial Decision. In either case, the Commission would then review the Initial Decision and issue a Final Decision in the case. This publication provides a compendium of Initial and Final Decisions in these matters and selected other actions that may be significant or establish a new legal precedent.

Table of Cases Reported By Docket Number

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FEDERAL MARITIME COMMISSION
Office of the Administrative Law Judges

A CUSTOMS BROKERAGE, INC., *Claimant* v. CARGOCARE LOGISTICS USA, INC. AND CARGOCARE LOGISTICS AMERICA, INC., *Respondents*.	**DOCKET NO. 1987(I)**

Served: July 17, 2023

BEFORE: Theresa DIKE, *Small Claims Officer*.

INITIAL DECISION[1]

[Notice of Commission Determination to Review served 8/17/2023; final decision served 4/4/2024]

I. INTRODUCTION AND SUMMARY OF DECISION

Claimant A Customs Brokerage, Inc. ("ACB") initiated this proceeding by filing an informal complaint against Respondents Cargocare Logistics USA, Inc. and Cargocare Logistics America, Inc. (collectively "Cargocare") with the Federal Maritime Commission ("FMC" or "Commission"), alleging that Cargocare violated 46 C.F.R. § 515.23 in connection with the delivery of its cargo from Cochin, India to Miami, Florida. Respondent Cargocare Logistics USA, Inc. ("Cargocare USA") failed to respond or participate in this proceeding.

A. Background and Procedural History

ACB, a customs broker, paid ocean freight to Cargocare USA on behalf of its client, Brian Trading Co., LLC ("Brian Trading"), for cargo shipped through Cargocare Logistics (India) PVT. Ltd. ("Cargocare India"), a registered non-vessel-operator ("NVOCC"), based in India. Cargocare USA, had been Cargocare India's delivery agent for previous Brian Trading shipments; however, Cargocare Logistics America, Inc. ("Cargocare America") was the designated delivery agent for the shipments this time, not Cargocare USA. Cargocare India, Cargocare America, and Cargocare USA share common ownership and management. The 80% owner and director of Cargocare USA, Sue Lao, is the sister of the 80% owner and director of Cargocare America, Chase Lao. Chase Lao also worked at Cargocare USA and was still an employee there when she formed Cargocare America, and both sisters live at the same residential address. Both Cargocare America and Cargocare USA are California State corporations with identical mailing addresses listed for Chase and Sue Lao. The owner and chairman of Cargocare

[1] Pursuant to 46 C.F.R. § 502.304(g), this decision will become final unless the Commission elects to review it within 30 days of service.

India, Joy Varghese Pareckattil, is the 20% owner and the second of the two directors of Cargocare USA and Cargocare America.

Cargocare America declined to release the shipments to Claimant on the basis that Cargocare USA was the wrong vendor for the ocean freight payments and that Claimant's payment had not been received by Cargocare America. Claimant was forced to pay duplicate ocean freight to Cargocare America to obtain the shipments and to avoid accrual of demurrage on them. When its efforts to obtain a refund of the duplicate payments from Cargocare failed, Claimant filed a complaint with the Commission, seeking reparations for the payments.

On December 28, 2022, the Commission issued a Notice of Filing of Small Claims Complaint and Assignment, instructing Respondents Cargocare to file a response to the complaint by January 23, 2023, and to indicate whether they consented to the use of the Commission's informal procedures at Subpart S for adjudication of the complaint. The Commission also assigned this proceeding to the Chief Administrative Law Judge ("Chief ALJ") to designate a small claims officer ("SCO") to adjudicate the proceeding. On January 23, 2023, Respondent Cargocare America filed a response to the complaint and consented to the use of the informal procedures. However, no response was received from Respondent Cargocare USA. On January 25, 2023, another copy of the Informal Complaint and Notice of Assignment was emailed to Cargocare USA using its email on file with the Commission and it was instructed to file a response by February 20, 2023. The Chief ALJ assigned this proceeding to the undersigned for adjudication on January 31, 2023.

Pursuant to 46 C.F.R. § 502.301(a) and (e) of the Commission's Rules, which authorize the SCO in a Subpart S proceeding to, if deemed necessary, request additional documents or information from the parties, on February 23, 2023, an order was issued directing the parties to submit any discovery requests that would aid them in establishing their claims and defenses, and directing Respondent Cargocare USA to file a response and participate in the proceeding otherwise a default judgment could be issued against it. Claimant and Cargocare America submitted discovery requests in response to the Order, but no response was received from Cargocare USA.

On April 12, 2023, an Order to Submit Answer to Complaint ("Order to File Answer") was sent by UPS to Cargocare USA through its director and designated FMC contact person, Lam (Sue) Lao. The UPS tracking information shows that the package containing the Order to File Answer was delivered on April 12, 2023, and signed for by Lao. On April 28, 2023, an Order to Submit Supplemental Information ("Order for Supplemental Information") was issued, directing the parties to provide certain information and documents by May 12, 2023, and permitting any party wishing to file a response to the opposing party's submission to do so by May 19, 2023. Claimant and Cargocare America submitted a response to the Order for Supplemental Information on May 15, 2023. Again, no response was received from Cargocare USA. Neither party submitted a reply to each other's response. The record is now complete.

As discussed in greater detail below, a default judgment is entered against Respondent Cargocare USA. In addition, it is found that Respondents violated section 41102(c) by forcing Claimant to pay double ocean freight to obtain its shipments, and that Respondents are jointly and severally liable to Claimant for its damages. Claimant is awarded a refund of the duplicate payments as reparations.

B. Argument of the Parties

Claimant states that it paid ocean freight to Cargocare USA for three shipments through PayCargo, an ocean freight payment platform, on behalf of Brian Trading, as it had always done in the past. According to Claimant, Cargocare USA had recently changed its name to Cargocare America, and when Claimant tried to collect its shipments Cargocare America denied that it received the payments and claimed not to know Cargocare USA, insisting that Claimant pay ocean freight again to it to obtain the shipments. Complaint, pg. 1. Claimant contends that "[a]lthough there is common management and ownership of [both respondents] they are not willing to refund payments made erroneously to Cargocare Logistics USA, Inc." Complaint at 1. It states that Cargocare USA ignored its requests for refund of the duplicate freight payments and neither paid the freight to the common carrier that transported the shipment nor refunded the payment. Complaint pg. 1.

Claimant explains that it also attempted to obtain a refund through PayCargo, which in turn requested a refund from Cargocare USA but Cargocare USA did not respond to PayCargo's communications. Claimant's Supplemental Info. ("C. Supp. Info") pgs. 1-2 at no. 5. Claimant states: "We attempted to amicably resolve the matter but without response, and facing demurrage charges, we made the duplicate payment to release the shipments and avoid demurrage." Complaint at 1. In addition, Claimant filed a claim with Cargocare America's bond company for a refund of the duplicate payments, but its claim was denied. Claimant Second Supplemental Info ("C. 2nd Supp. Info.") pg. 1. Claimant seeks reparations in the amount of $20,970 to cover the duplicate freight payments it made to Cargocare America. Complaint pgs. 1 and 3.

Respondent Cargocare America denies that it changed its name from Cargocare USA to Cargocare America. Responding on behalf of Cargocare America, its vice president and FMC contact, Chase Sut Lin Lao ("Chase Lao"), asserts:

> Cargocare Logistics America Inc. did not change name. I applied for the FMC license under my name, Chase Sut Lin Lao. I used my credit cards to pay for the expenses to start the company, including but not limited to incorporation, FMC Application, FMC Bond, Business License, computer, excel license, etc. I also borrowed money from my father to maintain the cash flow in the beginning of the business.

Answer pg. 1. Cargocare America avers that it "clearly specified (in bold red font) their payment options and information in all documents" it sent to Claimant, but Claimant nevertheless set up the PayCargo payment to the wrong vendor (Cargocare USA), which kept the funds that were erroneously sent to them. Answer pg. 2. It asserts:

> The Claimant alleges in his Small Claim Form, Paragraph V. that quote: 'Cargocare Logistics America Inc. claims not [to] know the other company and requests payment again…' end quote. When in fact, The Company informed the Claimant that they have made payment to the wrong vendor, and to request a

> refund from PayCargo. The Company provided Lam Lao [vice president of Cargocare USA]'s personal email to PayCargo . . .
>
> Furthermore, The Company was injured by Cargocare Logistics USA Inc. Creditors of Cargocare Logistics USA Inc. have been and continues to harass The Company. Cargocare has kept the funds that were erroneously sent to them for a number of shipments.

Answer pg. 2.

Chase Lao states that she processed the shipments in question and did not refuse to release the shipments. According to her, upon notification from Claimant that it paid the freight charges to Cargocare USA she "informed the Claimant that when remitting payment on the Paycargo Platform we are registered under: 'Cargocare Logistics America Incorporated,' and for him to cancel the payment with PayCargo," and upon receipt of Claimant's second payment processed the freight release the same day. R. Supp. Info Ex. H, at nos. 2-4. She opines that it "is not a crime for businesses to have [a] similar name." R. Supp. Info. Ex. H, at no. 6.

II. PERTINENT FACTS ESTABLISHED BY THE RECORD ("PF")

1. Claimant ACB is a customs broker located in Doral, Florida. Complaint pg. 14.

2. ACB has power of attorney to transact international transportation and customs business on behalf of Brian Trading, the importer of the cargo at issue. Complaint pg. 1 at ¶ III A.

3. Respondent Cargocare America is an FMC- licensed NVOCC (organization and license number 028643). Answer pg. 1; www2.fmc.gov/oti/NVOCC.aspx.

4. I take official notice that Sut Lin (Chase) Lao ("Chase Lao"), who owns an 80 percent share of Cargocare America, is one of its two directors, and its vice-president, secretary, chief financial officer, and designated FMC contact person. https://home-fmcgov.msappproxy.net/rpi/Organization.aspx.

5. Cargocare America's address on file with the FMC is listed as 145 E Live Oak Avenue, Suite C, Arcadia, CA 91006, but its mailing address is listed as 7702 Fern Avenue, Rosemead, CA 91770. https://home-fmcgov.msappproxy.net/rpi/Organization.aspx.

6. Chase Lao resides at 7702 Fern Avenue, Rosemead, CA 91770. Answer pg. 1.

7. I take official notice that Respondent Cargocare USA was formerly an FMC-licensed NVOCC (organization and license number 023053). Cargocare USA's NVOCC bond coverage was terminated effective October 27, 2021, and its NVOCC license was subsequently cancelled. https://home-fmcgov.msappproxy.net/rpi/Organization.aspx.

8. I take official notice that Lam (Sue) Lao ("Sue Lao"), who owns an 80 percent share of Cargocare USA, is one of its two directors, secretary, treasurer, chief financial officer, and FMC contact. https://home-fmcgov.msappproxy.net/rpi/Organization.aspx.

9. Cargocare USA's address on file with the FMC is listed as 7771 Garvey Avenue, Rosemead, CA 91770. https://home-fmcgov.msappproxy.net/rpi/Organization.aspx.

10. Sue Lao resides at 7702 Fern Avenue, Rosemead, CA 91770. Answer pg. 1.

11. Chase Lao and Sue Lao are sisters. Answer pg. 1.

12. Chase Lao was employed at Cargocare USA from June 6, 2011, to December 30, 2020. R. Supp. Info. pg. 1, at no. 2; R. Supp. Info. Ex. E, at pgs. 1-2.

13. Chase Lao incorporated Cargocare America in September 2020. R. Supp. Ex. E, at pgs. 1-2.

14. Chase Lao operated Cargocare America during some of the period she worked for Cargocare USA. R. Supp. Info. pg. 1 at no. 2; R. Supp. Ex. E, at pgs. 1-2.

15. I take official notice that Cargocare America and Cargocare USA are California State corporations, in Active status, and both companies' mailing addresses are listed by the California Secretary of State as 7702 Fern Avenue, Rosemead, CA 91770. In addition, Cargocare America's principal address is listed as 7702 Fern Avenue, Rosemead, CA 91770. Cargocare America's agent address is listed as: "Individual, Chase Sut Lin Lao, 7702 Fern Avenue, Rosemead, CA 91770." Cargocare USA's agent address is listed as "Individual, Lam D Lao, 7702 Fern Avenue, Rosemead, CA 91170." https://bizfileonline.sos.ca.gov/search/business.

16. Cargocare USA's principal address is listed with the California Secretary of State as 7771 Garvey Avenue, Rosemead, CA 91770. https://bizfileonline.sos.ca.gov/search/business.

17. Cargocare India issued three multimodal transport bills of lading for the three shipments at issue. Complaint Ex. at pg. 8.

18. Cargocare India is a registered NVOCC (organization number 020216) based in Mumbai, India. https://home-fmcgov.msappproxy.net/rpi/Organization.aspx.

19. Joy Varghese Pareckattil is Cargocare India's Chairman, owner, and FMC contact. Complaint Ex. Pg. 5; https://home-fmcgov.msappproxy.net/rpi/Organization.aspx ; R. Supp. Info. Ex. E, at pg. 107.

20. Joy Varghese Pareckattil is also the president and one of the two directors of Cargocare America and Cargocare USA and owns a 20 percent share of both Cargocare America and Cargocare USA. https://home-fmcgov.msappproxy.net/rpi/Organization.aspx; R. Supp. Info. pgs. 1 – 2 at nos. 3, 4, 9; R. Supp. Info. Ex. E, at pg. 111.

21. Joy Varghese Pareckattil is the signatory for Cargocare America's FMC-18 application for NVOCC license and signed the FMC-18 form and certifications in the application on behalf of Cargocare America. R. Supp. Info. Ex. E, at pg. 114.

22. Claimant usually handles the ocean freight payment and customs processing of the shipments imported by Brian Trading. Complaint pg. 1, at ¶ III A.

23. Until the events in dispute, Claimant regularly dealt with Cargocare USA when it advanced ocean freight payment and took delivery of Brian Trading's shipments. Complaint pg. 1, at ¶ III A.

24. Brian Trading arranged with Cargocare India to transport the shipments in question from Cochin, India to Miami, Florida by ocean transportation. C Supp. Info. pg. 1, at no. 1.

25. Cargocare India's bills of lading for the shipments, numbered CCLCOK190250, CCLCOK190251, and CCLCOK190255 respectively, list United Coir Factories as the consignor, Brian Trading as the consignee, Claimant ACB as the notify party, Cochin, India as the place of acceptance, Miami, Florida as the port of discharge, and the cargo as 40' high cube container nos. CAIU8547969, HLXU8508860 and UACU5812832, respectively, containing door mats. In addition, the bills of lading list Cargocare America as Cargocare India's delivery agent, address: 7702 Fern Avenue, Rosemead, CA 91770, USA. Complaint Ex. at pg. 8.

26. As Cargocare India's delivery agent Cargocare America processed the shipments at issue upon their arrival at the destination port. Complaint Ex. at pg. 8; R. Supp. Ex. H, at no. 2.

27. On October 1, 2021, Cargocare America sent arrival notices for the shipment to ACB. In pertinent part, the email containing the arrival notices stated in red font. "Please remit payment to the new company: Cargocare Logistics America Inc. Paycargo: Cargocare Logistics America Incorporated." Answer Ex. A, at pg. 4; Ex. B, at pg. 9; and Ex. C, at pg. 14.

28. In the arrival notices, Cargocare America listed its company address as "7771 Garvey Avenue, Rosemead, CA 91770," the same address Cargocare USA listed as its company address. Complaint Ex., at pg. 7; C. Supp. Info. Ex. 2 and 3; Answer Ex. A.

29. On October 4, 2021, Claimant paid Cargocare India's ocean freight charges for the three shipments to Cargocare USA through PayCargo. Complaint Ex., at pgs. 6, 9, and 12.

30. Chase Lao of Cargocare America states:

> On October 11, 2021, I received Paycargo Receipts from the Claimant, it was made to the vendor "Cargocare Logistics USA." Subsequently, I informed the Claimant that when remitting payment on the Paycargo Platform, we are registered under vendor: "Cargocare Logistics America Incorporated," and for him to cancel the payment with Paycargo.

R. Supp. Info. Ex. H, at no. 3.

31. Cargocare America refused to release the shipments unless Claimant paid ocean freight directly to it, stating: "Pending payment. Please cancel your payment cargo payment [sic]

and resend it to: PayCargo & CargoSprint: Cargocare Logistics America Incorporated." Complaint pg. 1, at ¶ V; Answer Ex. D, at pg. 20; R. Supp. Info. Ex. H, at no. 3.

32. On October 12, 2021, Claimant made three duplicate ocean freight payments totaling $20,970, through PayCargo for its three containers shipped by Cargocare India, with Cargocare America as the beneficiary. Complaint pg. 1, at ¶ V; Answer Ex. D, at pg. 19.

33. Claimant was unable to obtain a refund of the duplicate payments from Respondents despite efforts by PayCargo to obtain a refund for Claimant. Complaint pg. 1, at ¶ V; Answer Ex. D, at pg. 22 – 26.

34. Other shippers who paid Cargocare USA through PayCargo for ocean freight owed to Cargocare India were similarly denied release of their shipments by Cargocare America on the basis that they had paid the wrong vendor, forcing them to make a second payment. *See, e.g.,* Answer Ex. E, at pg. 28 (email from Chase Lao to Sue Lao dated September 8, 2021, re: bill of lading no. CCLBOM212209, stating: "Hi Sis . . . can you help ask Paycargo to remove CCL USA vendor account? So many people sending payment to CCL USA and coming back to me! This guy is asking for refund.); Answer Ex. E, at pg.38 (email from Chase Lao to Sue Lao dated September 17, 2021, stating in pertinent part: "another customer paid CCL USA . . . all asking me to refund before they pay CCL America again . . . please help!"); R. Supp. Ex. G, Text 02 at pg. 6 (payment in the amount of $6,243.06 by Pro Source to Cargocare USA (at pg. 8, Sue Lao purportedly sends a text message to Chase Lao stating: "Bank of America cleared all my info out. Please get me Prosource acct info and PayCargo acct info."))

35. The duplicate ocean freight paid by these shippers were never refunded to them. *See, e.g.,* Answer Ex. E, at pg. 28 (email from Keith to Chase Lao re: bill of lading no. CCLBOM212209, stating: "I took care of this on 8/31. There is a person at your company that is notified when Paycargo payments are made. Please find out who it is. Also, please see the attached. I am trying to get a refund from the other company. Can you please put me in contact with someone there? I have not heard back from Sue"); Answer, Ex. D, at pgs. 23-27 (Record of unsuccessful attempts by PayCargo to obtain refund of Claimant's duplicate payment.).

36. Cargocare America instructed Claimant to make another payment to it and cancel its payment to Cargocare USA even though it knew from experience that Claimant would not be able to cancel the payment and Cargocare USA would not refund the payment. *See, e.g.,* Answer Ex. E, at pg. 28, above; Answer Ex. E, at pg. 38, above; Answer Ex. E, at pgs. 38-39 (email from Yovin Udagadera of Apex Logistics International (NY) to Chase Lao, dated September 17, 2021, stating: Please see attached email. PayCargo is working with us to process the refund for our original payment – please assist with requirements on your end. The email to Sue at CargoCare didn't go through so please get the appropriate party in copy. I have added you to the aforementioned email chain.").

37. The ocean freight payments were deposited into a Cargocare USA account at Bank of America. *See, e.g.,* R. Supp. Ex. G, Text 01 at pg. 3 – 7; R. Supp. Ex. G, Text 02 at pg. 4-5 (text message purportedly from Chase Lao to Sue Lao, responding to a screen shot of a

deposit into Cargocare USA's Bank of America account, stating: "This is stupid pro source."). *See also* R. Supp. Ex. G, Text 02 at pg. 6 (screenshot of a deposit by Pro Source in the amount of $6,243.06 on January 11, 2023, into Cargocare Logistics USA's Bank of America account.).

38. Claimant filed a claim for refund of the duplicate payment with Cargocare America's bond provider, but its claim was denied on the basis that the claim "is not a covered claim." C. Supp. Ex. 7.

III. DISCUSSION

Pro se Claimant alleges that Respondents violated 46 C.F.R. § 515.23. That section of the Commission's Regulations describes how to pursue claims against ocean transportation intermediaries. Claimant was asked to specify a valid Shipping Act claim but in response, identified 46 U.S.C §§ 40902(b)(3) (which provides that a bond shall be available to pay any judgment for damages against an ocean transportation intermediary) and 41104(a)(4)(E) (which forbids common carries to engage in any unfair or unjustly discriminatory practice in the matter of adjustment and settlement of claims). *See* email from Claimant to SCO dated 7/5/2023, with Respondents Cargocare copied.

> It is well settled that the courts are to liberally construe *pro se* pleadings. Moreover, the Court's instruction has been construed to apply to all filings by a *pro se* litigant, not just to the pleadings alone . . . Consistent with the court's treatment of *pro se* litigants and pleadings, administrative agencies like this Commission have tended . . . to be more lenient even than courts in such matters.

Verucchi Motorcycles, LLC v. Senator Int'l Ocean, LLC, FMC Docket No. 06-05, 2008 WL 2019109, at *2 (FMC May 7, 2008) (internal citations and quotation marks omitted).

For the reasons discussed below, it is found that a violation of 46 U.S.C § 41102(c) occurred.

A. Controlling Authority

Respondents are NVOCCs. "The term 'ocean transportation intermediary' means an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(20). An NVOCC is "a common carrier that does not operate the vessels by which the ocean transportation is provided and is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(17). A "common carrier" is a person that –

> (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation;
>
> (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and

(iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . . .

46 U.S.C. § 40102(7). The term "shipper" means –

(A) a cargo owner;
(B) the person for whose account the ocean transportation of cargo is provided;
(C) the person to whom delivery is to be made;
(D) a shippers' association; or
(E) a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract.

46 U.S.C. § 40102(23).

Section 41102(c) provides that "[a] common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

To establish a successful claim for reparations under section 41102(c), the claimant must demonstrate that:

(a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;

(b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;

(c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;

(d) The practice or regulation is unjust or unreasonable; and

(e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4.

B. Evidence and Burden of Proof

"In all cases governed by the requirements of the Administrative Procedure Act, 5 U.S.C. 556(d), the burden of proof is on the proponent of the motion or the order." 46 C.F.R. § 502.203. Thus, a claimant alleging a violation of the Shipping Act bears the burden of proving its allegations against the respondent. The term, "burden of proof" is understood to mean "the burden of persuasion." *Director v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. *See Steadman v. SEC*, 450 U.S. 91, 102 (1981). When the party with the burden of persuasion produces sufficient evidence (characterized as a prima facie case), the burden of production shifts to the other party to produce evidence rebutting that case. *In re South Carolina State Ports Auth. for Declaratory Order*, 27 S.R.R. 1137, 1161 (FMC 1997). *See also Steadman*, 450 U.S. at 101 ("Where a party having the burden of proceeding has come forward with a prima facie or substantial case, he will prevail unless his evidence is discredited or rebutted."). When direct evidence is unavailable inferences may be drawn from certain facts and circumstantial evidence may be sufficient so long as the fact finder does not rely on mere speculation. *Waterman S.S. Corp v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993) adopted in relevant part, 26 S.R.R. 1424, 1994 WL 279898 (FMC June 13, 1994). If the evidence produced by both parties is evenly balanced the party with the burden of persuasion will not prevail. *See Greenwich Collieries*, 512 U.S. at 281.

C. A Default Judgment is Entered Against Respondent Cargocare USA

When Cargocare USA failed to respond to the Commission's December 28, 2022, Notice of Filing and Assignment ("Notice"), another copy of the Informal Complaint and Notice was emailed to Cargocare USA on January 25, 2023, using its email on file with the Commission and it was instructed to file a response to the Complaint by February 20, 2023. Again, Cargocare USA failed to respond. On February 23, 2023, an order was issued, which stated in pertinent part:

> The Notice [of Filing and Assignment for the Proceeding] advised Respondent Cargocare that failure "to submit a timely response expressly refusing the informal procedure set forth in Rule 304 of Subpart S will be deemed, conclusively, to indicate consent to the informal procedure." Notice at 1. Despite receipt of the delivery confirmation that the email containing the Notice and Complaint was successfully delivered to Respondent Cargocare USA, no response was received from Cargocare USA by the expiration of the deadline provided for its response. Cargocare USA is therefore deemed to have conclusively consented to the informal procedure. Accordingly, Respondent Cargocare USA is hereby cautioned that if it fails to respond to the complaint and to participate in this proceeding a default judgment may be issued against Cargocare USA awarding the requested reparations amount to Claimant.

Order to Submit Discovery Requests at 1-2. *See also* 46 C.F.R. § 502.304(e) ("Within twenty-five (25) days from the date of service of the claim, the respondent shall serve upon the claimant and file with the Commission its response to the claim, together with an indication . . . as to whether the informal procedure provided in this subpart is consented to. Failure of the respondent to indicate refusal or consent in its response will be conclusively deemed to indicate such consent.").

On April 12, 2023, an Order to File Answer was sent by UPS to Respondent Cargocare USA through its director and FMC contact person, Lam (Sue) Lao. The UPS tracking information shows that the package was delivered on April 12, 2023, and signed for by Lao. The Order to File Answer stated in pertinent part:

> Respondent is ordered for the final time to file a response to the Complaint as previously directed. Failure to file an answer by April 26, 2023, may result in a default decision against Respondent, including award of the reparation requested by Claimant and its attorney fees.

Order to File Answer at 1. Cargocare USA again failed to respond to that order.

Cargocare USA failed to participate in this proceeding despite receiving the Complaint and orders to respond to the Complaint as well as multiple warnings that failure to participate in this proceeding could result in a default judgment against it.

Although Rule 62(b)(6), which discusses the consequences of a respondent's failure to file an answer, is not applicable to Subpart S proceedings, the undersigned used the Rule as guidance. Rule 62(b)(6) provides:

> Failure of a party to file an answer to a complaint...within the time provided will be deemed to constitute a waiver of that party's right to appear and contest the allegations of the complaint . . . to which it has not filed an answer and to authorize the presiding officer to enter an initial decision on default . . . Well pleaded factual allegations in the complaint not answered or addressed will be deemed to be admitted.

46 C.F.R. § 502.62.(b)(6). Accordingly, a default judgement is entered against Respondent Cargocare USA.

D. Claimant Establishes that Respondents Violated Section 41102(c)

Although Claimant's well pleaded *factual allegations* in the complaint are deemed to be admitted against Cargocare USA, Claimant nevertheless must prove that the alleged conduct by Respondents constitutes a Shipping Act violation and that it is entitled to recover reparations against Cargocare USA. "In all cases governed by the requirements of the Administrative Procedure Act, 5 U.S.C. 556(d), the burden of proof is on the proponent of the motion or the order." 46 C.F.R. § 502.203. The term, "burden of proof" is understood to mean "the burden of persuasion." *Director v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. *See Steadman v. SEC*, 450 U.S. 91, 102 (1981). When direct evidence is unavailable inferences may be drawn from certain facts and circumstantial evidence may be sufficient so long as the fact finder does not rely on mere speculation. *Waterman S.S. Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993) adopted in relevant part, 26 S.R.R. 1424, 1994 WL 279898 (FMC June 13, 1994).

Section 41102(c) forbids a "a common carrier, marine terminal operator, or ocean transportation intermediary [to] fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 C.F.R. § 41102(c). To succeed in a claim for reparations under section 41102(c), the claimant must show that: 1) the respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary; 2) the alleged illegal conduct is "occurring on a normal, customary, and continuous basis;" 3) the alleged practice or regulation relates to or is connected with receiving, handling, storing or delivering property; 4) the alleged practice or regulation is unjust or unreasonable; and, 5) the alleged practice or regulation in question is the proximate cause of the loss the claimant alleges it suffered. 46 C.F.R. § 545.4(d). All five elements must be demonstrated to recover reparations.

1. Respondents Are Ocean Transportation Intermediaries

Respondent Cargocare America is a licensed NVOCC. PFF 3. Respondent Cargocare USA's bond on file with the FMC was active and effective until October 27, 2021, thus it was a licensed NVOCC when the transportation in dispute occurred. The first ocean freight was paid into its account on October 4, 2021, and the duplicate ocean freight was paid to Cargocare America on October 14, 2021. PFFs 7, 29, and 32. The first element for a claim for reparations under section 41102(c) is thus demonstrated.

2. The Alleged Practice Relates to or is Connected with Receiving, Handling, Storing, or Delivering Property

The alleged conduct is related to the delivery of cargo Claimant's client shipped from India to Florida. Therefore, the element requiring that the practice at issue be relate to or connected with receiving, handling, storing, or delivering property is also satisfied.

3. Respondents' Conduct was Unjust and Unreasonable

Although Respondent Cargocare USA received payments from Claimant for the ocean freight owed to Cargocare India, it did not apply the payments towards the release of the shipments in question, forcing Claimant to make duplicate ocean freight payments to obtain release of the shipments. Further, Cargocare USA failed to refund the duplicate payments to Claimant and ignored its attempts to obtain a refund. The evidence thus shows that Cargocare USA acted unjustly and unreasonably.

As for Cargocare America, while it is an NVOCC able to ship cargo, in this case it acted solely as a delivery agent for Cargocare India for the shipments at issue. Because Cargocare India, not Cargocare America, provided transportation for the shipments, ocean freight due from Claimant for the shipments was owed to Cargocare India, not Cargocare America. The evidence shows that Cargocare India's chairman and owner, Joy Varghese Pareckattil, is also the president, director, and part owner of both Cargocare America and Cargocare USA, which had previously acted as Cargocare India's delivery agent for other shipments delivered to Claimant by Cargocare India. The evidence also shows that Cargocare USA and Cargocare America, owned by the Lao sisters and Joy Varghese Pareckattil, operated out of the same office locations – 7771 Garvey Avenue, Rosemead, CA 91770 and 7702 Fern Avenue, Rosemead, CA 91770. PFFs 5, 6, 9, 10, 15, 16, 25 and 8; Complaint Ex., at pg. 7; C. Supp. Info. Ex. 2 and 3; Answer Ex. A. Also, Chase Lao operated Cargocare America during some of the period she worked for Cargocare USA. PFF 14. *See also* R. Supp. Info. pg. 1, at no. 2; R. Supp. Info. Ex. E, at pgs. 1-2. All the NVOCCs involved in the delivery of Claimant's shipments in this case thus appear to have acted as one unit, with intertwined operations.

While contrary to Cargocare America's instructions, on October 4, 2021, Claimant paid the freight owed to Cargocare India through Cargocare USA rather than through Cargocare America, Cargocare India is found to have taken constructive possession of the payment since Cargocare USA and Cargocare India share a common management and ownership. Because Claimant had already paid ocean freight to Cargocare India, the transportation provider, Cargocare America acted unjustly and unreasonably when it forced Claimant to remit the second payment to it in order to obtain release of its shipments. Moreover, Cargocare America knew when it asked Claimant to remit the second ocean freight payment that Claimant had already paid the freight charges owed for the shipments and also knew from experience that Cargocare USA would not refund Claimant's duplicate payments. *See, e.g.,* PFF 34 (Answer Ex. E, at pg. 28 (email from Chase Lao to Sue Lao dated September 8, 2021, stating: "So many people sending payment to CCL USA and coming back to me!") and Answer Ex. E, at pg. 38 (email from Chase Lao to Sue Lao dated September 17, 2021. stating: "another customer paid CCL USA . . . all asking me to refund before they pay CCL America again.")); R. Supp. Info. Ex. G, Text 02 at pg. 6 (payment from Pro Source, whom Cargocare America referred to as "Stupid Pro Source" (PFF 37), in the amount of $6,243.06 not refunded); PFF 35 (double payment from Keith for bill of lading no CCBOM212209, made on 8/31/2021, not refunded); PFF 36 (double payment from Apex Logistics on September 17, 2021, not refunded).

In the past, the Commission has found similar conduct to be unjust and unreasonable and a violation of section 41102(c). For instance, in *Total Fitness Equip.*, the Commission upheld the administrative law judge's finding that the respondent NVOCC had violated section 10(d)(1) (the predecessor to section 41102(c)) by forcing the shipper to pay twice for the same shipment. Dismissing the NVOCC's contention that it never received the first payment made by the claimant because the NVOCC's agent did not remit the claimant's payment, the Commission stated:

> However, the Commission recently held that the existence of a dispute between an NVOCC and its agent does not excuse the NVOCC from discharging its obligations to its shipper-customer. The same rule can be said to apply here. That Worldlink was having problems with its Taiwanese agent (which eventually led to Worldlink's decision to terminate that agency-relationship) does not excuse Worldlink from taking constructive possession of money paid to the agent for a shipment.

Total Fitness Equip., Inc. v. Worldlink Logistics, Inc., FMC Docket No. 1831(F), 1998 WL 940255, at *11, 28 S.R.R. 296 (FMC Dec 10, 1998) (citing *Corpco Int'l Inc. v. Straightway Inc.,* 28 S.R.R. 296, 299-300 (1998)). Similarly, here, Cargocare India has constructive possession of Claimant's payment to Cargocare USA, with which it has an even closer relationship than in the case of the respondent in *Total Fitness* and its Taiwanese agent, given that Cargocare India and Cargocare USA share the same ownership and management. In light of the foregoing, Claimant demonstrates that Respondents' conduct was unjust and unreasonable, another element necessary for a successful claim under section 41102(c).

4. The Claimed Act Occurred on a Normal, Customary, and Continuous Basis

The foregoing evidence and discussion also demonstrate that the unjust and unreasonable conduct by Respondents occurred many times, with Cargocare USA receiving, but failing to apply the ocean freight payments it received from shippers, and Cargocare America forcing the shippers to make a double payment despite knowing that the shippers had already paid ocean freight to Cargocare India through Cargocare USA. *See, e.g.,* Answer pg. 2 (Respondent Cargocare America stating: "Cargocare Logistics USA Inc. has kept the funds that were erroneously sent to them for a number of shipments."); PFF 34 (Answer Ex. E, at pg. 28 (email from Chase Lao to Sue Lao dated September 8, 2021, stating: "So many people sending payment to CCL USA and coming back to me!") and Answer Ex. E, at pg. 38 (email from Chase Lao to Sue Lao dated September 17, 2021, stating: "another customer paid CCL USA . . . all asking me to refund before they pay CCL America again.")); R. Supp. Info. Ex. G, Text 02, at pg. 6 (double payment from Pro Source in the amount of $6,243.06 not refunded); PFF 35 (double payment from Keith for bill of lading no CCBOM212209, made on 8/31/2021, not refunded); PFF 36 (double payment from Apex Logistics on September 17, 2021, not refunded).

Because there is evidence that Respondents engaged in the illegal conduct discussed above on many other occasions, I find that there is ample evidence that the illegal conduct by Respondents was customary and continuous, and thus was a practice. *See, e.g., J.M. Altieri v. Puerto Rico Ports Authority*, 7 F.M.C. 416, 420 (ALJ 1962) (stating that in order to constitute a practice the alleged act must involve a "series of such occurrences," rather than "an isolated or one-shot occurrence."). Accordingly, Claimant has demonstrated by a preponderance of the evidence that the illegal practice by Respondents occurred on a normal, customary, and continuous basis, another required element to establish a claim under section 41102(c).

5. The Practice by Respondents is the Proximate Cause of the Loss Suffered by Claimant

Claimant demonstrates that it incurred damages in the amount of $20,970 (FF 36), the amount it seeks as reparations, because of the double payments it was forced to make to obtain its shipments due to Respondents' conduct. Accordingly, the element requiring that the illegal practice by the respondent be the proximate cause of the loss suffered by the claimant is similarly demonstrated.

E. Reparations

Claimant is entitled to recover the $20,970 in double payments it was forced to pay. Respondents Cargocare USA and Cargocare America are jointly and severally liable to Claimant in that amount. It is noted that although Cargocare USA is no longer an FMC-licensed NVOCC, its bond was active and on file with the Commission at the time the illegal conduct transpired. Therefore, assuming that the bond has not been depleted it should be available to pay the judgment against Cargocare USA if this initial decision becomes final. As an FMC-licensed NVOCC, Cargocare America's bond should be active and available to pay judgments against it.

IV. CONCLUSION

The evidence supports a finding that Respondents Cargocare USA and Cargocare America violated section 41102(c) of the Shipping Act. Claimant is granted reparations in the amount of $20,970, jointly, and severally against Respondents.

IV. ORDER

Upon consideration of the evidence of record, arguments of the parties, and the foregoing findings and conclusion that Respondents Cargocare USA and Cargocare America violated section 41102(c), and Claimant suffered actual injury in the amount of $20,970 as a result, it is hereby

ORDERED that Claimant A Customs Brokerage, Inc.'s claim for reparations be **GRANTED**. It is

FURTHER ORDERED that Respondents Cargocare USA and Cargocare America pay reparations in the amount of $20,970, jointly, and severally to Claimant A Customs Brokerage, Inc.

Theresa Dike
Small Claims Officer

FEDERAL MARITIME COMMISSION

A CUSTOMS BROKERAGE, INC., *Claimant* v. CARGOCARE LOGISTICS USA, INC. AND CARGOCARE LOGISTICS AMERICA, INC., *Respondents*.	**DOCKET NO. 1987(I)**

Served: August 17, 2023

NOTICE OF COMMISSION DETERMINATION TO REVIEW

[final decision served 4/4/2024]

Notice is given that, pursuant to 46 C.F.R. § 502.227, the Commission has determined to review the Administrative Law Judge's Initial Decision served on July 17, 2023, in this proceeding.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

MCS INDUSTRIES, INC.,

Complainant,

v.

MEDITERRANEAN SHIPPING COMPANY S.A.,

Respondent.

Docket No. 21-05

Served: January 3, 2024

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*, Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, Max VEKICH, *Commissioners*.

Order Partially Affirming Initial Decision on Default and Remanding for Further Proceedings

[remand decision served 2/16/2024]

This case is before the Commission (FMC) on Exceptions to an Initial Decision on Default (Decision) of the Administrative Law Judge (ALJ) dated January 13, 2023. The Decision imposed a default on Respondent MSC Mediterranean Shipping Company S.A. (Mediterranean), a vessel-operating common carrier, for its failure to comply with multiple discovery orders in a case filed by

Complainant MCS Industries, Inc. (MCS), a shipper. The Decision also ordered reparations.

As to liability, we deny the Exceptions and affirm the ALJ's Decision. The ALJ permissibly found that Mediterranean's conduct merited default as a discovery sanction, whether the Decision is reviewed de novo or under an abuse of discretion standard.

As a threshold matter, the Decision properly determined that the FMC has jurisdiction over MCS's claims. That is so even though the parties agreed in service contracts at issue here to resolve disputes by arbitration, because Shipping Act claims like those made by MCS are distinct and can still be pursued in an FMC adjudication.

In addition, the ALJ's decision to impose default as a discovery sanction was within her discretion, and in any event it was well-reasoned and well-supported by the record. First, Mediterranean has failed to comply with multiple orders, dating back to December 2021, that it provide substantial outstanding discovery. The ALJ properly rejected Mediterranean's repeated claims that Swiss law bars it from providing that discovery under FMC procedures. In addition, the ALJ properly determined that all three factors set out in relevant D.C. Circuit precedent for the evaluation of default as a discovery sanction are present here. The ALJ found that Mediterranean's conduct had prejudiced MCS in this case, that it had prejudiced the FMC's adjudicatory system by creating burdens and delays, and that its willfulness presented a need to deter potential future misconduct. Finally, the Decision shows that lesser sanctions would not be adequate to address this situation.

However, we remand to the ALJ for further consideration of two issues. First, we remand for consideration of whether the sanctions available under 46 U.S.C. § 41302(d) for delay in the issuance of final FMC decisions are a potential additional basis for the imposition of default in this proceeding. Second, as to the appropriate remedy, we remand for the submission of evidence that is sufficient to support the reparations MCS seeks.

I. BACKGROUND

A. Procedural history

MCS, a U.S. shipper, initiated this case with a Complaint dated July 28, 2021, alleging that Mediterranean and COSCO Shipping Lines Co., Ltd. (COSCO), who are vessel-operating common carriers, had violated 46 U.S.C. § 41102(c) and several provisions of 46 U.S.C. § 41104(a) of the Shipping Act of 1984 in connection with their provision of ocean carriage services. Verified Complaint; Initial Decision on Default (Decision) at 2.

On September 23, 2021, the ALJ issued a Scheduling Order that set the close of discovery for January 27, 2022. On that same day, the ALJ approved a proposed settlement agreement between MCS and COSCO. Initial Decision Approving Confidential Settlement Agreement.

On November 22, 2021, MCS filed a motion to compel discovery, and on December 8, the ALJ granted MCS's motion to compel. Order Granting Motion to Compel (First Order). This extensive Order required Mediterranean to produce additional information in connection with 14 topics, encompassing responses to document requests and interrogatories. First Order; Decision at 4-8. The ALJ rejected Mediterranean's general objections that sought to limit its discovery obligations to what it saw as "core issues" and to put the burden on MCS to justify its discovery. Decision at 4-5. She also ordered Mediterranean to provide further information about interactions related to MCS as well as conduct beyond the specific transpacific bookings at issue. *Id*. at 5-8.

Although Mediterranean did not administratively appeal the First Order issued in December 2021, it also did not comply with the Order. Instead, later in December Mediterranean moved to dismiss the complaint, and MCS moved to file an amended complaint. FMC Docket No. 21-05, Docs. 31-34, 36. On February 4, 2022, the ALJ denied Mediterranean's motion to dismiss and granted MCS's motion to amend the complaint. Order on Motion to Amend Complaint and Motion to Dismiss (MTD Order).

In late February 2022, Mediterranean filed a notice that raised issues related to the production of documents in Switzerland, and the parties filed a joint status report; then, on March 4, the ALJ issued an order directing the parties to submit further detail as to what procedure they were requesting for the production of that evidence. Order on Proposed Revised Schedule and Discovery Notice. On April 4, the parties filed a joint status report requesting that a letter be issued under Hague Evidence Convention procedures, and on May 4, the ALJ granted that request. Order Granting Request for Letter of Request Under Hague Convention.

On July 8, 2022, MCS filed a notice attaching the response from a Swiss court that rejected the Request as outside the scope of the Hague Convention because the relevant FMC proceeding is an administrative one. Notice of Decision on Letter of Request.

On July 29, 2022, the ALJ issued an Order Requiring Production of Discovery (Second Order). Decision at 9-12. The Second Order rejected Mediterranean's request that a new request be submitted to the Swiss Federal Office of Justice, explaining that the Swiss court had determined that its involvement was not needed. *Id*. at 9. Relying on federal court precedent, the ALJ noted that a party seeking to use Hague Convention procedures must show they are necessary and that foreign law actually bars the discovery at issue, but here Mediterranean had failed to show that the provision of the Swiss criminal code it cited has that effect. The ALJ cited recent federal court decisions that had rejected similar claims based on the same Swiss provision because there was no threat of criminal sanction in the U.S. cases, and she noted that the same was true as to the sanctions available here under 46 C.F.R. § 502.150(b). *Id.* at 9-11. Thus, the ALJ ordered Mediterranean to produce the outstanding discovery by August 29, 2022. Second Order at 4.

Although Mediterranean did not administratively appeal the Second Order issued in July 2022, it also did not comply with the Order. Instead, it proceeded to seek advice from the Swiss government, requesting an extension of time to facilitate that, and on September 6, 2022, it submitted a Notice of Advice of the Swiss Federal Office of Justice, attaching a communication from that Office. In essence, Mediterranean argued that the Swiss Federal Office had indicated that a new request for judicial assistance could be submitted despite the earlier ruling of the Swiss court, and it further argued that the Office's response supported Mediterranean's insistence that Hague Convention procedures apply. Notice of Advice at 1-2.

On September 8, 2022, the ALJ issued an Order Denying Respondent's Motion for an Extension of Time and Order to Show Cause (Third Order). Decision at 12-14. The Third Order directed Mediterranean to "either provide the required discovery or show cause why default judgment should not be entered against it." *Id*. at 12. The ALJ rejected Mediterranean's continued arguments that Swiss law barred it from producing the outstanding discovery, noting that the "advice" from the Swiss Federal Office of Justice did not compel the result Mediterranean sought, and that Mediterranean was seeking to relitigate an issue that had already been decided. *Id*. at 12-13. Accordingly, the ALJ directed Mediterranean to show cause why default should not be entered under 46 C.F.R. 502.150(b), although the Order specifically noted that if Mediterranean produced the required discovery, the issue would be moot and the case could proceed. *Id.* at 13-14.

Mediterranean did not provide discovery in response to the Third Order, but the parties did file responses. Mediterranean argued that further consultation with Swiss authorities was the proper course because it would otherwise risk criminal sanctions, that default was a drastic remedy not called for where it had a good faith belief in that risk, that the consultation procedure in 46 U.S.C. § 41108(c)(2) had not been used, and that in any event the agency lacked jurisdiction over the matter. Respondent Mediterranean Shipping Company S.A.'s Response to Order to Show Cause, Sept. 22, 2022, at 1-4; Reply with Respect to Order to Show Cause, Oct. 14, 2022. MCS argued that Mediterranean had violated multiple FMC discovery orders and that a default sanction was justified under the standards applicable to the analogous Federal Rule of Civil Procedure 37(b)(2). Complainant MCS's Response to Order to Show Cause, Oct. 6, 2022, at 1-2.

While a decision on the Order to Show Cause remained pending, Mediterranean filed further notices attaching materials from the Swiss government that it insisted showed Hague Convention procedures were required. Notice of Determination of the Swiss Federal Office of Justice, Oct. 18, 2022; Notice of Issuance of Formal Decision of the Swiss Federal Office of Justice and Police That Hague Evidence Convention Procedures Apply to This Proceeding and Must Be Used, Nov. 8, 2022. MCS argued that Mediterranean was improperly attempting to relitigate the issues and that default remained the proper remedy. Response Letter of Complainant, Oct. 28, 2022.

On January 13, 2023, the ALJ issued the Initial Decision on Default. Mediterranean timely filed Exceptions on February 6, and MCS filed its Response on February 28.

B. The Initial Decision on Default

The ALJ's Initial Decision on Default noted that 46 C.F.R. § 502.150(b) describes the remedies available where a party fails to comply with an FMC discovery order, and that section 502.150(b)(3) specifically authorizes the ALJ to issue "a decision by default against the disobedient party." Decision at 14. The ALJ pointed out that the Commission had previously approved dismissals of cases where a party had willfully failed to provide discovery. *Id.* (citing, *inter alia*, *Kawasaki Kisen Kaisha, Ltd. v. Port Auth. of N.Y. and N.J.*, FMC Docket No. 11-12, 2014 WL

7328475, at *7-8, 2014 FMC LEXIS 35, at *17 (FMC Nov. 20, 2014)).

First turning to the FMC's jurisdiction, the ALJ stated that Mediterranean's claims on that issue had been resolved in the February 2022 MTD Order, which Mediterranean had not appealed, making its current claims untimely. Decision at 14-16. In any event, the ALJ determined that the FMC has jurisdiction over Shipping Act claims even if, as Mediterranean argued, a related proceeding is underway, such as an arbitration of a breach of contract claim required by a service contract. *Id.*; *see Anchor Shipping Co. v. Aliana Navegãao E Logística Ltda.*, FMC Docket No. 02-04, 2006 WL 2007808, at *10-11, 30 S.R.R. 991, 998 (FMC May 10, 2006).

Next, the ALJ evaluated whether default should be entered and concluded that it should. Decision at 17-22. The ALJ emphasized Mediterranean's failures to comply with FMC discovery orders and its failure to show Hague Convention procedures were required. *Id*. at 17. For the default analysis, the ALJ focused on the three factors set out in *Webb v. District of Columbia*, 146 F.3d 964, 971 (D.C. Cir. 1998) — prejudice to the other party as a result of the conduct at issue, prejudice to the judicial system, and the need to deter similar conduct. *Id.* at 17-18. She noted that only one factor need be present to support a default, but she found that all three were present here. *Id*. at 18.

First, with regard to prejudice to MCS, the ALJ stressed that Mediterranean had failed to produce additional information as ordered in more than a dozen categories and that it had wrongly tried to limit the scope of discovery to less than what was required to evaluate MCS's claims. Decision at 18. The ALJ noted that the information wrongly withheld here would likely have led to additional discovery requests, and that this significantly hampered MCS's ability to proceed. *Id*. at 19. Finally, the ALJ found that Mediterranean's conduct had prejudiced MCS by delaying the proceeding, making it harder for MCS to obtain evidence and exacerbating its injury. *Id*.

Second, as to prejudice to the adjudicatory system, the ALJ emphasized that federal agencies must protect their integrity and the orderly conduct of business. Decision at 19 (citing *Interpool, Ltd. V. Pac. Westbound Conf.*, 22 F.M.C. 762, 764, 19 S.R.R. 1719 (FMC May 15, 1980), available at https://www.fmc.gov/wp-content/uploads/2019/04/vol22.pdf (upholding dismissal where complainant had failed to respond to discovery)). The ALJ listed case deadlines that had not been met because of Mediterranean's failure to provide the discovery ordered, noting that this had disrupted FMC business and burdened the docket, harming the public. *Id*. at 20.

Third, the ALJ evaluated the deterrence factor. Decision at 20-22. She again relied on *Interpool*, which noted that the most severe sanction had to be available to deter future misconduct. *Id*. at 21. The ALJ noted that Mediterranean had not specifically described the information it claimed was protected because it was located in Switzerland, and it was not clear whether its refusal to produce was actually based on its disagreement with the ALJ's substantive findings about the case. *Id*. The ALJ found that Mediterranean's refusal to follow the determination of the Swiss court or the orders of the ALJ, even after repeated warnings, supported a finding that its refusal was willful and deliberate. *Id*. The ALJ also found that the violations alleged in the case were significant, and that Mediterranean's conduct had to be addressed to deter similar future conduct. *Id*. at 21-22.

Finally, the ALJ considered the appropriate remedy. Decision at 22-23. She cited precedent authorizing the award of damages following default of "specified liquidated amounts requiring little or no calculations." *Id.* (citing *Go/Dan Indus., Inc. v. Eastern Mediterranean Shipping Corp.*, 1998 WL 940249, at *3, 1998 FMC LEXIS 5, at *5-6 (ALJ Dec. 10, 1998) (Adm. final Jan. 27, 1999)). The ALJ looked to MCS's complaint, as well as information it had submitted in its order to show cause brief as permitted by 46 C.F.R. § 502.65(c), and awarded $944,655 in reparations. *Id.* at 22.

II. DISCUSSION

A. Standard of Review

Normally, when the Commission reviews exceptions to an ALJ's Initial Decision, it has "all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). The Commission therefore generally reviews the ALJ's findings de novo. *Id.*; *see also Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 12-02, 2015 WL 9426189, at *5, 2015 FMC LEXIS 43, at *10-11 (FMC Dec. 18, 2015). In particular, when reviewing an ALJ's Initial Decision on default after a respondent has failed to appear, the FMC has adopted the ALJ's findings of fact and law if "they are well-reasoned and supported by evidence in the record." *United Logistics (LAX) Inc. – Possible Violations of Sections 10(A)(1) and 10(B)(2)(A) of the Shipping Act of 1984*, FMC Docket No. 13-01, 2014 WL 5316339, at *1 (FMC Feb. 6, 2014).

However, the Commission reviews discovery orders, including orders imposing sanctions, under an abuse of discretion standard. *See Rana v. Franklin*, FMC Docket No. 19-03, 2022 WL 1744905, at *4 (FMC May 25, 2022); *Kawasaki*, 2014 WL 7328475, at *7-8. The FMC's rules do not expressly address the standard of review in this context. *See Rana*, 2022 WL 1744905, at *4; *Kawasaki*, 2014 WL 7328475, at *7-8. But "for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice." 46 C.F.R. § 502.12. "Federal Rule of Civil Procedure 37(b) is the corollary to the Commission's rule on discovery sanctions (46 C.F.R. § 502.150) for violating an order directing discovery responses." *Rana*, 2022 WL 1744905, at *4. "In reviewing district courts' orders on discovery, the United States Courts of Appeal apply an abuse of discretion standard because a 'narrowly circumscribed' scope of review is consistent with district courts' 'considerable discretion in managing discovery' and their 'broad discretion to impose sanctions for discovery violations under Rule 37.'" *Id.* (quoting *Parsi v. Daioleslam*, 778 F.3d 116, 125 (D.C. Cir. 2015) (additional citations omitted)); *see also Bonds v. District of Columbia*, 93 F.3d 801, 807 (D.C. Cir. 1996) (reviewing court should reverse discovery sanctions only if they are found to be "clearly unreasonable, arbitrary, or fanciful").

The abuse of discretion standard is appropriate for review of the ALJ's imposition of default as a discovery sanction. Indeed, the D.C. Circuit "review[s] the district court's imposition of discovery sanctions, including a default judgment award, for abuse of discretion." *Wash. Metro. Area Transit Comm'n v. Reliable Limousine Serv.*, 776 F.3d 1, 4 (D.C. Cir. 2015). Although there is no direct precedent for review of an FMC ALJ's decision imposing *default* as a discovery sanction, the Commission has reviewed decisions *dismissing* actions for failure to comply with discovery orders, *see*, *e.g.*, *Interpool*, 22 F.M.C. at 764, and in *Kawasaki,* it clarified that it would do so under an abuse of discretion standard, *see* 2014 WL 7328475, at *8. For its part, MCS advocates for that standard, although it argues that the ALJ's Decision here meets the higher de novo standard as well. Response at 1-4. Of course, default may be considered a more severe sanction than dismissal, as it determines liability and will likely lead to remedies, rather than a mere preservation of the status quo. The D.C. Circuit has described its abuse of discretion review in the default context as "more 'thorough' because the 'drastic' sanction 'deprives a party completely of its day in court.'" *Reliable Limousine*, 776 F.3d at 4 (quoting *Webb*, 146 F.3d at 971). Accordingly, the Commission has determined to review the ALJ's Decision with reference to both abuse of discretion and de novo standards.

B. Imposing default as a discovery sanction was within the ALJ's discretion as to liability, and in any event the Decision on that point was well-reasoned and supported by the record

In the Initial Decision on Default, the overall analysis and conclusions as to liability were within the ALJ's discretion. In particular, she properly determined that MCS had sufficiently stated claims within the FMC's jurisdiction, and that default was an appropriate remedy for Mediterranean's failure to comply with discovery orders. In any case, those determinations were well-reasoned and well-supported.

1. Jurisdiction and Adequacy of Claims

The ALJ's ultimate conclusions as to jurisdiction and the adequacy of MCS's claims are affirmed. In her discussion of jurisdiction, Decision at 14-16, the ALJ first noted that the issue had already been decided in the February 2022 MTD Order denying Mediterranean's motion to dismiss, an order that Mediterranean did not appeal, *id*. at 15. And she stated that as a result, Mediterranean's current effort to relitigate that issue is "not timely." *Id.* at 16. It is true that an appeal of the MTD Order would have enabled an early resolution of the issue. That would have allowed the parties to avoid re-briefing the issue now, in the midst of the pending Exceptions briefing, and if Mediterranean were correct about the issue, enabled the parties and the agency to have avoided all future proceedings in the matter. However, the ALJ does not cite authority for the principle that Mediterranean's pursuit of the jurisdictional issue now is time-barred, and we are not aware of any. In particular, Mediterranean had no obligation under FMC rules to appeal that interim ruling immediately or else waive the issues raised. *See* 46 C.F.R. § 502.221 (interim rulings other than orders of dismissal may not be appealed unless the ALJ finds it necessary or on motion of party seeking to appeal). In addition, as Mediterranean points out, the issue of whether a federal court has jurisdiction can be raised at any time. Exceptions at 26. MCS emphasizes that Mediterranean is trying to relitigate settled matters it failed to appeal, Response at 25, but it does not appear to specifically contend that the jurisdictional claims are untimely. It may be that the ALJ was simply indicating that the jurisdictional issue had already been resolved at the administrative level, and thus it was effectively "the law of the case" and not timely raised again at that level. *See Wye Oak Technology, Inc. v. Republic of Iraq*, 24 F.4th 686, 697-98 (D.C. Cir. 2022) (the law-of-the-case doctrine reflects the rule that courts should not re-open questions decided earlier in the case absent clear error or an intervening change of law). In any event, we conclude that Mediterranean is entitled to raise jurisdiction before the Commission now.

As to the substance of the jurisdictional question, the ALJ's Decision is well-reasoned and is affirmed. The ALJ reiterated the conclusions from her earlier Order, explaining that FMC precedent makes clear that the agency has jurisdiction over Shipping Act claims even if a related proceeding is underway, such as an arbitration required by a service contract that is also at issue in claims before the FMC. Decision at 15-16; *see Anchor Shipping*, 2006 WL 2007808, at *10-11, 30 S.R.R. 991, 998; *Cargo One, Inc. v. Cosco Container Lines Co. Ltd*, FMC Docket No. 99-24, 2000 WL 1648961, at *14-15, 28 S.R.R. 1635, 1645, 2000 FMC LEXIS 14 (FMC Oct. 31, 2000). The ALJ emphasized that the FMC in fact has an obligation to address Shipping Act claims, even if the relevant facts may also give rise to other claims between the parties, and even if, as Mediterranean argues here, a service contract requires contract claims to be arbitrated. Decision at 15-16. Shipping Act claims are distinct from breach of contract claims, entailing a different analysis of statutory standards that includes review of the carrier's broader practices beyond those directly affecting the complainant. In addition to the precedent the ALJ cites in her Decision, the Response by MCS cites further persuasive case support for these principles. *See* Response at 25-30. Mediterranean argues that the claims are barred by 46 U.S.C. § 40502(f), Exceptions at 27-31, but as MCS notes, Response at 28-29, that provision does not bar pursuit of the statutory allegations made here.

In fact, the provision simply says breach of service contract claims are resolved in court or as otherwise agreed by the parties. But this FMC matter is not a breach of contract action. Mediterranean also argues that MCS's claims are barred by the Federal Arbitration Act. Exceptions at 31-33. But again, that claim is contrary to the above precedent, including *Anchor Shipping*, as MCS notes, Response at 30. The ALJ correctly determined that the FMC has jurisdiction over this matter.

In addition, Mediterranean argues that MCS's complaint fails to state a claim as to the merits of any of its claims, Exceptions at 33-37, but that argument is unavailing. As an initial matter, as MCS notes, Response at 30, Mediterranean's basic arguments were already raised and rejected in February 2022, MTD Order at 3-10. But again, Mediterranean had no obligation under FMC rules to appeal that interim ruling. *See* 46 C.F.R. § 502.221. In addition, although the claims are beyond the scope of the briefing ordered by the ALJ's show cause order and the Decision understandably did not address them, the ALJ did address Mediterranean's basic arguments as to each of the five claims in considerable detail in the MTD Order. We conclude that Mediterranean is entitled to raise the claims here.

In any case, the ALJ's prior rejection of Mediterranean's failure-to-state-a-claim arguments was well-reasoned and consistent with the facial-plausibility standard under which such claims are analyzed under Federal Rule of Civil Procedure 12(b)(6). *See* MTD Order at 3-10. First, Mediterranean does not appear to specifically renew here its claims as to Counts I-II of the operative complaint, and so those claims have been waived. Mediterranean does make comparable arguments, that MCS's claims are inherently contractual ones that must be resolved by arbitration, as part of its current jurisdictional challenge. But those arguments are addressed above, and the ALJ persuasively rejected them in the failure-to-state-a-claim context in the MTD Order, *see id*. at 4-8. With regard to Counts III-IV, Mediterranean argues, as it did in moving to dismiss, that the activity MCS alleges does not state a discrimination claim under the relevant provisions of the Shipping Act, especially as amended by the Ocean Shipping Reform Act of 1998. Exceptions at 33-35. But the ALJ's earlier rejection of those same arguments was well-reasoned, MTD Order at 8-9, and MCS's Response to the Exceptions also persuasively refutes those claims, Response at 30-33. Finally, Mediterranean argues that Count V does not state a refusal-to-deal claim, but again, the ALJ addressed that argument and rejected it in a well-reasoned discussion, which the Commission adopts. MTD Order at 9-10; *see also* Response at 33-34. Mediterranean's failure-to-state-a-claim arguments are rejected and the ALJ's conclusions affirmed.

2. The Initial Decision on Default

a. General considerations

The ALJ began the discussion of default by reviewing the applicable FMC rule, explaining that 46 C.F.R. § 502.150(b) authorizes procedural consequences for discovery violations, and that section 502.150(b)(3) specifically authorizes default. Decision at 14. The ALJ also noted that the Commission has upheld dismissals of cases where *complainants* willfully failed to comply with discovery orders. *Id.* (citing *Kawasaki*, 2014 FMC LEXIS 35, at *17, and *Interpool*, 22 F.M.C. 762 at 764). As stated above, no FMC case precedent has been cited in this case for the imposition of default against a *respondent* as a discovery sanction, and we are not aware of one.

The ALJ noted that defaults are disfavored and a last resort. Decision at 17. However, she explained, Mediterranean had multiple chances to conform to the discovery orders at issue here. *Id*. The ALJ pointed out that she had even agreed to make the request Mediterranean had sought to the Swiss court under Hague Convention procedures, yet when that request was rejected, Mediterranean had still failed to comply with the discovery orders, seeking further relief from the Swiss executive branch. *Id*. The ALJ summarized her earlier conclusions from the Second Order as to Mediterranean's Hague Convention claims, emphasizing that the

Convention does not deprive district courts of jurisdiction, and that Mediterranean had failed to show that a specific foreign law actually bars the production at issue here. *Id*. Without the outstanding discovery, the ALJ concluded, the case was at an impasse.

We also note that the issues raised here with regard to the alleged need to use Hague Convention procedures to obtain discovery in an FMC adjudication are broadly comparable to those raised in FMC No. 22-23. In that case, the Commission rejected the respondent's argument that it could not comply with an FMC discovery order because of a French statute. *See Marine Transport Logistics, Inc. v. CMA CGM, S.A.*, FMC Docket No. 22-23, 2023 WL 7328874 (FMC Oct. 30, 2023).

Finally, before turning to the specifics of the default analysis, we will consider MCS's threshold claim that Mediterranean has waived the right to make arguments that amount to objections to the First and Second Orders because it failed to appeal them in a timely way. Response at 4-5. This argument relies on interpreting those orders as being "directed to persons or documents located in a foreign country" under 46 C.F.R. § 502.150(d), and therefore as orders that became final shortly after they were issued because Mediterranean failed to appeal them. *Id*. It is not clear where the documents at issue are actually located, as discussed below in connection with the alleged obligation to consult with the Department of State under 46 U.S.C. § 41108(c)(2). It is true that the First and Second Orders were directed to a "person" — Mediterranean — that is located in a foreign nation. But it is not clear if the location of a corporate respondent answering discovery in a foreign nation is sufficient to bring a discovery order within the scope of section 502.150(d). It may well be that the section should apply only where a discovery target is genuinely unavailable because it is located overseas beyond the reach of the FMC, which is not the case here. In any case, if this MCS argument were accepted, it would preclude challenges to the ALJ's specific determinations as to the proper substance and scope of discovery, including her findings as to the extent discovery in this proceeding is controlled by Swiss law and, as MCS suggests, whether the consultation process under section 41108(c)(2) is appropriate. Although we are not persuaded by MCS's argument, Mediterranean's repeated failures to either appeal or provide the discovery ordered do speak to its good faith, as discussed below. We conclude that it is appropriate to review Mediterranean's challenges to the discovery determinations, under an abuse of discretion standard. As explained below, those determinations survive that review.

b. Specific default standards

Under the analogous Federal Rule 37(b)(2), whether default is appropriate as a discovery sanction entails showing that three basic conditions are met: (1) a party has failed to obey an order to provide discovery; (2) any one of the three factors described in *Webb*, 146 F.3d 964, is present, namely prejudice to the other party, prejudice to the judicial system, or a need to deter future misconduct; and (3) lesser sanctions are inadequate to deter and punish the misconduct. *See SEC v. China Infrastructure Inv. Corp.*, 189 F.Supp.3d 118, 129–32 (D.D.C. 2016); Response at 6-7. Although the ALJ explicitly addressed only the second condition (the *Webb* factors), Decision at 17-22, her Decision adequately addresses the other factors in its overall discussion.

i. Mediterranean's failure to obey discovery orders

As to the first condition, the Decision amply demonstrated that Mediterranean has failed to obey discovery orders. Specifically, it did not provide discovery as directed by the First Order of December 2021, the Second Order of July 2022, and arguably the Third Order of September 2022, insofar as that last Order explicitly offered Mediterranean the option to avoid default by simply providing the outstanding discovery. *See* Decision at 4-14, 17. In addition, these Orders warned Mediterranean multiple times about the risk of sanctions if it did not comply. *See* Response at 7-10. And as MCS observes, *id*. at 7, Mediterranean does not actually seem to dispute that it has failed to provide the discovery ordered.

ii. The three *Webb* factors

The ALJ provided a detailed analysis of the *Webb* factors, concluding that although only one factor was needed, all three were present here. Decision at 17-22.

As to the *first Webb* factor, prejudice to MCS, the ALJ stressed that Mediterranean had failed to produce additional documents as ordered in more than a dozen categories, as laid out in the First Order in December 2021. Decision at 18-19. As a threshold matter, she noted that Mediterranean had failed to appeal the First Order, and so, she found, its arguments now are not timely. *Id*. at 18. Substantively, she noted that Mediterranean cannot limit the scope of discovery to preclude review of its practices beyond its interactions with MCS, because the FMC must review those broader practices to evaluate Shipping Act claims. *Id*. The ALJ also found that the written discovery compelled by her orders would likely have led to more discovery, such as depositions, so in the absence of the requested information, only default, not lesser sanctions, would fully address the prejudice to MCS. *Id*. at 19. Finally, the ALJ emphasized that Mediterranean's failure to provide the discovery ordered had "significantly delayed" the proceeding, causing additional prejudice to MCS since evidence becomes harder to develop as time passes, and she noted that the alleged injury may reasonably be found to increase to the extent violations were ongoing, as MCS alleged. *Id*.

The ALJ's analysis of the first *Webb* factor is generally correct. Although we are not persuaded that Mediterranean's failure to appeal the First Order actually precludes it from making arguments about the scope of discovery now, as discussed above in section II.B.2.a, the ALJ's findings in that First Order were well within her discretion, and her evaluation here of the prejudice caused to MCS is well-supported. Mediterranean argues that the

Decision failed to meet the standards needed to show prejudice by failing to make a sufficiently specific showing that the outstanding discovery was "essential" to resolving the claims at issue; it notes that Mediterranean has produced thousands of pages of documents on issues directly related to MCS and claims that the outstanding information related to other shippers is at best "tangential." Exceptions at 41-44. It is true that the Decision's section about the prejudice to MCS does not itself discuss specific types of information. Decision at 18-19. But the section does refer to the ALJ's exhaustive review earlier in the Decision of more than a dozen specific categories of outstanding discovery that she had ordered produced but Mediterranean never provided. *Id.* at 18 (citing earlier discussion, *id*. at 4-13). In addition, as to the material related to other shippers, the ALJ made clear that the claims MCS has made under the Shipping Act, as well as Mediterranean's defenses, require evaluation of practices beyond the carrier's relations with MCS itself. *See*, *e.g.*, *id*. at 6 (ordering production of information relevant to certain alleged conduct "occurring on a normal, customary, and continuous basis," 46 C.F.R. § 545.4, and force majeure notifications by Mediterranean to other shippers). Finally, the production of *some* material in response to discovery requests, as Mediterranean notes it has done, obviously does not excuse the repeated failure to comply with orders to produce a great variety of other materials.

Mediterranean also argues that the ALJ's analysis of prejudice to MCS was flawed because MCS is not actually harmed by the delay, Exceptions at 45, but that claim is incorrect. In particular, Mediterranean asserts that MCS has "consistently maintained" that the consultation procedure at 46 U.S.C. § 41108(c) is "mandatory" here. Even if MCS had taken that position in the past, however, it would not negate the ALJ's independent current findings of prejudice, and as discussed below in section II.B.2.c, such a position as to section 41108(c) would be incorrect in any case. Mediterranean also claims that delay is not prejudicial because the violations alleged are not really "continuous and ongoing," given that MCS is seeking reparations only for conduct occurring during a period that has now ended. Exceptions at 45. That argument has some force, but the ALJ's analysis made clear that the violations at issue are indeed alleged to be "continuous and ongoing" within the meaning of the Shipping Act, even if MCS is not currently seeking reparations for recent or future violations. Decision at 19; *see also* Response at 10-12.

On balance, the Decision is adequately supported on the first *Webb* factor, and even if it were not, any error would be harmless as long as either of the other two *Webb* factors was present.

As to the *second Webb* factor, prejudice to the judicial system, the ALJ relied on *Interpool*, in which the FMC had found dismissal the only appropriate sanction where a complainant had willfully failed to respond to discovery. Decision at 19. The ALJ noted that in that case the Commission had emphasized that agencies must protect their integrity and the orderly conduct of business, in order to protect all parties before them. *Id.*; *Interpool*, 22 F.M.C. at 767-68. Turning to the current matter, the ALJ listed many 2022 case deadlines that had not been met because of Mediterranean's failure to provide the discovery ordered, including multiple discovery deadlines and an initial decision deadline of August 2022. Decision at 20. She explained that these delays had disrupted FMC business and burdened the FMC docket, requiring multiple revisions of the schedule as well as harming MCS, the Commission, and the public. *Id.*

This evaluation of the harm to the Commission's adjudicatory system is well-supported. The ALJ described in some detail the burden to the system caused by Mediterranean's continuing failure, since the First Order in December 2021, to provide *any* further discovery in the many categories of information at issue. Decision at 20. Mediterranean argues that it should not be punished for delay caused by the purportedly "mandatory" consultation procedures described in 46 U.S.C. § 41108(c)(2), Exceptions at 46, but of course, those procedures have not actually been used here. To the extent Mediterranean means the unsuccessful request to the Swiss court under Hague Convention procedures, even if that were not deemed to be part of the delay for which Mediterranean is responsible, the docket shows that only about three months passed between the parties' April 2022 joint filing describing the request as an option and the filing of the July 2022 notice that the Swiss court had denied the request. In addition, as MCS observes, Mediterranean's failure to provide the discovery first ordered in December 2021 has played the dominant role in the case since then, accounting for many rounds of filings and the accompanying burdens to all concerned. Response at 12-14. That situation has also diverted FMC resources that might have been used for other matters. Finally, Mediterranean's repeated failures to either comply with or appeal the ALJ's discovery orders harm the FMC's adjudicatory system by undermining its authority.

As to the *third Webb* factor, the ALJ correctly emphasized that the most severe sanctions must be available not just to penalize wrongdoers, but also to deter bad conduct by those who might be tempted to engage in similar activity. Decision at 21; *Interpool*, 22 F.M.C. at 766. The ALJ stressed that Mediterranean has not provided any list of documents and witnesses it alleges are protected because they are located in Switzerland, but instead it has just broadly asserted that it has provided substantial discovery and only some items are still outstanding. Decision at 21. The ALJ therefore found that it was "not clear whether the refusal to provide discovery is in fact because information is located in Switzerland or whether MSC Mediterranean Shipping is refusing to provide the discovery because it disagrees with the findings related to the Commission's jurisdiction and scope of these proceedings." *Id*. The ALJ also found Mediterranean's misconduct to be willful and deliberate, citing its decision not to follow the finding of the Swiss court, but instead to seek further relief from the Swiss executive branch, as well as its refusal to comply with the ALJ's orders, even after repeated warnings that such conduct was sanctionable. *Id*. The ALJ reiterated that Mediterranean was an FMC-regulated entity that had to follow the FMC's direction and could not be allowed to hide evidence overseas; its repeated refusals to comply with the above decisions were not consistent with good faith or respect for the process. *Id*. And the ALJ noted the national significance of the allegations about Mediterranean, one of the largest container lines, which was a respondent in other FMC proceedings. *Id*. at 22. The ALJ reasonably concluded that default was needed to deter similar conduct in the future. *Id*.

In addressing the third *Webb* factor, Mediterranean argues that it has been actively engaged in this case, producing substantial discovery to MCS, but that it cannot simply choose not to comply with foreign law, and so there is an insufficient basis to justify the most severe discovery sanction of default. Exceptions at 46-48. Mediterranean also points out that the Swiss court did not actually order it do anything. *Id*. at 47. That is correct, but as the ALJ emphasized, Decision at 21, the Swiss court did reject the Hague Convention request as inappropriate. Rather than accept that and provide the discovery the ALJ had ordered, Mediterranean appears to have gone around the court to the Swiss executive branch, looking for a different answer. Mediterranean does not seem to have sought further *judicial* review in Switzerland. In addition, as the ALJ and MCS emphasize, Mediterranean chose to neither appeal the ALJ's adverse discovery rulings nor provide the discovery ordered, a practice that calls into question its good faith. Decision at 18; Response at 19. Those rulings would appear to have been in effect the "law of the case," at least until Mediterranean obtained a different decision from the Commission itself. *See Wye Oak Technology*, 24 F.4th at 697-98 (courts should not re-open questions decided earlier in the case absent clear error or an intervening change of law). Most fundamentally, Mediterranean has failed to show that Swiss law bars it from providing any particular information or categories of documents, as it must under relevant precedent, or even to show what responsive material may actually be located in Switzerland, as the ALJ noted. Decision at 17, 21. Mediterranean has simply failed to provide discovery responses, despite repeated orders from the ALJ, since December 2021.

In this situation, the ALJ correctly identified a substantial risk, in the absence of a meaningful sanction, of encouraging obstructive tactics in other FMC matters. Decision at 22. Such tactics could involve vague allegations that foreign law controls the discovery sought in comparable future matters involving similar activities by foreign carriers. Indeed, the Commission recently rejected such claims in an appeal of a discovery order in another case. *See Marine Transport Logistics*, FMC Docket No. 22-23, 2023 WL 7328874. This case provides ample reason for ongoing concern regarding the potential use of such tactics. Permitting FMC-regulated entities to subject ordinary FMC discovery proceedings about U.S. shipping activities to foreign control, and the inevitable disputes about international procedure, simply because a party asserts that unspecified information exists overseas, poses a significant threat to the fair and timely resolution of cases before the Commission.

iii. The inadequacy of lesser sanctions

With regard to the third condition for the entry of default under Federal Rule 37(b)(2), the inadequacy of lesser sanctions, the ALJ did not identify this as a distinct, stand-alone factor, but she did sufficiently address it as part of her overall discussion. First, in outlining the prejudice to MCS under the first *Webb* factor, the ALJ stressed that the lack of the range of discovery ordered had significantly limited MCS's ability to make its case, including the ability to identify additional needed discovery. Decision at 19. Accordingly, she continued, "a lesser sanction such as directing that certain matters be taken as established, prohibiting certain claims or defenses, or striking pleadings would not be effective to remedy the failure to provide such broad discovery." *Id*. And MCS argues persuasively that given the magnitude of the discovery failures here, no lesser sanction would adequately address its situation. Response at 20-21. Much of the discussion above as to the third *Webb* factor is also relevant here, as failing to impose a meaningful sanction in the face of Mediterranean's conduct would not adequately deter such conduct going forward. Finally, the ALJ emphasized the multiple warnings she had given Mediterranean that if it did not provide the discovery ordered, sanctions including default were possible. Decision at 20-21. The failure of those warnings to produce any effect also supports our conclusion that only default is an adequate sanction here.

c. The potential applicability of 46 U.S.C. § 41108(c)(2)

Mediterranean also makes a stand-alone argument that default is inappropriate because consultation with the U.S. Department of State under 46 U.S.C. § 41108(c)(2) is the proper way to resolve the discovery dispute at issue, Exceptions at 37-40, but that claim is unavailing. Section 41108(c)(2) states that such consultation shall occur where a carrier alleges that information "located in a foreign country cannot be produced because of the laws of that country." This issue was also raised in the recent *Marine Transport Logistics* case. *See* 2023 WL 7328874, at *7.

As an initial matter, MCS argues that this claim by Mediterranean, like others that amount to challenges to the ALJ's previous discovery orders, has been waived under 46 C.F.R. § 502.150(d), which states that ALJ orders "directed to persons or documents located in a foreign country" become final unless promptly appealed. Response at 4-5, 5 n.2. While that waiver claim did not persuade us as applied to the full scope of discovery orders to Mediterranean in this matter, as discussed above, it has more force to the extent Mediterranean's refusal to produce the information at issue is specifically based on its own claim that it cannot produce the information because the information is in fact "located in a foreign country." Thus, to the extent Mediterranean is accurately describing that situation, its claim would indeed appear to have been waived under section 502.150(d). The ALJ did not explicitly reach this issue in her Decision, although she did note that Mediterranean had argued section 41108(c)(2) applies in its opposition to the order to show cause. Decision at 4. It seems possible that she regarded the argument as untimely or marginal in light of Mediterranean's overall record of non-compliance with her discovery orders.

In any case, Mediterranean has not shown that 46 U.S.C. § 41108(c)(2) bars the imposition of default here. Given the burdens that implementation of the provision would impose on both the U.S. and foreign governments, and the potential effects on FMC discovery, it is reasonable to interpret the statute to require a more specific and developed showing that the documents sought actually are located in a foreign country, not available in the United States, and cannot be produced because of foreign laws. *See Marine Transport Logistics*, 2023 WL 7328874, at *7. In this case, Mediterranean has not adequately shown that responsive materials actually are located exclusively in Switzerland. As the ALJ explained in her discussion of deterrence, "[i]t is not clear whether the refusal to provide discovery is in fact because information is located in Switzerland or whether MSC Mediterranean Shipping is refusing to provide the discovery because it disagrees with the findings related to the Commission's jurisdiction and scope of these proceedings." Decision at 21. Mediterranean emphasizes that MCS itself has at times described the section 41108(c)(2) procedure as mandatory in the current situation. Exceptions at 37-38. But even if true, that would not control the ALJ's or the Commission's independent determination as to whether the statute compels the use of that procedure here. Finally, although Mediterranean describes the section 41108(c)(2) procedure as "proper" in this case, Exceptions at 37, 40, it does not appear to be arguing that it is in fact required, only that Hague Convention procedures are. And if the section 41108(c)(2) procedure is not required, it provides no independent basis to support Mediterranean's claim that default was improper.

In sum, the ALJ's decision to enter a default here was within her discretion, and in any event was well-reasoned and well-supported by the record.

C. The matter is remanded for consideration of whether the delay sanction provision at 46 U.S.C. § 41302(d) is an additional basis to support default in this case

The Shipping Act provides an additional basis to impose default as a sanction where a party has delayed an adjudication, in 46 U.S.C. § 41302(d). Although neither the ALJ nor the parties appear to have discussed the potential application of section 41302(d) here, it is appropriate to remand this matter for consideration of whether that provision may be an alternative basis to support that sanction.

The provision at 46 U.S.C. § 41302(d) (Sanctions for Delay) states that if, within the period the Commission has set for issuing a final decision as required by section 41302(c), the Commission "determines that it is unable to issue a final decision because of undue delay caused by a party to the proceeding," it may impose sanctions "including issuing a decision adverse to the delaying party." This provision authorizes what would amount to a default sanction if the Commission determines that a party's "undue" delay has caused the agency to be unable to issue a final decision within the period it has set to do so. Section 41302(c) specifically applies to final decision periods in proceedings initiated under "this section or section 41301," and section 41301 is the "Complaints" section describing the initial procedure for adjudications. This makes it clear that section 41302(d), which specifically applies to final decision periods established under section 41302(c), also applies to adjudications like the current case.

In this case, the deadline for final decision has been extended twice, resulting in a delay of almost one full year. The Secretary's initial Notice in August 2021 set a deadline for the final decision of February 17, 2023. FMC Docket No. 21-05, Doc. 2. The ALJ's First Order, which Mediterranean neither appealed nor complied with, was issued in December 2021. The ALJ's Second Order, which Mediterranean neither appealed nor complied with, was issued on

July 29, 2022. On that same day, the Secretary extended the final decision deadline to August 17, 2023. FMC Docket No. 21-05, Doc. 49. In September 2022, the ALJ issued the Third Order, which offered Mediterranean the option of simply producing the outstanding discovery in lieu of responding to the order to show cause. Mediterranean chose to resist the order, with several filings in late 2022. In January 2023, the ALJ issued the Initial Decision on Default, and Mediterranean filed Exceptions in February 2023. In August 2023, the Secretary again extended the final decision deadline, this time to February 16, 2024. FMC Docket No. 21-05, Doc. 67.

In this situation, imposing the sanction of default for the delay Mediterranean has caused may well be appropriate under 46 U.S.C. § 41302(d). Mediterranean's repeated failures to comply with discovery orders appear to have been the primary, if not the exclusive, cause of the two extensions which currently have set the final decision deadline back about a year, to February 2024. Obviously, the Commission cannot now issue a final decision by the initial deadline of February 2023, nor by the second deadline of August 2023. The Decision at issue here did not discuss the effect of Mediterranean's delay on the final decision deadline specifically. But the ALJ did discuss the effects of that delay at some length in explaining how it prejudiced the complainant (first *Webb* factor), noting that it "significantly delayed this proceeding." Decision at 19. And she returned to the subject in finding that Mediterranean's conduct had prejudiced the adjudication system (second *Webb* factor), describing the failure to meet a number of deadlines, which "caus[ed] multiple revisions of the schedule to accommodate the delays." *Id*. at 20. It may be that Mediterranean's failure to produce the discovery ordered was not the sole cause of the first extension of the final decision deadline in July 2022, since MCS and the ALJ did sign off on the initial effort to get documents from the Swiss court using a Hague Convention procedure in the preceding few months. But regardless, it seems likely that Mediterranean's failure to comply with the Second Order, also issued in July 2022, eliminated any chance of meeting the original February 2023 deadline for a final decision, and Mediterranean's continued resistance to producing the discovery also made the August 2023 deadline impossible to meet.

At a minimum, 46 U.S.C. § 41302(d) merits careful consideration because it reflects clear Congressional concern that causing undue delay to FMC proceedings may well merit the most extreme sanction: a "decision adverse to the delaying party." That concern may support the imposition of the default at issue here even if that result is based primarily on the discovery sanctions described in 46 C.F.R. § 502.150(b).

In view of the above, this matter is remanded to the ALJ for consideration, with the benefit of focused and prompt briefing from the parties, of whether 46 U.S.C. § 41302(d) provides an additional basis to support the imposition of default here.

D. The matter is remanded for the submission of evidence sufficient to support the claimed reparations

The Decision awarded $944,655 in reparations, plus interest, based on allegations in MCS's complaint and more specific figures included in its briefing on the order to show cause. Decision at 22-23. However, in view of the prevailing law in a context like the current one, we remand for the submission of evidence sufficient to support the reparations award.

In deciding to award the above reparations, the ALJ found that it was appropriate, based on the allegations in the complaint, to do so because they were "specified liquidated amounts requiring little or no calculations." Decision at 22 (quoting *Go/Dan Industries*, 1998 WL 940249, at *3). The ALJ also used additional information MCS submitted in its order to show cause brief, as permitted by 46 C.F.R. § 502.65(c). *Id.* The complaint alleged that, because of a shortfall in availability under MCS's 2021 and 2022 service contracts with Mediterranean, it had been forced to pay at least

$400,000 more than it would have under each service contract, and its recent briefing provided specific amounts of $480,719 and $463,936, for a total of $944,655 in reparations. *Id*.

Mediterranean argues that the reparations award was not adequately supported. Exceptions at 48-50. It primarily claims that it was improper to award reparations "without any proof," that is, without any affidavits or documentary evidence to support the award. *Id*. at 48-49. Mediterranean asserts that because the damages here were not liquidated or otherwise sums certain, relevant FMC and federal court precedent requires an evidentiary showing even if liability is established by default. *Id*.

Mediterranean's argument on this point is correct. In support of the requested reparations award, MCS simply stated in its brief that it "has calculated" the two yearly amounts above, without any explanation of how it arrived at them or any supporting evidence. Response to Order to Show Cause, Oct. 6, 2022, at 18-19. That is not adequate here. The damages appear to depend on unspecified charges for bookings MCS says it made on certain shipping routes in a certain time frame, and thus they do not appear to be appropriately considered liquidated or otherwise certain—as MCS itself seems to concede. Response to Initial Decision at 23. And where the damages claimed are of that less certain nature, the general rule for courts applying the analogous Federal Rule 55 is that even where a default judgment is to be entered, the plaintiff must provide evidence to justify a damages award. *See Bozzuto Contractors, Inc. v. Evans*, Civ. No. 19-3292, 2020 WL 7042766, at *3 (D.D.C. 2020) (where default judgment is sought, entitlement to damages must be proven "using detailed affidavits or documentary evidence on which the court may rely," *quoting Boland v. Providence Constr. Corp.*, 304 F.R.D. 31, 36 (D.D.C. 2014)); *GAG Enters., Inc. v. Rayford*, 312 F.R.D. 230, 234 (D.D.C. 2015) (denying default judgment because plaintiff had failed to provide sufficient affidavits or documentary evidence justifying damages claimed, relying instead on a general affidavit from an attorney without personal knowledge and statements in the complaint that simply listed dollar figures, without an explanation as to their calculation).

Authority cited by MCS and the ALJ do not sufficiently support a different result here. MCS faults Mediterranean's use of case law, Response at 22-23, but it provides no specific support for the proposition that damages can be awarded without evidence in a situation like this one. The two FMC cases the ALJ cites are also not sufficient to justify a departure from the general rule here. In *Go/Dan Industries*, 1998 WL 940249, at *3, the ALJ did award a total of a little less than $8,000 to complainants based on damages for freight and other charges "itemized" in a schedule attached to the complaint, which the ALJ considered to be "liquidated amounts requiring little or no calculations." And *Shipco Transport Inc. v. Jem Logistics, Inc.*, FMC Docket No. 12-06, 2013 WL 9808695, at *1, 4, 2013 FMC LEXIS 34, *2 (FMC Aug. 21, 2013), involved an award of reparations of a little more than $8,000 for what appears to have been reimbursement for one demurrage charge described in the complaint. But even if there is some FMC precedent for an award of reparations for the type of charges at issue here without extensive supporting evidence, it is necessary to require detailed evidence in this case, in light of the apparently greater complexity and vastly greater size of the reparations claimed, as well as the approach of federal courts applying comparable default principles.

Mediterranean also argues that it was improper to award damages for the 2020-21 shipping year because none of the outstanding discovery related to that year, Exceptions at 49, but that claim does not appear to be correct. Mediterranean cites no authority for the notion that reparations awarded following default as a discovery sanction must all relate directly to the particular discovery that led to the sanction. In any case, MCS explains that discovery relating to the year in question was in fact part of the discovery outstanding by the time of the Second Order in July 2022. Response at 23-25. It appears that reparations may be properly awarded for both shipping years sought.

Finally, Mediterranean claims that the reparations award was improper because the amounts MCS sought in response to the order to show cause were about 20% more than those in the amended complaint, Exceptions at 49-50, but that claim is unconvincing. The operative complaint here simply alleged that Mediterranean's misconduct had resulted in MCS paying "at least $400,000" more for each of the two shipping years in question, plus unspecified "other injuries." Decision at 22-23; Amended Complaint at 24. Then, in providing more detail in response to the order to show cause, MCS listed amounts of $480,719 and $463,936 for the two years, amounts that are consistent with the earlier "at least" caveat. A reparations award would not be improper because of this relatively modest change.

In light of the above, this case is remanded to the ALJ for a "determination of the amount of reparations" under 46 C.F.R. § 502.65(c) based on affidavits or documentary evidence that provides adequate detail as to the damages MCS actually suffered for the violations alleged in its operative complaint. *See also* 46 C.F.R. §§ 502.251 (Proof on award of reparation); 502.252 (Reparation statements).

E. <u>Mediterranean's request for oral argument is denied</u>

Mediterranean requests oral argument pursuant to 46 C.F.R. § 502.241. Exceptions at 1. The request is denied under section 502.241(b).

III. CONCLUSION

The Commission hereby:

(1) **DENIES** Respondent Mediterranean's February 6, 2023 Exceptions as to liability;

(2) **AFFIRMS** the ALJ's January 13, 2023 Initial Decision on Default as to liability;

(3) **REMANDS** for consideration of whether the delay sanction described at 46 U.S.C. § 41302(d) may support the imposition of default here; and

(4) **REMANDS** for the submission of evidence sufficient to support the reparations Complainant MCS seeks.

By the Commission.

David Eng
Secretary

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

BAKERLY, LLC, *Complainant* v. SEAFRIGO USA, INC., *Respondent*.	**DOCKET NO. 22-17**

Served: January 3, 2024

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION[1]

[Notice of Commission Determination to Review served 1/4/2024; exceptions filed by Complainant 1/25/2024; final decision served 10/30/2024]

I. INTRODUCTION

A. Overview

This proceeding began on July 27, 2022, when the Federal Maritime Commission ("Commission" or "FMC") issued a notice of filing of complaint and assignment, indicating that Complainant Bakerly, LLC ("Bakerly") had filed a complaint against Respondent Seafrigo USA, Inc. ("Seafrigo"). The complaint alleges that Seafrigo violated the Shipping Act of 1984 ("Shipping Act") filed rate doctrine at 46 U.S.C. § 41104(a)(2)(A); demurrage and detention rules at § 41102(c) and 46 C.F.R. § 545.5(d); and the Ocean Shipping Reform Act of 2022 ("OSRA 2022") at §§ 41104(a)(14), 41104(a)(15), and 41104(d). On August 22, 2022, Seafrigo filed an answer denying the allegations and raising affirmative defenses.

Seafrigo provided reefer (refrigerated) transportation services for Bakerly from 2015 through early 2022, as a non-vessel operating common carrier ("NVOCC"), a type of ocean transportation intermediary ("OTI"). The dispute involves over a thousand invoices and $2,774,923.42 of demurrage and detention charges which Seafrigo has paid to nonparties for Bakerly's shipments from December 2020 through March 2022. Bakerly seeks a refund of $973,227.05 in demurrage and $278,172.37 in detention that it paid Seafrigo. Bakerly also seeks an order that Seafrigo cease and desist collection of an additional $1,288,809.92 in demurrage and $234,714.08 in detention. Seafrigo states that it is not seeking reimbursement for $159,849.08 of charges.

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

According to Bakerly, the dispute began after a snowstorm and port closure during which, Bakerly argues, it should not have been responsible for demurrage and detention charges. Bakerly's concern expanded to include Seafrigo's staffing shortages and billing practices. By October 2021, Bakerly told Seafrigo that it would automatically reject certain invoices. Seafrigo contends that Bakerly's nonpayment of detention and demurrage charges is not justified.

The demurrage and detention charges were imposed by entities other than Seafrigo: marine terminal operators ("MTOs") or vessel-operating common carriers ("VOCCs"). Demurrage charges accrue on a daily basis and must be paid in order for containers to be released, while detention charges are incurred after a shipment is delivered if a container is not returned timely. As Seafrigo explains, "NVOCCs advance funds because requiring shippers and consignees to pay such charges in advance would unnecessarily grind transportation to a halt with containers sitting at ports and terminals for extended periods of time." Opposition at 6. This decision does not rule on OSRA 2022's new requirements for invoices. In the future, the Commission's new Charge Complaint process should be able to resolve disputes over invoice charges in a much more efficient manner. *See* https://www.fmc.gov/osra-2022-implementation.

As explained below, Bakerly has not established that Seafrigo violated the Shipping Act. Commission rules and the parties' negotiated rates and tariffs permitted Seafrigo to pass through charges without markup to Bakerly, including demurrage and detention charges, unless attributable to Seafrigo. The evidence shows that Seafrigo acted reasonably, exercised due diligence, and that the demurrage and detention charges were not attributable to Seafrigo, at least not in excess of the $159,849.08 for which Seafrigo accepts responsibility. This decision is limited to determining whether Seafrigo violated the Shipping Act in effect at the time the alleged violations occurred. Moreover, the evidence is viewed in the context of that timeframe. As Seafrigo notes, supply chain disruptions "plagued the ocean transportation industry in 2020 through early 2022." Opposition at 2. Additionally, this decision does not establish best practices; rather, it is limited to determining whether the Shipping Act was violated.

The evidence does not establish that the detention and demurrage charges at issue were inconsistent with the negotiated rates and tariffs and therefore they do not violate the filed rate doctrine. In addition, the evidence does not establish either that Seafrigo had a practice, or if it had a practice, that the practice was unreasonable, in violation of the demurrage and detention rule and section 41102(c). Moreover, OSRA 2022 does not apply to these shipments, which occurred before it was adopted. Therefore, a violation of the Shipping Act is not established.

B. Procedural History

On July 27, 2022, the Commission issued a notice of filing of complaint and assignment initiating this proceeding. On August 22, 2022, Seafrigo filed an answer. The parties began discovery. On February 7, 2023, an order was issued dismissing Bakerly's partial motion for summary decision. On March 30, 2023, an order was issued quashing three notices of depositions.

On May 8, 2023, Bakerly filed its brief ("Brief"), proposed findings of fact, and appendix. On May 31, 2023, Seafrigo filed its opposition brief ("Opposition"), supplemental proposed findings of fact, appendix, and response to proposed findings of fact. On June 14, 2023, Bakerly filed its reply brief ("Reply"), a reply to Seafrigo's responses to Bakerly's proposed findings of fact ("BReply/SFResponse/BPFF"), and a response to Seafrigo's proposed findings of fact ("BResp/SFPFF"). On June 21, 2023, Seafrigo filed a motion to address the request for sanctions raised in Bakerly's reply brief and a memorandum in response to the request for sanctions.

On June 29, 2023, the proceeding was reassigned to the undersigned and both parties were ordered to provide a table of contents for their appendices, including the excel files, and Seafrigo was ordered to refile portions of its appendix to add Bates numbers. The required filings were received on July 14, 2023.

C. Arguments of the Parties

Bakerly asserts that: Seafrigo violated the filed rate doctrine by charging Bakerly demurrage in contradiction to Seafrigo's rules tariff; Seafrigo established an unreasonable practice and policy of sending duplicative invoices that gave Bakerly cause to distrust Seafrigo invoicing for demurrage and detention; Seafrigo should not have paid demurrage when the ports were closed due to a snowstorm; and Seafrigo's responses to Bakerly's discovery request violated Rule 33. Brief at 28-62; Reply at 12-36.

Seafrigo contends that: Bakerly's argument ignores the governing contracts and the parties' course of conduct; Bakerly is obligated to pay for charges assessed as a result of its negligence or that of its warehouser; charges caused by reasons independent of either party were not Seafrigo's responsibility; Seafrigo's invoicing was not improper; and Bakerly failed to act in good faith. Opposition at 17-51.

D. Evidence

Under the Administrative Procedure Act, an administrative law judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 98-102 (1981). This initial decision is based on the pleadings, exhibits, briefs, proposed findings of fact, and replies thereto filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations in the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent that individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

Evidence in the record that was not in English as required by Commission Rule 7 was not considered. *See, e.g.,* CX 220, CX 586. Additionally, the record is significantly longer than necessary because parties submitted multiple copies of the same documents. *See, e.g.*, CX 221-

24 and CX 622-24; CX 472-78 and CX 1310-16; and CX 833-34 and RX 4609-10. Appendices should have a logical organization and if the evidence were organized by date or transaction, this might have been less likely to occur. Indeed, the best explanation of the organization of Seafrigo's evidence is provided by Bakerly in its Reply at 33-34. Bakerly's objections to Seafrigo's evidence are discussed below, in section III.A.3.

The findings in this decision are based on the totality of the evidence and no particular piece of evidence was determinative. Many of the facts below are from emails between the parties. Multiple conversations were occurring at the same time. Therefore, for ease of reading, conversations are loosely grouped together, which means the facts are not entirely chronological. Minor typographical changes are made in the quotes, primarily spacing changes, for example, combining paragraphs. The findings of fact summarize some of the over six thousand pages of evidence provided by the parties, but it does not attempt to summarize the entire record, trace the journey of every container, or match every invoice with every charge listed in the various spreadsheets. Rather, it focusses on the most relevant contemporaneous evidence pertaining to the alleged Shipping Act violations.

Specific findings of fact are in part two, prior to the analysis and conclusions of law in part three, and the order in part four.

II. FINDINGS OF FACT

A. Relevant Entities

1. Bakerly, LLC is a United States company that imports specialty French food products. CX 19; Bakerly Proposed Findings of Facts with Respondent's Responses and Bakerly's Replies ("BReply/SFResponse/BPFF") 1.[2]

2. Charles Lefort was Bakerly's Vice-President, Supply Chain and on January 1, 2023, became Vice President, Sales & Operations Planning and IT. CX 19, CX 1318.

3. Seafrigo is a non-vessel operating common carrier licensed by the Federal Maritime Commission as that term is defined at 46 U.S.C. § 40102(17). CX 3; BReply/SFResponse/BPFF ¶ 2.

4. Alfonse "Al" Raffa served as Seafrigo's Managing Director. RX 1.

5. Jérôme Lorrain was Seafrigo's CEO from January 1, 2021, to May 5, 2022. RX 38.

6. Bakerly's affiliated companies in France had for a lengthy period utilized the Seafrigo affiliates in France and Europe for distribution of their food products to most of Bakerly's affiliates. CX 19.

[2] Citations to the parties proposed findings of fact are to: (1) Bakerly's Proposed Findings of Facts with Respondent's Responses and Bakerly's Replies ("BReply/SFResponse/BPFF") and Bakerly's Response to Respondent Seafrigo's Supp. Statement of Facts ("BResp/SFPFF").

7. Bakerly LLC, the United States company, started importing refrigerated containers of Bakerly food products from its parent companies in France with Seafrigo in September 2015. CX 19.

8. Bakerly, in February 2019, decided to start buying from its Bakerly parent companies in France pursuant to FOB terms and to have Seafrigo USA handle the transportation from the port to door delivery. CX 19; CX 162.

9. Bakerly shipped in the range of 1,000 FEUs annually. CX 19.

10. Bakerly also transacted with a company called Lineage to handle some of Bakerly's warehousing, including a warehouse at Allentown, Pennsylvania. *See, e.g.*, Bakerly's Response to Respondent Seafrigo's Supp. Statement of Facts ("BResp/SFPFF") ¶¶ 27, 51; BReply/SFResponse/BPFF ¶¶ 30, 34, 51.

B. Agreements

11. Seafrigo sent quarterly rate proposals to Bakerly which stated: "This Rate Proposal does not include demurrage and detention charges, for which the shipper and/or consignee may be liable and port terminal handling charges." CX 226, CX 232, CX 239, CX 245, CX 251.

12. Seafrigo's quarterly rate proposals also stated: "All shipments are subject to the rules in Seafrigo's bill of lading, its Rules Tariff and its standard trading conditions." CX 226, CX 232, CX 239, CX 245, CX 251.

13. Seafrigo's quarterly rate proposals included Seafrigo's USA Standard Accessorials Tariff listing per diem charge as "At cost per terminal or carrier" and both demurrage and detention as "At cost per carrier." CX 230, CX 237, CX 243, CX 249, CX 255.

14. Seafrigo Tariff Rule 15, effective 22 Feb. 2017, under the heading "FREE TIME, DETENTION AND DEMURRAGE," states:

> 15.1 Carrier is a non-vessel operating common carrier and the equipment it uses to provide transportation services to Merchant is provided by the vessel-operating common carrier (VOCC) that operates the vessel transporting the cargo.
>
> 15.2 The VOCC imposes detention charges if empty containers released for loading and/or loaded containers released for unloading are not returned within a specified period of time (free time). Merchant shall be liable to Carrier for any detention charges imposed on Carrier by VOCC as a result of Merchants failure to return containers within applicable free time.
>
> 15.3 The VOCC imposes demurrage charges if loaded containers are not removed from the marine terminal within a specified period of time (free time). Where service is port at destination and removal of containers from

> the VOCCs marine terminal is responsibility of Merchant, Merchant shall be liable to Carrier for any demurrage charges imposed on Carrier by VOCC as a result of Merchants failure to return containers within applicable free time.

CX 111.

15. Seafrigo Tariff Rule 17, under the heading "USE OF EQUIPMENT" states:

> 17.1 General Provisions
>
> Merchant acknowledges and agrees that Carrier, as an NVOCC, does not own or operate equipment (i.e., chassis or containers). Merchants use of chassis and containers shall be subject to the requirements of the VOCCs and/or chassis leasing companies that own and/or operate the containers and chassis used to transport Merchants cargo. Merchant, by tendering shipments to Carrier for transportation, appoints Carrier as its agent for acquiring containers and chassis for such transportation and agreeing to free time, as well as demurrage and detention, storage and other charges that accrue with respect to containers and chassis used for such transportation, all of which shall be for the account of the Merchant except to the extent solely attributable to actions or omissions of Carrier.
>
> 17.2 Merchants Risk and Expense
>
> Except as otherwise specifically provided in this Tariff Rule, and Carrier's bill of lading terms and conditions, the following shall be at the Merchants risk and all expenses in connection therewith shall be for the Merchants account:
>
> 1. The pickup, transport, and delivery of the containers/goods moving between the port of loading or port of discharge on the one hand, and Merchant's facility on the other hand, except to the extent the goods are door cargo; and
>
> 2. The care and custody of equipment.

CX 113.

16. Seafrigo's bill of lading terms and conditions provide at Clause 6.5 that Seafrigo "shall not be liable for any loss or damage arising from: (a) an act or omission of Merchant" and at Clause 6.5(h) that Seafrigo cannot be held liable for any "cause or events" which it could not avoid, and which could not be prevented by the exercise of due diligence. CX 57.

17. Seafrigo's bill of lading section 9, labeled "CARRIER'S CONTAINERS," includes the statement: "9.4 Merchant undertakes to return such containers to Carrier within the time

provided for in Carrier's applicable tariff; otherwise, Merchant shall pay Carrier for the demurrage or detention charges applicable to the containers." CX 57.

C. Communications

1. Winter 2020/2021 Billing

18. As early as November 2020, Seafrigo noted container delays, "due to short week and availability," and "its been a mess lately due to vessel delays and having to deliver containers," described as a "roller coaster for all of us." CX 943, CX 938; *see* CX 935-49.

19. Seafrigo stated that it "met with the two primary VOCCs for Bakerly, CMA and MSC[] and sought to have them waive detention and demurrage charges" but that because "those carriers had significant leverage in an extremely tight market, they flatly refused to waive such charges." RX 18.

20. On January 5, 2021, Bakerly's warehouser Lineage emailed Seafrigo and Bakerly stating: "Please request the appointments when the containers are released from the port." CX 954. Seafrigo then wrote an email to Bakerly stating: ""[T]his kind of response is not going to help. We need to be proactive with our appointments" but "I don't want to step on any toes so I will not answer just yet. What do you think?" CX 953. Bakerly replied that they would call Lineage and Bakerly requested some specific appointments from Seafrigo. CX 953.

21. On January 4, 2021, Bakerly emailed Seafrigo, subject "Priority List Week 2," stating: "thanks for the time this afternoon. Right now, we have 70 [containers] waiting for drivers in NJ and NY port; as we discussed during the meeting, we have specific products out stock . . . . please see below how many [containers] we need per item# and its final destination . . . you may deliver the first available container from the references listed below[.]" CX 711. Seafrigo responded and suggested a telephone call. CX 711.

22. On January 5, 2021, Seafrigo emailed Bakerly stating:

> After speaking with Yudith about demurrage, here is a brief report of how this is being handled. Up to this point, Seafrigo has been financing all of the demurrage on behalf of Bakerly for the sake of ease and to avoid confusion with multiple parties getting involved. We do not have a grand total at this time, but just want to give you guys a rough idea of where we are in terms of cash outlay. Up to this point we paid around 100K to 125K in demurrage within the port of NJ. In port of Oakland, I believe we paid around 40K-45K so far. We will keep you posted as to how this progresses and as to when the situation is back under somewhat of normal control.

CX 709-10.

23. Later on January 5, 2021, Seafrigo emailed Bakerly stating: "I assigned 4 more containers. Please see attached [Bakerly Report excel file]. Sorry for the emails but I am

going to keep sending this whenever I have an update so we are not redundantly looking for drivers on covered containers." CX 709.

24. On January 20, 2021, Seafrigo emailed Bakerly, subject "Preferred Jersey City," stating:

> We have a potential serious issue brewing here. Despite making a great push to get all these containers delivered, we now have an issue that they are not unloading the containers in a reasonable amount of time. Some containers have been sitting there for over a week and rumor has it, they intend to keep them there longer. I know this is "he said, she said" but my reliable sources are telling me that "This customer brought in too many containers at the same time, and we do not have the time to unload them fast enough". The obvious issue here is per diem costs which you are already aware of. But the other residual issue here is that some of these truckers (including Seafrigo transport) are using our own chassis to service containers that we pay for, and they are now sitting in Jersey City for an undetermined period of time. That is costing we as truckers money as we need that equipment back. I know this week is a slow week in terms of imports for Jersey City so it would be great if there could be a catch up period for PFS JC to focus on unloading what they have so we can get our equipment back and containers returned back to the port. For all new shipments coming in? My recommendation would be to bring all those containers to Seafrigo's freezer and unload them here until PFS JC can catch up again. Then we can truck them to PFS JC when they are ready to receive them. Please let us know your thoughts.

CX 720.

25. On February 3, 2021, Bakerly emailed others at Bakerly stating:

> Last recap on demurrage :
>
> - Total $: $359,149.35
>
> - 50 containers
>
> - Average 13 days of demurrage (after free time expired – 2 free days).
>
> - Average $550 per day (after 10 days)
>
> Our actions:
>
> - Find drivers while Seafrigo could not : Yudith pulled 7 containers directly that had been in the port for 22 days accruing $90k in demurrage.
>
> - Divide the work between NJ and Allentown containers : Al focused on finding drivers for NJ containers (C017) and Yudith focused on finding drivers for Allentown containers - to get the maximum out of the port.
>
> - Estimation is that we gained, thanks to our intervention $68k:

o + 7 containers that Yudith pulled directly which could have easily stayed one additional week in demurrage : $27k

o At least one week of demurrage, which would be an equivalent of $41k (43 containers / 4 weeks X 7 days X $550).

CX 339.

26. On February 24, 2021, Bakerly emailed Seafrigo with the subject "per diem invoices recap | Bakerly," stating: "We are looking for a recap on an excel file on the detention charges accrued during the snow storm. Would you have that available please? (same as the one you send for the demurrage)." CX 707.

27. On February 25, 2021, Seafrigo responded:

> I can send you something as of today but per diem is something that accumulates over time based on when the carriers bill Seafrigo. In some cases it takes them 1 month+ to send us their invoice. On a general basis, I can send you a report of all containers with: · ETA · Date container left port · Date empty container returned to the port[.] This will give you an idea of the timing per container. Then average around $550.00 per container per day after our free time (on average 3 WD)[.] It's not perfect but it still give you an idea of what to expect. Does that work for you?

CX 706-07.

28. On February 25, 2021, Bakerly emailed Seafrigo stating: "Finance is just looking for the per diem accrued at the same time of demurrage, after the snow storm in December. They want to see the total amount received for the period so far. No need to have that on a regular basis but just for that same period. If you have that handy would be great. Attached is what we had for demurrage." CX 706.

29. On February 26, 2021, Seafrigo emailed Bakerly stating: "I ran a report based on the same timeframe and we have accounted for close to 40K in per diem charges that Seafrigo has already paid on behalf of Bakerly. Seafrigo has already billed Bakerly for this 40K of per diem. This is over 35 different containers. Please keep in mind this type of cost could continue to accumulate down the road." CX 705.

30. Later on February 26, 2021, Bakerly emailed Seafrigo stating: "Would you have the detail of the invoices? Sorry for the additional questions but our finance team is asking for it." CX 705. On March 2, 2021, Bakerly emailed Seafrigo again stating: "Sorry just to clarify, we just need the invoices number added to the file you sent." CX 704. On March 2, 2021, Seafrigo replied to Bakerly stating: "You mean your 4 digit PO# right?" CX 704.

31. On February 28, 2021, Seafrigo emailed Bakerly, subject "Shipping line invoices Demurrage and Per diem," stating: "we have not received any invoices that support any demurrage or per diem. Please note that if you do not send me the invoices of the

shipping companies that support your invoices, they will not be approved in a timely manner until Seafrigo provides all the necessary documents." CX 718.

32. On February 28, 2021, Seafrigo responded "Let me review this situation. I have a pack of demurrage invoices with back-up that might match up with these invoices." CX 718.

33. On March 2, 2021, Seafrigo responded to Bakerly stating: "I have attached back-up to the invoices you had questioned. Additionally, I have added a batch of new invoices + back-up. I will put everything in a FEDEX pouch and send it to you." CX 723.

34. On March 2, 2021, Bakerly emailed Seafrigo asking if they "have this info in a spreadsheet?" CX 722.

35. On March 2, 2021, Seafrigo responded: "I would have to run a customized report trying to capture a timeframe. We might have some overlapping from previous invoices that you have already received. Will that work for you?" CX 722.

36. On March 3, 2021, Bakerly responded to Seafrigo, thanking them for running "a customized report, of course, this would work for us, we really want to see all the containers that have had demurrage / per diem so far this year." CX 721.

37. On March 5, 2021, Seafrigo emailed Bakerly "2 reports based on invoicing dates of Jan 1st 2021," attaching excel documents labeled "Bakerly Per Diem 2021" and "Bakerly Demurrage 2021." CX 721.

38. Seafrigo agreed to provide Bakerly a $30,000 credit after Bakerly agreed to pay charges incurred during the NY snowstorm. CX 19; *see also* RX 11; CX 181 (referencing a $30,000 credit in March 2021 for January 2021 demurrage and detention charges).

39. On March 8, 2021. Seafrigo emailed Bakerly stating:

> Based on our last week discussion, please find herewith the confirmation that SeaFrigo will be issuing a $30k credit to Bakerly. This credit is only issued as a commercial gesture based on the business relationship between Bakerly and SeaFrigo. This credit should under no circumstances be an admittance of responsibility or liability of any kind from SeaFrigo towards Bakerly. Credit will be issued over the coming 2 months March and April 2021). As stated this gesture is purely out of pocket from SeaFrigo. Thank you for your business.

CX 259.

40. In December 2022, Bakerly again agreed it would not dispute Seafrigo's right to be reimbursed for the snowstorm charges, which amounted to $361,178.54. RX 10.

41. If "Seafrigo had been informed that Bakerly thought that Seafrigo was assuming the obligation to pay detention, demurrage, per diem, and other ancillary charges, it would have refused to advance the millions of dollars in advances it made on behalf of Bakerly"

from that point forward, and that it would have been "economically unfeasible" for Seafrigo to assume the obligation for these charges. RX 21.

2. Invoice Management

42. "During the period in question, VOCCs and MTOs were not obligated to provide detailed invoices as is now required under OSRA. Seafrigo forwarded information as provided by MTOs and VOCCs." RX 15.

43. "Seafrigo admits that on occasion it had to issue separate invoices for detention and demurrage charges that accrued or were invoiced by third parties at different times." RX 16. "If containers sit on a terminal or at a warehouse for an extended period of time, more than one invoice for that container may be issued. That simply reflects the billing practice of the underlying carrier or terminal." RX 14.

44. From January 29-June 25, 2021, the parties exchanged emails, subject "Invoices Management," regarding how to share invoices. CX 1335-50. The first email, on January 29, 2021, from Bakerly to Seafrigo, stated: "We were brainstorming on a way to optimize the invoices approval process. Right now, we are receiving one invoice per PO. With 40 POs per week, approval of each invoice separately is becoming too much time consuming. I understand the need to have one invoice per PO to match the booking, yet do we have a way to send a batch per week?" CX 1350.

45. On January 29, 2021, Seafrigo responded: "Indeed we do have a way. We are doing this for one other customer. The only invoices that may not be included in these weekly batches would be additional charge type invoices like demurrage, per diem, exam charges, etc… We are sending this manually along with the back-up." CX 1349.

46. From January 29-February 9, 2021, the parties discussed what to include and shared an example spreadsheet. CX 1342-48.

47. On April 1, 2021, Bakerly requested a container scheduled for delivery in Allentown the next day to be delivered to Easton that same day or the next day. CX 950.

48. On April 9, 2021, Bakerly emailed Seafrigo, subject "Per Diem / Demurrage," requesting per diem and demurrage reports and also asking for the support documents. CX 904-05. Seafrigo responded that they could not "combine the support documents with a general report. All support documents have already been sent with our original invoices. The report is just a summarization of what has been billed." CX 904.

49. On April 9, 2021, Bakerly asked for two backup invoices and on April 12, 2021, asked for a copy of the documents related to these invoices. CX 903-04. Seafrigo responded on April 14, 2021, stating to see the attached. CX 902.

50. On April 21, 2021, Bakerly emailed Seafrigo stating: "Al or Kizzy, please provide proof of per diem/ detention for all invoices attached. Please note if you don't send us any support those invoices cannot be approved as per accounting request. To do this process earlier please send both documents at the [same] time." CX 902.

51. On April 28, 2021, Bakerly emailed Seafrigo stating: "Al and Kizzy, it is very important that you send us the information complete, unfortunately our account department is requesting proof or any support to approve payments. Please let do this process earlier and get back to old procedure and I will be all happy. Please send this invoice together with the shipping line attached[.] Please note that all detention since February are on hold until we receive what is requested." CX 901.

52. Later on April 28, 2021, Seafrigo responded to Bakerly that "I have a batch of invoices + back-up sitting on my desk that I will put in a FEDEX. So sorry for the delay." CX 901.

53. On June 22, 2021, Bakerly reached back out to Seafrigo, subject "RE: Invoices Management | Seafrigo," stating:

> We are still receiving individual invoices only, without a recap of all invoices for a faster approval. Our goal is to have a first page that recaps all invoices (invoice number + amount + date), and then the individual as from the second page for reference. With all containers that we have, the invoicing approval is getting extremely time consuming and this is delaying the whole operation.

CX 1342. Bakerly also asked that the weekly recap of invoices be in excel as Bakerly had migrated to a new ERP system. CX 1341.

54. On June 22, 2021, Seafrigo responded, stating that "we left off that we would send to Bakerly on weekly basis batches of invoices," and addressing the three types of invoices: freight invoices and custom clearance invoices, both of which are not "an issue to send in weekly batch," and third:

> Accessorial Invoices – this is where it gets tricky. The problem with these types of invoices is that there is no fixed timeframe when Seafrigo receives these types of charges and so we are generating the invoices "as we get them". This is the most time consuming part of the process. With that said, I do not see any reason why we couldn't also "batch" these invoices but we also do not want to fall behind in getting you the invoice + back-up.

CX 1340.

55. On June 22, 2021, Bakerly responded, requesting the invoices in 3 batches and attached an upload template. CX 1339. Seafrigo responded that some data is not in the dataset, shouldn't the invoice amount also be listed, and asked how this would work "in terms of timing and invoice redundancy? I am just thinking theoretically, if we are able to do this, we have no way of knowing if the data is duplicated or not. We would simply do a data dump week to week." CX 1338-39.

56. The parties set a meeting and then on June 25, 2021, Seafrigo sent a sample asking if it would "do the trick ?" CX 1335-38.

57. The new format was approved by the parties on June 28, 2021, and the first batch sent by Seafrigo on July 12, 2021. CX 1332-34. However, as of July 22, 2021, Bakerly had only received one excel file and Seafrigo continued to send individual invoices. CX 1331.

3. Allentown Drop & Pick Program

58. Seafrigo had continuing issues with Bakerly's Lineage warehouse in Allentown, PA. On February 26, 2021, Seafrigo sent an email to Lineage, copying Bakerly, forwarding a complaint from a trucker and stating "This is not the first complaint from one of several truckers that I am using… Can't keep this up with this kind of service. I am losing truckers left and right…." RX 4606. The trucker described that a container had been at Lineage on time for an appointment at 2:30pm, and "[a]t 1am the driver was still waiting to be called in to get a door, dispatcher tried contacting them and they also would not give the driver an answer with any idea of when he would be unloaded. . . . [I] instructed them to have the driver bring the loads back to our yards, please note charges will apply but most importantly this has to be rescheduled." RX 4606.

59. On March 29, 2021, Seafrigo emailed Lineage, copying Bakerly, subject "LayOver Issues," stating:

> I am writing this email to you in order to understand what is the process for these late night appointments. I am finding that anytime one of our drivers delivers a container for appointments that are 630pm and later, they are kept there overnight. Naturally, the more this happens, the more drivers are not going to want to go you your location…. We really need to get some answers on this because I am getting major pushback from good drivers that I am working with for years now.

CX 833-34.

60. Bakerly responded to all, but addressed Frank Palaia, Sales Manager of Lineage Allentown PA, stating: "Frank, we would like to read your comments about Al e-mail, because this situation is strongly impacting our drayage cost, additionally we need our 5 inbound per day. We cannot lose drivers or continue paying detention + Layover fees." CX 833, RX 4609; *see also* BReply/SFResponse/BPFF ¶ 51.

61. On March 31, 2021, Lineage emailed Seafrigo and Bakerly at 12:20 PM stating: "Certainly understand the issue with the layover. We have addressed this internally, and you should not see this issues moving forward. You have 5 standing inbounds *every day* of the week (no weekends)." CX 832 (emphasis in original).

62. On March 31, 2021, Seafrigo responded at 1:20 PM: "Meanwhile we have a driver sitting in your yard for 10:30AM appointment still waiting for a door…." CX 832.

63. On April 14, 2021, Seafrigo emailed Bakerly, subject "Lineage – Allentown PA" which proposed implementing a "drop & pick program" and stated that "We gave this 2 weeks to see if the situation has improved and I am afraid our drivers are not happy and they are all threatening to not go back there." RX 4632.

64. Later on April 14, 2021, Bakerly responded that Lineage stated that "the major factor is manpower (which they are working on)" and explained: "Our major concern with the drop trailer is the fact that Lineage operations will not be efficient enough to have a regular in & out flow of fulls & empties. We have addressed that with Lineage : let us have their confirmation that drop trailer solution will not delay us further and we will go back to you shortly." RX 4631-32. Seafrigo responded in part that "our truckers are running out of patience." RX 4631.

65. On April 15, 2021, Seafrigo stated it received "a message from one of our good truckers rejecting all future loads to this location. We just lost 25% of our truck capacity…." RX 4630. Bakerly responded that they would have "final confirmation from Allentown tomorrow" and that they "need their operation team onboard with the drop trailer efficiency, otherwise the inventory will be sitting there and containers will run per diem." RX 4629-30.

66. On April 16, 2021, Bakerly stated: "We have the confirmation from Allentown so we can start the drop trailer program as from next week. We will be following closely to ensure empty containers are released on time for the pick up." RX 4628.

67. On May 20-25, 2021, Bakerly emailed Lineage asking about containers. CX 559-67. One email from Bakerly to Lineage stated:

> Cannot list all the delays[.] Outbounds orders : customers are yelling on all Memorial orders still not received because still not loaded! We are talking days now. Inbounds : 11 containers stuck on drop trailer program still not ready to pick up. And now the transfers to our plant that have still not been delivered : we are out of stock for orders this week. Transfers from our plant to Lineage are taking 1 week to be received. I have seen some delays on Walmart orders as well due to "delays at origin". Sorry but … what a mess! We have discussed other facilities during our visit but we still have our inventory at Allentown – we cannot drop the ball and impact so much our customers during our peak season! We need help here, pls!

CX 559-60. Bakerly states that this is "related to warehouse transfers between Lineage, PA and Bakerly's factory and is not related to Seafrigo containers." BResp/SFPFF ¶ 48-52.

68. On May 25, 2021, Lineage responded:

> The site continues to be severely impacted by labor and volume. We are doing everything possible to schedule and accommodate customer needs and unfortunately are behind across multiple segments. I will engage with Frank to help address your most severe needs to see if we can plan around priority-Are any needs, and I apologize that there are multiple segments impacted right now, more urgent than any other?

CX 559. Bakerly states again that this is "related to warehouse transfers between Lineage, PA and Bakerly's factory and is not related to Seafrigo containers." BResp/SFPFF ¶ 48-52.

69. On June 14, 2021, Seafrigo emailed Bakerly stating that "we are no longer going to perform Drop & Picks as it has done more harm than aid" and stating that they could use the Seafrigo storage yard only for a confirmed appointments the next day. CX 275. Seafrigo explained "as you know, we have been pulling containers and bringing them to our yard for storage . . . . We currently do not have any more yard plugs and we cannot store containers in our yard any longer for long stretches of time. We can, however, pull a container on day A, bring it to our yard for a 'confirmed' appointment the next day. Anything beyond that puts your containers at risk." CX 275.

70. Bakerly acknowledged, regarding the drop and pick program that it "indeed proved unsuccessful as Lineage, PA could not keep up with the drops at the time following limited resources due to the COVID-19 outbreak" and that the drop and pick program "was abandoned to return to live unload." BResp/SFPFF ¶ 44.

71. Bakerly also informed Seafrigo on June 9, 2021 that it was terminating its partnership with Lineage; however, two days later, Bakerly decided instead not to terminate its partnership with Lineage and rather to reduce its volume to Lineage. BResp/SFPFF ¶ 53.

4. Linden Inbounds

72. A series of emails, subject "Bakerly Inbounds," from June 9-16, 2021, discusses containers going to Linden, NJ, including a shipment that was received by Lineage Allentown and at the port. CX 851-62.

73. On June 16, 2021, Kizzy Hall, Ocean Import Coordination for Seafrigo, emailed Bakerly and Lineage, subject "Amended***** Bakerly Inbounds," stating:

> At this time Carriers have driver shortage, port congestion, insufficient equipment (GENSET) ETC. Trucking companies are booked to capacity, drivers are quitting on them, trucks are breaking down. Receiving stations are booked, pulling containers before Demurrage applies has been impossible. We are doing our best at this time to get containers pulled. Customer service will get better. Please call me if you have urgent matters and need my immediate attention. I communicate via the phone daily with Jessica, it's been extremely hectic.

CX 852.

74. On June 16, 2021, Bakerly responded: "This is the first time in 2 weeks that you provided an overview/recap of our current situation Kizzy!" CX 851.

75. On June 16, 2021, Seafrigo emailed Bakerly stating: "She is under a lot of pressure Yudith. Please don't scare her off. She is doing the best that she can. Everything is a mess

again like it was Dec and Jan… On a side note, we are looking to hire another person to assist with the account to help alleviate the pressure." CX 851.

76. A series of emails, subject "Linden Containers," from June 11-24, 2021, discuss containers at port, to be delivered to Linden. CX 863-76. On June 23, Seafrigo stated that a driver had gone to collect a particular container, but that the container was not empty and therefore could not be picked up. CX 871. Lineage said the container had been empty since June 16 and that it was sitting in the yard waiting to be picked up; Bakerly stated it would not cover per diem. CX 870-71.

77. On June 25, 2021, Seafrigo emailed Bakerly and Lineage stating: "If you don't mind, lets go back to the beginning and stick to the facts. @Jersey City – when the container is empty, you usually send us an email that the container is now empty. Would you mind please forwarding that email so we know which date we were notified? Just an FYI, this empty was returned back to the port on 6/23/2021." CX 869.

78. Lineage emailed Seafrigo and Bakerly stating "this is Linden. Not JC. Not sure if that was the confusion." CX 868. Seafrigo responded: "Based on your email, Yudith is right. Per diem, if any, in this case will not be billed to Bakerly." CX 868.

5. Bakerly Warehouse Reduced Capacity

79. On July 12, 2021, at 8:29 PM, Bakerly emailed Seafrigo, subject "STOP Seafrigo** Stop immediately BAKERLY CONTAINERS FOR BAKERLY - CARRIER SEAFRIGO" which stated:

> Seafrigo team, we regret to inform you that we must limit your inbounds due to complications and internal decisions. Starting now 07/13 only drop 2 containers per day until further notice. Inform your carriers do not request more allocations. In case they do, they will receive a resounding NO by Bakerly or Linden Team. We have priorities with our production.
>
> We are aware of the additional costs of demurrage, storage, or detention that this decision implies, but we do not have a choice. Please inform your carriers and avoid any misunderstandings. Keep in mind that of *all confirmed appointments, only 2 have been left active.*

RX 4594; CX 838 (emphasis in original).

80. On July 13, 2021, Seafrigo responded to Bakerly stating: "What does this mean? This sounds serious. Could we please have a conversation about this ? Also, regarding the demurrage, we are going to run into a financing issue at some point. These are charges that Seafrigo does not have any credit terms so it will be out of pocket on demand." CX 837.

81. On July 13, 2021, Seafrigo sent an internal email, subject "STOP Seafrigo** Stop immediately BAKERLY CONTAINERS FOR BAKERLY - CARRIER SEAFRIGO" which stated: "Team – we need to have a serious internal conversation about potentially

limiting the volume of bookings with this customer until the local situation in the US is more clear. We cannot continue to stockpile containers on the USA side without a 'home' for them…. Let's talk please." RX 4593.

82. On July 21, 2021, Seafrigo internally responded:

> I have issued this warning already so I will raise it again. This account is crippling our credit line. Containers are piling up in port of NY/NJ faster than they can be routed to a warehouse with availability. FYI – Bakerly management is MIA, nobody returning my phone calls. We cannot continue this way! Please see attached list. We have containers that arrived since end of June still sitting at the ports and/or staged in a yard somewhere with another wave of containers arriving next week !

RX 4589.

83. On July 21, 2021, Seafrigo emailed Bakerly, subject "Bakerly Volumes / Finance," stating "We were hoping to have a conversation with you regarding your current activity. We have noticed another red flag of volumes which is creating quite a bit of demurrage / per diem for Bakerly and we would like to discuss a few points ASAP." CX 625.

84. On July 22, 2021, Seafrigo again emailed Bakerly stating: "I am sorry but we are running out of credit and we are dangerously close to being unable to move any of your containers out of the port of NY/NJ currently so we really need to open up a discussion now before this situation disgresses [sic]." CX 625, CX 835.

85. For another container, in August 2021, Bakerly asked about the ETA. CX 909, CX 910. Seafrigo explained to Bakerly that the "movements of this container have not been updated by . . . their system" and web tracking of the container had a problem. CX 910, CX 911. Seafrigo stated that they "got off the phone with MSC. They confirmed ETA is 8/16." CX 907-08; *see also* CX 906-20.

6. Fall Lineage Emails

86. On October 11, 2021, Seafrigo emailed Lineage, copying Bakerly, listing 4 loads scheduled to be dropped the next day in Jersey City. Seafrigo then sent an updated schedule asking for confirmation that it would be OK to drop all 6 and noting that there are another 9 loads to be dropped in Jersey City, "all have LFD of tomorrow as well as 3 more with LFD of 10/13. Please advise if there's any room to increase the amount p/day so that we can do as many as possible for tomorrow and remaining of the week." CX 477.

87. On October 12, 2021, Lineage asked for clarification of the number of loads and dates and Seafrigo said that is correct and does not include what is already in schedule for today. CX 476. Lineage stated "I'm lost, what are you asking to deliver today? Please send a complete list of what you're requesting." CX 475. Seafrigo responded that it was sent yesterday and again attached a list of 6 containers. CX 475. Lineage responded:

> Understood, I see where you've provided this list of 6 containers. However, I believe that you're also stating there are 3 additional containers with LFD of 10/12. I'm trying to understand what you're requesting. If you have 9 containers with an LFD of 10/12 please send a list of 9 containers. If you have 15 containers with an LFD of 10/12, please send a list of 15 containers. If you're not clear on what I'm requesting please call me. The information you've provided thus far is insufficient for proper planning.

CX 474.

88. Later on October 12, 2021, Seafrigo emailed Bakerly asking if any of the containers could be diverted from Jersey City to Linden. Bakerly identified three containers that could be diverted to Linden and noted that two container numbers were not found and that some of the containers on the list were missing the last digit. CX 472-73.

89. On October 14, 2021, Seafrigo responded to Bakerly with a list of the containers that were able to be diverted and noting that one of the containers on the previous list had been for the "same location but another customer" and that it had been deleted from the list. CX 471-72.

90. Later on October 14, 2021, Seafrigo emailed Bakerly stating:

> Now we need to know how you'd like us to proceed, all of the below loads are either in demurrage or have LFD of tomorrow. Not sure which ones we should give priority to since either way there will be more charges added to whatever we can't pull tomorrow. Main issue is that majority of these are to be dropped in JC and they can only accept 4 to 5 loads p/day.

CX 469-70.

91. As of October 2021, Bakerly was still asking Seafrigo to pay demurrage fees, even when Bakerly was helping to find drivers. CX 986 ("please send us DO and pay demurrage."); CX 988 ("Please pay demurrage fees, send us the payment confirmation and D/Os.")

92. On October 15, 2021, at 5:02 PM, Bakerly emailed Seafrigo, subject "Reroute- From Jersey City to Elizabeth/Philadelphia," stating: "please note that we need to divert the following containers originally planned to Jersey City. Please see below the new destinations" with a chart showing two containers diverted to Seafrigo-Elizabeth and two containers diverted to "Honor Foods Phillys." CX 1000. The "Confirmed ETA US port" was 10/15/2021 for three of the containers and 10/13/2021 for one container

93. On October 18, 2021, Seafrigo emailed Bakerly stating: "These are noted and updated on our system, note that they all have LFD of tomorrow and we're at fully capacity this week, not sure when we will be able to deliver to Philly but we will keep you posted." CX 999.

7. 2021 Finance Discussions

94. In addition to the $30,000 credit in February 2021, Seafrigo agreed to provide another $30,000 credit to Bakerly in July or August 2021. CX 20; RX 10-11.

95. On August 19, 2021, Seafrigo emailed Bakerly, with the subject "Additional Commercial Gesture Bakerly," stating:

> Based on our meeting last week, and after discussing with Jerome, Seafrigo has agreed to issue another $30k credit to Bakerly. This credit is only issued as a commercial gesture based on our business relationship between Bakerly and SeaFrigo. This credit should under no circumstances be an admittance of responsibility or liability of any kind from Seafrigo. Credit will be issued based on payment received for the outstanding demurrages/per diem Seafrigo has already laid out of pocket. As stated, this gesture is purely out of pocket from Seafrigo. Thank you for your business.

CX 627.

96. On September 16, 2021, Seafrigo sent an internal email, subject "Bakerly updated statement," and attached the current statement with a list of overdue amounts. CX 697.

97. On September 16, 2021, Seafrigo forwarded the internal email to Bakerly stating:

> Sorry to come back to this subject, but it seems that we are in a routine of having over 1 million of outstanding again. Could you please have a discussion with your AP team so that we can get on a regular schedule of keeping the account up-to-date ? We are not asking to have every penny at 30 days, but certainly, we do not have deep enough pockets to float 1 million dollars on a regular basis.

CX 697.

98. On September 16, 2021, Bakerly responded to Seafrigo stating:

> Your timing is quite perfect as I just came out of a meeting with AP regarding the Seafrigo account. They have showed me quite a few examples where we are struggling to get invoices from Seafrigo, we do receive the past due notices but are having a hard time getting the invoices as well as the weekly excel report meant to breakdown the costs. To add to that Yudith has been fighting for a couple months now on the demurrage/per diem invoices to get backup, without backups we can't approve those charges. All we want to be is good partners and pay you on time but it seems to be getting increasingly harder for us to do so as we struggle to get the info we need. Attached you will find 2 examples of daily communication from our team on 2 topics: … invoice that appear on the statement and that we never received [and] . . . missing backups to

> approve demurrage/per diem invoices[.] Here to help to improve flow of invoices on both sides.

CX 696.

99. Later on September 16, 2021, Seafrigo responded to Bakerly stating: "Based on Alissa's message • 472K – not at all sure why you would not receive these invoices as we are sending them weekly in batches. Anyhow, all the invoices were resent • 500K demurrage/per diem/other – is there anything requires on our side to expedite whatever the delay is from the Miami team?" CX 695.

100. On September 16, 2021, Bakerly responded to Seafrigo stating: "Appreciate the help. • 472: Alissa will process payment accordingly[.] • 500K: we need the backup of the demurrage/per diem/other charges to see what happened with the container and approved invoices. Bethzaida should know what the team needs exactly[.]" CX 699-700.

101. On September 17, 2021, Seafrigo responded to Bakerly:

> For the demurrage – we have been sending all the invoices with the back-up on a case by case basis. There is no way we did not do it for all 500K of invoices. Maybe we are not perfect, but surely there is a good chunk of this due [that] has the back-up against. Anyhow, please keep us posted what is needed so we can get through. We understand that maybe you could be missing some back-up from time to time. All that we ask is for the base freight invoices and demurrage / per diem invoices (which you have the back-up and nothing is in dispute) to please get on a regular payment clock of 30 days.

CX 699.

102. On October 7, 2021, Seafrigo issued a Demurrage per Diem Finance Schedule stating:

> As you already know, we are working in an extremely aggressive market. Import volumes have increased significantly creating port congestion. There is also a lack of trucker capacity to cover the spike in volumes. Finally, the surrounding 3pl warehouses continue to be full creating longer than usual dwell times on containers.
>
> This has created a massive amount of demurrage and per diem charges to be paid to the various steamship lines. Seafrigo is the acting NVOCC and consignee delivering this equipment to you. We have inherited the responsibility of paying demurrage and per diem charges on behalf of our customer base. These charges are significant and are passed through charges only. This cash outlay has created major stress on our cash flow.
>
> From now on, any cash outlay related to Demurrage / Per diem, will incur the following:

- Admin fee (per transaction): $45
- 5% unsecured finance charge: 5% of the amount paid

CX 1403.

103. Seafrigo's 2022 Standard Accessorials Tariff lists a "Finance Fee/Per Diem/Demurrage/ Detention" charge as "5% of total demurrage/detention cost." CX 255.

104. Seafrigo imposed a "Finance Fee 5%" on selected shipments. CX 156 (Inv. date 8-Oct-21); RX 4997 (Inv. date 8-Oct-21); RX 5010 (Inv. date 20-Jan-22**)**.

105. On October 20, 2021, Bakerly emailed Seafrigo stating:

> I understand your concern and please know that we are absolutely not trying to undermine the current situation, we are fully aware of the market situation with the drivers. We just need you to understand our concern as well regarding Seafrigo's latest performances and how our containers are being serviced.
>
> We have had too many situations recently where we incurred demurrage because Seafrigo couldn't find drivers. In an effort to limit demurrage fees we exceptionally decided to go ahead and source a carrier ourselves for those containers which we were able to do in less than a day. Those are the concerns I want to discuss with you as I currently don't have the guarantees that Seafrigo is doing everything they can to secure drivers ahead of time or putting the correct resources into finding one in crisis situation like blank sailing.
>
> We are also still waiting for the weekly D&D report I discussed on my last call with Jerome. Without this report we are flying completely blind and have not control/vision over the demurrages we are incurring. It's also preventing us from approving the invoices in a timely manner as we have to manually research what happened with the containers in order to approve the charges. I can't stress enough how important this report is for us, it would help for instance highlight demurrage for containers where bakerly is responsible like the ones in this email thread below where we made a last minute change.
>
> For those reasons I instructed the team to reject invoices for demurrage due to lack of carriers until we can have that conversation. I don't feel right owning 100% of the financial exposure when we clearly have performance issues on Seafrigo's side.
>
> Also want to take that opportunity to give you a recap of the findings from the team during the last 2 weekends. We had Yudith and Jessica research 165 invoices during the last 2 weekends to either approve or reject the invoices (which shouldn't and wouldn't happen should we have had a weekly D&D report).

CX 310; *see also* CX 319 (October 19, 2021, email from Bakerly to Seafrigo stating "please note that we are not covering demurrage or per diem due to lack of drivers.").

106. On November 12, 2021, Bakerly emailed Seafrigo stating:

> I'm very concerned by the lack of answer we are getting from Seafrigo; as of today:
>
> - I have not received any reply/feedback to my email below
> - We are still not receiving the weekly D&D file we discussed despite our many follow up – the only version we received to date was on 10/21 but did not include any comments on the D&D making it impossible for us to control and approve D&D invoices
>
> We already invested 2 full weekends of work with the team to go thru the analysis below and do not have the resources to continue doing the work we expect Seafrigo (as service provider) to do. Please note that as of today we have taken the below decisions to limit bakerly's exposure given the current situation:
>
> - We will not approve any D&D invoices without proper reporting showing details/explanations on the reasons for D&D
> - We will start transitioning drayage services to a third-party provider to limit the impact on the lack of drivers for which we have no daily/weekly updates from Seafrigo
>
> I mention this every time we exchange on this subject; we only want to be a good partner and are willing to do everything that is needed from us to do so – we are just not able to operate the way we would like to because of the points mentioned above. As always I'm available to exchange on the phone as needed.

CX 578.

107. On November 13, 2021, Seafrigo replied to Bakerly stating:

> We understand your frustration. We are equally as frustrated. Our priority has been since day one to secure trucking and service all of your containers within the [best] time frame possible. I apologize for not getting you this weekly recap on time. This is a result of a system change and the report is only able to supply line by line information of what is being paid.
>
> Regarding the required explanations, this is something that is not possible to track on such a granular level meaning that if you are expecting a finite timeline on each and every container as why demurrage is being paid, I'm afraid we would spend more time on that type of analysis than actually

servicing your containers. There are combinations of reasons (through no fault of Seafrigo) that we have already discussed on numerous occasions and any one of them are contributing to the demurrage, not only driver capacity.

I know this is not what you want to hear, but this is the reality and we are trying our best to be as transparent about it. We are more than happy to arrange another call to see what you have in mind on the trucking part of the transactions. In the meantime, I will generate another recap for the month of Sept2021 and Oct2021 so you have an idea where we are. Thanks for your partnership and hoping that we can find solutions together during this very challenging time.

CX 577.

108. On December 16, 2021, Seafrigo emailed Bakerly stating: "please let us know if there is possible a planned payment to Seafrigo for tomorrow. The overdue has gone past $900K as of today. It is critical that you reply to this email." CX 687. Bakerly replied: "We have a planned $94,440.56 payment on the schedule for today." CX 687.

109. Later on December 16, 2021, Seafrigo replied and suggested a January meeting in Miami, also asking: "Is there anything holding up the payment process ? We seem to be not be seeing larger payments that we normally would see based on the due dates." CX 686.

110. On December 23, 2021, Seafrigo emailed Bakerly stating:

Given our last exchanges on the subject of demurrage, and for the sake of not experiencing any future business interruption, Seafrigo will no longer pay demurrage on behalf of Bakerly from this point forward until we reach an agreement. If any future containers require demurrage, we will inform your team, and you will be responsible for paying the charges directly to the source (source being the terminals and/or steamship lines). As an alternative, we would like to introduce you to a well-known tool called PayCargo. PayCargo is a user friendly website and pays vendors "real-time". As a matter of fact, this is the tool that Seafrigo uses in order to pay all of the demurrage for Bakerly's business real time to secure capacity for you. If you choose this route, go onto their website and create an account ASAP. Here is the website. https://paycargo.com/ Let us know if you have any further questions.

CX 495.

111. On December 26, 2021, Bakerly emailed Seafrigo in response, stating:

I had a phone conversation with Jerome on Friday and I just wanted to clarify in writing, to make sure we are on the same page, as from what I understood there appeared to be a misunderstanding. We have recently engaged a secondary freight forwarder, as well as a secondary drayage

> partner. For all shipments pertaining to those companies, we do not expect Seafrigo to be coordinate with the terminal/shipping lines on any demurrage payments. For all Seafrigo lines, and Jerome confirmed this over the phone, there will be no change in the way we have been doing things up until now, including who pays what to terminal and the [shipping] lines.

CX 494. Seafrigo confirmed "No change in how we are managing your containers through Seafrigo's Freight Forwarding services." CX 494.

112. "In some instances, Seafrigo had to re-send invoices to Bakerly because apparently Bakerly lost track (or claimed to have lost track) of invoices that had previously been issued." RX 14; *see also* RX 8 ("charges began accruing and multiple invoices were necessitated").

8. Custom Holds, Winter 2022

113. On January 4, 2022 Seafrigo emailed Lineage with subject "Re: DELIVERY REQUEST – ALLENTOWN," stating "Please see below PO's we would like to set up the final delivery" and listing three containers with dates and times: January 7 at 16:30, January 10 at 6:30, and January 10 at 14:30. CX 460. On January 5, 2022, Lineage replied stating: "The earliest we would be able to get these in would be Monday the 10th at 0430. That is your first open inbound appointment." CX 456.

114. Lineage also indicated that it had 41 team members out with COVID and another 40 who had called in sick. CX 456-57. Seafrigo asserted that these were employees of Bakerly's Lineage Allentown PA warehouse. RX 5. Bakerly clarified that "Seafrigo is correct that Bakerly misidentified the contents of this email. As a note, this staffing issue is only for one of Bakerly's warehouses—roughly 11% of shipments [went] to the Lineage warehouse in January 2022." BReply/SFResponse/BPFF ¶ 51).

115. Bakerly responded that they understood but identified the same three POs with the original dates and times and requested Lineage "try to unload them ASAP." CX 456.

116. On January 5, 2022, Bakerly emailed Lineage and Seafrigo, and asked Seafrigo to "please make sure these containers are delivered on the appointment dates," referring to the January 7 and January 10 dates and times. On January 6, 2022, Seafrigo emailed Bakerly and Lineage, stating "we need morning appointment for 1/7 .. we cannot deliver at 4:30pm that's too late for our drivers. we start the day at 5am." CX 454. Bakerly replied to Seafrigo on January 6 stating:

> Those containers are released since 12/28. They have been waiting at the port since then accruing demurrage and your drivers cannot deliver them at 4:30pm to the warehouse because it is too late? 4:30pm? Bakerly, as a client, has been pushing for those containers for days now. It's Seafrigo's responsibility to find drivers and remove the containers from the port. We need this inventory at the warehouse and we need those containers out of the port. Please intervene.

CX 452-53.

117. On January 18, 2022, Bakerly emailed Seafrigo asking the reason for a hold on two containers. CX 881. On January 18, 2022, Seafrigo responded to Bakerly that one container was "on customs hold and our broker is trying to get in touch with the customs officer" and the other container was on hold due to demurrage but should be cleared that day. CX 880.

118. On January 19, 2022, Seafrigo emailed Sunteck tts ("Sunteck"), subject "BAKERLY – HOUSTON, LA PORTE DELIVERY" and listed 12 containers and requested Sunteck "plan accordingly in order to [deliver] before the LFD expires." CX 649-50.

119. On February 1, 2022, Sunteck emailed Seafrigo listing two container numbers and stating these "containers have arrived into Houston but have customs hold. Please help to remove them before LFD. Port's LFD is 2.7. Can you please advise the line LFD?" CX 649. Sunteck also emailed Seafrigo on February 2 listing six containers and asking to please advise once these containers were fully released. CX 647.

120. On February 3, 2022, Sunteck emailed Seafrigo with a list of ten containers, writing "Friendly reminder, the below containers are still on hold with LFD 2/4. We cannot schedule drop appointments until they are fully released. Please advise ASAP." Seafrigo responded to Sunteck later on February 3 stating "thank you for your follow up but this is totally out of our control. Waiting on customs to release these shipments." CX 646.

121. On February 1, 2022, Seafrigo emailed Bakerly, subject "LIST OF CONTAINERS ON HOLD PORT OF HOUSTON," with a list of containers and stating: "Please note that these containers are under CBP/USDA hold, I have sent an email to CBP/USDA. Will keep you posted for the latest update." CX 811. On February 2, 2022, Bakerly responded, asking if there was any update on these containers. CX 809-10.

122. On February 2, 2022, Seafrigo responded to Bakerly stating "Unfortunately customs holds are out of our control. Hopefully they get released soon. Unfortunately if customs does not release in time we might have demurrage on some containers." CX 809. Seafrigo sent another update later on February 2, 2022, stating that the containers were still on hold, Seafrigo has sent another reminder to CBP/USDA, and "also called a couple of times today and nobody is picking up the phone." CX 808.

123. On February 3, 2022, Seafrigo sent Bakerly a list of containers and the USDA concerns, including regarding requirements for commodities containing yeast. CX 807-08.

124. On February 4, 2022, Seafrigo emailed CPB, stating:

> After consulting our local CBP management along with the Animal Products Manual the below request does not apply to the products filed on these entries. The products are FULLY FINISHED products and not pure yeast products coming in raw form. Therefore your assessment is incorrect and all entries need to be released immediately. Also, please include your supervisor in your response.

CX 804.

125. On February 4, 2022, Seafrigo and CBP exchanged emails regarding the contents of the containers (croissants or flour), ingredient lists, product labels, etc. Bakerly was copied on these emails and requested to provide photos of the items. CX 802-04.

126. On February 4, 2022, Seafrigo emailed CBP, copying Bakerly stating: “Again, we are talking about Frozen baked bread FINISHED products that has been imported for the last 6 years into multiple US ports. I am sorry but this back and forth is costing our client thousands of unnecessary dollars being that you are holding 13 containers because of such back and forth.” CX 812.

127. On February 7, 2022, Sunteck emailed Seafrigo stating that ten containers “were released an hour ago. Can you please cleared [sic] storage through 2/8 and 2/9? LFD was Friday 2/4. Please see below what is needed and confirmed once storage is paid.” CX 645.

128. On February 7, 2022, Seafrigo responded to Sunteck, coping Bakerly, stating that they would “clear the below accordingly” and “Bakerly team, please be advised that due to customs hold, I will have to clear the containers as per dates below.” CX 644.

129. On February 7, 2022, Bakerly emailed Seafrigo asking about LFD and stating “Please note that we were informed about this hold on 2/1, not before.” CX 643. Seafrigo then provided a list of the containers with the LFD date for each (February 2 through 7). CX 642.

130. On February 7, 2022, Bakerly emailed Seafrigo stating “Please note that we cannot cover demurrage fees for these 12 containers because we were not notified with enough time considering that you can have this information 10 days before the vessel arrival.” CX 641.

131. On February 7, 2022, Seafrigo emailed Bakerly stating:

> These were on USDA holds and this is completely out of our control. Customs can place any shipment under customs hold at any given time for further checkup of the products in the container. Further Argel has advised you and your team that customs needed more information about the ingredients and this made the release process take longer than usual.

CX 640.

132. On February 8, 2022, Al Raffa from Seafrigo emailed Bakerly stating:

> Your comments are unjustified here. Why do you say “we were not notified with enough time considering that you can have this information 10 days before the vessel arrival.” ?? These containers were placed on USDA hold (Seafrigo has no control over this whatsoever) 10 days before vessel arrival ?? How are we supposed to know this ? we cannot even file the Customs entry until 5 days prior to a vessel arrival (this is Customs

> regulations). We communicated this situation to you every step of the way. I am sorry but these demurrage charges are due in full. If your intentions are not to pay the demurrage, then Seafrigo cannot pay any more of these fees out of our own pockets.

CX 640.

133. On February 8, 2022, Bakerly emailed Seafrigo stating "Al, your team notified us late. If your team had been file 5 days prior the vessel arrived we would have enough time to send pictures and all yeast statements [required] and avoid at least 3 days of demurrage." CX 639.

134. On February 8, 2022, Seafrigo replied to Bakerly stating "We did not notify you late. We notified exactly when USDA notified us of what they were asking for. This is not a Seafrigo issue and the demurrage is due." CX 639.

135. On March 1-2, 2022, another container was reported as released from a hold on February 25, 2022. Bakerly requested that it be pulled from the port on March 1, 2022, to avoid demurrage but Lineage said that they did "not have the capacity at this time to pick up" the container that day but added it for the next day. March 1, 2022, was the last free day, so demurrage was due for March 2, 2021. CX 884-90.

136. The record also includes emails about containers on freight hold in September of 2021. CX 842-50.

137. The record also contains emails documenting a March 7, 2022, loss of 30 cases of food items, the request for compensation, and responses. CX 925-34.

9. 2022 Finance Discussions

138. On January 5, 2022, Bakerly emailed Seafrigo, subject "Containers Update / Urgent Information," with a list of containers "pending for status" for which Bakerly had not received "information about delivery appointments yet." CX 828-31.

139. Later on January 5, 2022, Bakerly emailed Seafrigo again, including the earlier email, copying additional Bakerly personnel, and stating:

> I don't know what's happening, but we are tracking and babysitting our containers, if you notice Jessica is constantly requesting information, warehouses are complaining about deliveries, Seafrigo is not being proactive, we must beg for information all the time. It would be great to review the SOP related to this account, it is not working for us, we have zero visibility and poor customer service.

CX 828.

140. On January 6, 2022, Seafrigo responded: "I will ensure that our local carriers add you in CC to all appointments. I will continue to push our carriers to ensure you see visibility of

your containers. We will work to ensure our customer service gets to the way it was when I first took on this account." CX 827.

141. On January 6, 2022, Bakerly responded to Seafrigo that "it is not the carrier" but is Seafrigo, adding:

> we had container since 12/13 at the port and you don't provide status on those, Bakerly (your client) is advising every morning that Seafrigo has containers in the port, that they are late for the app, that we do not have the AN yet, that we do not see the container in a certain vessel, that Seafrigo must go to pick up the empty container. We are exhausted, it is frustrating!!. Just keep in mind that we are not going to cover any demurrage or per diem.

CX 826.

142. Later on January 6, 2022, Bakerly forwarded the email to Seafrigo leadership stating:

> Another example where the service Seafrigo US is providing is unacceptable. Bakerly is pushing for a feedback on containers that arrived for days now, again accruing demurrage AND losing shelf life at the port. Remember this is reefer. Bakerly team is not asking to be in copy of emails with drivers that Seafrigo is hiring. Bakerly team is requesting prompt communication from Seafrigo – as our service provider – on status of containers, delivery appointments and empty pick up.

CX 826.

143. On January 6, 2022. Seafrigo responded: "This is something I need to discuss with the import team. I was under the impression that you are getting a daily report of all containers and from there, information should be transferring from Seafrigo to Bakerly." CX 825.

144. On January 6, 2022, Bakerly responded:

> The report does not say anything about deliveries at the warehouses, nor holds or empty pick ups. That's the problem. We need to be asking for the info every time. . . . All this info should be provided by Seafrigo. We have been asking for this info for months and months – this is not new request. It's also a support to the demurrage and detention explanation that we have been asking for a long time as well. We are still in the dark.

CX 824. Seafrigo responded that they would discuss next week. CX 824.

145. On January 25, 2022, Seafrigo emailed Bakerly, subject "Bakerly-SeaFrigo," stating:

> Further to the meeting we had at your Miami office on January 13th, we have reviewed the entire situation related to port congestion we have

experienced and are still experiencing. We, at SeaFrigo, are conscious that the current situation across the shipping and logistics industry represents massive challenges to Bakerly's supply chain, especially for all imported goods. While we have tried during 2020 and 2021 our very best to mitigate the situation and find solutions, there are a series of reasons which are beyond SeaFrigo's control and our multiple exchanges make us believe you are aware and understand.

The main reasons for our point of view are the combination of:

1. Overall unreliable shipping lines schedules and punctuality

2. Port congestion across North America which are, for the main ports, running at over 100% capacity, creating operational challenges for port operators to retrieve containers

3. Massive productivity issues related to the 2 items above impacting the number of dray moves in and out of ports

4. Lack of chassis and genset availability having as a consequence of operators not being able to retrieve containers at ports

5. Massive driver shortage across the industry

6. Frozen warehouse infrastructure running above full capacity with all the challenges it represents in terms of inventory management and setting up appointment

Over the past 6 or 7 quarters, the situation has only worsened, and while we hoped the situation would improve, there is at this stage very little signs of improvements. On our side and because the entire situation has forced SeaFrigo to outlay and advance massive amount of cash on behalf of our customers to allow them to be able to keep their supply chain afloat, we are experiencing now a massive cash drain which is not sustainable.

The immediate actions taken to mitigate this cash exposure linked to the outlay of demurrage fees to the shipping lines, has been to identify and contract two external container yards off port. This will have several immediate advantages:

a. Upon first available dray options we will pull the containers out of the port and de-facto limit the exposure in terms of demurrages

b. Once the containers will be on our controlled yard, they will become readily available and not exposed to terminal congestion

c. This will give you and SeaFrigo options to prioritize delivery to door for better/smoother planning.

> We can surely make this solution available to Bakerly should you expressed any interest.
>
> In full transparency, this will not mean less costs on the total chain but will offer smoother solutions and limit SeaFrigo's cash exposure. This might mean very little to you but this is a great solution considering the space scarcity at ports and the chassis, genset, trucks and drivers availability. It will not solve the final piece of the equation which is the warehouse congestion, which also remains a major element of the situation as it comes towards the end of the process. Now and as promised, SeaFrigo, like any other industry players had suffered challenges in terms of staffing and we won't try to escape from it.
>
> [Proposal for settlement of invoices, including an immediate credit of $120k against all demurrage due amounts incurred in 2021, subject to Bakerly clearing all its overdue amounts within the coming 15 days.]
>
> To conclude, we ran a small calculation for 2021. For the Bakerly account, SeaFrigo has advanced a total of $1,713,579.40 in demurrage charges to the shipping lines to keep Bakerly's product moving. . . .
>
> As stated in calls and meetings, the cash exposure SeaFrigo had to absorb and is still absorbing has reached its absolute limit and we would therefore be grateful for an acceptance by Bakerly as well as prompt payment of all overdues amounts deduction made from the credit order aforementioned.

CX 622-23.

146. On January 28, 2022, Bakerly replied to Seafrigo stating:

> As we've detailed to you numerous times in writing, over the phone, and more recently in person, we believe that a majority of the D&D charges over the last 12 months are Seafrigo's responsibility. This is supported by the Federal Maritime Commission's statutes, rules and recent caselaw. More precisely, of the approximately $1.8 M D&D invoices we've received in 2021, we approve only of $600K – leaving $1.2M that are being unfairly invoiced to Bakerly, for the following reasons:
>
> • <u>Supporting documents</u>: We received D&D invoices without a single supporting document, even though we have repeatedly asked for them. You had promised you would be sending D&D reports on a weekly basis, but nothing has come. How can you possibly expect us to pay amounts this large without supporting documentation? In November of 2021, we informed you that we would not be paying any D&D related invoices without proper justification. It's been radio silence on that front from you and your team. This conduct is not, "transparent, consistent, and reasonable", as required by the FMC's Interpretive Rule on Demurrage and Detention Under the Shipping Act, as of 05/18/2020.

• Demurrage: We pay for a service of moving containers from FOB Le Havre to our warehouses in the US: if Seafrigo does not find drivers to take the containers from the port, it is the responsibility of Seafrigo, not ours. That said, the few times we were made aware of a delay on finding drivers, we were able to secure drivers. So it is possible! Moreover, some of our container stay at the port more than 20 days! It's not just missing drivers. . . we just do not think that you are properly tracking these containers. Under the Governing Rules Tariff, as of 22-February-2017, this is not our responsibility. On this matter, we have dozens of communications with Seafrigo showing that we offered to help. . . without any response on your part.

• Detention: Empty containers are regularly not retrieved in time by Seafrigo. We are constantly needing to alert Seafrigo that a container needs to be retrieved, when they should be tracked by Seafrigo, not us. Detention sometimes goes up to 14 days for a forgotten container, which clearly shows a lack of control of your operations.

• Tracking: Seafrigo has clearly not been tracking containers correctly. Moreover the staffing issues you refer to most likely lead you to being unable to perform the service that we are paying you to perform. We also understood you changed IT systems / ERP during 2021. Staffing and IT changes are matters internal to Seafrigo, and we should not be paying for them.

• Industry standard We've been working with a competitor of yours for the past 3 months – whenever there are demurrage charges due to driver shortages. . . these demurrage charges are not invoiced to us. When demurrage is included in the freight, forwarding service, that finding a driver is the responsibility of that freight forwarder. Not the client's. . .

• Sharing of information If we had been made aware of issues in real time. . . in some cases we could have helped. We are not alerted of issues when they happen. . . we just get an invoice a few weeks later. Obviously, this is not "transparent", as required. Given the above, for 2021 invoices, any proposal short of a $1.2M credit cannot be excepted – that said, we are open to spreading the credit over a reasonable period of time.

After the meeting with our team in Miami, we were hopeful that you understood our point of view. Moreover, you told us in that same meeting that there would be an improvement both in terms of service and back up documentation – we have not seen that improvement yet, which adds to our concern. Yet we continue to be hopeful that we will reach an amicable solution. However, should we not be able to reach an amicable solution, the importance of this issue to us would leave us no other choice than having it arbitrated by the Federal Maritime Commission.

CX 662-63; CX 211-20.

147. On January 31, 2022, Bakerly emailed Seafrigo stating: “Following our Friday call, please find attached random invoices for January… You told us that the situation is going to improve thanks to all the processes you are putting in place. BUT: Demurrage: $7,927 for 1 container - $11,125 for another one…$11,602….$10,299 etc… It is not a full January analysis of course, (we are still receiving a very high number of invoices) but it’s giving you a perspective of what still going on in January…Crazy numbers.” CX 661.

148. On February 3, 2022, Seafrigo responded to Bakerly: “Thank you for sharing. The team and I will look into these specific cases and will revert. Please allow us some time as the “going back” exercise is quite time consuming.” CX 661.

149. On February 1, 2022, Bakerly forwarded an email from Seafrigo back to Seafrigo, subject “SEAFRIGO USA INC – IMPORT – Daily Status Report – Bakerly” stating: “Please see below another example – especially the containers arrived since beg of January. The report is been sent regularly but the info there is missing + no explanation on containers over the free time period, demurrage or detention.” CX 659-60.

150. Later on February 1, 2022, Seafrigo responded to Bakerly stating “Its true that the report itself does not reflect this granular information at the moment. You are receiving that type of details via email from the account handlers. Based on the snapshot below, are you saying that your team has no email information regarding the appointment process on any of these containers ?” CX 659.

151. On February 10, 2022, Bakerly emailed Seafrigo stating “We are going in circles here, we discussed that several times. The goal of a report is to report a complete information, and not to put half of the information and then to look for the rest via email.” CX 658.

152. On February 10, 2022, Seafrigo responded “I do understand your point and looking to achieve what you want. If is just that we do not have that ‘free text’ commentary available in this report just yet and simply have to rely on emails for the time being when it comes to ‘lengthy’ explanations.” CX 658.

153. On February 10, 2022, Seafrigo emailed Bakerly, subject “Bakerly-SeaFrigo,” stating:

> We have connected internally and have initiated a review, whenever possible, container by container for all moves as of Oct 2022. As you can imagine this is a very tedious and detailed task we have undertaken, so while we are compiling all the details, we would like to inform you that we would need at least a week more to compile all the data and revert back to you.
>
> In the meantime, and as the environment is still very volatile with the shipping lines, you will find attached a customer advisory note from one of the carrier, shared day before yesterday. The note is very clear and despite the fact it is not mentioned in this message this will put even more pressure on the drayage services and as a consequence retrieving reefer

> containers will become even more challenging in the weeks/months to come. The day after this announcement from Maersk we have received the confirmation of the same from another major carrier of the same. This will create significant disruption and equipment scarcity will be exacerbated.

CX 219.

154. On February 17, 2022, Bakerly replied to Seafrigo stating:

> I suppose you meant Oct 2021, not Oct 2022? Can you please go back to May 2021, as our claim goes back to that date? More specifically, attached is the list of invoices for which we have no backup or explanations – these add up to the $1.2M we've mentioned before for 2021. Some of these were paid by mistake (or in good faith, you could say) – but we do need back up / justifications for all.
>
> We've also received D&D invoices in January 2022 amounting to $681K:
>
> - Can you also provide backup / justifications?
>
> - If I may be honest… these invoices received in January 2022 are quite upsetting. It appears the issue is getting worse, not better. Difficulty at the port is nothing new and our other drayage and ocean freight partners are taking steps to ensure satisfactory levels of service.

CX 219.

155. On March 7, 2022, the parties agreed to have a video conference on March 16, 2022. CX 218.

156. "Bakerly had requested that Seafrigo identify the charges it was claiming for demurrage and detention into three buckets: a) Seafrigo caused; b) Bakerly caused; and c) third party or outside circumstance caused. This document was produced three times. SUI003470, CX01291 (produced on 4/14/23, referred to herein as "Round 2"); SUI001435, CX01010 (produced on 4/4/2023)." CX 1322.

157. "In Round 1, Seafrigo identified that it was at fault for $168,792.58 worth of charges, but in Round 2, Seafrigo identified that it was only at fault for $159,849.08." CX 1325.

158. Bakerly contested Seafrigo's analysis. "Bakerly, after researching what had been a troubled period with one specific warehouse, identified that it caused $198,551.87 of demurrage for failure to be capable of receiving containers during that period. This amount should have been reflected as a credit at 100% in the 'Bakerly Warehouse' cause of charge identified by Seafrigo, but it is not the case. Analysis below shows that this amount is split across all categories including $16,040.37 in the 'Seafrigo Fault' and $109,695.42 in the unidentified cause of charge[.]" CX 1325.

159. Seafrigo accepted responsibility for $159,849.08 of the charges at issue that resulted from its own delays in scheduling the pickup or return of containers. CX 1325; Opposition at 4 n.3, Opposition at 15-16.

10. Invoices

160. The record includes sample invoices from Seafrigo to Bakerly which include: the identity of the consignee (Bakerly LLC), a description of the goods, the vessel, destination, master BL number, house BL number, departure date, arrival date, container number, balance due, description of charges, and other data. CX 732, CX 736, CX 739.

161. The record also includes sample PayCargo receipts which list the invoice number (matching the container number) with the amount paid and date. CX 737.

162. As an example, for container TEMU09281481: CX 736 shows a bill for demurrage of $1073; CX 737 shows a PayCargo receipt for $815.50 ($808 plus $7.50 shipper fee); and CX 738 shows an invoice for $250 and lists Port Newark Container Terminal. Respondent asserts that terminals require payment by credit cards and often charge a fee, such as 3.99%. Opposition at 15, 45; *see also* CX 1359. The $250 fee plus 3.99% credit card fee equals $259.975. This added to the $815.50 PayCargo would equal $1075.475, just slightly above the invoice amount of $1073.

163. The record shows instances where Seafrigo admits to an overcharge. For example, for container SEGU9388853, Seafrigo admits to overcharging Bakerly by $8,879.55. RX 24 (Raffa Affid. ¶ 139); BReply/SFResponse/BPFF ¶ 46 ("Seafrigo admits that in this isolated instance it overcharged Bakerly by $8,879.55.").

164. The record also shows instances where Seafrigo admits to double billing. For example, a duplicate charge of $3,659.50 was acknowledged by Seafrigo. BReply/SFResponse/BPFF ¶ 83(c)(iii) (not disputed); RX 32 (Raffa Affid. ¶ 175) ("The invoice overcharged Bakerly for $3,650, which amount is not being sought and will be credited.").

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

The Shipping Act provides that a "person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Docket No. 02-04, 30 S.R.R. 991, 2006 WL 2007808, at *11 (FMC May 10, 2006); *see also Cargo One, Inc. v. COSCO Container Lines Co.*, Docket No. 99-24, 28 S.R.R. 1635, 1645, 2000 WL 1648961, at *15 (FMC Oct. 31, 2000).

2. Burden of Proof

To prevail in a proceeding to enforce the Shipping Act, a complainant bears the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.203; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, Docket No. 08-03, 2014 WL 9966245, at *14 (FMC Dec. 17, 2014). Under the preponderance standard, a complainant must show that their allegations are more probable than not. *Crocus Investments, LLC v. Marine Transport Logistics, Inc.,* Docket No. 15-04, 2021 WL 3732849, at *3-4 (FMC Aug. 18, 2021) (Order Affirming Initial Decision on Remand). It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, Docket No. 93-15, 26 S.R.R. 1173, 1180 (ALJ Dec. 9, 1993), adopted in relevant part, 26 S.R.R. 1424, 1994 WL 279898 (FMC June 13, 1994).

3. Discovery Dispute

Bakerly asserts that Seafrigo's responses to Bakerly's discovery requests violated the Federal Rules of Civil Procedure ("FRCP") and requests that Seafrigo be barred from relying on the documents, arguing that late discovery caused unnecessary delay, needlessly increased the cost of litigation, and was unreasonable. Brief at 60-62. Seafrigo contends that the parties discussed and agreed to extending time for document production; the vast majority of documents were produced timely; and a new spreadsheet reflecting charges in smaller invoices with a "small number of additional documents" were later provided. Opposition at 46 n.43.

In its reply brief, Bakerly asserts that Seafrigo's responses to Bakerly's discovery request violated FRCP 33 and Seafrigo made additional untrue statements to the ALJ in its response that merit sanctions, arguing that Seafrigo's discovery response was unduly burdensome and lacked clear information in violation of FRCP 33; statements made in Seafrigo's response brief amount to sanctionable misconduct; Bakerly is prejudiced by Seafrigo's bad faith conduct; and Bakerly is entitled to attorneys' fees for the violations. Reply at 31-35. Bakerly's reply also alleges that Seafrigo failed to provide a filing in word-processing format by the deadline and that their appendix lacked cover pages, sequentially numbered page numbers, a table of contents, and included emails already in the record. Reply at 5 n.1.

Seafrigo filed a motion requesting leave to file a limited response to Bakerly's request for sanctions and filed a memorandum in response to the request for sanctions raised in Bakerly's reply brief ("Sur-reply"). Bakerly's initial brief did not request sanctions; rather, that request was first raised in its reply brief. Therefore, if this motion were not granted, Seafrigo would not have an opportunity to respond. Thus, good cause exists to allow Seafrigo's sur-reply memorandum in response to the request for sanctions. Accordingly, the request to file a sur-reply is **GRANTED**.

In the sur-reply, Seafrigo states that "Bakerly's allegations are baseless, its request for sanctions should be rejected," and argues that Seafrigo produced the documents in files labeled with corresponding Bates numbers; Bakerly does not dispute that it agreed to extend the deadline for Seafrigo to produce discovery; Bakerly was granted five additional days to file its initial brief; and word-processing format was provided within less than two hours of being notified of the oversight. Sur-reply at 1-2.

The Commission's Rules permit discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense." 46 C.F.R. § 502.141(e)(1). Commission Rule 145 governs interrogatories to parties and is similar to Federal Rule 33. *Compare* 46 C.F.R. § 502.145 *with* FRCP 33. The Commission's Rules governing the production of documents or electronically stored information provide that parties "must produce the documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request" and "need not produce the same electronically stored information in more than one form." 46 C.F.R. § 502.146(b)(2)(v)(A, C).

The specific comments that Bakerly asserts warrant sanctions include statements that Seafrigo provided documents in labeled folders, including the Seafrigo Managing Director Alfonse Raffa declaration statement that folders were labeled with the Seafrigo invoice number. Reply at 33. Seafrigo clarifies in its sur-reply that "the documents were converted to being labeled with Bates stamps by a third-party vendor. Production of documents with Bates stamps is done in the ordinary course of litigation. It was not done to make review more difficult and did not have any appreciable impact on Bakerly's ability to review such documents." Sur-reply at 1 n.1.

The documents supporting Seafrigo's charges were not well-organized and were confusing. Indeed, Seafrigo's appendix was so confusing that the undersigned required it to resubmit portions of its appendix with Bates numbers and required both parties to submit a table of contents for their appendices. June 29, 2023, Order to Correct Filings at 2. However, it is not clear that this was willful or an inappropriate litigation tactic, but rather appears to be the manner in which the information was kept in the usual course of business with the addition of Bates numbers. Thus, the confusing presentation was apparently due to the manner in which the information was kept, attempts to include required Bates stamps on the evidence, and the sheer number of invoices that were in dispute between the parties. This is not a sufficient basis to warrant sanctions.

The other alleged violations alleged similarly do not warrant sanctions. Of the late-provided information, some of it was only one day late and the rest was fifteen days late; Seafrigo did not object to Bakerly's request for additional time to file its initial brief; and Seafrigo provided a word processing version of a filing within hours of being notified of the deficiency. Therefore, sanctions are not appropriate. Moreover, the request for attorney fees is premature as there is no mechanism for the presiding officer to award fees prior to the resolution of a proceeding. *See* 46 U.S.C. § 41305(e) and Commission Docket No. 15-06.

B. Relevant Law

The complaint alleges that Seafrigo violated the Shipping Act filed rate doctrine at 46 U.S.C. § 41104(a)(2)(A); demurrage and detention requirements at 46 U.S.C. § 41102(c) and 46 C.F.R. § 545.5(d); and OSRA 2022 rules at 46 U.S.C. §§ 41104(a)(14), 41104(a)(15), and 41104(d). Before discussing the violations, it is helpful to discuss the type of agreement between the parties.

1. NVOCC, NSA, and NRA Definitions

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including two types of ocean transportation intermediaries. "The term 'ocean transportation intermediary' means an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(20); 46 C.F.R. § 515.2(m).

"The term 'non-vessel-operating common carrier' means a common carrier that - (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(17); 46 C.F.R. § 515.2(m)(2). To be an NVOCC on a particular shipment, an entity must meet the Shipping Act's definition of "common carrier" on the shipment.

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

46 U.S.C. § 40102(7).

NVOCC Service Arrangements ("NSAs") and NVOCC Negotiated Rate Agreements ("NRAs") have specific requirements, including regarding charges such as demurrage and detention. These rules were adopted by the Commission in "Final Rule: Non-Vessel-Operating Common Carrier Service Arrangements," 69 Fed. Reg. 75850 (Dec. 20, 2004), and amended by the Commission in the "Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements," effective August 22, 2018. 83 Fed. Reg. 34780 (July 23, 2018) ("NSA/NRA Final Rule"). Commission rule 532.5, "Requirements for NVOCC negotiated rate arrangements," states in relevant part:

> (2) *Surcharges, assessorial*[3] *charges, and GRIs.*
>
> > (i) If the rate is not an "all-in rate," the NRA must specify whether additional surcharges, additional assessorial charges, or ocean common carrier general rate increases ("GRIs") will apply.
> >
> > (ii) The NRA may list the additional surcharges or assessorial charges, including pass-through charges, or reference specific surcharges or assessorial charges in the NVOCC's rules tariff.

[3] For the purposes of this decision, "accessorial" and "assessorial" are treated as synonyms. *See Global Link Logistics, Inc. v. Hapag-Lloyd*, 2014 WL 5316345, at *4 n.6 (ALJ April 17, 2014); *see also* 83 Fed. Reg. 34786-87 (treating assessorial and accessorial charges interchangeably).

> (iii) If the additional surcharges or assessorial charges are included in the NVOCC's rules tariff, those additional surcharges or assessorial charges and the corresponding amounts specified in the rules tariff must be fixed once the first shipment has been received by the NVOCC until the last shipment is delivered, subject to an amendment of the NRA.
>
> (iv) For any pass-through charge for which a specific amount is not included in the NRA or the rules tariff, the NVOCC may only invoice the shipper for charges the NVOCC incurs, with no markup.

46 C.F.R. § 532.5(d)(2). Therefore, the rules permit NVOCCs to pass through charges, although "the NVOCC may only invoice the shipper for charges the NVOCC incurs, with no markup." 46 C.F.R. § 532.5(d)(2)(iv).

2. Filed Rate Doctrine

Complainant asserts a violation of the filed rate doctrine, found at Section 41104 of the Shipping Act, which states:

> (a) In General.-A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not- … (2) provide service in the liner trade that is-(A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title, unless excepted or exempted under section 40103 or 40501(a)(2) of this title.

46 U.S.C. § 41104(a)(2).

The Commission described an initial decision regarding the filed rate doctrine, stating:

> [T]he ALJ first set out to examine the genesis and current applicability of the filed rate doctrine. He found that "[t]he 'filed rate doctrine' simply holds that a carrier must charge the rates duly filed under law in the carrier's tariffs and if those rates are reasonable under the applicable law the carrier must charge them notwithstanding misrepresentations by carriers' agents, ignorance of the filed rates by the shippers, or virtually any other defense that shippers could raise against the carriers' demands for payment of the duly filed tariff rates." He further determined that the doctrine has been recently affirmed by the Supreme Court in *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) ("Maislin"). The ALJ found that the Commission has consistently followed the doctrine, and observed that the doctrine is applied "regardless of equities and possible hardship on shippers." He concluded that Worldlink's refusal to ratify Cargocare's unfiled rate quote cannot be found to have been in violation of the Act because it reflects Worldlink's attempt to adhere to the filed rate.
>
> The ALJ then undertook to explore the limits to the filed rate doctrine. He found that "when a carrier violates some substantive provision of applicable law and the complaining party is not asking that an unfiled, negotiated rate be applied because

> the complainant relied on that rate, the 'filed rate doctrine' will not suffice to insulate the carrier from liability for harm caused a shipper." The ALJ found that Supreme Court precedent in *Maislin* and *Reiter v. Cooper*, 507 U.S. 258 (1993) ("Reiter"), indicates that alleging an unreasonable practice against a carrier for quoting one rate and then charging another, higher filed rate is no defense against the filed rate doctrine, but that the Court did hold that the Interstate Commerce Commission could find a filed rate unreasonable under its rate-fixing authority. The Federal Maritime Commission, the ALJ noted, does not have rate-fixing authority, but nevertheless may find other substantive violations of the Act despite the filed rate doctrine so long as the shipper is not merely asking that an unfiled, negotiated rate be applied.

Total Fitness Equipment, Inc. v. Worldlink Logistics, Inc., Docket No. 1831(F), 1998 WL 940255, at *4-5 (FMC Dec. 10, 1998) (citations to the record omitted); *petition for review denied per curiam* 203 F.3d 54 (table) (D.C. Cir. 1999) ("the Supreme Court has indicated that the filed-rate doctrine yields to agencies' statutory authority to require a different rate").

The Commission then found:

> The premise of the Initial Decision is that a violation of the Act can be found despite the filed rate doctrine. That is, that there are substantive violations which may arise in the context of, but apart from, filed rate collections. This is in accordance with Commission precedent. In *Valley Evaporating*, the Commission held that "a rate may be legal in the sense that it is the regularly published rate and yet be unlawful if it violates other provisions of the [A]ct." 14 F.M.C. at 20. The Commission thus found that substantive violations may arise to render a rate unlawful even if it has been filed. The filed rate doctrine does not function as a carte blanche to justify whatever action a carrier believes is appropriate; the provisions of the Act relating to unreasonable discrimination still apply. *See Maislin*; *Reiter*; *see generally* McCallister, The Filed Rate Doctrine Under the Interstate Commerce Act and the Shipping Acts, 19 Tul. Mar. L.J. 81 (1994).

Total Fitness Equipment, 1998 WL 940255, at *10; *see also American President Lines, Ltd. v. Cyprus Mines Corp.*, Docket No. 91-27, 1994 WL 33488, at *9-10 (FMC Jan. 13, 1994) (The filed rate doctrine "basically requires a carrier whose rates are governed by a tariff-filing system to collect the full amount of the rate filed in its tariffs.").

In *Taylors Resources*, the Commission affirmed the dismissal of a section 41104(a)(2)(A) claim where the "ALJ found that Mitui's actions were consistent with the applicable tariff, the service contract, and the waybill, and rejected Complainant's assertion that Mitsui unreasonably delayed disposal of the unclaimed cargo and then collected excessive detention/demurrage fees." *Taylors Resources, Inc. (USA) v. Mitsui O.S.K. Lines Ltd.*, Docket No. 1954(I), 2018 WL 1757672, at *5 (FMC Apr. 4, 2018). So, generally the agreed to rate (whether filed in tariffs or negotiated in a service contract or NRA) must be charged – not more and not less. However, that filed or negotiated rate may not be enforceable if it violates the Shipping Act, for example, if it is an unreasonable practice under section 41102(c).

3. Demurrage and Detention

a. Section 41102(c)

Section 41102(c) of the Shipping Act, previously section 10(d)(1), states that a "common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

On December 17, 2018, after notice and comment, the Commission issued Rule 545.4, specifying the elements of a section 41102(c) claim. Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018). Rule 545.4 states:

> 46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:
>
> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
>
> (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
>
> (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
>
> (d) The practice or regulation is unjust or unreasonable; and
>
> (e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4.

Failure of an NVOCC to "carry out the obligation it was paid to perform" may constitute a violation of section 41102(c). *Bimsha Int'l v. Chief Cargo Services, Inc. and Kaiser Apparel, Inc.*, 32 S.R.R. 1861, 1866-67, 2013 WL 9808692, at *5 (FMC Sept. 4, 2013), *aff'd sub nom. Chief Cargo Serv. v. Federal Maritime Commission*, 586 Fed. Appx. 730 (2nd Cir. 2014). In *Gruenberg-Reisner,* the Commission stated that it "has recognized in numerous decisions that NVOCCs or freight forwarders violate § 41102(c) when they fail to fulfill NVOCC or freight forwarder obligations, …" *Gruenberg-Reisner FMC*, 34 S.R.R. at 620. The Commission has found that "an NVOCC is not absolved of liability for imposing avoidable charges" because even if the charges stemmed from its agent, the NVOCC violated § 41102(c) by imposing additional charges that should have been avoided. *Gruenberg-Reisner* v. *Overseas Moving Specialists, Inc.,* 34 S.R.R. at 622 (FMC 2016) (citing *Orolugbagbe v. A.T.I., U.S.A., Inc.,* 33 S.R.R. 1300, 1309 (FMC Oct. 2015)). The Commission provided specific guidance on factors to consider in determining whether demurrage and detention charges violate section 41102(c) in the Demurrage and Detention Rule.

b. Demurrage and Detention Rule

The Commission has a long history of addressing demurrage and detention practices. As early as 1937, the Commission adjudicated the appropriate amount of free time at ports. *Storage of Import Property*, Docket No. 221, 1 U.S.M.C. 676 (FMC Nov. 16, 1937). Issues regarding port congestion, detention, and demurrage charges have continued as ship size and shipping cargo volumes have increased. The Commission held four regional port forums in 2014, issued a 2015 report, received a 2016 petition and held hearings, conducted a fact-finding investigation leading to a report in 2018, and issued a notice of proposed rulemaking in 2019. *Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC-Possible Violations of 46 U.S.C. § 41102(c)*, Docket No. 21-09, 2022 WL 1239377, at *23-25 (ALJ April 22, 2022) (proceeding resolved by settlement, 2022 WL 2209416 (FMC June 8, 2022)).

On April 28, 2020, the Commission issued an Interpretive Rule on Demurrage and Detention Under the Shipping Act, effective May 18, 2020, with minor changes from the proposed rule. 85 Fed. Reg. 29638 (May 18, 2020) ("Demurrage and Detention Rule"). "The rule followed years of complaints from U.S. importers, exporters, transportation intermediaries, and drayage truckers that ocean carrier and marine terminal operator demurrage and detention practices unfairly penalized shippers, intermediaries, and truckers for circumstances outside their control." 85 Fed. Reg. at 29638. The demurrage and detention rule provides "guidance as to what [the Commission] may consider in assessing whether a demurrage or detention practice is unjust or unreasonable" under section 41102(c). 85 Fed. Reg. 29638.

Commission Rule 545.5 provides in pertinent part:

> (a) *Purpose.* The purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and § 545.4(d) in the context of demurrage and detention.
>
> (b) *Applicability and scope.* This rule applies to practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, the terms demurrage and detention encompass any charges, including "per diem," assessed by ocean common carriers, marine terminal operators, or ocean transportation intermediaries ("regulated entities") related to the use of marine terminal space (*e.g.,* land) or shipping containers, not including freight charges.
>
> (c) *Incentive principle*—(1) *General.* In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.
>
> (2) *Particular applications of incentive principle*—(i) *Cargo availability.* The Commission may consider in the reasonableness analysis the extent to which demurrage practices and regulations relate demurrage or free time to cargo availability for retrieval.
>
> (ii) *Empty container return.* Absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its

> incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable.
>
> (iii) Notice of cargo availability. In assessing the reasonableness of demurrage practices and regulations, the Commission may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The Commission may consider the type of notice, to whom notice is provided, the format of notice, method of distribution of notice, the timing of notice, and the effect of the notice.
>
> (iv) Government inspections. In assessing the reasonableness of demurrage and detention practices in the context of government inspections, the Commission may consider the extent to which demurrage and detention are serving their intended purposes and may also consider any extenuating circumstances.

46 C.F.R. § 545.5.

4. OSRA 2022

The Ocean Shipping Reform Act of 2022 ("OSRA 2022") was signed into law on June 16, 2022. Pub. L. No. 117-146, 136 Stat. 1272 (June 16, 2022). The Commission described the changes:

> OSRA 2022 addressed the balance between common carriers and the shipping public in dealing with complaints about demurrage and detention charges. OSRA 2022 § 10, 46 U.S.C. § 41310. Specifically, pursuant to OSRA 2022, common carriers "bear the burden of establishing the reasonableness of any demurrage or detention charges pursuant to [the demurrage and detention interpretive rule] or successor regulations." OSRA 2022 § 10, 46 U.S.C. § 41310(b)(2). This provision shifts the burden of proof regarding the reasonableness of detention or demurrage charges from the invoiced party to the common carrier.
>
> Second, OSRA 2022 requires common carriers to provide certain information on invoices for demurrage and detention charges to demonstrate that the charges comply with the demurrage and detention interpretive rule. OSRA 2022 § 7, 46 U.S.C. § 41104(a)(15) and (d)(2). Specifically, common carriers must include a statement that the charges are consistent with the Commission's demurrage and detention rules. 46 U.S.C. § 41104(d)(2)(L). This provision requires common carriers to ensure invoiced demurrage or detention charges are consistent with the Commission's rules, especially the demurrage and detention interpretive rule.

Wan Hai Lines, Ltd. and Wan Hai Lines (USA) Ltd. - Possible Violations of 46 U.S.C. § 41102(c), Docket No. 21-16, 2022 WL 17830693, at *4-5 (FMC Dec. 15, 2022) (footnotes omitted).

The complaint alleges violations of sections 41104(a)(14), 41104(a)(15), and 41104(d), which became law after these shipments occurred. These three claims are dismissed as the sections were not in effect at the time the charges were incurred. Although OSRA 2022 is not controlling during the time period at issue here, to the extent that OSRA 2022 codified preexisting requirements, including from the demurrage and detention rule, they may be relevant to the other claims and are discussed.

Sections 41104(a)(14) and 41104(a)(15) state that:

> A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not- …
>
> (14) assess any party for a charge that is inconsistent or does not comply with all applicable provisions and regulations, including subsection (c) of section 41102 or part 545 of title 46, Code of Federal Regulations (or successor regulations);
>
> (15) invoice any party for demurrage or detention charges unless the invoice includes information as described in subsection (d) showing that such charges comply with-
>
> > (A) all provisions of part 545 of title 46, Code of Federal Regulations (or successor regulations); and
> >
> > (B) applicable provisions and regulations, including the principles of the final rule published on May 18, 2020, entitled "Interpretive Rule on Demurrage and Detention Under the Shipping Act" (or successor rule).

46 U.S.C. §§ 41104(a)(14), (15) (effective June 16, 2022).

Section 41104(d) creates requirements for "Detention and demurrage invoice information" including:

> (1) Inaccurate invoice.-If the Commission determines, after an investigation in response to a submission under section 41310, that an invoice under subsection (a)(15) was inaccurate or false, penalties or refunds under section 41107 shall be applied.
>
> (2) Contents of invoice.-An invoice under subsection (a)(15), unless otherwise determined by subsequent Commission rulemaking, shall include accurate information on each of the following, as well as minimum information as determined by the Commission:
>
> > (A) Date that container is made available.
> >
> > (B) The port of discharge.
> >
> > (C) The container number or numbers.
> >
> > (D) For exported shipments, the earliest return date.
> >
> > (E) The allowed free time in days.

(F) The start date of free time.

(G) The end date of free time.

(H) The applicable detention or demurrage rule on which the daily rate is based.

(I) The applicable rate or rates per the applicable rule.

(J) The total amount due.

(K) The email, telephone number, or other appropriate contact information for questions or requests for mitigation of fees.

(L) A statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage.

(M) A statement that the common carrier's performance did not cause or contribute to the underlying invoiced charges.

46 U.S.C. § 41104(d) (effective June 16, 2022).

Section 41104(e), which was not alleged as a violation, creates a safe harbor for some pass-through charges, stating:

> (e) Safe Harbor.-If a non-vessel operating common carrier passes through to the relevant shipper an invoice made by the ocean common carrier, and the Commission finds that the non-vessel operating common carrier is not otherwise responsible for the charge, then the ocean common carrier shall be subject to refunds or penalties pursuant to subsection (d)(1).

46 U.S.C. § 41104(e) (effective June 16, 2022).

C. Discussion

1. Violations Alleged

The complaint alleges improper demurrage and detention charges. Complaint at 9. In the complaint, Bakerly sought $2,973,475.29, but has since removed $198,551.87 for invoices for which Bakerly accepts responsibility. Complaint at 15; Brief at 62. In its brief, Bakerly seeks a ruling on $2,774,923.42 of demurrage and detention charges, requesting a refund of demurrage payments of $973,227.05 and detention payments of $278,172.37, plus an order that Seafrigo cease and desist collection of $1,288,809.92 in demurrage and $234,714.08 in detention charges. Brief at 62-63. These are the charges at issue in this proceeding.

Seafrigo seeks an order rejecting Bakerly's claims, finding that Bakerly has failed to establish any Shipping Act violation by Seafrigo, and holding that Bakerly is responsible for payment of $2,130,783.32 in demurrage and detention charges that Seafrigo paid on its behalf.

Opposition at 51. Seafrigo, however, acknowledges that it is not seeking to be reimbursed for charges that resulted from its shortcomings, which it asserts totals $159,849.08. Opposition at 4 n.3; Opposition at 15-16.

Because Seafrigo is not the complainant, this proceeding will not determine the specific amount that Bakerly may owe Seafrigo; rather, this proceeding will determine whether or not Bakerly established that Seafrigo violated the Shipping Act and is therefore entitled to reparations or a cease and desist order.

The complaint does not allege improper freight charges, so those charges are not at issue here. Nonetheless, Bakerly addresses the status of freight charges in its brief, stating:

> The parties have resolved most of the outstanding freight charges. Bakerly had stopped paying the freight because of the unexplained egregiously high charges being assessed by Seafrigo on demurrage and detention. Seafrigo claimed that Bakerly owed $865,336.89 in outstanding freight. Through negotiations involving document backup from Seafrigo, the outstanding amount is now $38,184.50. Bakerly made two payments of $672,823.55 and $11,506.51 for a total of $684,330.06. Of the full $865,336.89, Seafrigo agreed that $142,122.33 were not valid charges: either misidentified as alleged D&D (for $102,810.46) or completely abandoned by Seafrigo ($39,311.87). The parties are still negotiating the final disputed $38,184.50.

Brief at 18-20 (citations omitted); CX 1328-29.

The complaint alleges that the disputed demurrage and detention charges were improper because they violated the filed rate doctrine, the demurrage and detention rules, and OSRA 2022. Complaint at 9-14. As explained above, the OSRA 2022 violations are dismissed because these charges were for shipments prior to the enactment of OSRA 2022. Therefore, the remaining issues are whether the charges violated the filed rate doctrine or section 41102(c). The factual evidence regarding both the alleged filed rate violations and 41102(c) violations are intertwined. Therefore, the legal analysis will be discussed in this section, followed by a discussion of the facts established and how those facts impact determination of the legal issues.

a. Filed Rate Doctrine

Bakerly asserts that Seafrigo violated the filed rate doctrine by charging Bakerly demurrage in contradiction to Seafrigo's rules tariff, Brief at 28-30, and asserts that Bakerly is not liable for demurrage charges according to the bill of lading and rules tariff that it did not cause, Brief at 30-35, or alternatively, argues that even if the Rules Tariff does not exempt Bakerly from demurrage that it did not cause, Seafrigo failed to exercise due diligence and is liable for the charges, Brief at 35-40.

Seafrigo alleges that it acted in accordance with the governing contracts and the parties' course of conduct and states that it "does not contend that the parties' course of conduct negates the Tariff Rules; rather, Seafrigo maintains that the parties' course of conduct shows Bakerly and Seafrigo both shared the correct understanding of those rules over a long course of dealing." Opposition at 17-28.

The parties dispute who was responsible for the demurrage and detention charges at issue under the agreements and tariffs. These arguments are addressed below in the section regarding agreements between the parties (III.C.2). If the charges assessed were consistent with the negotiated rates and tariffs, then there would not be a violation of the filed rate doctrine. Even if the charges assessed are consistent with the negotiated rates and tariffs, there could still be a violation of another section of the Shipping Act. Therefore, the next question is whether there is another violation of the Shipping Act.

b. Section 41102(c)

To establish a violation of section 41102(c), a complainant must demonstrate that the respondent is a regulated entity; the practice or regulation is connected with receiving, handling, storing, or delivering property; the practice or regulation is unjust or unreasonable; the claimed acts or omissions occurred on a normal, customary, and continuous basis; and the practice or regulation is the proximate cause of the claimed loss. 46 C.F.R. § 545.4. The three elements not in dispute are discussed first, followed by the two contested elements.

i. Common Carrier

Section 41102(c) governs the activities of common carriers, marine terminal operators, and ocean transportation intermediaries. Bakerly asserts that as "an NVOCC, Seafrigo is an ocean transportation intermediary." Brief at 41. Seafrigo does not dispute that it is an NVOCC, and therefore an OTI, licensed by the FMC. SFResponse/BPFF ¶ 2. Accordingly, the first element is met.

ii. Connected with Receiving, Handling, Storing, or Delivering Property

Bakerly asserts the "invoicing at issue is related to the delivery of Bakerly's property" so that this element is not at issue. Brief at 41. Seafrigo does not specifically address this element, but discusses "delivery" throughout its brief. *See, e.g.,* Opposition at 18-19. The disputed charges were imposed as part of invoicing demurrage and detention charges related to the delivery of Bakerly's cargo. The element requiring that the practice be connected with receiving, handling, storing, or delivering property is, thus, also established.

iii. Proximate Cause of Loss

Bakerly asserts that the duplicative invoices are the proximate cause of the claimed loss. Brief at 57; Reply at 29. Seafrigo does not explicitly address this element. If the charges violated the Shipping Act, those charges would be the proximate cause of the fees assessed. It is noted, however, that the majority of the charges have not been paid by Bakerly.

iv. Normal, Customary, and Continuous Practice

Bakerly asserts that the claimed regulations or practices occurred on a "normal, customary, and continuous basis," arguing that Seafrigo stated that its policy was to issue supplemental invoices and that "duplicative invoicing is an industry practice." Brief at 42, 44-45;

Reply at 27-28. Bakerly did not discuss this element with regard to any other of Seafrigo's practices. Seafrigo did not directly address this element.

The evidence demonstrates that some of the practices at issue were part of Seafrigo's normal, customary, and continuous practices, such as passing through demurrage and detention charges and issuing supplemental invoices. However, as discussed more below, some of the practices were not part of Seafrigo's normal, customary, and continuous practices – such as lack of drivers, chassis, or genset availability – and Complainant does not specifically argue that these were part of Seafrigo's normal, customary, and continuous practices.

Bakerly's strongest argument may be its assertion that "Seafrigo lacked the systemic controls to properly track and ship containers and invoice Bakerly for demurrage and detention." This implies that Seafrigo had a normal, customary, and continuous practice of, essentially, sloppy recordkeeping. In addition, Bakerly asserts that Seafrigo's practices contributed to their driver shortage. Whether staffing or invoicing practices rise to the level of a normal, customary, and continuous practice and whether they are unreasonable is addressed further below.

v. Unjust and Unreasonable

The primary dispute between the parties is the reasonableness of Seafrigo's practices. Whether or not Seafrigo's practices were unreasonable is discussed in detail below. However, none of the practices at issue are found to be unreasonable.

2. Agreements Between the Parties

Bakerly asserts that its shipments were "on a door delivery basis" so that "Bakerly is not liable for demurrage charges that Bakerly did not cause." Brief at 28-29. Seafrigo contends that Bakerly's argument is "baseless and flatly contrary to: 1) the express terms [of] Seafrigo's tariff; 2) Seafrigo's bill of lading terms and conditions; 3) the parties' carefully crafted Negotiated Rate Agreements (NRAs); 4) the parties' longstanding billing and payment practices; and 5) the well-established practice in the industry;" and therefore "absent negligence on the part of Seafrigo, Bakerly is liable for detention and demurrage charges." Opposition at 2.

As discussed earlier, the Commission permits NRAs to include pass-through charges as long as there is no markup.

> The Commission also is amending its rules at 46 CFR part 532 to permit NVOCC Negotiated Rate Arrangements (NRA) to be amended at any time and to allow the inclusion of non-rate economic terms. In addition, an NVOCC may provide for the shipper's acceptance of the NRA by booking a shipment thereunder, subject to the NVOCC incorporating a prominent written notice to such effect in each NRA or amendment. In addition, the Commission is including clarifying language in part 532 to reflect the current treatment of third-party, pass-through assessorial charges and the enforceability of NRAs.

83 Fed. Reg. 34781 (July 23, 2018). Specifically, Commission Rule 532.5 states: "For any pass-through charge for which a specific amount is not included in the NRA or the rules tariff, the

NVOCC may only invoice the shipper for charges the NVOCC incurs, with no markup." 46 C.F.R. § 532.5.

The shipping agreements between these parties met the requirements of an NRA because Seafrigo provided quarterly rate proposals, in writing, prior to Seafrigo accepting receipt of Bakerly's cargo. Each of Seafrigo's quarterly rate proposals clearly stated that the "Rate Proposal *does not include demurrage and detention charges, for which the shipper and/or consignee may be liable* and port terminal handling charges." CX 226, CX 232, CX 239, CX 245, CX 251 (emphasis added). Moreover, each of Seafrigo's quarterly rate proposals included Seafrigo's USA Standard Accessorials Tariff listing per diem charge as "[a]t cost per terminal or carrier" and both demurrage and detention as "[a]t cost per carrier." CX 230, CX 237, CX 243, CX 249, CX 255.

The parties' NRA also refers to Seafrigo's tariff, which states in Tariff Rule 17 that demurrage and detention shall be for the account of the Merchant "except to the extent solely attributable to actions or omissions of Carrier." The relevant portion of Tariff Rule 17 regarding use of equipment states:

> Merchant acknowledges and agrees that Carrier, as an NVOCC, does not own or operate equipment (i.e., chassis or containers). Merchants use of chassis and containers shall be subject to the requirements of the VOCCs and/or chassis leasing companies that own and/or operate the containers and chassis used to transport Merchants cargo. Merchant, by tendering shipments to Carrier for transportation, appoints Carrier as its agent for acquiring containers and chassis for such transportation and agreeing to free time, as well as demurrage and detention, storage and other charges that accrue with respect to containers and chassis used for such transportation, all of which shall be for the account of the Merchant *except to the extent solely attributable to actions or omissions of Carrier*.

CX 113 (emphasis added). In addition, Seafrigo's bill of lading terms and conditions provide at Clause 6.5 that Seafrigo "shall not be liable for any loss or damage arising from: (a) an act or omission of Merchant" and at Clause 6.5(h) that Seafrigo cannot be held liable for any "cause or events" which it could not avoid, and which could not be prevented by the exercise of due diligence. CX 57.

Bakerly argues, in part based on Tariff Rule 15.3 that "Seafrigo took on the risk, control, and management of the loaded containers when they arrived in Port in the United States because they were door delivery shipments" and since "these shipments are door delivery, Bakerly as merchant would not be liable for the risk and exposure of pickup, transport and delivery." Brief at 19, 59-60. Seafrigo responds that: Tariff Rule 15.3 provides "that the Merchant, i.e., Bakerly, shall be responsible if a VOCC imposes demurrage charges when loaded containers are not removed from the marine terminal within a specified period of time (free time)" and that while "the demurrage provision cited therein does not apply if failure to remove the container from the terminal is the responsibility of the Carrier, as set forth herein, the failure to remove the containers from the terminal was not the responsibility of Seafrigo." Opposition at 17-18.

Tariff Rule 15.3 states: "Where service is port at destination and removal of containers from the VOCCs marine terminal is responsibility of Merchant, Merchant shall be liable to Carrier for any demurrage charges imposed on Carrier by VOCC as a result of Merchants failure to return containers within applicable free time." CX 111. This section is confusing because it applies to demurrage charges for failure to pick up containers but concludes by assessing responsibility for detention charges for failure to return containers. It is possible that the last sentence should say that "Merchant shall be liable to Carrier for any demurrage charges imposed on Carrier by VOCC as a result of Merchants failure to *remove* containers within applicable free time." Either way, this rule applies to port delivery and is silent as to door delivery. At most, therefore, it is ambiguous and it is appropriate to look to other parts of the parties' agreement.

Bakerly also relies on Tariff Rule 17.2 to assert that when service "is door delivery, the Merchant cannot bear the (sic) any risk, between the port of loading or port of discharge on the one hand, and Merchant's facility on the other hand." Brief at 33-34. Seafrigo asserts that 17.2.1 means "that in cases of door moves, the Merchant is not liable for the pickup, transport, and delivery of the containers" but that the rule "conspicuously does not refer to detention, demurrage, or storage charges, in fact *does not relate* to detention, demurrage, or storage charges." Opposition at 19 (emphasis in original).

Tariff Rule 17.2.1 states in relevant part:

> [T]he following shall be at the Merchants risk and all expenses in connection therewith shall be for the Merchants account: 1. The pick up, transport, and delivery of the containers/goods moving between the port of loading or port of discharge on the one hand, and Merchant's facility on the other hand, except to the extent the goods are door cargo.

CX 113. This section indicates that the Merchant is responsible for all expenses from the port to the Merchant's facility. In contrast, in door delivery, the carrier, here Seafrigo, pays costs to pick up, transport, and deliver containers, such as truck drivers. This section does not clearly apply to demurrage or detention.

While the evidence shows that the parties agreed to door delivery, Seafrigo's quarterly rate proposals explicitly stated that the rates did not include demurrage and detention charges so that the door delivery was not an "all-in" rate where Seafrigo would be responsible for demurrage and detention. Indeed, the contemporaneous evidence shows that Bakerly did not object to the charges because this was door delivery, but rather argued that Seafrigo was responsible for the charges due to failure to meet its obligations, for example with regard to staffing and invoicing. Therefore, the parties agreements indicate that Bakerly would be responsible for demurrage and detention charges.

The Commission has held that "assessing pass-through charges with no markup is a just and reasonable practice, in accordance with § 41102(c)." *Gruenberg-Reisner*, 34 S.R.R. at 622. And, although not in effect at the time, the 2022 changes to the Shipping Act require a common carrier to include a statement that: "the common carrier's performance did not cause or contribute to the underlying invoiced charges" and there is now a safe harbor provision which states that: "If a non-vessel operating common carrier passes through to the relevant shipper an invoice made by the ocean common carrier, and the Commission finds that the non-vessel operating common carrier is not otherwise responsible for the charge, then the ocean common carrier shall be subject to refunds or penalties pursuant to subsection (d)(1).” 46 U.S.C. §§ 41104(d)(2)(m), 41104(e). Seafrigo’s tariff rule is slightly broader, permitting it to pass through demurrage and detention charges “except to the extent solely attributable to actions or omissions of Carrier.” CX 57. However, these differences do not impact this decision. As discussed below, the evidence does not show that Seafrigo “caused or contributed” or is “otherwise responsible” for the charges, nor that the charges are “solely attributable” to Seafrigo; thus, the disputed charges are not attributable to Seafrigo.

Seafrigo’s tariff rule permitting it to pass through charges with no markup is consistent with Commission case law and is a reasonable practice. Per the parties’ agreements, this is appropriate as long as the charges are not attributable to actions or omissions of Seafrigo. This is consistent with the incentive principle because if an NVOCC fears that it will not be reimbursed and therefore hesitates to pay the demurrage and detention necessary to pick up containers, then the flow of commerce will slow.

3. Specific Categories of Charges at Issue

Pursuant to Commission rules and the parties’ agreement, Seafrigo was permitted to pass through charges without markup that were not attributable to Seafrigo. Here, there are a number of specific categories of charges or practices that are disputed, including: (1) snowstorm charges, (2) staffing shortages; and (3) invoice practices, such as documentation of pass-through charges; confusing invoices; multiple invoices, referred to by Bakerly as duplicative; and overcharges.

a. Snowstorm

Bakerly asserts that Seafrigo should not have paid demurrage and detention charges amounting to $361,178.54 when the New York ports were closed due to a snowstorm from December 2020 to January 2021, arguing that “Seafrigo was not at fault for the weather-related event and therefore should not have paid the D&D assessed in the first place by the ocean common carrier/terminal, and did so at its own risk” and citing *TCW, Inc. v. Evergreen Shipping Agency (America) Corporation, & Evergreen Line Joint Service Agreement*, 2022 WL 18068977 (FMC Dec. 29, 2022). Brief at 58-60; Reply at 30-31.

Seafrigo contends that snowstorms are one of the charges at issue that were caused independent of either party; the tariff and bill of lading terms and conditions “recognize Seafrigo is not liable for events which it could not avoid and the consequences of which it could not prevent by the exercise of due diligence;” the “snowstorms which resulted in closures of New York ports are classic examples of such unavoidable occurrences which Seafrigo did not cause and for which it is not responsible;” and Seafrigo was under no obligation to “bring legal action against [VOCCs and MTOs] on behalf of Bakerly.” Opposition at 12, 22, 37-38.

The evidence shows that Seafrigo was not responsible for the weather-related closure of the port and resulting delays in picking up containers. Bakerly is correct that charging detention when the port was closed may not be consistent with the incentive principle and may violate the demurrage and detention rule, although the Commission decision Bakerly relies on was not issued until long after this snowstorm. 46 C.F.R. § 545.5; *TCW, Inc. v. Evergreen Shipping Agency*, 2022 WL 18068977. Moreover, Seafrigo's request to waive the charges was denied, Seafrigo needed to pay the charges in order to obtain release of the containers, and Seafrigo did not have the power to waive the charges.

The Commission has advised "that 'passing on' a charge is not necessarily a defense under § 41102(c)." *Tereno Sdn Bhd v. C.H. Robinson Int'l*, 4 F.M.C.2d 45, 2022 WL 3093190, at *1 (FMC March 22, 2022). In that case, the claimant alleged that the OTI respondent failed to respond to Customs and Border Protection's request for documents, causing the shipment to incur demurrage charges. *Tereno Sdn Bhd v. C.H. Robinson Int'l*, 4 F.M.C.2d 30, 2022 WL 3093188, at *2 (SCO Jan. 27, 2022). The Commission affirmed the Small Claim Officer's dismissal of the claim, clarifying that the "claim fails, not because Respondent was passing on the charge, but because Claimant did not prove that Respondent acted unreasonably and because there was evidence that Claimant did not satisfy its obligation to timely provide the documentation needed to release its cargo." *Tereno*, 2022 WL 3093190, at *1. So, passing on charges may not be a defense if a complainant establishes that the respondent violated section 41102(c) by having an unreasonable practice.

Bakerly has not established that Seafrigo had an unreasonable practice that led to the demurrage and detention charges during the snowstorm. Seafrigo does not point to any authority suggesting that the responsibility of filing litigation to enforce the Shipping Act is part of the due diligence required from NVOCCs or that NVOCCs assume the risk of nonpayment when paying demurrage and detention charges on behalf of shippers. Indeed, these charges need to be paid before containers will be released. Moreover, Seafrigo's testimony is not contested that Seafrigo "met with the two primary VOCCs for Bakerly, CMA and MSC[] and sought to have them waive detention and demurrage charges" but that because "those carriers had significant leverage in an extremely tight market, they flatly refused to waive such charges." RX 18. Therefore, Seafrigo made a reasonable attempt to contest the charges, which is sufficient to meet its obligation not to impose avoidable charges.

The flow of cargo would be slowed if NVOCCs had to litigate contested charges or run the risk that they would not be reimbursed, as NVOCCs would be incentivized not to pay the charges which would result in delays picking up containers and additional charges being incurred. Permitting an NVOCC to pass through detention and demurrage charges it has reasonably paid is consistent with the incentive principle as it promotes freight fluidity and ensures that containers do not sit at the port accruing additional charges. While not binding here, such a finding is also consistent with OSRA 2022's safe harbor provision that refunds for improper invoices are paid by the ocean common carrier, not the NVOCC. 46 U.S.C. § 41104(e).

In February 2021, the parties had a video meeting to discuss the charges and "Bakerly agreed to pay those charges and Seafrigo agreed to send Bakerly a $30,000 credit as a commercial gesture but that it did not represent admission of fault." CX 19; RX 11. After agreeing to pay the charges in February 2021, in December 2022, Bakerly again agreed it would not dispute Seafrigo's right to be reimbursed for the snowstorm charges, which amount to $361,178.54. RX 10. Seafrigo's statement is credible that if "Seafrigo had been informed that Bakerly thought that Seafrigo was assuming the obligation to pay detention, demurrage, per diem, and other ancillary charges, it would have refused to advance the millions of dollars in advances it made on behalf of Bakerly" from that point forward and that it would have been "economically unfeasible" for Seafrigo to assume the obligation for these charges. RX 21.

Indeed, in December 2021, Seafrigo stated that it would "no longer pay demurrage on behalf of Bakerly from this point forward until we reach an agreement" and Bakerly responded that there was a "misunderstanding" and for Seafrigo lines, "there will be no change in the way we have been doing things up until now, including who pays what to the terminal and the [shipping] lines." CX 494-95. Bakerly wanted Seafrigo to continue paying these charges on its behalf. It is noted that this occurred prior to the Commission's new Charge Complaint process, whereby such disputes over demurrage and detention charges can be promptly resolved.

Bakerly has established that Seafrigo had a normal, customary, and continuous practice of passing through demurrage and detention charges, including those caused by weather delays such as the snowstorm. However, Bakerly has not established that it was unreasonable for Seafrigo to pass through the demurrage and detention charges for the snowstorm under these circumstances. Moreover, Bakerly has not established that this would be a violation of the filed rate doctrine as the parties' NRA states that the "Rate Proposal does not include demurrage and detention charges, for which the shipper and/or consignee may be liable." CX 226, CX 232, CX 239, CX 245, CX 251. It is not explicitly argued in this briefing, but the same approach would apply to other delays outside of the NVOCC's control, such as port congestion, customs holds, and chassis or genset shortages which are not attributable to actions or omissions of Seafrigo.

b. Staffing Shortages

Bakerly asserts that: Seafrigo lacked sufficient drivers; Bakerly suggested that Seafrigo pay more competitively to procure drivers; Seafrigo is responsible for finding drivers to take containers from the port and to retrieve empty containers; Bakerly was able to find drivers faster than Seafrigo; and another provider was able to find sufficient truck drivers. Brief at 14; Reply at 23-24. Seafrigo argues that truckers began refusing to deliver containers to Bakerly warehouses due to the warehouse's inability to timely accept deliveries and return empty containers and that there was a nationwide shortage of truckers which was caused by reasons independent of either party. Opposition at 9, 13, 32-33, 40.

As early as January 2021, Seafrigo alerted Bakerly to problems with their warehouse, stating:

> We have a potential serious issue brewing here. Despite making a great push to get all these containers delivered, we now have an issue that they are not unloading the containers in a reasonable amount of time. Some containers have been sitting there for over a week and rumor has it, they intend to keep them there longer.
>
> I know this is "he said, she said" but my reliable sources are telling me that "This customer brought in too many containers at the same time, and we do not have the time to unload them fast enough".
>
> The obvious issue here is per diem costs which you are already aware of. But the other residual issue here is that some of these truckers (including Seafrigo

> transport) are using our own chassis to service containers that we pay for, and they are now sitting in Jersey City for an undetermined period of time. That is costing we as truckers money as we need that equipment back.
>
> I know this week is a slow week in terms of imports for Jersey City so it would be great if there could be a catch up period for PFS JC to focus on unloading what they have so we can get our equipment back and containers returned back to the port.
>
> For all new shipments coming in? My recommendation would be to bring all those containers to Seafrigo's freezer and unload them here until PFS JC can catch up again. Then we can truck them to PFS JC when they are ready to receive them. Please let us know your thoughts.

CX 720.

Moreover, evidence shows that from February 2021 to April 2021, Seafrigo was receiving complaints from truckers trying to find appointments at Bakerly's warehouse, having drivers be kept overnight, and refusing to go to Bakerly's warehouse. Seafrigo sent Bakerly emails documenting these issues, for example: "I am losing truckers left and right," "I am getting major pushback from good drivers that I am working with for years now," "our drivers are not happy and they are all threatening not to go back there," "our truckers are running out of patience," and "one of our good truckers [is] rejecting all future loads to this locations." RX 4606, CX 833-34, RX 4632, RX 4631, RX 4630.

Additionally, in July 2021, Bakerly limited inbounds "due to complications and internal decisions" and specifically stated that "[w]e are aware of the additional costs of demurrage, storage, detention that this decision implies, but we do not have a choice." RX 4594; *see also* CX 469-70 (in October 2021, Jersey City "can only accept 4 to 5 loads p/day."). This led Seafrigo to have its own internal conversation where they discussed "potentially limiting the volumes of bookings with the customer . . . [as we] cannot continue to stockpile containers on the USA side without a 'home' for them." RX 4593. Seafrigo further noted that:

> This account is crippling our credit line. Containers are piling up in port of NY/NJ faster than they can be routed to a warehouse with availability. FYI – Bakerly management is MIA, nobody returning my phone calls. We cannot continue this way! Please see attached list. We have containers that arrived since end of June still sitting at the ports and/or staged in a yard somewhere with another wave of containers arriving next week !

RX 4589. Thus, the record shows significant and long-standing issues by Seafrigo's drivers in delivering containers to Bakerly's warehouses. The demurrage and detention charges caused by these delays are not attributable to Seafrigo.

The record also includes evidence of numerous delays at the Lineage warehouses, for example from May 20-25, 2021. CX 559-67. However, Bakerly states that this is "related to warehouse transfers between Lineage, PA and Bakerly's factory and is not related to Seafrigo containers." BResp/SFPFF ¶ 48-52. These emails further demonstrate delays caused by Bakerly's warehouses.

At the time, Seafrigo was transparent about the issues impacting demurrage and detention charges. For example, in June of 2021, Seafrigo acknowledged:

> At this time Carriers have driver shortage, port congestion, insufficient equipment (GENSET) ETC. Trucking companies are booked to capacity, drivers are quitting on them, trucks are breaking down. Receiving stations are booked, pulling containers before Demurrage applies has been impossible. We are doing our best at this time to get containers pulled.

CX 852.

There are some instances in the record of demurrage and detention charges that were due to Seafrigo's challenges finding truck drivers. For example, as early as February 2021, Bakerly asserted to Seafrigo that Bakerly employee Yudith was able to find drivers when Seafrigo could not. CX 339. Bakerly also complained in early January 2022 regarding containers, that had been released since December 28, 2021, but not yet delivered. On January 6, 2022, Bakerly stated to Seafrigo that "Bakerly, as a client, has been pushing for those containers for days now. It's Seafrigo's responsibility to find drivers and remove the containers from the port. We need this inventory at the warehouse and we need those containers out of the port." CX 452-53; *see also* CX 826 ("Bakerly (your client) is advising every morning that Seafrigo has containers in the port, . . . that Seafrigo must go to pick up the empty container. We are exhausted, it is frustrating!!."); CX 826 ("Bakerly is pushing for a feedback on containers that arrived for days now, again accruing demurrage AND losing shelf life at the port. Remember this is reefer."). But, on January 4, 2022, when Seafrigo attempted to set up the final delivery, it was told by Bakerly's warehouser, Lineage, that the "earliest we would be able to get these in would be Monday the 10th at 0430." CX 456. Lineage also revealed at this time that it had 41 team members out with COVID and another 40 who had called in sick. CX 456-57. In any event, the evidence does not support finding that these amounts exceeded the amount for which Seafrigo takes responsibility.

The record also shows that Seafrigo on occasion listed containers in emails that were for other customers. *See, e.g.* CX 471-73. The record does not establish that Bakerly is seeking demurrage and detention charges for these containers.

In addition, the record includes information about twelve containers placed on customs hold by Customs and Border Protection ("CBP") and the United States Department of Agriculture ("USDA.") The record shows that Seafrigo followed up with CBP/USDA, provided the required information, and advocated for release of the containers. CX 802-12. Moreover, the record shows that Bakerly was copied on the emails and there is no evidence that Seafrigo delayed notifying Bakerly or contributed to the delay in having the containers released. Other containers were also put on government holds but the record does not indicate that these were attributable to Seafrigo. CX 842-50, CX 880-81. At most, one day of demurrage was incurred after a container was released from a government hold and Lineage did not have capacity to pick up on the last free day. CX 884-90. Therefore, the record does not show that demurrage and detention charges for the containers on government holds was attributable to Seafrigo.

Bakerly does not devote a particular section of its briefs to this issue, instead, raising it throughout. However, the evidence does not support a finding that Seafrigo had a practice of failing to secure drivers that was unreasonable. The evidence primarily shows that Lineage, Bakerly's warehouser, struggled with significant staffing issues and that Bakerly's warehouses were limited in the number of containers they could accept and that they did not always empty and return containers in a timely fashion. *See, e.g.,* CX 832 ("5 standing inbounds every day of the week (no weekends)"; CX 838 ("only drop 2 containers per day until further notice")). While the evidence does show instances where Seafrigo was delayed in picking up or returning a container, those isolated instances to not rise to the level of a practice. Moreover, Seafrigo accepts responsibility for $159,849.08, Opposition at 15-16, and the isolated instances in the record do not suggest a higher amount of the charges are attributable to Seafrigo. Finally, Seafrigo twice provided Bakerly with $30,000 credits. CX 259; CX 627. Therefore, the record does not support finding that Bakerly has been overcharged for demurrage and detention that was attributable to Seafrigo's staffing.

c. Invoices

i. Documentation of Pass-Through Charges

Bakerly contends that Seafrigo's invoices "violate the basic requirement that pass through of invoices must be substantiated by the NVOCC with the underlying ocean carrier/terminal invoices" and asserts that the "regulations require invoices to be substantiated." Brief at 42, 48, 49. Seafrigo asserts that: invoices and backup documentation were timely provided to Bakerly; some details regarding demurrage and detention charges were not provided because that information was not provided by third parties; and OSRA 2022's safe harbor provisions confirm that NVOCCs such as Seafrigo are not liable for demurrage and detention assessed by third parties for which the NVOCC is not responsible. Opposition at 13-14.

This is one of the most significant areas of contention between the parties – whether and how pass-through charges should be substantiated; for example, whether the NVOCC is required to provide a copy of the ocean carrier or terminal invoice and if so, how those invoices should be provided. This subsection addresses whether particular documentation is required in order for pass-through charges to be permitted by the Shipping Act.

Bakerly does not identify which section of the Shipping Act or NSA/NRA Final Rule it alleges supports its position that charges must be substantiated with invoices, however, it is presumed that Bakerly is referring to the Commission's discussion of the *Gruenberg-Reisner* v. *Overseas Moving Specialists (FMC)* case.

> [T]he Commission has clarified through case law the treatment of pass-through assessorial charges for which no specific amount is fixed in either the NRA or the rules tariff. Specifically, in *Gruenberg-Reisner* v. *Overseas Moving Specialists, Inc.,* 34 S.R.R. 613, 622-623 (FMC 2016), the Commission found that *an NVOCC was entitled to collect pass-through assessorial charges without any markup,*

> *which it substantiated with invoices*. The NVOCC described in its rules tariff the types of charges that were not included in the rate and provided that any of those charges assessed against the cargo would be for the account of the cargo, even if the NVOCC was responsible for the collection thereof. *Id.* The Commission found that Respondent was "entitled to payment for . . . destination terminal handling charges and the additional floor fee, and . . . local port fees, customs fees, parking permit, and elevator fee because these were reasonable accessorial charges that Respondent passed through to the Claimants without any markup." *Id.* at 623. The Commission also stated that "assessing pass-through charges with no markup is a just and reasonable practice, in accordance with [section] 41102(c)." *Id.* at 622.
>
> The Commission has determined to incorporate the interpretations in *Gruenberg-Reisner*, subject to a few clarifications, into part 532. Specifically, pass-through assessorial charges need not be fixed at the time of receipt of the first shipment, in light of the Commission's decision in *Gruenberg-Reisner*, which found it permissible for an NVOCC to collect pass-through assessorial charges that were not fixed upon receipt.
>
> In summary, the final rule adopts the following requirements. If the NRA rate is not an "all-in rate" the NRA must specify which surcharges or assessorial charges will apply by either including the specific additional charges in the NRA itself or referencing in the NRA the specific charges contained in the rules tariff. For applicable charges contained in the rules tariff, the charges and amounts for those charges (if the amounts are specified in the tariff) are fixed once the first shipment has been received by the NVOCC until the last shipment is delivered, subject to further amendment of the NRA by mutual agreement of the NVOCC and shipper. For pass-through charges and ocean carrier GRIs for which the NRA or rules tariff does not include a specified amount, the *NVOCC may invoice the shipper for only those charges the NVOCC actually incurs, with no markup*.

NSA/NRA Final Rule, 83 Fed. Reg. at 34787 (emphases added).

A more detailed description of the *Gruenberg-Reisner* case may be helpful. In *Gruenberg-Reisner*, the NVOCC substantiated some of its charges with invoices. However, Bakerly goes too far in asserting that substantiation with invoices is always required. Indeed, although the Commission found the *Gruenberg-Reisner* Respondent entitled to payment for local customs fees, parking permit fee, elevator fee, and customs inspection fees, the Commission remanded the issues of the fuel surcharge and U.S. terminal handling charges to determine whether Respondent reasonably assessed those charges. *Gruenberg-Reisner FMC*, 34 S.R.R. at 623. Although the record did not contain supporting documentation for these charges, the Commission stated that it did "not believe that Respondent had sufficient time to contact the vessel ocean common carrier and track down the exact amount of these charges." *Gruenberg-Reisner*, 34 S.R.R. at 623. The Commission found that invoices were "not the only indication of whether the charges were reasonable," explaining:

> The Commission has found that a carrier, under some circumstances, may recover reasonable charges it incurred without providing evidence that it incurred those charges. *C.H. Leavell & Co. v. Hellenic Lines, Ltd.,* 13 F.M.C. 76, 89 (FMC 1969). In *C.H. Leavell & Co.,* the Commission found that:
>
>> [R]espondent's showing of increased voyage distance and duration is sufficient to overcome any presumption of unreasonableness; and there is no basis for a finding that the surcharges assessed were unreasonable, in the absence of any proof of unreasonableness. On the contrary, the record supports a positive finding that the surcharges assessed for the extra services rendered to complainant's cargoes represented, in each case, a reasonable extra charge for such services.
>
> *Id.*
>
> Therefore, we remand the issue of whether Respondent's assessment of these charges was a just and reasonable practice. On remand, we recommend that the SCO request the invoices again. The invoices, however, are not the only indication of whether the charges were reasonable. *See id.* If the NVOCC is unable to produce the invoices, we recommend that the SCO look at other factors such as whether the charges were similar to those assessed by other NVOCCs.

Gruenberg-Reisner FMC, 34 S.R.R. at 623.

Therefore, case law does not support Complainant's position that pass-through charges must always include the underlying ocean carrier/marine terminal invoices or that failure to include such invoices justifies non-payment of the charges. It appears that the best reading of the comment after the comma in that NRA/NSA Final Rule – that "the Commission found that an NVOCC was entitled to collect pass-through assessorial charges without any markup, *which it substantiated with invoices*" – was descriptive and not prescriptive.

NVOCC duties include "[c]ollecting freight monies from shippers and paying common carriers as a shipper on NVOCC's own behalf." 46 C.F.R. § 515.2(k)(11). Indeed, NVOCCs have been found to have unreasonable practices in the domestic trades, a violation of the Shipping Act of 1916, by failing to "pay applicable demurrage charges," subjecting "property of the shipping public to vessel-operating common carrier's liens." *Maritime Corporation v. Acme Fast Freight of Puerto Rico*, 17 S.R.R. 1655, 1662, 21 FMC 198, 203-04 (ALJ Jan 18, 1978), *aff'd*, 18 S.R.R. 853, 21 FMC 194 (FMC Aug. 14, 1978).

Moreover, Commission Rule 532.5(d)(2) only requires that for pass-through charges which are not included in the NRA or the rules tariff, "the NVOCC may only invoice the shipper for charges the NVOCC incurs, with no markup." The rules do not specify how demurrage and detention charges should be communicated. Failure to communicate the charges in a manner preferred by a shipper, without more, would not justify stopping payment for services rendered, particularly where the cost was clearly incurred – for example, where a container was not picked up or an empty container returned within the available free time.

As the Small Claims Officer stated in the *Gruenberg-Reisner* remand decision:

> It is undisputed that the Commission "permit[s] carriers to recover their additional expenses." *See* [*Gruenberg-Reisner* FMC, 34 S.R.R. at 622] (quoting *Imposition of Surcharge at U.S. Atlantic and Gulf Ports on Cargo Moving Between Said Ports and Lain Am. Ports.*, 10 F.M.C. 13, 26 (FMC 1966)). However, "[t]he basic purpose behind surcharges such as those in issue here is to reimburse the carriers for additional costs temporarily incurred by the performance of their service, and which costs the carriers are not recovering in their basic freight rates." [*Gruenberg-Reisner FMC*, 34 S.R.R. at 622] (quoting *Imposition of Surcharge at U.S. Atlantic and Gulf Ports on Cargo Moving Between Said Ports and Lain Am. Ports.*, 10 F.M.C. 13, 26 (FMC 1966)).

Gruenberg-Reisner SCO Remand, Docket No. 1947(I), 2017 WL 2241031 at *20 (SCO May 17, 2017) (SCO Decision on Remand) (administratively final June 19, 2017).

The evidence shows that Seafrigo did provide back-up documentation and the exhibits suggest that it made a good faith attempt to provide as much information as possible about these pass-through charges. *See* RX 45-4470. For example, there are a number of references in the record to Seafrigo mailing the underlying invoices to Bakerly. *See, e.g.,* CX 723 ("I have attached back-up to the invoices you had questioned. Additionally, I have added a batch of new invoices + back-up. I will put everything in a FEDEX pouch and send it to you."); CX 901 ("I have a batch of invoices + back-up sitting on my desk that I will put in a FEDEX. So sorry for the delay."). The evidence shows that the underlying invoices were often sent in batches and were occasionally sent late. However, the evidence does not show that Seafrigo had a practice of refusing to provide the information that it had regarding the charges.

On September 16, 2021, Seafrigo sent Bakerly an updated statement and then emailed again stating:

> Sorry to come back to this subject, but it seems that we are in a routine of having over 1 million of outstanding again. Could you please have a discussion with your AP team so that we can get on a regular schedule of keeping the account up-to-date ? We are not asking to have every penny at 30 days, but certainly, we do not have deep enough pockets to float 1 million dollars on a regular basis.

CX 697. Bakerly responded, saying:

> I just came out of a meeting with AP regarding the Seafrigo account. They have showed me quite a few examples where we are struggling to get invoices from Seafrigo, we do receive the past due notices but are having a hard time getting the invoices as well as the weekly excel report meant to breakdown the costs. To add to that Yudith has been fighting for a couple months now on the demurrage/per diem invoices to get backup, without backups we can't approve those charges.

CX 696.

Later on September 16, 2021, Seafrigo responded: "Based on Alissa's message • 472K – not at all sure why you would not receive these invoices as we are sending them weekly in batches. Anyhow, all the invoices were resent • 500K demurrage/per diem/other – is there anything requires on our side to expedite whatever the delay is from the Miami team?" CX 695. Bakerly responded: "Appreciate the help. • 472: Alissa will process payment accordingly[.] • 500K: we need the backup of the demurrage/per diem/other charges to see what happened with the container and approved invoices. Bethzaida should know what the team needs exactly[.]" CX 699-700.

On September 17, 2021, Seafrigo emailed Bakerly stating:

> For the demurrage – we have been sending all the invoices with the back-up on a case by case basis. There is no way we did not do it for all 500K of invoices. Maybe we are not perfect, but surely there is a good chunk of this due [that] has the back-up against. Anyhow, please keep us posted what is needed so we can get through. We understand that maybe you could be missing some back-up from time to time. All that we ask is for the base freight invoices and demurrage / per diem invoices (which you have the back-up and nothing is in dispute) to please get on a regular payment clock of 30 days.

CX 699.

This exchange in September suggests that, at times, Bakerly was delaying payment without good cause. Seafrigo's statements are credible that "[m]aybe we are not perfect, but surely there is a good chunk of this due [that] has the back-up against" and "[w]e understand that maybe you could be missing some back-up from time to time." CX 699. However, this does not justify nonpayment of freight or the charges for which documentation has been provided.

The next month, Seafrigo imposed a finance charge, stating "[w]e have inherited the responsibility of paying demurrage and per diem charges on behalf of our customer base. These charges are significant and are passed through charges only. This cash outlay has created major stress on our cash flow." CX 1403.

Later in October 2021, Bakerly complained that there were "too many situations recently where we incurred demurrage because Seafrigo couldn't find drivers," that Bakerly was "still waiting for the weekly D&D report" and Bakerly didn't "feel right owning 100% of the financial exposure when we clearly have performance issues on Seafrigo's side." CX 310; *see also* CX 578 (November 12, 2021 email from Seafrigo stating "please note that we are not covering demurrage or per diem due to lack of drivers"). Seafrigo apologized "for not getting you this weekly recap on time" stating that this "is a result of a system change and the report is only able to supply line by line information of what is being paid" and there "are combinations of reasons (through no fault of Seafrigo) that we have already discussed on numerous occasions and any one of them are contributing to the demurrage, not only driver capacity." CX 577.

The evidence supports Seafrigo's argument that "the charges assessed largely were straight pass-throughs of amounts that Seafrigo paid to third parties" and the "only additional charges imposed by Seafrigo were finance charges in late 2021 when Seafrigo's finances were being impacted by Bakerly's failure to reimburse it for millions of dollars Seafrigo had advanced on Bakerly's behalf." Opposition at 45.

The evidence also shows that on October 7, 2021, Seafrigo issued a demurrage per diem finance schedule stating: "From now on, any cash outlay related to Demurrage/Per diem, will incur the following," listing an "Admin fee (per transaction)" of $45 and a "5% unsecured finance charge: 5% of the amount paid." CX 1403. Seafrigo's 2022 standard tariff lists a "Finance Fee/Per Diem/Demurrage/Detention" charge as "5% of total demurrage/detention cost." CX 255. Invoices in the record confirm that these charges were imposed in October 2021 and January 2022. CX 156; RX 4997; RX 5010. Bakerly does not specifically object to this admin fee and finance charge, which were clearly disclosed both by email notice and listing on the tariff. Rather, Bakerly seems to object to passing through unsubstantiated invoices and confusing invoices. Opposition at 5, 27.

As complainant, Bakerly has the burden of proof. Bakerly has established that Seafrigo had a normal, customary, and continuous practice of passing through demurrage and detention charges. Indeed, this practice is identified in the parties' agreement and Seafrigo's tariff. However, Bakerly has not established that this practice is unreasonable under the Shipping Act. In addition, this practice would not violate the filed rate doctrine as it is consistent with the parties' negotiated rate or tariff. Therefore, Seafrigo passing through demurrage and detention charges without mark-up does not violate the Shipping Act. Moreover, the caselaw does not support Bakerly's contention that all pass-through charges must be substantiated or documented with the underlying invoice and the evidence shows that Seafrigo reasonably provided Bakerly with back-up documentation of the charges. The impact of confusing invoices is discussed next.

ii. Confusing Invoices

The next issue that Bakerly asserts made the invoices unreasonable was that they were "incoherent" and "failed to note any required information about the charge, such as the number of free days, the date the demurrage started, and when it ended." Brief at 42, 48. Bakerly acknowledges that "through discovery, it is clear that Seafrigo did not maliciously withhold information from Bakerly," but asserts instead that "Seafrigo lacked the systemic controls to properly track and ship containers and invoice Bakerly." Brief at 7.

Seafrigo primarily disputes these arguments on a factual basis, arguing that the invoices "detailed the amounts owed and specified the basis for the charges;" that if "Seafrigo had not made the payment, Maher Terminal would not have released the container and demurrage would have continued to accrue;" and "[s]imply reviewing the ETA and the pickup date one can determine the approximate number of days the container sat at the terminal undelivered and the basis for the demurrage charges assessed." Opposition at 44-45. Seafrigo also contends that "Maher Terminal, which assessed the vast amount of detention and demurrage charges at issue, does not issue invoices reflecting the basis for amounts charged but instead requires credit card payment of all amounts due in order for the containers to be released." Opposition at 45.

Bakerly asserts that to be reasonable, invoices in 2020-21 were required by the Demurrage and Detention Rule to include information such as the number of free days, the date the demurrage started, and when it ended. Brief at 55-57. Seafrigo asserts that Bakerly is attempting to shift the burden of proof; no such obligation existed pre- or post- OSRA 2022; and OSRA 2022's safe harbor confirms that "NVOCCs such as Seafrigo are not liable for detention and demurrage assessed by third parties for which the NVOCC is not responsible." Opposition at 45-46.

After these shipments, OSRA 2022 imposed new requirements on the contents of a demurrage and detention invoice and required a "statement that the common carrier's performance did not cause or contribute to the underlying invoiced charges." 46 U.S.C. § 41104(d)(2) (June 16, 2022). These requirements were not in effect during the time of these shipments and these requirements appear to apply to the entity initially imposing the charge.

An NVOCC can only make available to the shipper the information that it receives from the ocean common carrier or marine terminal imposing the charge. During the timeframe at issue, ocean common carriers and marine terminals were not required to provide the detailed information that Bakerly was seeking from Seafrigo. While that information would have been helpful and there are now new requirements regarding the contents of invoices, Bakerly has not established that as an NVOCC, at that time, Seafrigo acted unreasonably by not providing additional information beyond what it received from the entities initially imposing the charges. Moreover, while not providing certain information may make the invoices confusing, they do not make the invoices inaccurate or justify non-payment. Bakerly has not shown that any lack of back-up documentation caused the demurrage or detention charges to accrue.

Moreover, Seafrigo asserts that it did provide this information and the exhibits suggest that it made a good faith attempt to provide as much information as possible about these pass-through charges. As noted earlier, there are a number of references in the record to Seafrigo mailing the underlying invoices to Bakerly. *See, e.g.*, CX 723 ("I have attached back-up to the invoices you had questioned. Additionally, I have added a batch of new invoices + back-up. I will put everything in a FEDEX pouch and send it to you."); CX 901 ("I have a batch of invoices + back-up sitting on my desk that I will put in a FEDEX. So sorry for the delay.").

The evidence shows that Seafrigo provided information about particular charges in a mix of spreadsheets, emails, and hard copy by mail. However, lack of details in backup documentation or provision of that information in a mix of formats does not cause detention or demurrage to accrue or permit non-payment. Moreover, to the extent that Bakerly suggests that Seafrigo is responsible for the charges because the delays were attributable to Seafrigo, for example because of a driver shortage, the underlying invoice would not shed light on that issue. It would just indicate that demurrage and detention were charged; it would not identify the cause of or responsibility for the charges.

While data could be taken from underlying invoices and entered into a spreadsheet, if Bakerly wanted to see those invoices, they would have to match the underlying invoices with the charges in the spreadsheet because these are separate documents. As Seafrigo explained, they could not "combine the support documents with a general report. All support documents have already been sent with our original invoices. The report is just a summarization of what has been billed." CX 904.

The evidence shows that Bakerly asked and Seafrigo attempted to provide information in a variety of formats. For example, Bakerly requested a combined weekly spreadsheet and

Seafrigo acknowledged that it was unable to provide that level of granular detail requested in the spreadsheets. Seafrigo explained on November 13, 2021:

> Regarding the required explanations, this is something that is not possible to track on such a granular level meaning that if you are expecting a finite timeline on each and every container as why demurrage is being paid, I'm afraid we would spend more time on that type of analysis than actually servicing your containers . . . .

CX 577. Again, on February 1, 2022, Seafrigo told Bakerly:

> Its true that the report itself does not reflect this granular information at the moment. You are receiving that type of details via email from the account handlers. Based on the snapshot below, are you saying that your team has no email information regarding the appointment process on any of these containers ?

CX 659; *see also* CX 658 ("I do understand your point and looking to achieve what you want. It is just that we do not have that 'free text' commentary available in this report just yet and simply have to rely on emails for the time being when it comes to 'lengthy' explanations.").

A sample of the Seafrigo invoices shows that they list: the identity of the consignee (Bakerly LLC), a description of the goods, the vessel, destination, master BL number, house BL number, departure date, arrival date, container number, balance due, description of charges, and other data. CX 732, CX 736, CX 739. The record also includes sample PayCargo receipts which list the invoice number (matching the container number) with the amount paid and date. CX 737.

Seafrigo provided credible testimony that: "During the period in question, VOCCs and MTOs were not obligated to provide detailed invoices as is now required under OSRA. Seafrigo forwarded information as provided by MTOs and VOCCs." RX 15. "Seafrigo admits that on occasion it had to issue separate invoices for detention and demurrage charges that accrued or were invoiced by third parties at different times." RX 16. To the extent that the underlying invoices do not include information that Bakerly wanted, Bakerly has not identified any Shipping Act requirement that the NVOCC passing through the invoice must supplement or add information to each invoice.

Bakerly has also argued that "Seafrigo lacked the systemic controls to properly track and ship containers and invoice Bakerly." Brief at 7. Bakerly has established that Seafrigo's recordkeeping was sometimes confusing and documentation sent late. Bakerly hired another NVOCC in October 2021 and asserts that the other NVOCC performed better, with no demurrage and detention charges during certain time periods. Brief at 39-40; Reply at 9-10. However, even if this were the case, the fact that one practice is more efficient than another does not, without more, make the less efficient practice unreasonable. The record here does not support finding that the demurrage and detention charges incurred were attributable to Seafrigo because of a lack of systemic controls. Moreover, it is not clear that Seafrigo lacked systemic controls, as part of the problem was Bakerly's continuing desire for additional information for each charge and the large number of unpaid charges that Seafrigo needed to continue to track for Bakerly. Additionally, the lack of detail available is not attributable to Seafrigo as it can only provide the information that it received from the VOCC or MTO.

Bakerly has the burden of proof. Bakerly has established that Seafrigo had a normal, customary, and continuous practice of issuing demurrage and detention invoices and subsequently mailing the underlying invoices, sometimes with delays. However, Bakerly has not established that Seafrigo's invoicing practices were unreasonable under the Shipping Act. In addition, passing through detention charges would not violate the filed rate doctrine as it is consistent with the parties' negotiated agreement regarding rates. Therefore, Seafrigo's failures to provide underlying invoices substantiating the charges in the precise manner requested by Bakerly does not violate the Shipping Act.

iii. Multiple Invoices

Bakerly asserts that "Seafrigo had a practice of issuing duplicative invoices for detention, demurrage, and per diem and the practice was unjust and unreasonable," where "duplicative invoicing," is defined by Bakerly as meaning "that Seafrigo issued multiple invoices for one activity (such as demurrage, detention, per diem, freight, accessories)." Brief at 40, 40 n.8; CX 1319. Seafrigo contends that "the charges are not duplicative," but rather, "they reflect additional demurrage or detention charges that accrued and were invoiced after an initial invoice had been issued" and "the mere fact that more than one invoice for detention or demurrage was issued for the same container does not in any way reflect that the charges were duplicative or incorrect." Opposition at 11.

The use of the term "duplicative" is misleading because it is used by Bakerly to encompass both overcharges, where Bakerly is billed inaccurate amounts, and supplemental billing, where Bakerly is issued multiple bills with different charges (for example, a January bill for January charges and a February bill for February charges). This order will use the terms "overcharge" and "supplemental billing" to distinguish between the two.

Bakerly asserts that "Seafrigo is issuing duplicative invoices principally due to the fact that Seafrigo's invoices were issued before demurrage stopped accruing" and the multiple invoices for the same shipment were "incoherent" and "uncertain" as Bakerly could not determine whether the invoices were proper charges or overcharges. Brief at 42. This "possibility of overcharges by the unreasonable multiple invoicing," and Bakerly's belief that some containers had been overcharged, "caused Bakerly to cease paying for demurrage." Brief at 43.

Seafrigo argues that: Bakerly does not satisfy its burden of proof by "highlighting a tiny number of supposed discrepancies;" Bakerly "identified a handful of invoices which it claims are incorrect;" a "handful of errors in invoices totaling less than $15,000 do not justify a refusal to pay almost $2 million in charges owed;" and some of the discrepancies are caused by credit card fees imposed by terminals. Opposition at 15, 43.

There is nothing inherently unreasonable about issuing supplemental invoices. Even if, as Bakerly asserts, the previous practice had been to include all charges regarding one shipment in one invoice, Bakerly has not identified anything in the Shipping Act that requires all billing regarding a shipment to be included in one invoice statement or that prohibits supplemental bills. Further, it may be that the unprecedented strain on the shipping industry during this timeframe justified departures from prior practice. *See* RX 14 ("If containers sit on a terminal or at a warehouse for an extended period of time, more than one invoice for that container may be issued. That simply reflects the billing practice of the underlying carrier or terminal."); CX 1340 (for accessorial invoices, "there is no fixed timeframe when Seafrigo receives these types of charges and so we are generating the invoices 'as we get them.'").

The evidence shows that at the time Bakerly requested the excel spreadsheets, Seafrigo warned that they might contain duplicates or "invoice redundancy." *See, e.g.,* CX 722 ("I would have to run a customized report trying to capture a timeframe. We might have some overlapping from previous invoices that you have already received."); CX 1338-39 ("if we are able to do this, we have no way of knowing if the data is duplicated or not. We would simply do a data dump week to week."). Seafrigo also explained early on that in "some cases it takes [carriers] 1 month+ to send us their invoice." CX 706-07. Seafrigo explained: "The only invoices that may not be included in these weekly batches would be additional charge type invoices like demurrage, per diem, exam charges, etc… We are sending this manually along with the back-up." CX 1349. Bakerly acknowledged that with "all containers that we have, the invoicing approval is getting extremely time consuming and this is delaying the whole operation," especially as Bakerly had migrated to a new system. CX 1341.

Moreover, because Bakerly refused to pay for many invoices, those invoices remained in an unpaid and billable status. Follow-up bills meant to document the extent of the arrearage would not violate the Shipping Act, nor would additional information sent by Seafrigo at Bakerly's request or to obtain payment. *See* RX 8 ("charges began accruing and multiple invoices were necessitated"); RX 14 ("In some instances, Seafrigo had to re-send invoices to Bakerly because apparently Bakerly lost track (or claimed to have lost track) of invoices that had previously been issued."). The attempt to document all of the unpaid invoices in the various formats requested by Bakerly, for example in various spreadsheets, contributed to the confusion. *See, e.g.*, CX 904 ("Seafrigo stated "All support documents have already been sent with our original invoices. The report is just a summarization of what has been billed."). In part, the multiple bills resulted from Seafrigo's continuing attempts to collect the mounting charges that it had paid to others on behalf of Bakerly.

The Shipping Act prohibits billing an additional amount that was not disclosed and agreed to but permits passing through charges with no markup. Here, the rate proposal stated that the rates did not include demurrage and detention charges, for which the shipper and/or consignee may be liable, but also did not state that these charges would be increased or billed beyond what Seafrigo was required to pay. If Seafrigo were expecting to be paid twice for demurrage or detention, that would exceed the agreement in the rate proposal and would be unreasonable. However, the record shows that where Seafrigo found an error, it did not expect payment. RX 24, RX 32. The record does not, however, support finding under these circumstances that the practice of sending multiple invoices was unreasonable.

iv. Overcharges

Bakerly points to two examples in the record that it believes are overcharges. Brief at 42-43, 50-53; Reply at 10-11. Seafrigo argues that "Bakerly's identification of supposed errors in isolated invoices is largely inaccurate" but admits that in a few isolated instances, it overcharged Bakerly. Opposition at 14-15.

Commission precedent supports finding that overcharges violate the filed rate doctrine. In *Total Fitness*, the Commission found that "the ALJ was correct in determining that Worldlink violated section 10(d)(1) of the Act by billing Total Fitness a second time without giving credit for the earlier payment to Worldlink's agent Cargocare." *Total Fitness*, 1998 WL 940255 at *10-11. Here, if there were any overcharges, they would violate the Shipping Act as both an unreasonable practice and a violation of the filed rate doctrine. However, the record does not support finding that Seafrigo overcharged Bakerly by more than the amount for which Seafrigo already accepts responsibility.

The evidence shows instances where Seafrigo admits to an overcharge. For example, for container SEGU9388853, Seafrigo admits to overcharging Bakerly by $8,879.55. RX 24; BReply/SFResponse/BPFF ¶ 46 ("Seafrigo admits that in this isolated instance it overcharged Bakerly by $8,879.55."). The record also shows instances where Seafrigo admits to double billing. For example, a duplicate charge of $3,659.50 was acknowledged by Seafrigo. BReply/SFResponse/BPFF ¶ 83(c)(iii); RX 32 ("The invoice overcharged Bakerly for $3,650, which amount is not being sought and will be credited."). Regarding another containers, Seafrigo stated "[p]er diem, if any, in this case will not be billed to Bakerly." CX 868. Therefore, the record supports Bakerly's argument that overcharges occurred, but the record also supports Seafrigo's argument that these were isolated instances for which it is no longer seeking payment.

To support its allegations of overcharges, Bakerly also points to emails it sent to Seafrigo, stating that they would not pay invoices without proper substantiation and discussing evaluations that Bakerly's team made about the invoices. However, this is not persuasive evidence that the invoices were, in fact, inaccurate or that Bakerly was being overcharged. Moreover, Bakerly often raised concerns about underlying documents and other complaints in response to Seafrigo's request for payment of past due freight, as well as demurrage and detention charges. *See, e.g.*, CX 699-700 and CX 696. Often, Bakerly ended up eventually accepting responsibility for and paying a significant amount of the past due charges.

Section 41102(c) prohibits unreasonable charges when they are practices. However, here, the evidence does not support finding that overcharges were systemic or a regular practice but rather isolated instances of errors. There are over a thousand invoices and 2.7 million dollars at issue. The overcharges that were identified by the parties are a tiny fraction of the charges. Moreover, Seafrigo is not claiming that it is entitled to collect overcharges and has identified $159,849.08 for which it is not seeking payment, as well as providing credits totaling $60,000 to Bakerly. Opposition at 15-16; CX 259; CX 627.

Bakerly has established that overcharges, above what Seafrigo paid on behalf of Bakerly, are unreasonable as they would constitute a markup on passed through charges. Bakerly has not established, however, that Seafrigo's normal, customary, and continuous practice was to invoice with the expectation of being paid twice or being overpaid. Rather, the evidence establishes that the actions complained of were often the result of Bakerly's continuing requests for additional information about charges and were not part of Seafrigo's practices. Contemporaneous documents show that any overcharges were a deviation from normal procedure; were outside of Seafrigo's normal, customary, or continuous practices; and that Seafrigo is not currently seeking payment for any overcharges.

Complainant has the burden to establish a violation of the Shipping Act. Thus, Bakerly has the obligation to establish that overcharges occurred on a normal, customary, or continuous basis. The evidence does not support finding that overcharges were a practice as required by Section 41102(c) and the evidence does not show more than occasional minor mistakes in Seafrigo's billing. Bakerly would not be responsible for paying any overcharges or amounts beyond the pass-through charges described in Seafrigo's tariff. But, Bakerly has not established that Seafrigo had an unreasonable practice of overbilling, rather, the evidence establishes that Seafrigo was reasonably attempting to obtain payment for significant amounts that it had paid on Bakerly's behalf. Therefore, because Bakerly has not established a practice of overcharging, Bakerly has not met its burden to establish a violation of section 41102(c) with regard to the so-called duplicative invoices.

4. Conclusion

As explained above, Bakerly has not established a violation of the filed rate doctrine, section 41104(a)(2)(A), as it has not established that the charges were inconsistent with the negotiated rates or tariffs. In addition, Bakerly has not established a section 41102(c) violation, as it has not shown that Seafrigo's practices were unreasonable or because it was not established that the practices were normal, customary, and continuous practices of Seafrigo, in violation of section 41102(c) and 46 C.F.R. § 545.5(d). The alleged violations of sections 41104(a)(14), 41104(a)(15), and 41104(d) are dismissed because the conduct occurred prior to those sections being adopted.

Because a violation of the Shipping Act is not established, it is not necessary to reach the issue of damages. However, even if Bakerly had established a violation, it is not clear that it would be entitled to reparations.

Bakerly asserts that it was billed $2,774,923.42 in invoices for which it does not take responsibility. Brief at 36. Bakerly further asserts that it has already paid $973,227.05 demurrage and $278,172.37 for detention for which it is seeking a refund. Brief at 36. In addition, Bakerly seeks an order that Seafrigo cease and desist collection of $1,288,809.92 in demurrage and $234,714.08 in detention. Brief at 36-37. Although the math does not quite add up, Bakerly admits that is has not paid over half of what it has been billed for demurrage and detention. Moreover, Seafrigo acknowledges that it is not seeking to be reimbursed for charges that resulted from its shortcomings, which total $159,849.08. Opposition at 15-16. As explained above, the Shipping Act does not justify non-payment of demurrage and detention charges under these circumstances.

IV. ORDER

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

ORDERED that Bakerly's Complaint be **DENIED**. It is

FURTHER ORDERED that Seafrigo's motion to file a sur-reply be **GRANTED**. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

BAKERLY, LLC, *Complainant*

v.

SEAFRIGO USA, INC., *Respondent*.

DOCKET NO. 22-17

Served: January 4, 2024

NOTICE OF COMMISSION DETERMINATION TO REVIEW

[exceptions filed by Complainant 1/25/2024; final decision 10/30/2024]

Notice is given that, pursuant to 46 C.F.R. § 502.227, the Commission has determined to review the Chief Administrative Law Judge's January 3, 2024, Initial Decision in this proceeding. Notwithstanding this determination to review, the parties can choose to file a memorandum excepting to any conclusions, findings, or statements contained in this decision and a brief in support of the memorandum; and reply to the exceptions as provided for under 46 C.F.R. § 502.227(a)(1), (2). The deadline to file a memorandum and brief is January 25, 2024, with the reply being due within 22 days after the date of service thereof.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

IN THE MATTER OF ATTORNEY MARCUS NUSSBAUM	Docket No. 24-03

Served: January 10, 2024

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*, Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, Max VEKICH, *Commissioners*.

Order Directing Marcus Nussbaum to Show Cause

[Settlement Agreement 2/23/2024]

Marcus Nussbaum is an attorney who has appeared in five Federal Maritime Commission (FMC) matters over the past decade and engaged in alleged conduct that may violate FMC practice rules in at least three of those matters: *Crocus Investments v. Marine Transport Logistics, Inc.*, FMC Docket No. 15-04; *Ovchinnikov v. Hitrinov*, FMC Docket Nos. 15-11 & 1953(I); and *Andrew v. Marine Transport Logistics, Inc.*, FMC Docket No. 20-12. These allegations were discussed or otherwise referenced in the Order Affirming the Initial Decision on Different Grounds, *Ovchinnikov*, FMC Docket Nos. 15-11 & 1953(I), Doc. 220, 2023 WL 1963462, at *2, *10-12 (FMC Feb. 8, 2023) (Order in *Ovchinnikov*). In that Order, the Commission stated it elected not to proceed as to the alleged misconduct as part of the case before it, but it discussed the allegations in detail and emphasized that the agency had the option to return to them later. *Id*. The Commission now does so.

The Commission hereby initiates a proceeding through the issuance of this Order to Show Cause, pursuant to 46 C.F.R. § 502.91, directing Mr. Nussbaum to show cause why the Commission should not impose a sanction of revocation or at least suspension of his permission to practice before the agency, on the basis of potential violations of the certification requirements of 46 C.F.R. § 502.6 and the professional conduct requirements of 46 C.F.R. § 502.26.

Mr. Nussbaum will have 30 days from the service of this Order to file a response. In this response, he may rely on evidence previously submitted in the three FMC matters noted above and need not re-submit it. He may also submit additional evidence, including affidavits and documentary evidence. If Mr. Nussbaum requests oral argument, that request should be made in accordance with 46 C.F.R. § 502.241 as part of his main submission.

I. BACKGROUND

The FMC's final Order in *Ovchinnikov* specifically addressed Mr. Nussbaum's alleged misconduct in all three FMC matters at issue here. *See* 2023 WL 1963462, at *2, *10-12. In that Order, the Commission rejected respondents' filing of purported exceptions to the Administrative Law Judge's (ALJ) denial of their motion for an order to show cause why Mr. Nussbaum should not have his privilege of practicing before the Commission revoked. *Id*. at *2, *10-11. Respondents' motion had alleged specific violations of the American Bar Association's (ABA) Model Rules of Professional Conduct, with supporting evidence. *See* FMC Docket Nos. 15-11 & 1953(I), Doc. 112. Although the Commission found respondents' exceptions to the ALJ's denial to be procedurally defective, it emphasized that it did have "the authority to act on the serious allegations of misconduct" by Mr. Nussbaum, for example by starting a new proceeding to address the conduct, "about which the Commission has repeatedly warned him." Order in *Ovchinnikov*, 2023 WL 1963462, at *2. In particular, the Commission explained that its regulations authorize it to institute a proceeding by order to show cause and that attorneys practicing before it are expected to conform to the ABA's Model Rules. *Id*. at *12 (citing 46 C.F.R. § 502.91, 502.26). The Order noted that the agency was choosing not to take such action at that time, "but may do so in the future." *Id*. at *2.

In its Order, the Commission described the alleged misconduct. Order in *Ovchinnikov*, 2023 WL 1963462, at *11. It noted that the allegations in the *Ovchinnikov* matter included that Mr. Nussbaum falsified evidence that he submitted to the FMC; that he misrepresented facts, arguments, and actions of the ALJ; that he misused confidential information from a former client and acted to the detriment of that client; that he "acted extremely uncivilly;" and that he failed to deny allegations of forgery and other misconduct. *Id*. (citing opposing party filings from 2016 and 2017).

The Order also described allegations that Mr. Nussbaum had engaged in misconduct in two other FMC matters. In one case, "Mr. Nussbaum, among other things, repeatedly misquoted the record to support his client's claims and attacked the ALJ as advocating for the opposing side." Order in *Ovchinnikov*, 2023 WL 1963462, at *11 (citing *Andrew v. Marine Transp. Logistics, Inc.*, FMC Docket No. 20-12, Docs. 31, 38 (opposing party filings from 2021 and 2022); *see also* Docket No. 20-12, Doc. 41 (order affirming initial decision)). In the other case, the Commission directed Mr. Nussbaum not to file documents that did not meet the verification requirements of 46 C.F.R. § 502.6 or that did not comply with the ABA Model Rules, after finding that he had come "close to admitting" that his own claims that opposing attorneys had altered evidence were baseless. Order in *Ovchinnikov*, 2023 WL 1963462, at *11 (quoting *Crocus Investments v. Marine Transp. Logistics, Inc.*, FMC Docket No. 15-04, 2018 WL 2113084, at *1, 8 (FMC May 2, 2018)). The Commission also noted that such conduct "'bears the unmistakable hallmarks of other pleadings filed by Mr. Nussbaum in this case and other proceedings before the Commission,' and warned him that, '[f]urther violation of these rules may result in sanctions by the Commission.'" *Id*. (quoting *Crocus*, 2018 WL 2113084, at *1, 8, FMC Docket No. 15-04, Doc. 62 (order denying motion to suspend counsel)).

II. DISCUSSION

In light of the above, the Commission now "institute[s] a proceeding by order to show cause," 46 C.F.R. § 502.91, and directs Mr. Nussbaum to show why his permission to practice before the FMC should not be revoked or at least suspended because of his alleged conduct in the three FMC cases described above.

The alleged conduct implicates 46 C.F.R. § 502.6(a). Under that section, the signature of an attorney representing a party in an FMC matter constitutes a certificate that the filing is, "to the best of the signer's knowledge, information and belief formed after reasonable inquiry, well grounded in fact" and warranted by the law, and not "interposed for any improper purpose, such as to harass or to cause unnecessary delay or a needless increase in the cost of litigation." 46 C.F.R. § 502.6(a). For a "willful" violation, the Commission may take "appropriate disciplinary action." *Id*. This section is comparable to Federal Rule of Civil Procedure 11, which provides that attorneys signing federal court pleadings are certifying that they are well-supported in fact and law along similar lines. *See* Fed. R. Civ. P. 11(b).

In addition, the alleged conduct implicates the ABA Model Rules. Order in *Ovchinnikov*, 2023 WL 1963462, at *12. Those Rules are incorporated at 46 C.F.R. § 502.26: "An attorney practicing before the Commission is expected to conform to the standards of conduct set forth in the American Bar Association's Model Rules of Professional Conduct in addition to the specific requirements of this chapter." Model Rules that are potentially implicated here are: Rule 1.8 (Conflict of Interest) (a lawyer shall not use information related to representation to disadvantage a client without consent); Rule 1.9 (Duties to Former Clients) (a lawyer shall not reveal information relating to the representation of a former client except as these Rules would permit or require); Rule 3.1 (Meritorious Claims & Contentions) (a lawyer shall not assert an issue unless there is a non-frivolous basis in law and fact for doing so); Rule 3.3 (Candor Toward the Tribunal) (a lawyer shall not knowingly make a false statement of fact or law to a tribunal or offer evidence the lawyer knows to be false); Rule 3.4 (Fairness to Opposing Party & Counsel) (a lawyer shall not falsify evidence); and Rule 8.4 (Misconduct) (a lawyer shall not engage in conduct involving dishonesty or misrepresentation or that is prejudicial to the administration of justice).

In this proceeding, the Commission will consider whether Mr. Nussbaum's ability to practice before it should be revoked or at least suspended. Federal agencies like the FMC have the authority to police the conduct of attorneys who practice before them. *See Polydoroff v. Interstate Commerce Comm'n*, 773 F.2d 372, 374-75 (D.C. Cir. 1985) (affirming six-month suspension of attorneys from practice before the ICC and noting that "[t]here can be little doubt that the [ICC], like any other institution in which lawyers or other professionals participate, has authority to police the behavior of practitioners appearing before it."). A revocation or suspension of permission to practice may well be an appropriate sanction for the violations of the standards of practice contained in 46 C.F.R. §§ 502.6 and 502.26 alleged here, particularly the alleged making of submissions that lack a factual basis and conduct disruptive of agency proceedings, in order to protect the integrity of the Commission's adjudicative process.

III. CONCLUSION

The Commission hereby:

(1) **ORDERS** that a proceeding is instituted by this Order to Show Cause pursuant to 46 C.F.R. § 502.91;

(2) **ORDERS** that Marcus Nussbaum show cause why his permission to practice before the FMC should not be revoked or at least suspended, on the basis of 46 C.F.R. §§ 502.6 and 502.26, in light of the alleged misconduct in *Crocus Investments v. Marine Transport Logistics, Inc.*, FMC Docket No. 15-04; *Ovchinnikov v. Hitrinov*, FMC Docket Nos. 15-11 & 1953(I); and *Andrew v. Marine Transport Logistics, Inc.*, FMC Docket No. 20-12, as discussed or otherwise referenced in this Order; and

(3) **ORDERS** that Mr. Nussbaum's response to this Order, if any, is due 30 days from service of the Order. In his responsive submission, Mr. Nussbaum may rely on evidence previously submitted in FMC Docket Nos. 15-04, 15-11 & 1953(I), and 20-12, with no need to submit it again. He may also rely on any additional evidence he may provide as to those FMC matters, including affidavits and documentary evidence, as part of his responsive submission. If Mr. Nussbaum requests oral argument, that request should be made in accord with 46 C.F.R. § 502.241 as part of his responsive submission. The Commission will issue a decision based on the evidence and argument described in this Order, without the use of the additional procedures described in 46 C.F.R. Subparts I, J, and L, absent an affirmative showing by Mr. Nussbaum that any such procedures are necessary.

In the Matter of Marcus Nussbaum

By the Commission.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

COLOR BRANDS, LLC v. AAF LOGISTICS, INC.	Docket No. 22-18

Served: January 18, 2024

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*; Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, and Max M. VEKICH, *Commissioners*.

Order Affirming Initial Decision In Part and Remanding In Part

[remand decision served 8/27/2024]

I. INTRODUCTION

On August 30, 2022, Color Brands, LLC (Color Brands) filed a complaint against AAF Logistics, Inc. (AAF) alleging Shipping Act violations and asking for reparations. On January 27, 2023, the Administrative Law Judge (ALJ) issued an Initial Decision on Default (I.D.) awarding reparations to Complainant. On February 23, 2023, the Federal Maritime Commission (Commission) determined to review the I.D.

For the reasons discussed below, the Commission remands this proceeding to the ALJ to determine the basis for reparations and the correct award amount.

II. BACKGROUND

Complainant Color Brands is a Michigan corporation and exports shipments. Complaint at ¶¶ 1, 7. Respondent AAF is a

California corporation and a common carrier within the meaning of the Shipping Act. *Id.* at ¶ 2.

Color Brands claimed that "[s]ince August 1, 2019, over 1,250 shipments took place with repeated requests by Color Brands that AAF provide proof of insurance coverage." *Id.* at ¶ 14. Color Brands alleged that: it "has shipped with AAF freight with a stated value of $37,057,209.14;" "AAF charged an average rate of[0.32%] of value for the requested insurance coverage;" and "[t]his converts to Color Brands paying AAF $118,583.07 for such coverage." *Id.* Despite Color Brands making payments for cargo insurance coverage for over 1,250 shipments, "AAF has provided proof of insurance coverage only three times which is when so required under letter of credit terms." *Id.*

Color Brands also stated that some shipments were delivered with physical damage and were also delayed, and claims that AAF has engaged in a pattern of improper practices in handling those damage claims, and "[a]s a result of AAF's improper practices, Color Brands has been damaged in the principal amount of $204,041.10." *Id.* at ¶¶ 15-20. Color Brands averred that "AAF had otherwise said insurance coverage was not obtained for Color Brands's shipments, thus, it appears AAF has been charging and been paid for cargo insurance coverage but not, in fact, obtaining such coverage." *Id.* at ¶ 12. Color Brands stated that "[it] had been given no information on [] who the cargo was covered by, or who the insurer was" for its eighteen damaged shipments. *Id.* at ¶ 13.

AAF did not respond to the complaint or otherwise participate in the proceeding. See I.D. at 1. On November 28, 2022, Color Brands filed a motion seeking default and entry of a default judgment. On January 27, 2023, the ALJ issued an Initial Decision on Default awarding reparations to Complainant, stating that "Complainant alleges violations of the Shipping Act and a pattern of conduct sufficient to demonstrate a violation of the Shipping Act." *Id.* at 4.

III. DISCUSSION

A. <u>Initial Decision on Default</u>

As of the date of the ALJ's issuance of the I.D., "AAF has failed to respond to the complaint, the initial order, the order to show cause, the motion for default, or the order to respond to the motion for default." I.D. at 2. "AAF has been advised that a default may be entered against it in numerous orders as well as by the attorneys it hired to represent it." *Id.* "Despite multiple warnings that failure to respond would result in a default decision, AAF has failed to respond or participate in this proceeding." *Id.* at 3. "In addition, Respondent hired attorneys to represent it but decided to terminate their service." *Id.*

Respondent AAF was aware of this proceeding against it. That is demonstrated by the fact that AAF hired attorneys to represent it in this proceeding, although it terminated the attorneys' service about a month later. AAF, however, failed to participate in this proceeding despite many opportunities to do so and numerous notices and ALJ orders.

Therefore, the ALJ's determination of a default against AAF was proper. *See* 46 C.F.R. § 502.62(b)(6)(i) (failure of a party to file an answer within the time provided will be deemed to authorize the presiding officer to enter an initial decision on default). *See also* 46 C.F.R. §§ 502.65(b)-(c) (when a party is found to be in default, the Commission or the presiding officer may issue a decision on default upon consideration of the record, and the presiding officer may require additional information or clarification when needed to issue a decision on default, including a determination of the amount of reparations).

B. <u>Reparations</u>

Although the Initial Decision on Default was properly issued, we remand for further consideration the award of reparations in the amount of $322,624.17, plus interest.

The Shipping Act provides that "the Federal Maritime Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of [the Shipping Act]." 46 U.S.C. § 41305(b). The term "'actual injury' includes the loss of interest at commercial rates compounded from the date of injury." 46 U.S.C. § 41305(a). The Commission, however, must order payment of reparations and interest only if "the complaint was filed within the period specified in section 41301(a)." 46 U.S.C. § 41305(b). In turn, section 41301(a) provides that "[i]f the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation." 46 U.S.C. § 41301(a). *See also* 46 C.F.R. § 502.62(a)(4)(iii) ("[a] complaint seeking reparation must be filed within three years after the claim accrues").

Color Brands filed its complaint on August 30, 2022. Color Brands's complaint, however, states that "[s]ince August 1, 2019, over 1,250 shipments took place with Color Brands repeated request that AAF provide proof of insurance coverage." Complaint at ¶ 14. Even if we accept the factual allegations of the complaint as true in the context of Complainant's motion for entry of default judgment, it is clear that some of the injury might have occurred more than three years before Color Brands' filing of its complaint with the Commission. Any such injury must be excluded from the reparations amount.

In addition to reparations, the I.D. awarded interest and stated that "Color Brands is also entitled to interest running from December 17, 2021, when it requested evidence of insurance, to be calculated by the Commission when this judgment and decision become administratively final." I.D. at 5. The Shipping Act requires the Commission to award the loss of interest at commercial rates compounded from the date of injury. *See* 46 U.S.C. § 41305(a). The allegation shows, however, that December 17, 2021, was not the date of injury for Color Brands's insurance premium claim. The date appears in paragraph 9 of the complaint. That paragraph states that "[o]n December 17, 2021, Color Brands requested evidence of insurance on orders through AAF that had received damages in transit." Complaint at ¶ 9. Color Brands claimed that its cargoes were damaged for a "total of eighteen orders." *Id.* at ¶ 13. December 17, 2021, was the date on which Color Brands requested evidence of insurance only for its damaged cargoes. Color Brands' complaint, however, states that "over 1,250 shipments took place with Color Brands repeated requests that AAF provide proof of insurance coverage." *Id.* at ¶ 14. As Color Brands claims injury of $118,583.07 for cargo insurance premium for its "over 1,250 shipments," the proper date of injury for this claim may be the date of each shipment for which Color Brands paid cargo insurance premium but AAF failed to purchase such coverage. Color Brands should be able to provide the relevant information and, if necessary, supporting documents. In addition, Color Brands also stated that "AAF had provided proof of insurance coverage only three times which is when so required under letter of credit terms." *Id.* at ¶ 14. Therefore, inasmuch as AAF purchased cargo insurance coverage for some of the shipments, Color Brands' insurance premium claim should be reduced accordingly.

Nor is December 17, 2021, the date of injury for Color Brands' improper practices claims. Color Brands is claiming that it was injured with respect to its damaged shipments because AAF did not purchase cargo insurance coverage even though Color Brands paid AAF for such coverage, and thus Color Brands could not recover their cargo damages from cargo insurers. *See* Complaint at ¶¶ 7 - 20. As Color Brands claims they could not recover cargo damages from cargo insurers because of AAF's failure to secure such insurance coverage in spite of Color Brands' payment of insurance premium for such insurance coverage, the dates of injury for these claims should be the dates on which Color Brands' cargoes were damaged. Color Brands should be able to provide the relevant information and, if necessary, supporting documents for its improper practices claims.

Given, among other things, AAF's failure to participate in this proceeding, there is no evidence in the record to assure the Commission that $322,624.17 is the proper and lawful amount that should be awarded. Considering, however, that Color Brands alleges that there were more than 1,250 shipments, it may be burdensome for Color Brands to submit all the relevant shipping documents and for the Commission to review all those documents. Instead, pursuant to the Commission's regulation for reparations with respect to multiple shipments, the ALJ should be able to determine the reasonable date or dates of injury. 46 C.F.R. § 502.251 (if many shipments are involved, the Commission will determine the issues as to violations, injury to complainant, and right to reparation; in certain cases, freight bills and other exhibits bearing on the details of all shipments, and the amount of reparation on each, need not be produced unless called for or needed to develop other pertinent facts). For example, for Color Brands' insurance premium claims, it would not appear to be unreasonable to determine that the mid-point date of the period of all eligible shipments was the date of injury for the claim, because such a date may award Color Brands approximately the same amount of interest as being calculated using each shipment date, by evening out the earlier and later dates of injury.

IV. CONCLUSION

Although the Initial Decision on Default was properly issued, we remand for further consideration the award of reparations in the amount of $322,624.17, plus interest.

IT IS ORDERED that the ALJ's determination of a default against AAF Logistics, Inc. is affirmed.

IT IS FURTHER ORDERED that the ALJ's determination with respect to the reparations amount and date of injury is vacated, and this case is remanded to the ALJ for further proceedings consistent with this order.

By the Commission

David Eng
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

VISUAL COMFORT & CO., *Complainant*

v.

COSCO SHIPPING LINES (NORTH AMERICA) INC.,
Respondent.

DOCKET NO. 24-01

Served: February 6, 2024

ORDER OF: Linda S. Harris CROVELLA, *Administrative Law Judge*.

ORDER GRANTING COMPLAINANT'S MOTION TO AMEND COMPLAINT AND SUBSTITUTE RESPONDENT, AND GRANTING RESPONDENT'S MOTION TO DISMISS

[Notice Not to Review served 3/8/2024, order administratively final]

On February 5, 2024, Complainant Visual Comfort & Co. ("VCC") filed an Unopposed Motion for Leave to File Amended Complaint ("MTA"), in response to COSCO Shipping Lines (North America) Inc.'s ("COSCON") Verified Motion to Dismiss for Lack of Jurisdiction ("MTD"), filed on January 24, 2024.

The MTD asserts that the current Respondent, COSCON, is "not a vessel-operating ocean common carrier as that term is defined in the Shipping Act and FMC regulations" but rather, "serves only as the general agent for North America for the actual ocean common carrier, identified on the FMC's website as 'COSCO Shipping Lines Co., Ltd.'" MTD at 1, 3; Complaint at 2, ¶ 7. COSCON asserts that it is an agent that does not hold itself out "in its own name" as performing as an ocean common carrier, and accordingly, "the Commission does not have personal jurisdiction over COSCON or subject matter jurisdiction of VCC's claims against COSCON." *Id.* at 3-4; 5-6; Verification of Houghtalin. COSCON further states that, "the appropriate measure is for VCC to file a new complaint naming only COSCO Shipping Line Co., Ltd. as respondent or to file an amended complaint substituting COSCO Shipping Lines Co., Ltd. for COSCON."[1] MTD at 7.

Accordingly, and after conferring with counsel, VCC filed the MTA and attached the proposed Amended Complaint identifying "COSCO Shipping Lines Co., Ltd." ("COSCO") as the Respondent and alleging that "COSCO is a vessel-operating ocean common carrier as that term is defined by 46 U.S.C. § 40102(18) with organization number 015614." Amended Complaint at 2, ¶ 7. VCC asserts in the MTA that it has amended the complaint only as to the identity and description of the Respondent and, "proposes no other amendments." MTA at 2.

[1] Counsel for COSCON indicated that "the new pleading may be served on the undersigned, rather than any COSCO entities…[to] minimize any delay." *Id.*

The complaint in this matter was filed on January 4, 2024. COSCON filed the MTD 20 days later, and VCC filed the MTA and a copy of the amended complaint 12 days thereafter. Pursuant to 46 C.F.R. § 502.66(a) and (b), there is good cause to allow the filing of the amended complaint because it does not "broaden the issues," was filed early in the proceedings, and is not opposed by Respondent. Since the parties' motions indicate that they agree that COSCON is not an appropriate party to this proceeding, good cause is also established to dismiss the proceeding as to COSCON and substitute COSCO Shipping Lines Co., Ltd as the sole respondent.

Accordingly, it is

ORDERED that Respondent's Motion to Dismiss is **GRANTED** as to COSCO Shipping Lines (North America) Inc., and it is removed as a party to this proceeding. It is further

ORDERED that Complainant's Motion for Leave to File Amended Complaint, and thereby substitute COSCO Shipping Lines Co., Ltd as the sole Respondent in this proceeding, is **GRANTED**. It is further

ORDERED that Respondent COSCO Shipping Lines Co., Ltd. respond to the Amended Complaint within 14 days after service of this Order, pursuant to §502.66(b) and in order to avoid further delay. It is further

ORDERED that the parties submit a joint status report and proposed schedule within 25 days of service of the answer, as set forth in the Initial Order in this proceeding, and to follow the other instructions contained therein.

The Secretary is requested to docket the Amended Complaint with today's date, February 6, 2024. Complainant served the Amended Complaint on Counsel identified in the Notice of Special Appearance and the Motion to Dismiss, and pursuant to Commission Rule § 502.66(b), the undersigned authorizes Complainant's service of this pleading, and the Secretary need not provide further service. Further, the Secretary is requested to revise the caption in this matter to remove COSCO Shipping Lines (Noth America) Inc. as Respondent and substitute COSCO Shipping Lines Co. Ltd as Respondent.

Linda S. Harris Crovella
Administrative aw Judge

FEDERAL MARITIME COMMISSION

INTERMODAL MOTOR CARRIERS CONFERENCE, AMERICAN TRUCKING ASS'N, INC., *Complainant*, v. OCEMA, ET AL., *Respondent.*	Docket No. 20-14

Served: February 13, 2024

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*; Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, *Commissioners*. Max M. VEKICH, *Commissioner*, dissenting.

Order Affirming Initial Decision
and Remanding for Further Proceedings
[remand decision served 12/10/2024]

This Order addresses whether certain ocean common carrier practices that restrict motor carriers' choice of chassis providers for port-to-port shipments (merchant haulage) violate 46 U.S.C. § 41102(c). The Administrative Law Judge (ALJ) ruled that Respondents' practice of designating an exclusive chassis provider for merchant haulage and using merchant haulage volume to obtain discounted carrier haulage rates where motor carriers have no choice of chassis providers violates Section 41102(c) and ordered Respondents to cease and desist engaging in those practices. The ALJ also ruled that the Commission has authority to order ocean common carriers not to withdraw from interoperable chassis pools, but could not determine whether that relief is appropriate here until the record is further developed.

In this interlocutory appeal, Respondents challenge the ALJ's rulings on procedural and substantive grounds. Respondents argue that the Commission lacks jurisdiction because the challenged restrictions relate to their contracts with chassis providers and involve overland transportation between the ports and inland facilities, and also assert that Complainant's Section 41102(c) claims cannot be resolved without joining the major chassis providers as parties. Substantively, Respondents argue that the Commission's long-standing test for assessing the reasonableness of exclusive arrangements should not apply here and claim the ALJ misapplied the law in finding Respondents' practices unlawful under Section 41102(c) because they are not reasonably related, fit and appropriate to their goal of ensuring an adequate supply of chassis for merchant haulage. Complainant opposes Respondents' appeal and asks the Commission to affirm the ALJ's Initial Decision Partially Granting Summary Decision (I.D.) in its entirety.

The ALJ's findings on these claims and the cease-and-desist order are supported by the record and by sound reasoning. The Commission plainly has jurisdiction over allegations that ocean common carriers' practices and rules governing chassis provisioning violate Section 41102(c) and those allegations can be resolved without the chassis providers participating as parties in this case. Substantively, the Commission finds that Respondents' rules and practices designating an exclusive chassis provider for merchant haulage and using merchant haulage volume to lower their carrier haulage rates when motor carriers have no choice of providers are unreasonable under Section 41102(c).

The Commission denies Respondents' exceptions and affirms the ALJ's Initial Decision in its entirety. Respondents are ordered to cease and desist from the restrictive practices found to be unlawful under Section 41102(c) in the four regions covered by this ALJ's Initial Decision: Los Angeles/Long Beach, Chicago, Savannah, and Memphis. This case is remanded to the ALJ to resolve the remaining claims.

I. BACKGROUND

A. Factual Background

1. Parties and Intermodal Equipment Providers

Complainant Intermodal Motor Carriers Conference (Intermodal) is a conference of the American Trucking Association, Inc. that represents the interests of motor carriers hired to transport containerized cargo between U.S. ports and inland facilities. Joint Stipulation of Facts (JSF) ¶¶ 1-2.[1] Securing the chassis (wheeled metal frames) required to transport containers over the road between ports and inland facilities is an essential part of the motor carriers' business. I.D., 2. Chassis are generally owned by intermodal equipment providers who rent them at daily rates. *Id.*

Respondents Ocean Carrier Equipment Management Association Inc. (OCEMA) and Consolidated Chassis Management LLC (CCM) are associations of ocean common carriers that operate under the authority of agreements filed with the Commission. JSF ¶¶ 3-10, 14-19. OCEMA was established in 1990 to allow its ocean common carrier members to confer and collaborate on certain issues of mutual interest and concern. *Id.* ¶ 3; FMC Agreement No. 011284. OCEMA's website describes it as "an association of major U.S. and foreign flag international ocean carriers" that "operate worldwide and serve all major U.S. ports and inland locations, moving cargoes primarily in containers." *See* JSF ¶ 10; http://www.ocema.org/about.html. OCEMA members mostly transport containerized cargo, and their services include arranging intermodal transportation between ports and inland locations by motor carrier or railroad. *Id.*

CCM was established in 2005 "to provide for a cooperative working arrangement" allowing its ocean common carriers members to form and operate "local, metropolitan, and/or regional chassis pools." FMC Agreement No. 011962 (CCM Agreement),[2]

[1]Appendix A lists the docketed filings and submissions referenced in this Order. References to documents the parties submitted or proposed for confidential treatment under 46 C.F.R. § 502.5 include the descriptor "Confid."

[2]The Agreement Library is available at https://www2.fmc.gov /FMC.Agreements.Web/Public.

Art. 2; JSF ¶¶ 14, 16. The CCM Agreement authorizes the parties "to meet, discuss, exchange information and data, negotiate, and agree upon all matters related to the establishment, operation and use of Chassis Pools." CCM Agreement, Art. 5.2. OCEMA and its members are also parties to the CCM Agreement. *Id.,* Art. 3. CCM manages some regional chassis pools and has issued a manual containing rules and guidance on chassis usage and charges. I.D., 16.

Individual ocean common carriers who are OCEMA and CCM members are named as Respondents, and that list includes: CMA CGM S.A.; COSCO Shipping Lines Co. Ltd. (COSCO); Evergreen Line Joint Service Agreement (Evergreen) (FMC No. 011982); Hapag-Lloyd AG; HMM Co. Ltd.; Maersk A/S; MSC Mediterranean Shipping Company S.A. (MSC); Ocean Network Express PTE Ltd. (ONE); and Zim Integrated Shipping Services. Two carriers who do not belong to both organizations are also named as Respondents: (1) Wan Hai Lines Ltd. (Wan Hai) belongs to OCEMA but not CCM (JSF ¶ 149), and (2) Yang Ming Marine Transport Corp. (Yang Ming) belongs to CCM but is no longer a member of OCEMA (JSF ¶¶ 163-64).

The Respondent ocean carriers contract with three major chassis providers who currently dominate the U.S. chassis market: Direct Chassislink, Inc. (DCLI), Flexi-Van Leasing, LLC (Flexi-Van) and Interpool, Inc. d/b/a TRAC Intermodal (TRAC), collectively referred to as the IEPs.[3] JSF ¶¶ 188-190, 207. Respondents typically rent the chassis from the IEPs, and shippers or motor carriers are then billed for chassis usage in accordance with that ocean common carriers' contract with the IEPs and/or CCM rules, or some other prearranged system. *See* I.D., 2. North American Chassis Pool Cooperative, LLC (NACPC) also operates as an intermodal chassis provider, and it was established by a group of motor carriers. JSF ¶¶ 191, 207.

[3]In this Order, IEP refers to the three major chassis providers: DCLI, Flexi-Van, and TRAC. "Chassis provider" is used as a generic term to include the three IEPs and any others engaged in the business of supplying chassis for containerized cargo transported in U.S. foreign commerce.

2. Haulage Types and Chassis Provision Models

Customers[4] of ocean common carriers can opt for door-to-port transportation (carrier haulage) or port-to-port transportation (merchant haulage). I.D., 15 (Finding Nos. 9-12). If the customer opts for carrier haulage, the ocean common carrier is responsible for arranging and paying the cost of transporting the cargo between an inland facility and the port. *Id.* If the customer opts for merchant haulage, the customer takes responsibility for arranging and paying the cost of transporting the cargo between an inland facility and the port. *Id.* Chassis are generally provided under one of four different models depending on who owns the chassis equipment and whether the chassis are interchangeable. *Id.* at 15-18 (Finding Nos. 14-34).

Chassis Provision Models[5] (Table 1)

1. Single Chassis Provider	**2. Gray Pool**
*Chassis owned by chassis provider *Daily usage (rental) subject to individually negotiated agreements *Maintenance & repairs responsibility of chassis provider *Chassis picked up & dropped off at provider's location *Daily usage charges established by contract or at posted daily rates	*Chassis contributed by several providers *Operated under a pool manager *Chassis providers receive a share of revenue based on number of chassis they contribute *Chassis are interchangeable regardless of which provider contributed them.

[4]"Customer" in this Order generally refers to the party that contracts for ocean transportation service for containerized cargo which is consistent with the parties' use of the term. Depending on the situation, the customer might be the beneficial cargo owner (BCO), a non-vessel operating common carrier (NVOCC), or another entity that contracts with the ocean common carrier for ocean transportation service.

[5]*See* JSF ¶¶ 192-94; Complainant's Reply Stmt. Facts ¶¶ 42-43; Rodrigue Report 29 (Figure 8) (citing U.S. Government Accountability Office (2021), Commercial Shipping: Information on How Intermodal Chassis Are Made Available and the Federal Government's Oversight Role, 3, 10-13).

	*Maintenance & repairs are the responsibility of the pool manager.
3. Pool of Pools Los Angeles/Long Beach *Functions by cooperation among chassis providers *Providers are DCLI, TRAC, and Flexi-Van (the IEPs) *Pools are separately managed *Flexible pickup/drop off locations *Pool chassis are interchangeable *Maintenance and repairs are responsibility of each chassis provider *Billing rights are assigned to the provider who has a contractual relationship with the ocean common carrier whose container is being moved.	**4. Motor Carrier Controlled (Trucker-Owned Wheels)** *Chassis owned or leased long term by motor carriers *Chassis provided as part of the transportation service *Maintenance and repairs are the responsibility of the motor carrier owners.

Complainant is challenging practices Respondents employ in connection with Models 1, 2 and 3 in Table 1 when motor carriers obtain chassis for merchant haulage. Depending on how they are structured, each model has inherent features that affect choice and flexibility. Single-provider or proprietary pools, by their nature, do not offer users a choice of equipment providers. I.D., 15 (Finding No. 14); JSF ¶ 192. Fully interoperable or gray pools commingle multiple chassis providers' equipment and operate under rules that assign particular providers the right to bill for chassis usage regardless of which provider actually owns the equipment that customer used. Complainant's Reply Stmt. Facts ¶ 36.

3. CCM Rules and Chassis Pool Operations

CCM has established rules for chassis pool operations, chassis allocation, and billing for chassis usage which are set forth in a document entitled Pools Operations Manual (Version 4.0, effective October 2019) (hereinafter CCMP Operations Manual). *See* I.D., 16 (Finding Nos. 19-22). CCM allocation rules allow an IEP to charge the ocean carrier's customer for chassis usage regardless of which IEP actually owns the equipment used. *Id.* CCM Rule 5.5 assigns chassis charges to the ocean carrier's designated or preferred provider. It provides that: "Usage Days will be assigned by default to the User associated with the Container Line Operator for the container loaded on a Chassis, (i.e., to either the User itself or to the User for whom the Container Line Operator is a customer)." *Id.* (Finding No. 21).[6] The CCMP Operations Manual defines "User" as "an entity that has entered into a written Master Chassis Use Agreement with a pool" and "Container Line Operator" is defined as "the ocean carrier that is operating the container at the time of usage." *Id.*

CCM Rule 5.7 provides that motor carriers may select the chassis provider *but only if* ocean common carriers and IEPs grant an exception. *Id.* (Finding No. 22) (emphasis added). It also describes how chassis usage charges are assigned if the "Container Line Operator" (ocean common carrier) grants the motor carrier's request for an exception. Rule 5.7 provides that:

> Notwithstanding Section 5.5, under the Choice Program, Usage Days may be directed to another User when the Container Line Operator and the User for whom the Container Line Operator is a Customer *authorizes a deviation from the default assignment*. To utilize this program, the Container Line Operator must notify CCM that it allows exceptions: at the shipment level (based on booking or bill of lading reference); upon request and approval; based on the motor carrier (for merchant haulage moves); or for all merchant haulage moves (provided the Container

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[6]The rule text quoted above is not entitled to confidential treatment, but we note that the ALJ granted confidential treatment to Exhibits C and G (CX2423 and CX 2428-29) of Version 4.0 of CCM Rules 5.5 and 5.7 and Exhibit C of Version 2.7 of CCM Rules 5.5 and 5.7 (CX 2218)). I.D., 10. The ALJ also noted that CCMP Version 4.6 "is not part of the record and was not reviewed" or considered aside from addressing the parties' confidentiality requests. I.D., 10 n.4.

> Line Operator provides CCM with access to shipment data sufficient to make such assignments).

Id.

At one time, CCM chassis pool subsidiaries serviced ports and inland terminal facilities across much of the United States. *See* JSF ¶¶ 200-204. CCM-operated pools formerly included:

> (1) Chicago & Ohio Valley Consolidated Chassis Pool LLC (Chicago Pool) (serving Chicago, Illinois; multiple cities in Ohio; Indianapolis, Indiana; and Louisville, Kentucky);
>
> (2) Denver Consolidated Chassis Pool LLC (serving Denver and Salt Lake City);
>
> (3) Gulf Consolidated Chassis Pool LLC (Gulf Pool) (serving Houston, Dallas and other Texas cities and New Orleans, Louisiana);
>
> (4) Mid-South Consolidated Chassis Pool LLC (serving Memphis and Nashville, Tennessee);
>
> (5) Mid-West Consolidated Chassis Pool LLC (serving St. Louis, Missouri; Kansas City, Kansas; and Omaha, Nebraska); and
>
> (6) South Atlantic Chassis Pool LLC (serving Atlanta and Savannah, Georgia; Charleston, South Carolina; Charlotte, North Carolina; Jacksonville and Tampa, Florida).

Id.; *see also* http://www.ocema.org/ccm.html. The CCM-operated Gulf Pool and Chicago Pool ceased operating on August 19, 2020.

Evergreen is a CCM member but operates under a different chassis-provisioning model. It obtains chassis from IEPs for both carrier and merchant haulage at a single, fixed daily contract rate. I.D., 14 (Finding No. 8). Evergreen's merchant haulage customers pay a fixed chassis usage charge that covers the day of delivery plus four business days, after which the per diem charge is $20.00. *Id.*

4. Chassis Pools in Test Case Locations

At the ALJ's suggestion, the parties limited the time frame and geographic scope of this case to focus initially on the ports at Los Angeles/Long Beach and Savannah and intermodal facilities in Memphis and Chicago as test case regions. I.D. at 3, 17-18, 43.[7] The Memphis and Savannah facilities operate under CCM Rules. *Id*. at 17-18 (Finding No. 32-33). The Memphis region is serviced by the Mid-South Pool which operates as an interoperable gray pool and by proprietary pools operated by two of the major IEPs, DCLI and TRAC. JSF ¶ 200; Complainant's Reply Stmt. Facts ¶¶ 645-46. The Savannah region is serviced by the South Atlantic Chassis Pool (SACP) Agreement (FMC Agreement No. 011980) which operates an interoperable gray pool. JSF ¶¶ 200, 205-206. It services the ports and intermodal terminals at Atlanta, Charleston, Savannah, and Jacksonville. *Id.* ¶ 200. Ocean carriers using on-dock chassis at the Ports of Savannah and Jacksonville must use SACP-supplied chassis. *Id*. ¶ 200.

The Chicago region and Los Angeles and Long Beach ports are not currently serviced by CCM pools and do not operate under its rules. JSF ¶¶ 203-04; *see* I.D., 17-18 (Finding Nos. 24, 31). Following the closure of the Chicago Pool in August 2020, the Chicago region is serviced by individual proprietary pools. I.D., 17 (Finding No. 31); JSF ¶ 204. The Los Angeles and Long Beach ports are serviced by the Pool of Pools which is operated collectively by the IEPs (DCLI, TRAC Intermodal, and Flexi-Van). JSF ¶¶195-97. The Pool of Pools operates as a gray pool so a motor carrier may use any chassis in the pool. *Id*. The IEP who has a contractual

[7]The ALJ "encouraged [the parties] to identify ways to limit the time and expense associated" with litigating these complex claims and "instructed [them] to discuss" possible options, such as stipulating to facts or focusing on particular geographic areas or time periods and file a joint report on the options discussed. Order Denying Respondents' Mot. for Leave to File Interlocutory Appeal, 9 (Jan. 29, 2021). The parties conferred and "propose[d] limiting certain categories of initial Party document discovery to the following geographic areas: the Ports of Long Beach and Los Angeles, the Port of Savannah, intermodal terminals in the Chicago area, and intermodal terminals in the Memphis area." Joint Status Report and Proposed Discovery Schedule, 1 (Mar. 1, 2021).

relationship with the ocean carrier whose container is being moved bills for chassis usage. *Id*. Although the IEPs are competitors, the Department of Justice (DOJ) issued a business review letter stating it will not challenge the Pool of Pools Chassis Use Agreement under federal antitrust laws.[8] I.D., 17 (Finding No. 28).

The chart below summarizes the chassis provisioning models relevant to Complainant's claims:

Chassis-Provisioning Models in the Test Case Regions (Table 2)

Test Case Region	Regional Pools	Notable Features
Savannah	*SACP	*CCM Rules govern Interoperable gray pool *Serves ports and intermodal terminals at Atlanta, Charleston, Savannah, and Jacksonville.
Memphis	*Mid-South Pool *Single Provider Pools (operated by DCLI and TRAC)	*CCM Rules govern *Interoperable gray pool (Mid-South Pool) *Proprietary pools (DCLI and TRAC)
Chicago	*Proprietary Pools	
LA/Long Beach	*Pool of Pools	*Collectively operated by DCLI, TRAC and Flexi-Van

[8]Unlike entities regulated by the Commission, the IEPs do not qualify for the antitrust exemption conferred on FMC agreement filers by 46 U.S.C. § 40307. *See* JSF ¶ 196. As FMC-agreement filers, Respondents qualify for the exemption as long as their agreement is in effect and they are operating within its authority. *See In re Vehicle Carrier Services Antitrust Litigation*, 846 F.3d 71, 80-81 (3d Cir. 2017) *Mercedes-Benz USA, LLC v. Nippon Yusen Kabushiki Kaisha*, Civ. No. 18-13764, 2018 WL 6522487, at *4-5 (D.N.J. Dec. 12, 2018).

B. Procedural History

1. Proceedings Before the ALJ

Complainant brought this action to obtain a cease-and-desist order under 46 U.S.C. § 41102(c) directing Respondents OCEMA, CCM, and the individual ocean common carriers to refrain from establishing or following unfair or unreasonable chassis-provisioning practices. Complainant seeks an order directing Respondents to: (1) remove and stop enforcing parts of the CCMP Operations Manual; (2) refrain from adopting or enforcing any regulation restricting motor carriers' choice of chassis provider (including default designations) when the motor carrier is charged for usage or at a per diem rate; and (3) refrain from using certain single-provider chassis pools or intermodal terminals that effectively preclude chassis choice by motor carriers. Compl. ¶¶ 40-41.[9]

The ALJ denied Respondents' motion to dismiss the complaint for lack of jurisdiction, failure to join the IEPs as indispensable parties, and on other grounds. The parties then engaged in fact and expert discovery. At the ALJ's suggestion, the parties focused discovery and briefing on four geographic regions to be considered first as a test case, with the remaining claims to be decided at a later stage of the proceedings. After discovery ended, the parties jointly filed a statement of undisputed facts. All parties filed cross-motions for summary decision supplemented by their respective proposed findings of undisputed facts. The Respondents joined in a consolidated motion for summary decision. Because its practices differ somewhat from the other Respondents, Evergreen also moved separately for summary decision in its favor.

In February 2023, the ALJ issued an Initial Decision granting in part Complainant's motion and denying in their entirety the Respondents' summary decision motions. The ALJ rejected Respondents' renewed motions to dismiss on the grounds that the

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[9]We note that the complaint does not allege violations of 46 U.S.C. § 41105(2), which prohibits a "group of two or more common carriers" from "engag[ing] in conduct that unreasonably restricts the use of intermodal services or technological innovations." Whether this case, or a future case, might address the potential application of this statutory provision is not presently before the Commission.

Commission lacks jurisdiction[10] because the claims involve chassis-provisioning and inland chassis pool operations, and also rejected Respondents' renewed motion to dismiss because the IEPs are not joined as parties. The ALJ also ruled on cross-motions to strike filings and on multiple requests to keep certain information confidential. *Id*. at 61.[11] The ALJ granted in part and denied in part the motions for confidential treatment of various filings and materials. *Id.*at 9-11.[12]

[10]The ALJ addressed the jurisdictional question in three separate orders entered at different stages of the case. The ALJ rejected Respondents' arguments that the Commission lacks jurisdiction in denying: (1) Respondents' motion to dismiss the complaint (ALJ Order dated Nov. 18, 2020); (2) Respondents' request for leave to file an interlocutory appeal challenging the ALJ's denial of their motion to dismiss (ALJ Order dated Jan. 29, 2021); and (3) Respondents' cross-motion for summary decision (I.D., 20-21).

[11]In granting leave for this interlocutory appeal, the ALJ noted that an appeal filed by any party would place "the entire proceeding before" the Commission. I.D., 59. The parties did not file exceptions challenging the ALJ's rulings on these ancillary motions. This Order only addresses the issues raised by Respondents' Consolidated Exceptions and Evergreen's Exceptions as grounds for reversing the ALJ's rulings in the Initial Decision which focus solely on the rulings denying Respondents' motions for summary decision. *See generally* 46 C.F.R. § 502.227(a)(1) (exceptions "shall indicate with particularity alleged errors").

[12]Information only qualifies for confidential treatment upon a showing of good cause by demonstrating that it is "a trade secret or other confidential research, development, or commercial information." 46 C.F.R. § 502.5(b). Treating information as confidential does not affect the Commission's or the ALJ's ability to rely on that information to decide the claims. 46 C.F.R. § 502.5(c).

The ALJ granted confidentiality "as requested with the exception of the non-confidential CCMP Operations Manual portions at CX2170-2217, CX2219-20, CX2379-2422 and CX2424-27, the selected statements used in this decision, and the corrected public filings." I.D., 61. The ALJ denied the parties' requests in part as overbroad because they sought confidential treatment for entire documents, such as expert reports, declarations, or depositions, not just the portions that contained commercial information or trade secrets that qualify for protection under Rule 502.5(b). I.D., 10-11. The parties have not challenged that ruling on appeal, and even if they had, the ALJ correctly ruled that confidential treatment is limited to qualifying information and does not extend to the entire document.

On the merits of Complainant's Section 41102(c) claim, the ALJ determined that the Respondents' practices of designating an exclusive chassis provider for merchant haulage and contractually linking merchant haulage volume and carrier haulage rates are unreasonable, and directed Respondents to cease engaging in those practices in the four test case regions. *Id.* at 46-47. The ALJ also determined that the Commission has "authority to prevent regulated entities from withdrawing from interoperable pools," but found that disputed issues of material fact precluded ruling on whether the Commission should order Respondents to cease and desist from any further withdrawals from interoperable pools. *Id.* at 5. The ALJ ordered:

> Within thirty days of the date this decision becomes final, Respondents shall cease and desist from violating the Shipping Act in Chicago, Los Angeles/ Long Beach, Memphis, and Savannah *by ceasing and desisting adopting, maintaining, and/or enforcing any regulations or practices that limit the ability of a motor carrier to select the chassis provider of its choice for merchant haulage*.

Id. at 59, 61 (emphasis added).[13] The ALJ also determined that rules specifying a default (or preferred) chassis provider may promote efficiency and, at this stage of the case, have not been shown to be unreasonable so long as the motor carrier can select a different chassis provider. *Id.* at 4. The ALJ found that to the extent Evergreen's chassis provisioning practices (which differ somewhat from the other ocean carriers') deny motor carriers a choice on merchant haulage, they are likewise unreasonable under Section 41102(c). The ALJ granted the parties leave to file an interlocutory appeal challenging the summary decision rulings. *Id.* at 5, 61.

Consistent with ALJ's ruling and Rule 502.5, information that does not qualify as confidential is not treated as such, and is not redacted from the public version of the Commission's Order. *See* 46 C.F.R. § 502.5(b).

[13]The ALJ's cease-and-desist order was automatically suspended when Respondents filed exceptions to the Initial Decision. *See* 46 C.F.R. § 502.527(a)(5) ("Upon the filing of exceptions to, or review of, an initial decision, such decision shall become inoperative until the Commission determines the matter.")

2. Exceptions Before the Commission

Respondents timely filed consolidated exceptions challenging the ALJ's rulings on jurisdiction, non-joinder of the IEPs, and parts of the Section 41102(c) claim. Respondents argue that the Commission must dismiss the case for lack of jurisdiction and failure to join the IEPs as indispensable parties. If the case is not dismissed, Respondents ask the Commission to reverse the ALJ's rulings finding the exclusive designation practices and using merchant haulage volume to offset carrier haulage costs unreasonable under Section 41102(c). Exceptions, 27-34. Respondents argue that in finding their practices unreasonable, the ALJ improperly equated those practices to exclusive arrangements imposed by ports or marine terminal operators (MTOs), misapplied the law in requiring Respondents to provide a justification for those practices, and impermissibly decided disputed issues of material fact. *See id.* Respondents also argue that there is no legal basis for the cease-and-desist order and that the ALJ failed to consider how that order will interfere with supply chain efficiency and lead to increased transportation costs. Evergreen joined in the consolidated exceptions, and also filed separately to address aspects of its chassis-provisioning practices that differ from the other ocean carriers' and to specifically dispute the ALJ's findings that those practices are unreasonable and argue that it is entitled to summary decision as a matter of law.

Complainant responded to Evergreen's and Respondents' consolidated exceptions and urges the Commission to affirm the ALJ's Initial Decision in its entirety. Complainant contends that the ALJ correctly applied Commission case law on exclusive arrangements and found that the challenged practices are not a necessary or fit means of ensuring an adequate supply of chassis -- the purpose that Respondents contend justifies their existence. Complainant's Reply to Exceptions, 34-46. Complainant argues that the record shows that these practices unreasonably deprive motor carriers of choice, impede competition, increase merchant haulage rates, and unfairly require motor carriers to subsidize lower carriage haulage rates for ocean carriers.

The Commission granted the IEPs (DCLI, Flexi-Van, and TRAC) leave to file an amicus brief, in which they contend that the

ALJ erred in finding certain practices unreasonable and assert that the ALJ failed to consider the implications of ordering the ocean carriers to cease engaging in those practices.[14] The Commission also granted the American Cotton Shippers Association leave to file an amicus brief, in which it contends that the ALJ properly found Respondents' withdrawal from interoperable pools unreasonable and in violation of Section 41102(c), and urges the Commission to uphold the ALJ's findings.

II. DISCUSSION

A. Standard of Review and Burden of Proof

The Commission reviews exceptions to the ALJ's Initial Decision on motions for summary decision de novo and can exercise "all the powers" it would have had in ruling on the motion initially, and may enter its own findings. 46 C.F.R. § 502.227(a)(6). Under the Administrative Procedure Act, the complainant has the burden of proving its allegations by a preponderance of the evidence, meaning that it must persuade the Commission that the allegations are more probable than not. 5 U.S.C. § 556(d); 46 C.F.R. § 502.203; *Maher Terminals, LLC v. Port Auth. Of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 WL 9966245, at *14 (FMC Dec. 17, 2014). The burden of proof never shifts to the respondents, and if the evidence is evenly balanced, complainants do not prevail. *Waterman Steamship Corp. v. General Foundries, Inc.*, Docket No. 93-15, 1994 WL 279898, at *9 (FMC June 13, 1994) (complainants "must carry the burden of proving every element of the" claim that respondent engaged in conduct prohibited by the Shipping Act).

The Commission's Rules of Practice and Procedure do not define a standard for deciding motions for summary decision. In the absence of a Commission rule, the Commission applies the Federal Rules of Civil Procedure to the extent they are consistent with sound administrative practice. 46 C.F.R. § 502.12. The Commission applies the federal summary judgment standard (Fed. R. Civ. P. 56) in deciding parties' motions for summary decision. Federal Rule 56(a) provides that a party is entitled to summary judgment if "there

[14] The IEPs did not petition to intervene in this case under 46 C.F.R. § 502.68(c)(1) (allowing non-parties to intervene as of right if "disposition of the proceeding may as a practical matter impair or impede" their ability to protect their interests).

is no genuine dispute as to any material fact and [the moving party] is entitled to judgment as matter of law." There is a genuine factual dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Facts are viewed in the light most favorable to the nonmoving party. *Maxwell v. FCA US, LLC*, No. 22-1356, 2023 WL 246836, at *2 (FMC Jan. 18, 2023).

Once the movant demonstrates an absence of disputed material facts, the non-movant must present evidence to create a genuine dispute of fact with respect to each "essential element" of his case or defense. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This requires more than "simply show[ing] that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). It is not the Commission's role to make credibility determinations or weigh the evidence, its role is limited to determining whether there is a genuine issue of material fact. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

B. Commission's Supplemental Findings of Fact

The Commission enters the following supplemental findings based on the evidence of record:[15]

Chassis Provider Rates and Choice

35. Ocean carriers can negotiate with IEPs for lower carrier haulage rates in exchange for higher merchant haulage chassis volume and restrictions on choosing a chassis provider. Langenfeld Report ¶¶ 19-20; *see also* Confid. Compl. Reply Stmt. Facts ¶ 497 (listing contracts linking carrier haulage rates to merchant haulage volume).

36. Allowing motor carriers to choose a chassis provider affords them the potential to negotiate and contract for chassis usage rates. *See* Rodrigue Report ¶ 99.

[15]Sequential numbering for the Commission's supplemental findings begins where the ALJ's numbered findings left off.

Relevant Product and Geographic Markets

37. The relevant product market for the chassis provisioning services provided by the IEPs is daily chassis usage. Langenfeld Report ¶¶ 40-43.

38. The relevant geographic market for the chassis provisioning services provided by the IEPs is the region surrounding a particular port or inland facility where the chassis is to be used on a short-term basis. *Id.* ¶ 12; Rodrigue Report ¶ 164.

39. The relevant geographic market for the test case regions are the areas surrounding the ports at Savannah, Georgia, Los Angeles/Long Beach California and the inland terminal facilities at Memphis and Chicago. Langenfeld Report ¶ 67.

C. Jurisdiction over Complainant's Claims

The ALJ ruled that the Commission has jurisdiction because Respondents are ocean common carriers and associations operating under the authority of FMC-filed agreements that are clearly subject to the Commission's regulatory authority, and are allegedly engaged in practices that violate Section 41102(c). I.D., 22. Respondents do not deny their status as regulated entities, but challenge the ALJ's rulings rejecting their arguments that their contractual arrangements with IEPs and the nature of merchant haulage place Complainant's claims outside the Commission's jurisdiction. Exceptions, 27-35. They argue that the chassis-provision restrictions are insulated from the Commission's review because the ocean carriers are contractually bound to honor those restrictions under their contracts with the IEPs. *Id.* at 31-34, 42. They also protest jurisdiction as an overextension of the Commission's authority because merchant haulage involves transportation between the ports and inland facilities. And finally, they argue that it was reversible error for the ALJ to rely on *Norfolk S. Railway Co. v. Kirby*, 543 U.S. 14 (2004), for the general principle that maritime law does not cease to apply as soon as cargo moves away from a coastal port.

1. Jurisdictional Standards

Complainants have the initial burden of showing that the Commission has jurisdiction over their claims. *See River Parishes Co., Inc. v. Ormet Primary Aluminum Corp*., Docket No. 96-06, 1999 WL 125991, at *17 (FMC Feb. 3, 1999). Where, as here, jurisdiction is challenged in a motion for summary decision, the complainant cannot rely on allegations alone but must point to specific facts and evidence supporting the allegations. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992) (discussing burden and evidentiary requirements when constitutional standing is challenged on summary judgment); *Indiana Coalition for Public Education—Monroe County, v. McCormick*, 338 F. Supp. 3d 926 (S.D. Ind. 2018) (applying Fed. R. Civ. P. 56).

The Commission plainly has jurisdiction over ocean common carriers[16] who are allegedly violating the Shipping Act while acting in their regulated capacity. *See Cargo One, Inc. v. COSCO Container Lines Co*., Docket No. 99-24, 2000 WL 1648961, at *15 (FMC Oct. 31, 2000) (alleged Shipping Act violations involving "just and reasonable regulations and practices, are inherently related to Shipping Act prohibitions and are therefore appropriately brought before the Commission."). The Commission's "jurisdiction extends to all alleged violations of the Act." *Chief Cargo Services. v. Fed. Mar. Comm'n*, 586 Fed. Appx. 730, 731 (2d Cir. 2014); *Cf. Auction Block Co. v. Fed. Mar. Comm'n,* 606 Fed. Appx. 347, 348 (9th Cir. 2015) (distinguishing conduct within and outside scope of MTO's regulated activities).

The individual ocean common carriers' status as regulated entities are not in dispute.[17] OCEMA and CCM did not stipulate to their status as regulated entities, but undisputed facts demonstrate that is clearly the case. They operate solely under the authority of

[16]The Shipping Act's definition of "ocean common carrier" relies on the description of a common carrier. A common carrier is defined as a person that holds itself out to the general public as providing water-borne transportation for passengers or cargo between the United States and a foreign country for compensation that assumes responsibility for the transportation and uses for all or part of that transportation a vessel operating on the high seas between a port in the U.S. and a port in a foreign country. 46 U.S.C. § 40102(7)(A) and (18).

[17]*See* JSF ¶¶ 25, 42, 58, 72, 87, 102, 117, 132, 148, 162, 176.

their FMC-filed agreements, represent the interests of their ocean common carrier members and act on their behalf. The OCEMA Agreement expressly authorizes it to engage in discussions and activities related to "equipment pools or pool-owning companies" and act on behalf of its members who are described as "major U.S. and foreign flag international ocean common carriers." JSF ¶¶ 3, 7, 10. The CCM Agreement specifically provides that it "is authorized by and is subject to the Shipping Act of 1984, as amended, and regulations issued pursuant thereto." CCM Agreement, Art. 9; JSF ¶¶ 16-17. The CCM Agreement also specifically authorizes activities related to the chassis pool rules and operations that the Complainant challenges as unreasonable under Section 41102(c), such as entering into exclusive contracts and agreements and allowing a governing board to establish chassis pool operating rules. CCM Agreement, Arts. 5.9, 6.1. The Commission exercises continuing oversight over activities conducted under FMC-filed agreements by, for example, reviewing meeting minutes to ensure that the parties are operating within the bounds of the agreement. JSF ¶¶ 13, 21; *see generally Anchor Shipping Co. v. Aliança Navegação E Logística Ltda*., Docket No. 02-04, 2006 WL 200788, at *12 (FMC May 10, 2006) (noting Commission's ongoing oversight responsibilities over filed agreements).

OCEMA and CCM could not engage in these antitrust-exempt activities outside the bounds of their FMC-filed agreement. In antitrust terms, the ocean common carriers are in a horizontal relationship—they compete against one another in the market for container transportation services in U.S. foreign commerce.[18] Federal antitrust laws prohibit collaboration and information sharing among competitors and OCEMA; CCM and their members are only exempt from those restrictions because they are operating under an FMC-filed agreement currently in effect. *See* 46 U.S.C. § 40307(a). Respondents cannot use the Shipping Act's antitrust exemption to carry out activities that would otherwise be scrutinized by the Department of Justice (DOJ) or Federal Trade Commission (FTC) as possible antitrust violations, but then seek to exempt those same activities from the Commission's scrutiny. Their argument, if accepted, would effectively give Respondents free rein to adopt

[18]*See* I.D., 32 (citing *Eastman Kodak Co. v. Image Tech. Services*, 504 U.S. 451, 471 n.18 (1992); *Sprint Nextel Corp. v. AT&T Inc*., 821 F. Supp. 2d 308, 317-18 (D.D.C. 2011)).

practices that restrain competition or impose unjust and unreasonable conditions on other transportation service providers or shippers. OCEMA's and CCM's role in framing and enforcing chassis-provisioning practices leaves no doubt that they were acting on behalf of their ocean common carrier members in promoting the challenged practices, and they are bound by the same Shipping Act prohibitions as their members.

The Shipping Act gives any person the right to file Shipping Act claims with the Commission and imposes a corollary duty on the Commission to adjudicate those claims. Section 40301(a) gives person(s) the right to file with the Commission "a sworn complaint alleging a violation" of any Shipping Act provision (with one exception not relevant here). 46 U.S.C. § 41301. Section 41301(c) provides that: "If the complaint is not satisfied, the Commission shall investigate the complaint in an appropriate manner and make an appropriate order." These provisions have been read in tandem as giving complainants a right to file and have their complaints of Shipping Act violations adjudicated by the Commission if they are not otherwise "satisfied." *S.C. State Ports Auth. v. Fed. Mar. Comm'n*, 243 F.3d 165, 176 (4th Cir. 2001) ("[if] a private party file[s] a complaint … [t]he FMC ha[s] no choice but to adjudicate this dispute"), *aff'd sub nom. Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) (holding that state sovereign immunity barred Commission from adjudicating private party complaint alleging state-run port violated the Shipping Act); *see also Anchor Shipping*, 2006 WL 200788, at *12 (Chairman Blust and Commissioner Dye, concurring) (noting that the Shipping Act "makes clear that the Commission does not have discretion whether to hear filed complaints"). Adjudicating sworn complainants is also part of the Commission's mission of promoting an ocean transportation system that is "efficient, competitive, and economical." 46 U.S.C. § 40101(2).

Section 41301(a) is plainly worded and does not carve out exceptions. The Supreme Court has cautioned the Commission against circumscribing its jurisdiction too narrowly when the Shipping Act confers authority in plain language or uses expansive terms. *See Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261, 273-75 (1968) (reversing Commission's "extremely narrow" interpretation of "expansive [statutory] language"). The Commission has heeded that caution in other cases and found that broadly drafted Shipping Act provisions "should not be narrowly construed" to limit the Commission's jurisdiction. *Int'l Ass'n of NVOCCs v. Atlantic Container Line*, Docket No. 81-5, 1990 WL 427461, at *14 (FMC Feb. 5, 1990). *Cf. Landstar Express America Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493, 496 (D. C. Cir. 2009) ("Where the Shipping Act includes a precise definition, 'the limits of the Commission's jurisdiction to regulate carriers under [the Act] must necessarily depend upon the meaning and interpretation of the [statutory] definition.'") (quoting *Austasia Intermodal Lines, Ltd. v. Fed. Mar. Comm'n*, 580 F.2d 642, 644 (D.C. Cir. 1978)).

Avoiding an overly restrictive interpretation is also important because no other forum has original jurisdiction over Shipping Act claims. The Commission has "exclusive primary jurisdiction" over alleged Shipping Act violations and complainants cannot choose another forum. *Gov't of Guam v. Am. President Lines*, 28 F.3d at 142, 149 (D.C. Cir. 1994). Bringing a different cause of action in state or federal court would still leave the complainant without recourse for actual harm caused by a Shipping Act violation. The Commission is also uniquely positioned to judge whether its regulated entities' practices are reasonable and fair. The Commission's experience monitoring ocean common carriers and expertise in assessing supply chain logistics and chassis-related issues is particularly relevant in this case. *See generally A/S Ivarans Rederi v. United States*, 895 F.2d 1441, 1447 (D.C. Cir. 1990) ("Congress specifically authorized the FMC" to review, approve, and monitor "agreements among ocean common carriers. This delegation of authority by Congress, coupled with the FMC's technical knowledge of the subject matter, cautions us to accord great weight to the agency's judgment.").

2. Respondents' Objections to Jurisdiction

Notwithstanding Respondents' regulated status and the Shipping Act violations alleged, Respondents raise multiple objections to jurisdiction. Initially they assert that the Commission cannot grant relief that conflicts with their contractual commitments to the IEPs. Exceptions, 42. This argument is not persuasive. As the ALJ properly determined, parties cannot evade Shipping Act prohibitions by entering into a contract, then proclaiming that any commitment embodied in that contract is exempt from Commission review. *See* I.D., 23. As the Commission explained in the Interpretative Rule on Demurrage and Detention:

> Ocean carriers and [MTOs] do not have an unbounded right to contract for whatever they want. They are limited by the prohibitions of the Shipping Act, one of which is section 41102(c). Although the general trend in the industry has been deregulatory, Congress retained section 41102(c) when it enacted the Ocean Shipping Reform Act in 1998.

85 Fed. Reg. 29639, 29649 (May 18, 2020) (codified at 46 C.F.R. § 545.5).

Nor is the Commission's jurisdiction constrained by the fact that Shipping Act claims may become intertwined with breach of contract issues. *See generally Anchor Shipping Co.,* 2006 WL 200788, *12; *New York Shipping Ass'n v. Fed. Mar. Comm'n*, 854 F.2d 1338, 1364, 1371 (D.C. Cir. 1988). Respondents argue that cases the ALJ relied on for this principle are factually distinguishable. Exceptions, 40; *see* I.D. 28. For example, Respondents contend that *Sealand Serv., Inc. & Gulf Puerto Rico Lines v. Proposed Rules on Containers*, 21 F.M.C. 1 (FMC 1978), does not apply because it involved a collective bargaining agreement. The factual distinctions that Respondents point to are immaterial and do not undermine the general principle that regulated entities cannot use contractual obligations to insulate their activities from Commission review.

Respondents' related argument that the Commission is impermissibly asserting jurisdiction over their chassis usage contracts with the IEPs is grounded on an erroneous premise. *See* Exceptions, 40. The issue before the Commission is whether Respondents' chassis-provisioning practices are unreasonable or unjust under Section 41102(c). Respondents' contractual obligations to the IEPs are a separate issue. The ALJ did not make any determination about those obligations, and they are not before the Commission. *See generally California Stevedore Ballast Co. v Stockton Port District* (*Stockton*)*,* 7 F.M.C. 75, 81 (1962) (Commission action "condemning and preventing . . . unjust and unreasonable practices" by stevedores engaged in vessel loading "does not constitute regulation of stevedoring"). Respondents' argument that Complainant failed to show that it cannot bring a cause of action in another forum is also meritless. *See* Exceptions, 44 n.24. Complainant is not required to prove there is no remedy in another forum in order to establish Commission jurisdiction.

Respondents' argument that the Commission lacks jurisdiction over merchant haulage issues because they involve overland transportation is likewise untenable. The Commission and the courts have repeatedly recognized that the Shipping Act's authority does not end at the port's boundary. *See, e.g., Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc*., Docket No. 09-01, 2011 WL 7144008, at *5-8 (FMC Aug. 1, 2011) (recognizing jurisdiction over "split routing" claim that involved transportation inland). Whether the Shipping Act applies depends on the nature of the activity, namely, its connection to ocean transportation service for foreign shipments, not where the activity takes place or whether it is carried out at the port or offsite. *See id.*[19]

Respondents recognized this established principle and used it to their advantage to expansively define the geographic scope of the CCM Agreement by including moving loaded or empty chassis to or from inland destinations as authorized activities. Article 4 of the CCM Agreement describes authorized activities as covering:

> Inland Intermodal Terminals located within the United States at which containers moving to or from Marine Terminals in the foreign commerce of the United States, *or chassis which transport such containers*, are received, delivered, handled, stored, repaired, maintained, loaded, unloaded, inspected, or interchanged. *Loaded or empty containers moved on chassis via such Marine Terminals or Inland Intermodal Terminals may be moving to or from any origins, or to or from any destinations, within the United States, its territories or possessions.*

[19]The Shipping Act defines various terms related to inland transportation segments. *See* 46 U.S.C. § 40102(12) ("inland division"); § 40102(13) ("inland portion"); § 40102(25) ("through rate"); and § 40102(26) ("through transportation"). The Commission's regulations also define marine terminal facilities as including "inland locations." 46 C.F.R. § 535.104(p).

CCM Agreement, Art. 4 (emphasis added). By including these activities, CCM signaled an intent to bring them under the Section 40307 exemption and insulate them from scrutiny by DOJ and FTC for potential antitrust violations. Respondents cannot now claim that activities they declared within the scope of their FMC-filed agreement are at the same time outside the Commission's jurisdiction and cannot be policed or restricted under the Shipping Act.

Respondents' "inland segment" argument is also contradicted by the Ocean Shipping Reform Act of 2022 (OSRA 2022) and Commission precedent, which make clear that chassis, and by inference chassis pools, are integral components of the ocean transportation system. In fact, OSRA 2022 directs the Commission to partner with the Transportation Research Board of the National Academies of Sciences, Engineering, and Medicine to study the "best practices for on-terminal or near-terminal chassis pools" servicing MTOs, motor carriers and other stakeholders [to] optimize supply chain efficiency and effectiveness." Public Law 117-146, 136 Stat. 1272 (June 16, 2022); https://www.fmc.gov/commission-contracts-with-national-academies-for- osra-mandated-chassis-study/. Even before the passage of OSRA in June 2022, the Commission examined chassis practices as an integral component of the ocean supply chain. *See, e.g.,* Fact Finding No. 29 Final Report to the Commission, 29 (May 31, 2022); Fact Finding No. 28 Final Report to the Commission, 29 (Dec. 3, 2018); Memphis Supply Chain Innovation Team, "A Single Gray Chassis Pool Fosters Fluid Commerce and Improves Supply Chain Velocity."[20] The Commission has also held that the Shipping Act applies to regulated entities' handling of chassis issues. *See, e.g., Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake*, LLC, Docket No. 11-11, 2013 WL 9808672, at *21 (ALJ Jan. 10, 2013) (holding that maintenance and repair work on chassis and refrigerated containers "have a direct and close connection to the cargo operations of oceangoing vessels"), (admin. Final Mar. 20, 2013). The Commission's regulations exempt equipment interchange agreements among carriers from 46 U.S.C. § 40302 filing requirements which would not be necessary if those

[20]*See* https://fmc2.fmc.gov/wp-content/uploads/2019/05/Memphis SupplyChainWhitepaper.pdf.

agreements were already outside the Commission's jurisdiction. *See* 46 C.F.R. §§ 535.304-535.305.

Finally, Respondents' argument that the ALJ misapplied the law by citing to *Norfolk S. Railway Co. v. Kirby*, 543 U.S. 14 (2004) ignores the ALJ's discussion entirely. Respondents argue that citing *Kirby* shows that the ALJ misapplied the law because that case involved a claim under the Carriage of Goods by Sea Act (COGSA).[21] *See* Exceptions, 29-31. The ALJ only cited *Kirby* to make the point that whether maritime law applies depends on the nature of the conduct at issue, not where it occurred, and that it does not cease to apply the moment cargo leaves the port. *See* I.D., 23-24 (quoting *Kirby*, 543 U.S. at 27). The ALJ cited *Kirby* as authority for a universal principle that guides maritime law, not for any principle unique to COGSA.

In sum, Complainant's allegations that regulated entities violated the Shipping Act while acting in their regulated capacity places this case squarely within the Commission's jurisdiction, Respondents do not establish any basis for finding otherwise.

The ALJ's ruling denying Respondents' motion for summary decision for lack of jurisdiction is affirmed.

D. IEPs' Alleged Status as Indispensable Parties

The ALJ found that the three major IEPs (DCLI, Flexi-Van, and TRAC) who supply chassis equipment to the Respondent ocean common carriers are not necessary parties and that the case can be adjudicated without joining them as parties. I.D., 26-29. Because the Commission's Rules of Practice and Procedure do not specifically address joinder of non-parties, the ALJ applied the corresponding federal rule, Federal Rule of Civil Procedure 19. Respondents argue that the ALJ erred in finding that the IEPs are not indispensable because the carriers are contractually bound to them and the IEPs have an interest in the outcome since the chassis-provisioning rules they apply are being contested. Exceptions, 39-44. Notably, the record does include the IEPs' position on the points on which they

[21]The Commission joined several other federal agencies in signing onto an amicus brief filed by the U.S. Department of Justice in *Kirby* in support of Norfolk Southern's position. Br. for the United States as Amicus Curiae Supporting Petitioner, 2004 WL 587237 (Mar. 24, 2004).

claim the ALJ erred in finding exclusive provisioning practices unreasonable. *See* IEP Amicus Br., 11-36.[22]

Federal Rule of Civil Procedure 19 applies a three-part test to determine whether litigation may proceed in the absence of a particular party "who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction." *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 251 (D.D.C. 2016) (citing *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1494. (D.C. Cir. 1995). The first step is determining whether the absent party is required (or necessary) for a just adjudication under the criteria identified in Rule 19(a). A party is necessary to the proceeding if either of the following apply: (1) the court cannot grant "complete relief" in their absence; *or* (2) they claim to have an interest related to the case *and* disposing of the claims in their absence impedes their ability to protect that interest or creates a "substantial risk" of double, multiple or inconsistent obligations. Fed. R. Civ. P. 19(a); *see Republic of the Philippines v. Pimentel*, 553 U.S. 851, 862 (2008); *De Csepel v. Republic of Hungary*, 27 F.4th 736, 746-47 (D.D.C. 2022). The second step is determining whether the non-party's joinder is feasible. Fed. R. Civ. P. 19(b); *Kickapoo Tribe*, 43 F.3d at 1494. The third and final step considers whether the case can proceed "in equity and good conscience" if the absent (but necessary) party cannot be joined or whether the case should be dismissed. Fed. R. Civ. P. 19(b); *see Pimentel*, 553 U.S. at 862.

Respondents fail to clear the test's first hurdle because the IEPs are not necessary parties under either prong of Rule 19(a). The IEPs do not need to be parties for the agency to grant Complainant

[22] The IEPs argue that granting Complainant the relief it seeks will undermine supply chain efficiency and directly interfere with their contractual and business arrangements. IEP Amicus Br., 19-23. They claim that Commission case law on exclusive arrangements does not apply because the IEPs do not dominate the market. *Id.* at 2. The IEPs also contend that the relief ordered by the ALJ will "directly upset the competitive arrangements the marketplace has developed." *Id.* As discussed below, these arguments are not legally or factually supported and do not countermand Complainant's evidence that the challenged practices fail the Commission's reasonableness test for exclusive arrangements.

the relief it seeks by ordering Respondents to cease designating exclusive chassis providers for merchant haulage, using merchant haulage volume to obtain better carrier haulage rates, or withdrawing from interoperable pools. *See* I.D., 27. Complainant is not seeking any relief directly against the IEPs, either in the form of reparations or a cease-and-desist order. *See* Compl. ¶¶ 40-41. As for the second prong of the Rule 19(a) test, the IEPs claim and may be able to demonstrate an indirect interest in whether Respondents may continue designating exclusive providers for merchant haulage or withdrawing from interoperable pools at will because those activities may impact volume or demand for a particular IEP's chassis. But the IEPs do not face a "substantial risk" of being ordered to satisfy multiple or inconsistent obligations. Respondents will need to bring their practices into line with the Commission's cease-and-desist order and modify their dealings with shippers, motor carriers, and chassis providers accordingly—but granting that relief will not subject the IEPs to conflicting or inconsistent demands.

Respondents' arguments that Rule 19(a) requirements have been met are not supported by the record and overstate the potential impact of awarding relief on the IEPs' business operations. Respondents characterize the impact on the IEPs as "direct, immediate, adverse and dramatic" but do not point to statistics, expert opinion or clear evidence to substantiate that claim. *See* Exceptions, 36-40. This argument also inaccurately suggests that how IEPs allocate and bill for chassis usage is an immutable or permanent fixture of IEP/ocean carrier contracts and that cannot be shifted to a system that relies on default (preferred) chassis providers for merchant haulage without making their business model unsustainable. *See id.*

[redacted]

[redacted]

Respondents acknowledge that certain ocean common carriers allow exceptions from exclusive designations for merchant haulage cargo.[23] While that is different than disallowing exclusive designation practices entirely, the difference is a matter of degree. The exception allowance shows that IEPs can function or adjust in a climate where motor carriers or shippers can exercise a choice. Under the current system, opt-outs may only occur infrequently and on an ad hoc basis, but the fact that they can and presumably do occur undercuts Respondents' argument that exclusive designations are necessary and allowing motor carriers a choice is not sustainable and will endanger the chassis supply. As with any operational change, switching away from exclusive designations may require a period of adjustment as the IEPs assess changes in demand, but Respondents do not point to any reason why that would not be a temporary phenomenon, and a new equilibrium would eventually be established as IEPs adjust to new chassis usage trends and make corresponding adjustments to their chassis supplies and positioning.

This argument also ignores the fact that the heart of the case is the reasonableness of *Respondents'* restrictions on motor carriers' choices for merchant haulage. Resolving that question may affect who IEPs can bill for chassis usage and how they allocate chassis usage charges but does not place the indirect impact on their

[23]Respondents also contend that the ocean common carriers do not have free rein in granting or denying motor carriers' request to choose a chassis provider for merchant haulage because the IEPs can veto the carriers' decision, but again they do not point to data or statistics indicating either how frequently motor carriers request an exception, how frequently the ocean carrier grants or denies those requests, or how frequently IEPs veto the ocean carrier's decision to grant an exception. *See* Exceptions, 38-40. In fact, these are some of the disputed factual questions that led the ALJ to conclude that it is not possible to decide whether the exclusive designation rules are unreasonable as applied (or in actual practice). *See* I.D., 39.

allocation and billing procedures at the center of this case or make the IEPs a necessary party under Rule 19(a). That is simply not the type or degree of impact on non-parties that Rule 19(a) requires to show they are necessary to fairly and justly adjudicate the issues. *See* I.D., 27. This is not a situation in which the Respondents or the IEPs will be confronted with multiple damage awards for the same cause of action or inconsistent outcomes in other forums—the harm that Rule 19(a) is meant to prevent. Accepting Respondents' argument that indirect impact on the business practices of a non-party forecloses Commission review of alleged Shipping Act violations would allow regulated entities to claim Rule 19 requires dismissal anytime the relief granted may impact their contractual relationships with non-regulated entities. That would be an untenable result and an overly broad interpretation of Rule 19.

Even if Respondents had cleared the first Rule 19 hurdle and demonstrated that the IEPs qualify as necessary parties, they would not clear the second. Joining the IEPs as additional respondents is not feasible. *See* Fed. R. Civ. P. 19(b). The sole claim alleged is brought under Section 41102(c) which only regulates the conduct of ocean common carriers, MTOs, and ocean transportation intermediaries, so its requirements do not govern the IEPs' business practices. *See* 46 U.S.C. § 41102(c).

And finally, even if Respondents had cleared the first and second Rule 19(a) hurdles, the fairness and equity considerations applicable under Rule 19(b) weigh in favor of allowing the case to proceed. Rule 19(b) provides a non-exhaustive list of factors to be considered in deciding whether the case should go forward in the non-party's absence, consisting of:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Id.

Complainant's inability to bring its Shipping Act claim in any other forum weighs against dismissing this case. Bringing a different cause of action in federal or state court would not give the Complainant the same opportunity to seek a cease-and-desist order because Respondents' chassis-provisioning practices do not meet Section 41102(c) reasonableness standards. A different claim may also be litigated in a forum without the Commission's unique experience and expertise in ocean transportation logistics and chassis provisioning.

Respondents' and the IEPs' similar interest in defending the chassis provider rules and maintaining the status quo also weighs against dismissal. The IEPs expressed their position on allowing the rules to remain in place, and their interests are aligned with the Respondents' in defending the exclusive provider rules as fair and reasonable and continuing to apply those rules to merchant haulage shipments. Respondents are both eminently capable of defending the chassis provider rules and interested in achieving the same outcome in this case as the IEPs—a ruling declaring the rules fair and reasonable and denying Complainant's Section 41102(c) request for a cease-and-desist order blocking their continued enforcement. *See De Csepel*, 27 F.4th at 746-47 ("If a party remaining in the case is both capable of and interested in representing the interests of the absent party, the party's exit or exclusion from the suit exposes it to no additional risk of an adverse decision.")

The Commission finds that the IEPs are not necessary or indispensable parties, and the case can fairly and equitably proceed without joining them as parties. Respondents' motion for summary decision for failure to join indispensable parties is denied.

E. <u>Merits of Complainant's Section 41102(c) Claims</u>

We examine the reasonableness under Section 41102(c) of five practices related to merchant haulage in the four test case locations: Savannah, Memphis, Chicago and the Ports of Los Angeles and Long Beach. I.D., 30. Complainant alleges that Respondents' restrictive practices unreasonably deprive motor carriers of choice, stifle competition among chassis providers, and raise transportation costs for motor carriers, shippers, and the public in general.

Two challenged practices relate to CCM-managed chassis pools servicing Memphis and Savannah: (1) designating exclusive or preferred/default chassis providers; and (2) contractually linking merchant haulage volume and carrier haulage rates to give ocean common carriers the benefit of lower rates for carrier haulage. *Id.* at 16, 36. The challenged practices of withdrawing from interoperable pools and designating proprietary pools relate to the Chicago region and the Ports of Los Angeles and Long Beach. And finally, a third challenged practice questions the reasonableness of merchant haulage restrictions at the Los Angeles/Long Beach Pool of Pools. *Id.*

The ALJ found the following practices unreasonable as a matter of law: (1) enforcing or applying CCM Rule 5.7, *as written*, to designate an exclusive chassis provider for merchant haulage; and (2) contractually linking carrier haulage rates to merchant haulage volume when the motor carrier does not have a choice of chassis providers. *Id*. at 42, 46-47, 61. The ALJ found that designating a preferred or default chassis provider is not necessarily unreasonable "as long as the motor carrier is not required to use the preferred IEP," can "select from any available pools or chassis providers," and their selection cannot be overridden by the ocean carrier. *Id.* at 4, 48. The ALJ agreed with Respondents' assertion that designating a default provider is not unreasonable and serves a legitimate purpose by ensuring there is a system to efficiently assign a chassis provider and incentivize "the efficient flow of cargo." *Id.* at 48. Finally, the ALJ also determined that the Commission has "authority to prevent regulated entities from withdrawing from interoperable pools, where multiple equipment providers contribute chassis" but found insufficient evidence on the present record to issue an order granting relief based on that finding. *Id.* at 5. Based on the findings that certain practices are unreasonable, the ALJ ordered Respondents to cease and desist "from violating the Shipping Act in Chicago, Los Angeles/Long Beach, Memphis, and Savannah *by ceasing and desisting adopting, maintaining, and/or enforcing any regulations or practices that limit the ability of a motor carrier to select the* *chassis provider of its choice for merchant haulage*." I.D., 61 (emphasis added).[24]

The ALJ did not rule on the reasonableness of CCM Rule 5.7 *as applied* by the ocean common carriers, because material facts are in dispute about how frequently or readily ocean carriers grant or deny exceptions requested by the motor carrier. The ALJ found that "resolving this issue would require a factual determination not appropriate at the summary decision stage." I.D., 36. As the ALJ explained:

> The parties agree that requests for choice under Rule 5.7 are made; those requests are sometimes granted and sometimes denied; and *different ocean carriers impose different requirements to process such requests*. It is not necessary to determine the precise number of requests that are made or that would be made if requests for exceptions were not required. Also, given the current Rule 5.7, even if an ocean carrier were to grant a request for an exception today, it would be free to deny a similar request tomorrow, with no recourse available to motor carriers.

Id. at 38 (emphasis added). Respondents acknowledge that ocean carriers follow different approaches in dealing with exception requests. *See id.*; JSF ¶¶ 200-206.

1. Elements of a Section 41102(c) Claim

Section 41102(c) provides that common carriers and other regulated entities "may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). Proving a Section 41102(c) claim requires the Complainant to show that: (1) the respondent is an ocean common carrier, MTO, or ocean transportation intermediary (OTI); (2) the "claimed acts or omissions" occurred on a "normal, customary, and continuous basis;" (3) the challenged practice or regulation relates

[24] The ALJ left open the question of whether Complainant has alleged and can seek reparations. That question is not before the Commission at this point, and we express no view at this stage of the proceedings.

to or is connected with "receiving, handling, storing or delivering property;" (4) the practice is unjust or unreasonable; and (5) the practice proximately caused the claimed loss. 46 C.F.R. § 545.4. Where, as in this case, the complainant is seeking a cease-and-desist order, it needs to prove that the order will address harm proximately caused by violating Section 41102(c). *See generally Maher Terminals, LLC v. Port Authority of New York and New Jersey*, Docket No. 08-03, 2013 WL 9808667, at *3 n.8 (FMC Jan. 31, 2013).

Respondents limit their challenges to the ALJ's findings on unreasonableness (element 4) and proximate harm (element 5). The ALJ's findings that Complainant met the first three elements required to prove a Section 41102(c) claim are fully supported by evidence that is not in dispute. *See* Complainant's Reply to Exceptions, 47-48. As discussed in Section II-C above, the individual Respondents meet the Shipping Act's definition of ocean common carriers and were plainly acting in that capacity in establishing and following the challenged practices. OCEMA and CCM were likewise clearly acting on behalf of their ocean common carrier members in establishing and following the challenged practices. Nor is there any dispute about whether the challenged conduct qualifies as acts "occurring on a normal and customary basis"—the practices were defined and established as the carriers' policy in CCM rules and in other respects. Finally, the challenged practices clearly relate to handling and delivering containerized cargo transported in U.S. foreign commerce.

The Respondents focus their exceptions on two of the required elements—whether the challenged practices are unreasonable and proximately caused harm that justifies a cease-and-desist order. Respondents contend that in finding the challenged practices unreasonable, the ALJ misapplied Commission case law, improperly relied on antitrust principles, improperly weighed conflicting evidence, and failed to give proper deference to Respondents' stated justifications. Complainant counters these arguments by pointing to case law and evidence that support the ALJ's findings that the challenged practices unreasonably deprive motor carriers of choice and detrimentally impact competition. *See* Complainant's Reply to Exceptions, 1, 3, 19, 27, 34. Complainant also asserts that CCM's self-described "choice program" under Rule 5.7 is illusory because it is rarely effective in practice. *See id.*

Complainant challenges the practices overall as unduly restrictive and unnecessary to ensure an adequate supply of chassis. *See id.*

2. Exclusive Arrangements under the Shipping Act

Historically, the Commission has tested the reasonableness of ocean carriers' and MTOs' practices, including exclusive arrangements with service providers, by examining how closely the challenged practices are aligned with their stated purpose. That was the standard the ALJ applied in this case. *See* I.D., 30-34. This long-standing test, originally applied under the Shipping Act of 1916, asks whether the challenged practices are "otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view." *Investigation of Free Time Practices--Port of San Diego*, 9 F.M.C. 525, 547 (1966).[25] *See Plaquemines Port, Harbor and Terminal Dist. v. Fed. Mar. Comm'n*, 838 F.2d 536, 546 (D.C. Cir. 1988); *W. Gulf Mar. Ass'n v. Port of Hous. Auth*, 21 F.M.C. 244, 248 (FMC 1978), *aff'd without opinion sub nom. W. Gulf Mar. Ass'n. v. Fed. Mar. Comm'n*, 610 F.2d 1001 (D.C. Cir. 1979). This test remains the benchmark for assessing whether terminal practices are unjust or unreasonable under Section 41102(c). *See Port Elizabeth Terminal & Warehouse Corp. v. Port Auth. of New York and New Jersey*, Docket No. 17-07, 1 F.M.C. 2d 29, 2018 WL 1942720 (ALJ Apr. 17, 2018).

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[25]This test was originally applied to claims arising under Section 17 of the Shipping Act of 1916, the second paragraph of which was the precursor to Section 41102(c) and provided that:

> *Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.* Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

Former 46 U.S.C. § 816 (emphasis added). Cases decided under the Shipping Act of 1984 before it was codified refer to what is currently Section 41102(c) as Section 10(d)(1) of the Shipping Act of 1984.

The Commission has applied this test to various practices including policies for allocating or charging for terminal equipment and services. In *Puerto Rico Ports Auth. v. Fed. Mar. Comm'n*, 642 F.2d 471, 485 (D.C. Cir. 1980), the Commission applied this test to determine whether a decision "not to exact a crane-sharing agreement" from the Puerto Rico Maritime Shipping Authority was unreasonable under Section 17 of the 1916 Act. In *Indiana Port Comm'n v. Fed Mar. Comm'n,* 521 F.2d 281, 285 (D.C. Cir. 1975), the Commission applied this test to decide the reasonableness of a harbor service charge levied on all vessels entering the port to cover improvement costs.

Against the backdrop of the general "reasonably related" test for actions challenged as unreasonable, the Commission has also adopted specific criteria for determining whether an "exclusive arrangement" for the use of terminal facilities or equipment is unjust or unreasonable. The practices examined in *Stockton* parallel Respondents' chassis-provisioning restrictions and offer a fair basis for analyzing whether Respondents' practices are reasonable under Section 41102(c). *Stockton*, 7 F.M.C. at 82. Respondent Stockton Elevators owned and operated grain elevators and terminal facilities as a public utility at the Port of Stockton, California. *Id*. at 77. Stockton Elevators granted the Port "the exclusive right to perform all the usual or necessary dockside and other wharfinger and stevedoring services" for loading and unloading grain and other bulk commodities at the Port*. Id.* at 76. The Commission evaluated that practice under Section 17 of the 1916 Act (a precursor to Section 41102(c)) and found the arrangement was "prima facie unjust, not only to stevedoring companies seeking work, but to carriers they might serve, and the general public which is entitled to have the benefit of competition among stevedoring companies." *Id*. at 83. The Commission found this practice in essence set up a stevedoring monopoly at a U.S. port and prevented "carriers from selecting stevedores of their choice to serve their ships." *Id.* at 82. This practice, the Commission found, "runs counter to the anti-monopoly tradition of the United States[] upsets the long-established custom by which carriers pick their own stevedoring companies, deprives complainants and other stevedoring companies of an opportunity to contract for stevedoring work . . . and opens the door to evils which are likely to accompany monopoly, such as poor service and excessive costs." *Id*. at 82-83. The Complainant did not need to prove "these evils" actually exist at the Port, the Commission stated, because "[h]ealthy competition for business" is the best insurance and prevention. *Id.* at 83 n.5.

The ALJ's analysis and Commission's affirmance of the ALJ's ruling in *Perry's Crane Serv., Inc. v. Port of Houston Authority of Harris County*, also provide useful guidance. Docket No. 75-51, 16 S.R.R. at 1459 (ALJ Sept. 28, 1976) (*Perry's Crane* ALJ), *aff'd in part,* 19 F.M.C. 548 (FMC Feb. 25, 1977) (*Perry's Crane FMC*). The ALJ examined the reasonableness of the Port of Houston's tariff that gave the port's crane operator first priority to service vessels and authorized "bumping" another crane operator off the job even if they had already begun working. 16 S.R.R. at 1472-76. A competing crane operator challenged the practice as unreasonable because it deprived stevedores of the right to choose their crane operator, disrupted operations, and led to higher costs. *Id.* The Port justified the practice as affording stevedores *some* choice because they could select which crane operator to displace and also relied on the port's status as a state agency with a sizable investment in port equipment. *Id*. The ALJ found that the Port's first priority practice was unreasonable and should be modified to restore stevedores' ability to choose the crane operator and equipment best suited to the task without the Port's interference insofar as circumstances allow. *Id.* The ALJ found that the Port was not trying to monopolize the crane market "in the sense of seeking an exclusive right to carry on the business" but was operating as a "limited mini-monopoly" which it needed to justify and that its justifications fell short. *Id.* at 1472, 1476.

The Commission affirmed the ALJ's ruling finding the Port's practice unreasonable and went a step further—finding that even the "limited bumping" the ALJ allowed with modifications was not a reasonable practice. *Perry's Crane FMC*, 19 FMC at 552-53. The Commission did not outlaw the Port's practice entirely but modified it to conform to the Shipping Act's standards of reasonableness. Instead of an absolute right of first refusal that gave the port the right to bump crane operators even if already on the job, the Commission modified the practice to allow a preference for the port's cranes if they are available and equally suitable for the job and eliminated the port's ability to bump or displace a privately-owned crane already on the job. *Id.* at 551-52. The Commission identified multiple factors as justifying this modified preference: the ports' investment in the equipment, private cranes portability which the port's cranes lacked, the fact that the port had constructed and paid for the facilities used by the private crane operators, and finally the absence of any evidence that the port was attempting to monopolize the crane rental business at its facilities. *Id*.

The Commission's analysis of an exclusive contract in *Petchem, Inc. v. Canaveral Port Authority* (*Petchem FMC)* is likewise instructive for examining the conduct challenged in this case and marks a milestone in developing the Commission's "reasonableness" test. *Petchem* involved dual claims challenging the Canaveral Port Authority's decision to grant one tug operator an exclusive contract to service the commercial vessels at the port and its refusal to grant non-exclusive rights to a potential competitor (Petchem). Docket No. 84-28, 1986 WL 170038, 28 F.M.C. 281, 296 (FMC Mar. 28, 1986), *aff'd, Petchem v. Fed. Mar. Comm'n,* 853 F.2d 958 (D.C. Cir. 1988). The Commission synthesized two trends in Commission case law analyzing exclusive arrangements. *Id.* at 296-98. One trend, the *Stockton* approach, followed an approach which *Petchem FMC* described as declaring "such arrangements unreasonable per se which meant that the proponent had to justify the arrangement" which might be done by demonstrating that the arrangement was necessary for economic efficiency or other reasons. *Id.* at 296; *see also A.P. St. Philip, Inc. v. Atlantic Land & Improvement Co.* (*St. Philip*), 13 F.M.C. 166, 173 (1969) (endorsing the *Stockton* approach as applicable to "a situation where a vessel owner's right to select a tugboat operator is denied by exclusive contract"). The second approach was applied in *In the Matter of Agreement No. T-2598*, Docket No. 72-24, 17 F.M.C. 286 (FMC Mar. 20, 1974) and was described in *Petchem FMC* as a two-part test which involved first determining whether the challenged "decision was reasonable at the time it was made" and second, "whether it was still reasonable in light of its subsequent effects." *Petchem FMC*, 1986 WL 170038, at *14.

In *Petchem FMC*, the Commission adopted a standard for evaluating exclusive arrangements that combines the two approaches and summarized its reasoning as follows:

> *Such arrangements are generally undesirable and in the absence of justification by their proponents may be unlawful under the Shipping Act*. However in certain circumstances such arrangements may be

> necessary to provide adequate and consistent service to a port's carriers or shippers to ensure attractive prices for such services and generally to advance the port's economic well being.

Petchem, 1986 WL 170038, at *15 (emphasis added). The Commission further explained that the proponent of an exclusive arrangement generally bears the burden of proving it is justified because it is the one championing the arrangement and generally controls evidence justifying its existence or alleged benefits. *Id.* However, the Commission was careful to note the ultimate burden of proving that the challenged practice is unreasonable remains on the complainant. *Id*. (citing 5 U.S.C. § 556(d)).

Petchem's "synthesized" test was affirmed on appeal, with the court emphasizing that the starting point for any analysis is the premise that the Shipping Act "does not favor exclusive arrangements except in exceptional circumstances." *Petchem, Inc. v. Fed. Mar. Comm'n*, 853 F.2d 958 (D.C. Cir. 1988). The court observed that even though the Shipping Act disfavors exclusive arrangements, it affords the Commission flexibility in applying those restrictions "in light of the particular circumstances existing at a given port." *Id.* at 963. "This flexibility is served by a rule that, in the first instance, holds restrictive port service arrangements to be presumptively illegal, but allows the proponents to meet the presumption of illegality through the offer of evidence in support of the restrictive arrangements reasonableness." *Id.*

The Commission has applied *Petchem's* synthesized test in subsequent cases challenging exclusive arrangements as unreasonable under the Shipping Act. *See, e.g.*, *Docking and Lease Agreement by and Between City of Portland, Main and Scotia Prince Cruises Ltd.,* Docket No. 04-10, 2004 WL 1895827, at *3 (FMC Aug. 23, 2004); *Exclusive Tug Arrangements in Port Canaveral, Florida*, Docket No. 02-03, 2002 WL 418057, at *2-3 (FMC Feb. 25, 2002); *Ocean Common Carriers Serving the Lower Mississippi River*, Docket No. 01-06, 2000 WL 128688, at *2 (FMC Aug. 21, 2000).

The Commission's established standard for exclusive arrangements as explained in *Petche*m, is the proper test for assessing the reasonableness of Respondents' practices.

3. Claims Against Respondents' Practices

Complainant Intermodal has the initial burden of demonstrating a prima facie case that the Rule 5.5 and 5.7 restrictions and practice of linking carrier haulage rates to merchant haulage volume are unreasonable. *See River Parishes,* 1999 WL 125991, at *12. That requires a two-part inquiry identifying, first, the relevant product and geographic markets and, second, the "degree of actual harm or harm likely to be caused by the practice within that market." *Id.; Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake, LLC,* Docket No. 11-11, 2013 WL 9808672, at *31 (ALJ Jan. 10, 2013). If Intermodal meets its initial burden, the onus shifts to the Respondents to offer a justification for restricting motor carriers/shippers to the ocean carriers' designated IEP and linking rates paid by the ocean carrier to merchant haulage volume. *See Maher Terminals, LLC v. Port Auth. of New York and New Jersey*, Docket No. 12-02, 2015 WL 435475, at *8 (ALJ Jan. 30, 2015); *Petchem FMC*, 1986 WL 170038, at *15. Complainant still has the ultimate burden of proving that these challenged practices are unreasonable under Section 41102(c). *See River Parishes*, 1999 WL 125991, at *12.

a. Prima Facie Showing of Unreasonableness

The first element--the relevant product market--is defined as "the boundaries within which competition meaningfully exists." *Marine Repair*, 2013 WL 9808672, at *6. The relevant geographic market is the "area in which consumers can practically turn for alternative sources of the product and to which the antitrust defendants face competition." *Id.* Complainant submitted reports from two experts addressing the relevant product and geographical markets. James Langenfeld, Ph.D., provided his opinion as an expert on market economics, competition, and antitrust principles. Jean-Paul Rodrigue, Ph.D., provided his opinion as an expert on the U.S. intermodal supply chain and transportation industry. Respondents submitted an expert report from MICP Capital prepared by Roger A. Passal, an experienced transportation industry analysis, and J. Douglass Coates, a self-described "innovator in international and domestic transportation and logistics." MICP Report, 34-35. The MICP Report did not define the relevant product or geographic markets but addressed the chassis usage market in general. *See id.* at 11-12, 34-35.

Complainant's experts identified the relevant product market as daily chassis usage. Dr. Langenfeld arrived at this definition by examining the competition boundaries for chassis used for merchant haulage. *See* Langenfeld Report ¶¶ 40-43. Dr. Langenfeld assessed whether motor carriers have a reasonable alternative or substitute for daily chassis rentals from the designated IEP to transport containers between the port and inland facilities. *Id.* In theory, motor carriers locked into an arrangement with a designated (exclusive) IEP could still supply their own chassis, either by renting the equipment long-term or purchasing it outright. *Id.* Dr. Langenfeld examined that option but found that would not make economic sense in most situations for several reasons: (1) daily usage charges for chassis are a small percentage of the overall cost of ocean transportation; (2) chassis equipment is costly and would require a significant initial outlay to purchase the equipment outright or an on-going commitment to regular rental payments; and (3) there is considerable risk that trucker-owned (or leased)[26] equipment could be underutilized. *Id.* Using trucker-owned wheels may add time and expense to container moves because it may require more chassis splits (moving the chassis without a container) and chassis flips (switching chassis) which also increase turn times and fewer trips per workday. *Id.* ¶¶ 45-51. Dr. Langenfeld cited these additional expenses and logistical complications in finding that trucker-owned wheels are not a reasonable substitute for daily rentals for merchant haulage shipments. *Id.* That conclusion is also consistent with statistics, he cited, indicating that trucker-owned wheels are uncommon. [redacted]

Respondents' expert, MICP, acknowledges the economic realities that limit the usage of trucker-owned wheels. *See* MICP

[26]Trucker-owned wheels in this Order refers to equipment owned outright or leased long-term by the motor carrier.

[redacted]

Report, 11-12. MICP states that: "[T]he acquisition or long-term lease of a chassis only makes sense where utilization rates are high and causes a motor carrier to assume more risk than taking on daily rental rates." *Id*. at 11. MICP also notes, however, that this may be changing in some U.S. locations, "where spot rates for daily chassis use" are high—motor carriers may increasingly view trucker-owned wheels as a viable option. *Id.*

The undisputed economic realities associated with using trucker-owned wheels for merchant haulage in most situations and the statistics on current ownership support Dr. Langenfeld's conclusion that daily chassis usage is the relevant product market. As he explained, the commitment to ownership or a long-term lease for equipment at risk of sitting idle some of the time does not make financial sense in most situations. *See* Langenfeld Report ¶ 67. For smaller carriers, purchasing or leasing may not be an option at all, since they may lack the up-front capital to purchase or revenue to commit to a long-term lease—particularly if that equipment may sit idle part of the time. So, the record clearly supports Dr. Langenfeld's opinion that daily chassis usage is the relevant product market.

Dr. Langenfeld defined the relevant geographic market as "the regions around major port and inland terminals." *Id.* ¶ 12; *see also* Rodrigue Report, ¶ 164. Dr. Langenfeld explained the practical and economic constraints that define the market boundaries:

> Motor carriers cannot substitute between ports in response to an increase in daily usage prices for chassis; the motor carrier is charged with transport from the port where the Ocean Carrier discharges the container to the end destination (or vice-versa). *Procuring chassis from an alternate location and carrying that bare chassis between ports or terminals in response to a price increase in the daily usage rate for chassis is cost prohibitive*.

Langenfeld Report ¶ 17 (emphasis added); *see also id.* ¶¶ 65-66. As he explains, ferrying the chassis any significant distance would quickly cancel out the cost-savings of a lower daily rental fee. *Id*. ¶¶ 65-67. Dr. Rodrigue also described how practicalities restrict the distance motor carriers can realistically travel to collect a chassis for short-term usage:

> Unlike container leasing markets, which are usually international and interoperable, chassis leasing and usage are predominantly regional. Chassis are rarely exchanged between markets, unless as part of a deliberate repositioning strategy by an equipment provider. For instance, due to changes in demand, an IEP may decide to relocate some chassis from one regional pool to another. Once the chassis have been relocated, they become part of the regional pool and are no longer available from the pool they were repositioned from.

Rodrigue Report ¶ 164. Collectively, these considerations led Dr. Langenfeld to conclude that the relevant geographic market is the area surrounding ports and inland terminals. Langenfeld Report ¶ 67.

Respondents' expert, MICP, did not define the geographic market or offer a contrary analysis. *See* MICP Report. Dr. Langenfeld's definition is supported by the record and reasoned analysis. The Commission adopts the Complainant's definition of the relevant geographic market as circumscribed by the region surrounding a particular port or inland facility where the chassis is to be used on a short-term basis.

The final prima facie case consideration is the degree of actual harm or harm likely to be caused by the practice within the relevant product and geographic markets. Dr. Langenfeld and Dr. Rodigue analyzed and stated their opinions on the effect the challenged practices have on rates and competition. Dr. Langenfeld explained that rates are negatively affected by the lack of choice which deprives motor carriers of the opportunity to compare and negotiate rates and service terms. That impact is apparent, Dr. Langenfeld states, because merchant haulage rates have increased while comparable carriage haulage rates have decreased or remained constant. Langenfeld Report, ¶ 20-22. As he explains, market dynamics allow IEPs designated as the exclusive provider to raise rates with impunity, because they do not risk losing business to a competitor offering better rates or more favor service terms. *See id.*

Dr. Langenfeld buttresses this assessment of rate trends with examples from areas serviced by CCM pools. *Id*. ¶ 22. He points to (1) Intermodal Cartage's increases between 3 and 50 percent, and (2) Evans Delivery's increase between 17 and 40 percent. *Id.* ¶ 58. He also notes that CCM's own data shows substantial price increases:

> For example, in the SACP, prices from non-NACPC providers increased from just under $15 in 2013 to around $20 by early 2018. In the years following . . . [merchant haulage] rates continued to rise substantially. Standard TRAC per diem rates at SACP (the same location as depicted below) reached $28.50 as of December 1, 2020, which is approximately a 35% increase from the depicted early 2018 rates.

Id. ¶ 60. Summarizing this price trend, Dr. Langenfeld states: "Excluding NACPC, prices for chassis on [merchant haulage] movements have increased by between 18 and 45 percent." *Id.* ¶ 59.

Dr. Langenfeld explains that it is telling that these marked price increases are only seen for merchant haulage and that carrier haulage rates have not increased over the same time period. He notes that: "List prices for [merchant haulage] daily chassis usage have increased significantly since 2016 . . . . in stark contrast to the rates that the Ocean Carriers negotiated in their contracts for chassis usage for [carrier haulage] . . . rates [which] have remained relatively flat over time, or, in some cases, have decreased. *Id.* ¶ 93. Because Dr. Langenfeld saw "no indication that daily rentals fell significantly during the period of these significant increases in daily prices by the IEPs," he interpreted that as evidence that IEPs can raise rates with impunity because motor carriers cannot readily take their business to a competing provider or decide to rely on trucker-owned wheels instead. *Id.* ¶¶ 61, 77, 81.

Dr. Langenfeld states that ocean carriers may have a built-in incentive to designate exclusive chassis providers because they may obtain monthly payments or lower carrier haulage rates if they do so. *Id.* ¶ 69. This leads to artificially low (below cost) carrier haulage rates and merchant haulage rates that are artificially high. Ocean carriers benefit from this arrangement at motor carriers' expense. *Id.*

¶ 81. These dynamics led Dr. Langenfeld to conclude that: "Economic analysis of relevant contracting terms and econometric analysis of chassis prices, controlling for relevant variables, shows that the absence of [c]hoice is associated with higher [merchant haulage] prices." *Id.* ¶ 91.

Complainant's second expert, Dr. Rodrigue, also explained how designating an exclusive chassis provider effectively shuts out potential competitors and increases merchant haulage rates. Rodrigue Report ¶ 108. Motor carriers cannot divert their business to a competitor unless they first obtain permission from the ocean carrier and in some cases, from the IEP as well. *See id.* The net effect is it leads to higher merchant haulage rates because IEPs can raise rates without losing business to competitors. *Id.*

Respondents' expert, Douglass Coates, acknowledged that some ocean carrier/IEP contracts reward the carrier for increased merchant haulage volume. Mr. Coates is Respondents' expert on the "design, organization and operation of the U.S. chassis provisioning system," and he states that:

> Some of the user agreements contain clauses which provide that the ocean carrier may receive a discounted [carrier haulage] rate or a direct payment if the [merchant haulage] chassis usage volume exceeds a certain amount or [merchant haulage] movements under the agreement exceeds a certain percentage.

Decl. of J. Douglass Coates ¶¶ 4, 14. However, Mr. Coates, discounts the effect of these contract clauses and states that evidence indicates that ocean carriers are not actually motivated by these provisions. *Id.* In his opinion, the "driving force" behind their decisions is the BCO and supply chain strategies, not financial incentives in their contracts with IEPs. *Id.*

Dr. Langenfeld's and Dr. Rodrigue's opinions about the exclusivity restrictions have on prices and competition are supported by facts and sound reasoning. It is clear from merchant haulage pricing trends, particularly when compared with carrier haulage pricing trends, that these choice restrictions are tied to higher prices with no attendant drop in business volume. In most situations, motor carriers do not have a viable alternative to paying the price the designated IEP imposes. Chassis are a necessity and substituting trucker-owned wheels is generally not economically feasible. These restrictions also effectively shut out potential chassis provider competitors or at least markedly impede their ability to compete for motor carriers' merchant haulage business.

Complainant has clearly demonstrated a prima facie case that the Rule 5.5 and 5.7 restrictions and contract linkages are unreasonable and will actually or likely cause harm in the relevant product and geographical markets. These impacts establish a prima facie case of unreasonableness. *See, e.g., Stockton*, 7 F.M.C. at 82-83 (evidence that a common carrier restricted competition and gave pricing power to a third party establishes a prima facie case of unreasonableness); *All Marine Moorings v. ITO Corp. of Baltimore*, Docket No. 94-10, 1996 WL 264720, at *10 (FMC May 15, 1996) (practices tending to support a monopoly are prima facie unreasonable); *St. Philip*, 13 F.M.C. at 172-73 (declaring an arrangement "where a vessel owner's right to select a tugboat operator is denied by exclusive contract" and thereby eliminated competition prima facie unjust and unreasonable, making it "incumbent upon respondents to furnish the justification").

The Commission defines the relevant product market as daily chassis usage and the relevant geographic market as the region surrounding a particular port or inland facility and finds that Complainant met its burden of establishing a prima case of unreasonableness.

b. <u>Respondents' Justification for the Challenged Practices</u>

Respondents state that the need to ensure an adequate supply of chassis justifies the challenged practices. Exceptions, 11-14.[28]

[28]The ALJ stated that motor carriers share that general objective, and Respondents challenge that statement. *See* Exceptions, 13-14. Motor carriers, like ocean carriers, plainly have a vested interest in ensuring an adequate supply of chassis so their operations can function smoothly. The fact that Complainant and Respondent have a shared goal is not the determining factor in weighing Respondents' justification, but it was not error for the ALJ to point out this truism.

Without the challenged restrictions, Respondents contend there is no practical means of ensuring a sufficient supply of chassis at ports and inland facilities around the country. *Id*. at 14. Respondents' expert cited the advantages of this arrangement in its report from the perspective of the IEPs and the benefits they derive from it. MICP Report, 27-28. MICP explains that IEPs commit to make their assets available at particular locations in exchange for the assurance that they will not be underutilized and that assurance "comes primarily from IEP's contracts with container lines." *Id.* at 27. Without that assurance, in MICP's opinion, there is a risk that IEPs would find their equipment are underutilized and "this would endanger the ability of the container lines to ensure a chassis supply sufficient to handle cargo." *Id.* at 27-28. MICP states that IEPs could decide either to relocate some equipment (potentially creating a shortfall at the original location) or they could lower merchant haulage rates to attract more business. *Id*. at 28. In MICP's view, either scenario is undesirable, because relocating would potentially leave the original location undersupplied and lowering prices would lead to a decline in chassis quality and maintenance. *Id.* MICP does not predict how likely these negative consequences are or cite supporting data or statistics. *See id.*

Respondents argue that the ALJ improperly weighed the evidence in addressing their justifications for Rules 5.5 and 5.7, failed to construe evidence in their favor, and unfairly discounted their experts' opinions. Exceptions, 8-9 (citing MICP Report, 14-16, 27-28).

c. Challenged Restrictions Reasonableness

To prevail on the reasonableness element of its Section 41102(c) claim, Complainant must show that the Rule 5.5 and 5.7 restrictions and contracts linking merchant haulage volume to lower carrier haulage rates are not reasonably related, fit or appropriate to the justification Respondents identified--maintaining an adequate supply of chassis for merchant haulage. *See River Parishes*, 1999 WL 125991, at *12; *Stockton*, 7 F.M.C. at 83 (weighing exclusive stevedoring arrangement's alleged benefits against "the disadvantage to complainants, carriers, and the public inherent in a stevedoring monopoly"); *Petchem*, 853 F.2d at 964; *Petchem*, 1986

WL 170038, at *15. *Compare St. Philip*, 13 F.M.C. at 173 (justifying exclusive arrangements is "a heavy" burden and arrangements not justified will be struck down).

Complainant's expert on the U.S. intermodal system, Dr. Rodrigue opined that Rule 5.7 is "more restrictive than needed to promote a reliable supply of intermodal chassis at a fair and reasonable price." Rodrigue Report, 8. He explained that it "give[s] IEPs unreasonable negotiating leverage, which leads to higher prices for motor carriers and their customers and creates inefficiencies in the supply chain, such as chassis splits and chassis flips" and these problems would be alleviated if motor carriers "were free to obtain chassis from the provider of their choice." *Id.* Dr. Rodrigue supported his opinion with an analysis of market dynamics that reduce competition and give IEPs the freedom to raise prices at will without risking that motor carriers will divert their business to another chassis provider. *Id.* ¶ 108. As he explained, the challenged restrictions:

> fail to promote the availability of a reliable supply of intermodal chassis at a fair and reasonable price. This is so because the existing Choice Rules give IEPs unreasonable negotiating leverage since motor carriers must request choice [sic], and IEPs have the discretion to accept or refuse the request.

Id. ¶ 114. In Dr. Rodrigue's opinion, ocean carriers have an incentive to adopt these restrictive practices because they benefit in the short term from lower carrier haulage rates and are not penalized by the higher merchant haulage rates. *Id.* ¶ 157. As he explains: "While such decisions may benefit individual ocean carriers" profit and loss statements in the short term, they externalize those costs to motor carriers, [beneficial cargo owners], and other stakeholders and reduce supply chain fluidity and velocity." *Id.*

Dr. Rodrigue cites evidence supporting his opinion that Rules 5.5 and 5.7 "create unreasonable negotiating leverage for the [designated] IEP" which leads to "higher [merchant haulage] prices and inefficient bargaining." *Id.* He cited [[redacted]] negotiated contract with an IEP [[redacted]] as an example of a contract "that severely restricted [[redacted]] ability to approve choice." *Id.* "As a consequence, when a motor carrier or its customer requests choice, [[redacted]] internal guidelines dictate that the request is at first denied, although [[redacted]] might then refer the requesting entity to the IEP to negotiate a lower rate." *Id.* So even though the motor carrier may nominally have the option of requesting a different chassis provider, that option may be illusory when the IEP has little incentive to negotiate a lower rate. *Id.* ¶ 101.

Dr. Rodrigue also points to ocean carriers' conduct as evidence that Rules 5.5 and 5.7 "are more restrictive than they need to be to" support an efficient chassis system. *Id.* ¶ 106. He states that carriers have successfully allowed motor carriers open choices which supports his opinion that "[l]imiting chassis choice for [merchant haulage] moves is not necessary for an ocean carrier to meet its own chassis provision goals." *Id*. Dr. Rodrigue explained that Rule 5.7's restrictions also have negative impacts that go beyond rates and competition because they may lead to IEPs withdrawing from gray pools, which in turn leads to "increased operational costs" for motor carriers and possibly lower quality service. *Id.* ¶ 108.

Dr. Rodrigue also explained how freeing motor carriers from these constraints will tend to lower merchant haulage rates:

> This price-reducing competition can occur in two ways. First, using choice, motor carriers (or BCOs/OTIs) may be able to substitute a lower-price IEP for the ocean carrier's default IEP as its daily chassis rental provider. Second, using choice, motor carriers and their customers may be able to obtain lower [merchant haulage] prices from the ocean carrier's default IEP, by negotiating a chassis supply contract with either the ocean carrier's default IEP or some other IEP. The motor carrier would have much greater ability to obtain a competitive rate than they do without choice, since the IEPs would know that the motor carrier or its customer could choose among IEP s for their [merchant haulage] business as a result of choice.

Id. ¶ 99.

Respondents' expert, MICP, does not analyze the restrictions and contract linkage on merchant haulage rates and competition among chassis providers. MICP simply states, without supporting analysis or citations to specific facts and data, that "the evidence does not support [Complainant's] claims that the status quo harms the shipping public." MICP Report, 27, Section V-C. MICP opines that, contrary to the opinions expressed by Complainant's experts--the "unfettered, unilateral Choice [Complainant] advocates is likely to be harmful to the shipping public." *Id.* MICP also states that the exclusivity provisions give IEPs the assurance they require to commit to retaining equipment at particular locations and without that commitment, IEPs "would be faced with a greater degree of financial uncertainty than they face at present." *Id.* Faced with that uncertainty and the possibility of assets being underutilized, MICP states that IEPs would have two options--both of which they it states would be detrimental to the shipping public. *Id.* at 28. IEPs could either relocate underutilized chassis to a different market or lower prices to increase business. *Id.* In MICP's opinion, neither outcome is desirable, because any short-term benefit motor carriers and shippers derive from lower rates would be short-lived and leave the IEPs lacking the revenue needed to support a well-maintained fleet of chassis. *Id.* MICP also opines that allowing free choice to "all motor carriers in all locations on demand" will require revising chassis pool operations and the shipping public will bear the cost of those adjustments. *Id.* MICP does not address whether these adjustment costs will be transitory or long-lasting or the likelihood that the market will adjust to a "free choice" model and reach a new sustainable equilibrium. *See id.*

The rationale that MICP offers as justification for linking merchant haulage volume and carrier haulage rates does not address the issue in this case. MICP states that industry discounts for high-volume customers are "not unusual in the international ocean transportation industry." MICP Report, 15-16. But the question is not whether volume discounts are permissible, but rather whether a practice that subsidizes ocean carrier expenses by limiting motor carriers' or shippers' free choice and imposing higher rates on them is reasonable. MICP does not address that question or point to evidence that justifies that practice.

Complainant makes a compelling case supported by its experts' analysis that the challenged practices impose unfair restrictions on competition and raise merchant haulage prices.[29] *Cf. River Parishes*, 1999 WL 125991, at *12 (complainant failed to show that respondents' exclusive tug arrangement resulted in poor service or excessive costs, or resulted in unlawful anticompetitive effects). Respondents have not refuted Complainant's evidence with facts, data, or well-supported analysis. *See* MICP Report; Exceptions 11-14. Their expert, MICP, principally relies on conclusory assertions that without the challenged restrictions, the chassis supply system will become dysfunctional. Balanced against Complainant's well-supported expert analysis, Respondents' arguments are not persuasive. *See generally All Marine Moorings*, (approving ALJ's observation that "the greater the degree of preference or monopoly, the greater the evidentiary burden of justification"); *Distribution Services, Ltd. v. Trans-Pacific Freight Conference of Japan*, Docket No. 86-12, 1988 WL 340659, at *7 (Jan. 6, 1988) (general statements or universal goals are insufficient to justify exclusive arrangements).

The Commission finds that Respondents' practices restricting motor carriers to the designated IEP and linking carrier and merchant haulage to obtain lower rates for ocean carriers are unreasonable under Section 41102(c).

4. <u>ALJ's Alleged Reliance on Antitrust Standards</u>

Notwithstanding the courts' and the Commission's acceptance of the *Petchem* synthesized approach as the standard for reviewing exclusive arrangements, Respondents argue that the ALJ should have applied a different test. They contend that the challenged chassis-provisioning arrangements are not "akin to exclusive dealing," and even if the two were comparable, the ALJ misapplied the Commission's test. Exceptions, 10-17. Respondents contend that: (1) the ALJ's legal analysis is "rooted in antitrust law" primarily meant to prevent monopolies, which is not the concern

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[29]Unlike cases in which the respondent is a public port entrusted with a duty to act in the public interest, this is not a case in which Respondents are duty-bound to act in the public's best interest. When the respondent has that duty, the Commission has assumed that it will honor the public trust placed in it and fulfill that duty. *See Petchem FMC*, 1986 WL 170038, at *14. That same assumption does not apply here where the entities are private companies and associations with a duty to act in the best interest of their shareholders and members.

here; (2) the antitrust concepts the ALJ applied are outdated and have fallen into disfavor; (3) the ALJ improperly shifted the burden of justifying the practices to the Respondents; and (4) the ALJ failed to consider their practices' procompetitive benefits which are supported by antitrust law.

As the discussion in Section 2 above highlights, the synthesized *Petchem* test that the ALJ applied is firmly rooted in established Commission case law developed under the Shipping Act. *See* I.D., 30-34. The ALJ did not judge the reasonableness of Respondents' practices by applying antitrust law. In fact, the ALJ expressly stated that antitrust principles have only a "limited role" in evaluating whether practices are reasonable under the Shipping Act and that limited utility is basically their use as a tool to understand the structure and potential impact of exclusive arrangements. *See id.* at 31. As the Commission explained in *All Marine Moorings*: "While no determination of whether a particular practice or action would be considered violative of the antitrust laws is necessary to a determination of reasonableness under the Shipping Act, the concepts, terminology, and framing and analysis of issues involved in antitrust cases are frequently useful in such determinations." 1996 WL 264720, at *29. That was the strategy the ALJ used in this case in referring to antitrust concepts as a mechanism for understanding the chassis market and how the various participants are affected by Respondents' practices. I.D., 31-32. Following that strategy was consistent with sound reasoning and established Commission case law and is not reversible error. *See id.*

Respondents raise several related arguments about the ALJ's alleged misapplication of federal antitrust law that are equally unfounded. *See* Exceptions, 10-11. First, they contend that the ALJ applied an "outdated and incorrect interpretation of the antitrust law." *Id*. Ignoring the fact that the ALJ did not decide the claims by applying antitrust law, Respondents nevertheless contend that the ALJ relied on outdated antitrust principles that the federal courts have since rejected. Their only basis for that assertion is a sentence the ALJ quoted from *Sanofi-Aventis U.S., LLC v. Myland, Inc.*, 44 F.4th 959, 983 (10th Cir. 2022): "The primary antitrust concern with exclusive dealing arrangements is that they may be used by a monopolist to strengthen its position, which may ultimately harm competition." I.D., 32. The ALJ quoted *Sanofi* only to to illustrate the risk that exclusive dealing can pose to competition, but did not quote the sentences that followed because they were not germane. *See id*. As the ALJ made clear in the sentence immediately following the *Sanofi* quotation. "Reliance on antitrust principles is not necessary, however." *Id.* Respondents ignore that disclaimer entirely and argue that the ALJ misapplied federal antitrust law because the ALJ did not quote *Sanofi's* commentary about the law moving away from an outright rejection of exclusive dealing as presumptively harmful. *See* Exceptions, 10-11. It is plain that the ALJ did not base the reasonableness determination on antitrust law and Respondent's criticism of the ALJ's isolated quotation from *Sanofi* is simply irrelevant. *See id.*

In a second argument based on *Sanofi's* discussion about the federal courts' evolving views on exclusive dealing contracts, Respondents argue that the line of cases synthesized in *Petchem*, which the ALJ relied on, was grounded in federal antitrust law as it existed decades ago and that the Commission's standards for judging exclusive arrangements need to evolve in tandem with federal law. Exceptions, 10-11. *Sanofi* stated that: "Despite some initial confusion, today exclusive dealing contracts are not disfavored by the antitrust laws," and listed potential benefits such arrangements might offer. 44 F.4th at 998. Respondents argue that the Commission should follow *Sanofi's* lead and abandon Commission precedent treating exclusive dealing as presumptively or potentially harmful or requiring Respondents to justify those arrangements. *See id*.

This argument is not persuasive for two reasons. First, it incorrectly assumes that the Shipping Act and federal antitrust statutes rely on the same elements of proof and therefore must evolve in tandem. That is simply not the case. Proving a Section 41102(c) claim depends on evidence demonstrating that the respondent engages in unjust or unreasonable practices in handling, delivering or transport ocean-borne cargo. That question is highly fact-dependent and is analyzed through the prism of Commision case law and regulations. *See Port Elizabeth Terminal*, 1 F.M.C. 2d 29, 2018 WL 1942720, at *12 (describing the benchmark test for unreasonableness as whether the practice is "otherwise lawful, not excessive" and "fit and appropriate to the ends in view"). Here, as the ALJ accurately stated, the legal question is whether ocean carriers' policy of designating chassis providers exclusively or by default is reasonable. I.D., 37. Whereas in *Sanofi,* the court was addressing a claim brought under Section 2 of the Sherman Act, and that claim required evidence of: (1) "the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Sanofi*, 44 F.4th at 980 (quoting *United States v. Grinnell Corp*., 384 U.S. 563 (1966)). The stark differences between antitrust and Shipping Act claims defeat Respondents' starting premise that the Shipping Act's reasonableness test is tethered to federal antitrust law and that the two must evolve in tandem. As the Commission has repeatedly cautioned, antitrust principles are useful in comprehending and explaining market behavior and impact on competition, but they are not the factors that determine whether a regulated entity violated the Shipping Act.

Second, Respondents' contend that the ALJ failed to consider the challenged practice's potential benefits. *See* Exceptions, 10-11. On the contrary, the ALJ expressly acknowledged the CCM rules' potential procompetitive effects, but found that they did not outweigh the negative effects or counteract the essential unfairness of eliminating motor carriers' choice. I.D., 54. The ALJ found that, as "a captive audience," motor carriers "must pay the rate determined by the IEP" the ocean common carrier designates but have no opportunity to negotiate rates or terms of service. *Id*.; JSF ¶¶ 195, 197.

Respondents raise two additional arguments in claiming that the ALJ misapplied controlling law. They contend that the ALJ erroneously relied on principles that govern monopolies, and simultaneously criticize the ALJ for not finding that this case involves a monopoly. *See* Exceptions, 12-13; I.D., 32. This argument is contradicted by the ALJ's analysis. The ALJ had no reason to address whether the Respondents are operating as a monopoly—since that is not part of the reasonableness test. Further, as already noted, the ALJ applied the Commission's case law, not federal antitrust law, to determine whether the practices violate Section 41102(c). I.D., 32. Respondents' criticism of the ALJ's citation to *Fed. Mar. Comm'n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 243 (1968) is equally misplaced. Respondents argue that its holding was superseded by statute. The ALJ cited *Aktiebolaget* and *Agreement No. 57-96, Pac. Westbound Conference Extension of Authority for Intermodal Svs*., 19 F.M.C. 291, 301 (FMC Sept. 15, 1976) to explain that "the necessity of FMC [agreement] review in exchange for limited antitrust immunity is central to the purpose of the Shipping Act itself." *See* I.D., 28-29, 31. That principle has not changed.

The Commission finds that the ALJ did not misinterpret or misapply the Shipping Act or federal antitrust law in finding Respondents' restrictive practices unreasonable under Section 41102(c).

5. Objections to Exclusive Arrangement Standard

Respondents object to the ALJ's reliance on the *Petchem* test and argue that this is not an exclusive arrangement case. The ALJ's analysis of Respondents' chassis-provisioning practices was guided by long-standing Commission case law on exclusive arangements for terminal services. *See* I.D., 36. That is unquestionably an apt comparison. CCM Rules 5.5 and 5.7 restrict motor carriers' ability to select the chassis provider to supply equipment for merchant haulage cargo. *Id.* In the two test case regions where CCM pools operate (Memphis and Savannah), Rule 5.5 assigns chassis charges to the ocean carriers' designated provider and Rule 5.7 allows the motor carrier to switch to another chassis provider only if the ocean carrier supports that request and, in some cases, if the request is not vetoed by the IEP. *Id.*

Despite the clear parallels between these exclusive chassis-provisioning rules and exclusive arrangements addressed in other Commission decisions, Respondents argue that the ALJ's reliance on those exclusive arrangement cases, like *Petchem and Perry's Crane*, is reversible error. Exceptions, 11-13. Respondents contend that those cases were addressing the reasonableness of exclusive arrangements imposed by MTOs and ports, but the chassis-provisioning restrictions here are materially different. *Id.* This argument fails on several levels. The ALJ acknowledged that this case "does not involve an exclusive arrangement" for services provided by an MTO or a public port and consequently treated the exclusive arrangement cases as "instructive and provid[ing] a useful analytical framework" but did not reflexively apply *Petchem* or the line of cases it represents. I.D., 34. Rather, the ALJ applied the test to the facts presented in this case. Further, this line of cases is not restricted to factually-identical claims as Respondents' contend. Exceptions, 11-13. The *Petchem* test originated from the general principle that reasonableness under the Shipping Act should be tested against how well a challenged practice is suited to achieve its intended objective. That underscores that it is not restricted to a narrow set of cases involving ports' or MTOs' services.

Moreover, this case is factually similar to *Petchem* and *Perry's Crane,* where shippers or service providers protested restrictions on their ability to retain or choose among service providers. *See* I.D., 38-39. Here, as in those cases, complainants' freedom to choose and negotiate with a provider for essential services was restricted by an arrangement put in place or endorsed by the respondents. In *Perry's Crane*, the port's assigment of right of first refusal to its crane operator restricted complainant's ability to work with other crane operators. In *Petchem*, the restrictions affected tug service and stymied potential competitors' efforts to offer a choice among competiting tug operators. Not only are the facts and claims materially similar to this case, it is telling that the defenses and justifications Respondents raise in this case are notably similar to those raised in *Petchem*. *See id.* The cross-overs in terms of the restrictions on necessary transportation-related services and potential impact on the quality and cost of those services clearly signal that the ALJ appropriately relied on Commission precedent examining exclusive arrangements—represented most notably by the analysis in *Petchem* and *Perry's Crane*.

Respondents also contend that even if the analytical framework used in *Petchem* and *Perry's Crane* applies, this case is distinguishable because Respondents are not public ports or MTOs. Exceptions, 12. That is not a material difference. The ALJ examined the impact of Respondents' practices on motor carriers' inability to choose among chassis providers or negotiate for more favorable terms and justifiably found those restrictions are unfair. Respondents also point to the impact on competition as a material difference. *See id.* at 11-13. They contend that unlike the restrictions imposed by ports and MTOs, here motor carriers retain the ability to compete with one another for ocean carriers' business. *See id.* That argument is a non sequitur. The restrictions limit motor carriers' ability to choose among competing chassis providers—

which precisely parallels the situations in *Petchem* and *Perry's Crane*. *See* I.D. 38-39.

Respondents also argue that even if their practices qualify as exclusive dealing (which they deny), the ALJ "erred in requiring Respondents to justify their conduct" and misapplied the burden-shifting framework and also contend they have justified the challenged practices. Exceptions, 11, 13. Respondents contend that the ALJ should have considered whether the chassis provisioning restrictions are "not excessive" and "fit" the ends in view. Exceptions, 13, 19. That is in fact what the ALJ did. The ALJ applied the "fitness" standard, which Respondents seem to acknowledge in making their second argument, which claims that the ALJ erroneously failed to identify the "end in view" for Respondents' restrictions. *See id*. This second argument reverses the order of the analysis. It is incumbent on Respondents in the first instance to identify what they meant to achieve with the restrictions and point to evidence showing how the restrictions further that objective. *See, e.g., All Marine Moorings*, 1996 WL 264720, at *3; *River Parishes*, 1999 WL 125991, at *27; *Petchem* (explaining that "[t]he burden of adducing evidence of such circumstances falls upon the port and the other parties to the exclusive arrangement both because they are the arrangement's proponents and because evidence of that nature usually lies within their control"). In their third "fitness standard" argument, Respondents partially concede that the ALJ did identify the restrictions' objective but then quibble with what the ALJ identified as that objective. The ALJ mentioned as likely objectives: establishing an orderly system for assigning chassis providers and allocating charges to incentivize the efficient flow of cargo. *See* I.D., 36, 38.

Respondents quarrel with those objectives and claim they are not sufficiently definite or specific and are inconsistent. Exceptions, 19. Again, Respondents have flipped the order of proceeding on its head—they ignore the fact that it was their responsbility in the first instance to identify the restrictions' objective. The ALJ was not responsible for defining the objectives Respondents meant to achieve. To the extent that Respondents argue that the ALJ failed to adequately describe *their* objectives, the Respondents, not the ALJ are at fault. It was their responsibility to clearly articulate the objectives their practices were meant to serve and explain how the restrictions are tailored to serve that intended purpose. The ALJ examined the objectives Respondents identified, such as the need to ensure a safe supply of chassis, but found them insufficient. I.D., 38-39 (acknowledging a "[s]ufficient supply of safe chassis" as a "legitimate concern" but finding that Respondents did not "sufficiently explain how ocean carrier control over chassis" are necessary to attain that objective and that it "does not justify the restraints on competition.")

The Commission finds that the ALJ did not err in requiring Respondents to offer a justification for their challenged practices and in evaluating whether those practices are otherwise lawful, not excessive, fit and appropriate to the stated purpose. The Commission therefore denies Respondents' exceptions challenging the ALJ's analysis on those points.

6. Objections to ALJ's Rejection of Respondents' Justifications

The ALJ found Respondents' exclusive designation of an IEP and the practice of linking carrier haulage rates paid by ocean carrier to merchant haulage volume unreasonable as a matter of law. I.D., 43-46. Respondents contend that in making that determination, the ALJ impermissibly required them to justify these restrictions as necessary or fit for the intended goal and improperly weighed conflicting testimony and other evidence and failed to construe evidence in their favor. Exceptions, 9. Respondents also contend that the ALJ failed to consider evidence that motor carriers can negotiate for discounts. *See id.* Complainant argues that this practice unfairly allows Respondents to negotiate for lower carrier haulage rates in exchange for guaranteeing a certain level of merchant haulage volume which in effect results in motor carriers subsidizing lower carrier haulage rates. *See* I.D., 42-43.

The ALJ agreed with Complainant that the choices ostensibly allowed under CCM Rule 5.7 are illusory because the ocean common carriers have veto power. I.D., 36. Respondents do not dispute that motor carriers' exemption requests are subject to approval by the ocean carrier and the IEP. *Id.* The ALJ also considered whether CCM Rules 5.5 and 5.7 were tailored to meet their intended purpose by considering whether they incentivize the efficient flow of cargo for merchant and carrier haulage. I.D., 36-37. To answer that question, the ALJ considered ocean carriers' veto power over motor carriers' choice of alternative chassis providers and found it equivalent to giving "the selected IEP an exclusive right to provide chassis" or in effect, "a de facto mini-monopoly." *Id*. at 37. The ALJ determined that designating a chassis provider for merchant haulage unreasonably limits motor carriers' freedom of choice. *Id*. at 35.

Respondents dispute Complainant's assertion that removing the designated chassis provider restrictions will tend to lower the cost of renting chassis for merchant haulage and contend that lower rental costs paid by the motor carrier will not necessarily be passed along to the shipper (or beneficial cargo owner) billed for the motor carrier's service—since motor carriers' bills to their customers generally include a markup. Exceptions, 14-15. The ALJ acknowledged that granting motor carriers the freedom to choose would not necessarily lower costs and might even lead to higher costs since motor carriers would not have the same bargaining power as ocean common carriers. I.D., 35. But, the ALJ found that that: "With freedom to compete, however, the market may freely adjust," rather than be constrained by arrangements the carriers dictate to the motor carriers. *Id.*

Under the *Petchem* burden-shifting framework, once the ALJ found certain challenged practices unreasonable, the burden shifted to Respondents to offer a justification and explain why the restrictions should be allowed to stand. *See id.* The justification they offered was the need to ensure an adequate supply of safe chassis. *See* Exceptions, 13-14, 17-18. Respondents also relied heavily on what they described as their willingness to voluntarily step forward and make the financial commitment to establish and operate interoperable pools. *See id.* The ALJ acknowledged that ensuring a sufficient chassis supply is a legitimate goal but was not persuaded that designating an exclusive chassis provider was either a necessary or the least restrictive means of achieving that goal. I.D., 38. The ALJ determined that the "choice program" embodied in CCM Rule 5.7 is more restrictive than necessary because in the end, the choice of a chassis provider for merchant haulage is in the hands of the ocean common carrier, not the motor carrier responsible for arranging and paying for chassis usage. *Id.* at 30, 36. The ALJ also observed that motor carriers have the same interest as ocean carriers in ensuring an adequate supply of safe chassis is available. I.D., 38-39; *see generally Stockton Port District*, 7 F.M.C. at 75-76.

Respondents challenge the ALJ's reasoning and cite this proceeding as evidence that motor carriers and ocean common carriers have divergent interests. Exceptions, 17. Respondents contend that they have a unique interest in and commitment to structuring an efficient chassis-provisioning system. Exceptions, 17-18.[30] In making this argument, Respondents rely on two assertions that are not in dispute, but fail to acknowledge or provide evidence on a critical link between those two assertions. *See id.* The importance of ensuring an adequate supply of safe chassis and interoperable pools' potential role in facilitating that goal are not in dispute. What Respondents fail to show, however, is how or why their exclusive provider restrictions are the least restrictive means to reach that goal. *See id.*

It is possible to infer that designating an exclusive provider gives the IEPs some assurance of minimum volume or demand at particular locations which lets them predict the number of chassis needed to serve that demand and gives them some assurance of a predictable revenue stream. But even if the Commission accepts that inference, Respondents do not point to evidence showing that their exclusive designation practice is the least restrictive means of ensuring an adequate supply of chassis. While Respondents suggest that without the guarantee of a certain minimum of merchant haulage, IEPs will be reluctant to commit to position chassis at needed locations, they do not point to supporting evidence. *See id.* Changing or eliminating the exclusivity restrictions presumably would not change the overall demand for chassis at a particular location, but on a more granular level, it might shift demand or usage among chassis providers, particularly if they compete for motor carriers' and shippers' business. IEPs would not have the built-in assurance they currently have under their exclusive designation arrangements with the ocean carriers. So even if the Commission considers ensuring an adequate chassis supply a valid justification, Respondents are still not entitled to prevail because they have not shown why designating an exclusive provider is a necessary or the least restrictive means to achieve that goal.

[30]Complainant counters that argument by contending that maintaining an adequate supply of safe chassis cannot be a legitimate objective for the restrictions because ocean carriers do not arrange or pay the cost of merchant haulage. *See* Complainant's Mot. for Summary Decision, 18-19.

Respondents argue that the ALJ improperly weighed the evidence and relied on disputed facts in finding that the practices of designating chassis providers for merchant haulage and linking carrier and merchant haulage are unreasonable. Exceptions, 4-8. This argument overlooks the distinction between deciding whether the rules are unreasonable or overly restrictive as written and/or as applied to motor carriers engaged in merchant haulage and the evidence relevant to each question. The ALJ resolved the first question in finding that the rules are unreasonable and overly restrictive as applied, but not the second. *See* I.D., 36. The ALJ found that it was not possible to determine at this stage of the case whether the rules are unreasonable or overly restrictive as applied, because material facts are in dispute. *See Anderson*, 477 U.S. at 248 (explaining that facts are material fact if they may affect the outcome under the governing law).

Finally, Respondents argue that the restrictions are a discretionary business decision entitled to deference. While the Commission gives appropriate deference to a port's business decisions, that does mean those decisions are exempt from scrutiny when they are challenged as unreasonable. *See Petchem*, 1986 WL 170038, at *17-18; *Seacon Terminals, Inc. v. Port of Seattle*, Docket No. 90-16, 1993 WL 197325, *19 (FMC Apr. 14, 1993). Business decisions are still subject to review under the applicable legal standard, and that is what the ALJ conducted in this case.

In sum, once Complainant established a prima facie case of unreasonableness, Respondents needed to offer a justification for the challenged practices. Respondents did not support that proffered justification with relevant facts, data, or sound expert analysis, and the ALJ appropriately found it unpersuasive. The Commission denies Respondents' exceptions challenging the ALJ's analysis and determination on that point.

7. Objections to ALJ's Findings on Exclusivity Arrangement at the Pool of Pools

CCM does not manage the Pool of Pools (POP) servicing the Ports of Los Angeles and Long Beach. The POP does not operate under CCM rules, but does operate under similar exclusivity rules. I.D., 54. The POP is an interoperable pool operated collectively by the IEPs (DCLI, TRAC, and Flexi-Van). *Id.* at 52; JSF ¶ 195. The ocean carrier whose container is being moved selects the IEP for merchant and carrier haulage, and motor carriers must use that provider. I.D., 52; JSF ¶ 197. Ocean carriers can negotiate volume discounts based on both carrier and merchant haulage but those savings are not passed along to the motor carrier or shipper. I.D., 52; JSF ¶ 197. The ALJ found these restrictions unreasonable because motor carriers are deprived of choice and an opportunity to negotiate for better rates or terms of service on merchant haulage and they are more restrictive than necessary to operate the POP as an interoperable pool. I.D., 55. The ALJ also found that these operating practices conflict with representations the IEPs made to the DOJ in obtaining the business review letter that allows them to operate the POP collabroatively without risking accusations that they are violating federal antitrust law. *Id.* at 54-55.

Respondents argue that they are not responsible for the restrictions because the IEPs establish and enforce operating rules for the POP, which Respondents merely follow. Exceptions, 37-38. That argument lacks merit. As the ALJ pointed out, ocean carriers select a particular IEP to provide chassis for their containers and are fully cognizant of the fact that their selection will lock in the motor carrier while giving the ocean carrier the benefit of better rates linked to increased merchant haulage volume. I.D., 54. The ALJ reasonably concluded that Respondents failed to support their stated justification with relevant evidence.

The Commission denies Respondents' exceptions and affirms the ALJ's findings on the challenged practices applicable to the Pool of Pools.

8. Withdrawing from Interoperable Pools and Designating Proprietary Pools

Complainant alleges Respondents' practice of withdrawing from interoperable pools in favor of designating proprietary pools unreasonably restricts motor carriers' choices for merchant haulage. *See* I.D. 48-52. This practice allegedly leads to inefficiency and drives up costs. *Id.* at 22-25. The ALJ found that the Commission has authority to order "Respondents to cease and desist withdrawing from interoperable CCM pools" if that practice violates the Shipping Act, to determine which chassis-provisioning model is most efficient, and to direct Respondents to continue using that model.

I.D., 48-52. The ALJ also concurred with concerns Complainant raised about the impact ocean carriers' withdrawals may have on supply chain efficiency and cited the Commission's Memphis Supply Chain Innovation Team study findings about the state of its chassis provisioning model and the need for immediate improvements. *Id.* at 51 (signaling that "final briefing on Memphis" may be "the next step" if this case proceeds to the next level). However, the ALJ did not direct Respondents to cease or desist from withdrawing or order them to remain participants in interoperable pools. *Id.* The ALJ found that "the facts necessary to determine the reasonableness of decisions to withdraw from interoperable pools are disputed. Therefore, it cannot be determined by summary decision whether the decisions to withdraw from interoperable pools in the four geographic regions at issue are unreasonable." *Id.*

Respondents do not directly challenge the ALJ's determination that the Commission has authority to decide whether withdrawing from an interoperable pool violates the Shipping Act and can be the subject of a cease-and-desist order. *See* Exceptions. The ALJ based the Commission's authority over this practice on its power to determine whether that conduct violates the Shipping Act and to order that conduct to cease when a violation is found. I.D., 50. The ALJ also relied in part on the Commission's mission and inherent responsibility for "ensuring an efficient transportation system for ocean commerce." *Id*. The ALJ appropriately rejected Respondents' contention that the Commission lacks authority to order them to remain in interoperable pools. *See id.* at 52. The Commission can require regulated entities to conform their practices to the Shipping Act's requirements. As redefined by OSRA 2022, the Shipping Act's purposes include ensuring that the U.S. ocean transportation system is "efficient, competitive, and economical." 46 U.S.C. § 40101; *see also American Export-Isbrandtsen Lines*, 444 F.2d at 828-29.

To fairly assess whether that determination is sound and its potential implications, it is helpful to consider separately as the ALJ did in part, whether: (1) the Commission has authority to decide whether an ocean carrier acted unreasonably or unjustly in withdrawing from an interoperable pool; (2) if so, whether a complainant has demonstrated actual harm that can be addressed by the Commission, either in the form of reparations or a cease-and-desist order; and (3) if the appropriate remedy is a cease-and-desist order, whether that order can issue and provide meaningful relief without requiring action or forbearance by non-regulated entities. The ALJ answered the first question but not the second as it involved disputed issues of fact, and did not reach the third question.

The ALJ's determination that the Commission has authority to decide whether an ocean common carrier's decision to withdraw from an interoperable pool and switch their carrier and merchant haulage business to an interoperable pool is unreasonable or unjust is soundly grounded in the Shipping Act and Commission case law. As the ALJ explained, the Commission clearly has authority and oversight responsibility to determine whether ocean common carriers' chassis provisioning practices are unreasonable. I.D., 48-52. It also clearly has authority to determine whether a complainant has sustained actual harm that can be addressed through reparations or a cease-and-desist order. The IEPs assert in their amicus brief that Complainant has failed to show how the market is harmed by the exclusive restrictions it challenges. IEP Amicus Br., 4. Complainant is not required to demonstrate a detrimental impact on the chassis-provisioning market to justify the cease-and-desist order issued by the ALJ. Demonstrating motor carriers' inability to use a chassis provider they choose for a service they are responsible for providing and will be billed for is sufficient to show harm justifying a cease-and-desist order.

The third question, which the ALJ did not reach and which the Commission need not and does not resolve at this stage of the case, is more complicated both legally and factually. Assuming, as Respondents contend, the IEPs operate independently and are not regulated by the Commission (i.e., not directly or indirectly controlled by ocean common carriers or operating under FMC-filed agreements), it is difficult to conceive in the abstract of how the Commission might structure injunctive relief that is meaningful while simultaneously avoiding directing the IEPs to act or refrain from acting. Since Respondents depend on chassis use agreements with IEPs and do not own the chassis used for carriage or merchant haulage, any relief the Commission awards would need to consider those constraints and frame the relief to require meaningful compliance from the ocean common carriers but not require action or forbearance by the IEPs who are outside the Commission's regulatory authority under Section 41102(c). Whether that is feasible will depend in part on how ocean common carriers have structured their relationship with the IEPs, and will need to be tailored to differences between regions where interoperable chassis pools are still operating versus locations where proprietary pools now exist and other location-specific conditions.

The ALJ also tacitly proposed an unreasonableness test for this particular claim derived from the Supreme Court's test applied in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585, 603-04, 608-611 (1985) to decide whether an entity's voluntary withdrawal from a cooperative joint venture violates antitrust laws. I.D., 50. The ALJ accurately observed that interoperable pools are essentially "joint ventures between competing IEPs authorized by ocean carriers." *Id. Aspen* involved a claim that a dominant firm's withdrawal from a joint venture with smaller competitors offering combined ski passes violated the Sherman Act. In *Aspen*, the court considered the dominant's firm's decision to withdraw from what was presumably a profitable and beneficial joint venture as potential evidence of their willingness to forgo short-term profits for an opportunity to dominate the market or achieve some other anticompetitive result. *See Verizon Communications, Inc. v. Law Offs. of Curtis V. Trinko*, LLP, 540 U.S. 398, 409 (2004) (interpreting *Aspen,* 472 U.S. at 608, 610-11). *Aspen* also considered the impact the dominant ski operator's withdrawal had on consumers and competition and the fact that it continued participating in similar ticket ventures in other markets. *Aspen,* 472 U.S. at 608, 610-11. The *Aspen* test is a reasonable proxy for examining whether ocean carriers' withdrawal from an interoperable pool is based on reasonable objectives or calculated to achieve some other end.

The Commission finds that it has authority to direct Respondents not to withdraw from interoperable chassis pools if their withdrawal is found to be unreasonable under Section 41102(c).

9. Evergreen's Objections to the ALJ's Findings

Evergreen joined in Respondents' consolidated exceptions, and also filed individual exceptions to address what it contends are unique aspects of its chassis-pool arrangements with IEPs and motor carriers. Evergreen asserts that it provides chassis to motor carriers free of charge, does not differentiate between carriage and merchant haulage when fees are charged, and affords motor carriers a choice of merchant haulage. Evergreen contracts with IEPs to secure chassis for carrier and merchant haulage, then imposes a chassis usage charge on its customers and motor carriers for both carrier and merchant haulage. JSF ¶¶ 63-65. If the chassis is not returned within the allotted free time, Evergreen assesses a per diem charge until the chassis is returned, under the terms of the UIIA Agreement[31] signed by the motor carrier and Evergreen. *Id*. Evergreen's merchant haulage terms are defined in its filed tariff. *Id.*

Evergreen moved for summary decision based on its chassis-provisioning model for the four test case regions and opposed Complainant's motion for summary decision. The ALJ determined that to the extent Evergreen's practices mirror those of the other Respondents in limiting motor carriers' choice of chassis providers for merchant haulage, those practices violate the Shipping Act. I.D., 61. The ALJ also denied Evergreen's cross-motion for summary decision on the basis of its chassis-provisioning model for the four test case regions. *Id.* The ALJ found that "[b]y obtaining chassis from exclusive chassis providers at a single, fixed contractual daily rate for use in both [carrier and merchant haulage] moves, Evergreen is presumably benefitting from volume discounts as well as profiting from any upcharges on chassis daily late fees." *Id.* at 60. The ALJ found that undisputed evidence shows that Evergreen pays the same rate whether the chassis is used for merchant or carrier haulage, but that Evergreen does not pass its rates directly along to the motor carrier. *Id.* Instead, Evergreen links merchant haulage volume to obtain discounted rates for both merchant and carrier haulage and charges motor carriers a "daily late fee" after the first 5 days and keeps any profit over the charges it pays to the IEP. *Id.*

Evergreen argues that the ALJ erred in denying its motion for summary decision and undisputed facts entitle it to judgment as a matter of law. Evergreen's Exceptions, 2. The facts that Evergreen asserts are dispositive are: (1) motor carriers' ability in theory to use their own chassis or a chassis provided by an IEP they or the customer select; and (2) the absence of charges during the initial 5-day free time. Complainant argues that Evergreen's model is not materially distinct from the other common carriers' because motor

[31]The Uniform Intermodal Exchange and Facilities Access Agreement (UIIA) is available online at https://intermodal.org/uiia/.

carriers still lack freedom of choice and Evergreen bills them or the beneficial cargo owner directly for a chassis usage fee even if the chassis is returned within the 5 days of "free time." Complainant's Reply to Exceptions, 46-47.

Evergreen is correct in that these facts it relies on are not disputed, but accepting these facts as true does not address or erase the fundamental problem with Evergreen's approach. Evergreen's model may differ from the other Respondents' but it still has the same fundamental flaw. That flaw is the built-in assumption that the motor carrier will use Evergreen's chassis at the rates Evergreen has set unless the motor carrier provides its own chassis or contracts separately with an IEP. That built-in assumption places Evergreen's model on the same footing as the other Respondents' practices in terms of placing the onus on the motor carrier to make alternate arrangements if they do not want to use Evergreen's chassis for merchant haulage or pay its preset rates. Evergreen's assertion that motor carriers can opt out of its model by providing their own chassis or independently contracting with an IEP is a defense that may show that the Evergreen's policy is reasonable as applied, but the record is not sufficiently developed to establish that as a matter of law at this point. While Evergreen points to motor carriers' ability to exercise this opt-out feature in theory, it does not recite statistics or undisputed facts to show that the opt-out alternative is something more than a theoretical option and is actually available to motor carriers for the asking.

The Commission denies Evergreen's exceptions and affirms the ALJ's Initial Decision as to the claims against Evergreen.

10. Objections to Cease-and-Desist Order

The ALJ directed Respondents to cease violating Section 41102(c) in the four test case regions (Chicago, Los Angeles/Long Beach, Memphis and Savannah) and directed them to cease adopting, maintaining, or enforcing regulations or practices that limit motor carriers' ability to use the chassis provider of their choice for merchant haulage. I.D., 61. The ALJ based that order on findings that these practices proximately cause financial harm to motor carriers, generally restrain competition, and detrimentally impact transportation system efficiency. *Id*. at 46-47, 57. The harm derives from motor carriers' lost opportunities to negotiate more favorable rates or service terms from a chassis provider of their choosing. *Id*. Although the order is limited to the four test case regions, the ALJ noted that the same legal analysis would apply if Respondents engaged in those practices in other locations. *Id*. at 58.

Respondents argue that the ALJ improperly ignored undisputed evidence that motor carriers suffer no harm because they mark up their costs and receive more from shippers than they pay out for chassis usage. Exceptions, 18. They assert that Complainant failed to prove financial harm proximately caused by the merchant haulage practices and argue that the ALJ should also have considered this absence of harm in assessing whether the practices are reasonable under 46 C.F.R. § 545.4. *Id.* Complainant defends the ALJ's order as supported by the record and appropriately tailored to address the consequences of conduct the ALJ found unlawful under Section 41102(c). Complainant's Reply to Exceptions, 48. Complainant asserts that there is evidence of actual harm in the form of increased rates prices for merchant haulage chassis and the collapse of interoperable pools which impacts motor carriers and the shipping public in the form of higher transportation costs and inefficiencies. *Id*. at 1, 14. Complainant claims that Respondents' practices caused the collapse of regional interoperable CCM pools including Chicago and that Memphis could be the next casualty. *Id.* at 14.

The Commission has the authority to order regulated entities to cease violating the Shipping Act. *See American Export-Isbrandtsen Lines,* 444 F.2d at 828. A cease-and-desist order is justified if the Commission finds a Shipping Act violation and has determined that the unlawful conduct is likely to continue or resume unless Respondents are ordered to stop. *Maher Terminals,* 2013 WL 9808667, at *3 n.8; *see also, e.g., Alex Parsinia d/b/a Pac. Int'l Shipping and Cargo Express,* Docket No. 97-01, 27 SRR 1335, 1342 (ALJ 1997) (cease-and-desist orders are "appropriate when the record shows that there is a likelihood that offenses will continue absent the order and when the record discloses persistent offenses"); *Portman Square Ltd.-Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, Docket No. 96-17, 28 S.R.R. 80, 86 (ALJ 1998) (cease-and-desist orders are appropriate if respondents are likely to resume their unlawful activities).

Beyond vindicating the interests of the Complainant in a particular case, cease-and-desist orders also provide broader relief and protections for industry stakeholders and the shipping public. *See Pacific Champion Express Co. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, Docket No. 99-02, 1999 WL 1126489, at *9 (ALJ Nov. 17, 1999). They alert the shipping industry to practices found to be unreasonable and unjust, help to prevent future violations, and facilitate addressing future violations of the same kind. Such orders should be narrowly tailored to address harms the Commission has found are occurring and violate Shipping Act prohibitions. *See id.*

Respondents' objections to the cease-and-desist order here are unfounded. *See* Exceptions, 18. While it is true that the ALJ did not find financial harm, that is not a prerequisite for an order directing unreasonable practices to cease. *See* I.D., 57 (acknowledging that ending the exclusivity restrictions could actually lead to an increase in merchant haulage rates because motor carriers may lack the same bargaining power as ocean common carriers); *see also Stockton Port District,* 7 F.M.C. at 76. When the conduct at issue is an exclusive arrangement that restricts choice or opportunities to compete, those conditions alone can support ordering a respondent to cease engaging in those practices. *See Stockton Port District,* 7 F.M.C. at 76. In *Stockton*, the Commission granted a cease-and-desist order based on findings that Stockton Elevators' exclusive arrangement with the port over "dockside and other wharfinger and stevedoring services" was unjust and unreasonable. *Id*. This arrangement prevented ocean common carriers from using stevedores they selected to unload their vessels. *Id*. at 82. That arrangement was found to "operate[] to the detriment of the commerce of the United States . . . contrary to the public interest," and upended the long-standing custom of carriers working with stevedoring companies of their own choosing and "opens the door to evils which are likely to accompany monopoly, such as poor service and excessive costs." *Id.* at 82-83. These considerations led the Commission to conclude that:

> Such a practice is prima facie unjust not only to stevedoring companies seeking work but to carriers they might serve and the general public which is entitled to have the benefit of competition among stevedoring companies serving ships carrying goods

> in which the public is interested as shipper or consumer for the same reasons it is prima facie unreasonable.

Id. at 83. The Commission cautioned that it was not declaring "all monopolistic stevedoring agreements are necessarily and inevitably unjust and unreasonable practices which must be prohibited at any cost." *Id*. at 84. But the Commission also hastened to add that "the burden of sustaining such practices as just and reasonable is a heavy one." *Id*. at 84 n.6.

Importantly, for purposes of this case, *Stockton* made clear that a complainant need not prove actual harm has already occurred to justify the Commission directing unreasonable restrictions to cease. As the Commission explained: "It is not significant that these evils have not been proved to actually exist yet at Stockton [Port]. Healthy competition for business which is the best-known insurance against such evils has been destroyed." *Id.* at 83 n.5. It is sufficient to show that the challenged practice denies the complainant a choice of service providers which in and of itself creates the potential for exploitation if there is no competition on costs or terms of service. *See id.* at 82-83.

Here, Respondents' practice of designating a chassis provider for merchant haulage moves deprives motor carriers of choice and denies them the opportunity to negotiate rates and terms of service. Interfering with motor carriers' ability to choose among chassis providers affects basic interests that promote economic efficiency. Here, as in *Stockton*, proving these practices exist is sufficient to justify an order directing Respondents to cease-and-desist. Complainant is not required to show that the restrictions have or will inexorably cause higher prices. Proving that the restrictions foreclose free choice and opportunities to negotiate rates and terms of service is sufficient. *See, e.g., Perry's Crane* ALJ, 16 S.R.R. at 1477.

Given that a showing of actual harm is not a prerequisite for a cease-and-desist order, Respondents' arguments that the Complainant failed to prove financial harm or actual loss are legally immaterial. Exceptions, 14. Further, even if that were not the case, their arguments lack merit. Respondents' argument that motor carriers will suffer no harm if chassis usage prices are higher is defeated by the direct purchaser rule.[32] *See In re Vehicle Carrier Servs.*, 1 F.M.C. 2d 440, 446 (FMC 2019). For the past 90 years, the Commission and its predecessor agencies have followed Supreme Court precedent in applying what has become known as the "direct purchaser rule." From the complainant's side, the direct purchaser rule deems the person that paid illegal overcharges (or directly sustained the harm) as the only person "directly damaged" regardless of what may have occurred later, *i.e.,* even if they passed the overcharges or loss on to their customer. *Id*. (citing *Oakland Motor Car Co. v. Great Lakes Transit Corp*., 1 U.S.S.B.B. 308, 310-311 (1934)). From the respondents' side, the direct purchaser rule means that they cannot defend claimed overcharges or other financial loss by asserting that the complainant could pass the overcharge or loss along to their customer. *Id.* (citing *Southern Pacific Co. v. Darnell Taenzer Lumber Co*., 245 U.S. 531 (1918)). The Supreme Court reaffirmed the direct purchaser rule in May 2019 in finding that plaintiffs in that case could sue the defendant under the antitrust laws because they were direct purchasers. *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1519 (2019).

Respondents also argue that their exclusive arrangements with the IEPs are a stabilizing force that ensure a reliable supply chain and ordering them to halt their current practices will obliterate those benefits and may potentially disrupt the supply chain. Exceptions, 15. They contend that if chassis providers cannot be certain of a minimum level of demand, they are likely to move eqiupment to higher demand locations, leaving some regions struggling to find enough equipment to meet the demand. *See id.* Respondents contrast that with the status quo where "each chassis provider places chassis at locations where they are needed" and where they have ocean carriers' contractual assurance that they will be utilized. *Id.* Without that assurance, Respondents contend, chassis providers will look to motor carriers and shippers to commit to use their equipment for merchant haulage moves and there is nothing in the record to suggest that motor carriers will provide that level of commitment. *See id.* at 15-17. Respondents also raise concerns about the practical aspects of implementing the ALJ's cease-and-desist order and the impacts it may have on overland

[32]The IEPs make the same assertion, claiming that motor carriers profit by marking up the chassis charges billed to their customers. IEP Amicus Br. 3-4.

transportation, and potential difficultes it may experience with railroads. *Id.*

Respondents do not point to statistics or expert evidence indicating the likelihood that the scenario they paint of supply chain disruption, inadequate chassis supplies, or other difficulties stemming from the cease-and-desist order will actually occur. While a period of readjustment is certainly possible if ocean carriers stop using exclusive arrangements, it is equally possible that the chassis supply market will adjust within a reasonable time frame and reach a new equilibrium. Changing which provider supplies the chassis will not alter traffic volume or demand—the same number of chassis will still be required—but who supplies them will be open to competition.

Respondents and the IEPs who filed as amici also theorize that the motor carriers may collectively step into the role of securing minimum commitments for chassis usage and contend that have a self-interest in promoting NACPC, a chassis provider operated by several motor carriers. Exceptions, 16. The IEPs also claim that ordering the ocean carriers to cease designating exclusive chassis providers or withdrawing from interoperable pools will benefit NACPC and that NACPC is positioning itself as a potential competitor that will unfairly benefit from IEP's investment. IEP Amicus Br., 3, 11-17. The IEPs contend that Complainant is trying to dictate a pool model that will allow NACPC to bill for the use of the IEPs' equipment without making the same commitment of assets required of other pool members. *Id*. at 3.

Motor carriers' ownership or operation of a chassis-provisioning enterprise that does or may aspire to compete with the IEPs who currently dominate the market does not detract from Complainant's arguments or provide a reason for refusing to direct Respondents to cease engaging in unreasonable practices. If declaring exclusive arrangements unlawful opens the playing field up to more potential competitors, owned by the motor carriers or another entity, that is a positive development. The fact that Complainant's constituents and members may have an interest in competing with the IEPs is not a reason to allow Respondents' to continue restrictive practices that make it more difficult for other chassis providers to compete for merchant haulage contracts.

In framing the relief to address Respondents' violation of Section 41102(c), the ALJ appropriately ordered Respondents to cease and desist from designating an exclusive chassis provider, enforcing rules that restrict motor carriers to the chassis provider the ocean common carrier has chosen, and practices that lock in the motor carrier to the chassis provider the ocean carrier selected.

The Commission affirms the cease-and-desist order issued by the ALJ.

III. CONCLUSION

The Commission hereby:

(1) **DENIES** Respondents' March 7, 2023 Consolidated Exceptions to the ALJ's Initial Decision Partially Granting Summary Decision;

(2) **DENIES** Respondent Evergreen's March 7, 2023 Exceptions to the ALJ's Initial Decision Partially Granting Summary Decision;

(3) **AFFIRMS** the Initial Decision Partially Granting Summary Decision;

(4) **ORDERS** Respondents to cease and desist from engaging in the practices for merchant haulage the Commission has determined violate 46 U.S.C. § 41102(c) in the four test case regions addressed in this Order: Chicago, Los Angeles/Long Beach, Memphis, and Savannah; and

(5) **REMANDS** this case to the ALJ to resolve the remaining claims and for further proceedings consistent with this Order.

By the Commission.

David Eng
Secretary

APPENDIX A

DATE	DOCKET ENTRY/SUBMISSION[redacted]
08/17/20	Complaint (**Compl.**)
02/28/22	Joint Statement of Facts (**JSF**)
[redacted]	
04/29/22	Decl. of J. Douglass Coates (Public Version)
04/29/22	Complainant's Mot. for Summary Decision (Public Version)
06/02/22	Respondents' Response to Complainant's Statement of Material Facts
06/02/22	Complainant's Supplemental Statement of Undisputed Material Facts
06/16/22	Complainant's Reply to Respondents' Response to Intermodal's Statements of Undisputed Material Fact (**Complainant's Reply Stmt. Facts**) (Public Version)
[redacted]	
12/21/22	Respondents' Response to Complainant's Stmt. Of Undisputed Facts (Public Version)
12/19/22	Complainant's Response to Mot. for Summary Decision (Corrected Public Version)
02/06/23	Initial Decision Partially Granting Summary Decision (**I.D.**)
03/07/23	Respondents' Exceptions to Initial Decision Partially Granting Summary Decision (**Exceptions**)
03/07/23	Evergreen's Exceptions to Denial of Mot. for Summary Decision (**Evergreen's Exceptions**)
04/05/23	Complainant's Consolidated Reply to Respondents' and Evergreen's Exceptions (**Complainant's Reply to Exceptions**)
04/14/23	Brief Amici. Curiae Direct Chassis Link, Flexivan Leasing & Interpool, Inc. (**IEP Amicus Br.**)
05/08/23	Brief of Amicus Curiae American Cotton Shippers

[redacted]

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

TIR AUTO TRANSPORT LLC, *Complainant* v. V&S BROTHERS INC. AND V&S CARGO INC., *Respondents*.	**DOCKET NO. 23-07**

Served: February 14, 2024

ORDER OF: Linda S. Harris CROVELLA, *Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

[Notice Not to Review served 3/18/2024, decision administratively final]

I. Overview

A. Background

On January 30, 2024, Complainant TIR Auto Transport LLC ("TIR" or "Complainant") and Respondents V&S Brothers Inc. ("VBI"), and V&S Cargo Inc. ("VSC" or collectively, "Respondents"), filed a joint motion seeking approval of a confidential settlement agreement and dismissal with prejudice of the complaint ("Motion"), with a copy of the confidential settlement agreement.

Using language borrowed in part from the Administrative Procedure Act, Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b); *see* 5. U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old*

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

Ben Coal Co. v. Sea-Land Serv., Inc., 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A AM. JUR. 2D *Compromise and Settlement* § 3 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

The parties state that the confidential settlement agreement "reflects a fair and considered judgment of the relative strengths of their positions, the desire to avoid continuing litigation costs, and to avoid inherent litigation risks." Motion at 3. The parties further state:

> [The Confidential Settlement Agreement] does not contravene law or public policy. It is the product of arms-length negotiations, free of fraud, duress, or undue influence, is not unjust or discriminatory, has no adverse effect on any third

> parties or market, and does not violate the Shipping Act. It does not reflect mistake or any other defects.

Id.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991).

The confidential settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

Based on the representations in the joint motion and other documents filed in this matter, the parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The parties are represented by counsel and have engaged in arms-length settlement discussions. The proceeding would require review of the parties' briefing and an initial decision would be subject to exceptions or appeals. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. Accordingly, the settlement agreement is approved.

Upon consideration of the motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the motion to approve the settlement agreement between Complainant TIR and Respondents VBI and VSC be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. The settlement agreement should be maintained in the Secretary's confidential files. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.

Linda S. Harris Crovella
Administrative Law Judge

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

MCS INDUSTRIES, INC., *Complainant*

v.

COSCO SHIPPING LINES CO., LTD. AND MSC MEDITERRANEAN SHIPPING COMPANY SA, *Respondents*.

DOCKET NO. 21-05

Served: February 16, 2024

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION ON REMAND[1]

[exceptions filed by Respondent MSC 3/11/2024, final decision served 7/16/2024]

I. INTRODUCTION

A. Overview and Summary of Decision

This proceeding commenced on August 3, 2021, when the Federal Maritime Commission ("Commission") issued a Notice of Filing of Complaint and Assignment ("Notice"). The Notice stated that Complainant MCS Industries, Inc. ("MCS Industries") had filed a complaint alleging violations of the Shipping Act of 1984 ("Shipping Act") and it required the Commission's final decision to be issued by February 17, 2023. Shortly thereafter, Respondent COSCO Shipping Lines Co., Ltd. was dismissed due to a settlement.

An Initial Decision on Default ("Initial Decision" or "I.D.") was issued on January 13, 2023, imposing a default decision against Respondent MSC Mediterranean Shipping Company SA ("MSC Mediterranean Shipping" or "Mediterranean") for failing to produce discovery. The Initial Decision explains the basis of the discovery dispute, including the undersigned's letter of request to Switzerland pursuant to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. The Judge in Switzerland rejected the request on the ground that this proceeding is administrative and therefore does not fall within the scope of the Hague Convention. I.D. at 2. Nonetheless, Respondent continued to refuse to produce the discovery and, after multiple warnings, a default decision was entered.

On January 3, 2024, the Commission issued an Order Partially Affirming Initial Decision on Default and Remanding for Further Proceedings ("Commission Order"). The Commission found that the Initial Decision properly determined that the FMC has jurisdiction over the claims;

[1] This decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

default as a discovery sanction was well-supported by the record; Mediterranean's repeated claims that Swiss law bars it from providing discovery under FMC procedures was properly rejected; D.C. Circuit factors for the evaluation of default as a discovery sanction are present here; and lesser sanctions would not be adequate to address this situation. Commission Order at 2. Therefore, the Commission denied exceptions and affirmed the Initial Decision as to liability; remanded for consideration of whether the "delay sanction" described at 46 U.S.C. § 41302(d) may also support the imposition of default here; and remanded for the submission of evidence sufficient to support the reparations Complainant seeks. Commission Order at 31.

MCS Industries seeks reparations of $1,152,677 for the difference between the rate it contracted for with MSC Mediterranean Shipping and the rate that it actually paid on the spot market for the shortfall of 422 TEUs from May 2020 to July 2021. MCS Industries submitted a declaration from its only logistics analyst, who verified the amended complaint and who is also the contact person and signatory of the service contracts. MCS Industries also submitted copies of the service contracts, a table listing the shipments on which the reparations claim is based, and freight bills, invoices, and other documents supporting the amounts claimed. MSC Mediterranean Shipping contends that the claim for reparations is inconsistent with prior claims; an oral hearing is required; and MCS Industries has failed to provide competent evidence to justify any reparations award.

As discussed more fully below, the delay sanction is found to be an additional ground for imposing a default decision. Additionally, it is reasonable to calculate actual damages based on the difference between the rates contracted for with MSC Mediterranean Shipping and the actual spot rates MCS Industries paid for shipments during the timeframe and from the port pairs identified in the amended complaint. The evidence provided by MCS Industries is sufficient to support the reparations claims, although only for timeframes and port pairs alleged in the amended complaint. Therefore, reparations claims from December 2021 to April 2022 and one claim for a shipment from Jakarta are found to be outside the scope of the violations alleged in the amended complaint and are excluded from the calculation of reparations. Accordingly, the total reparations ordered is $861,706.50, plus interest.

B. Background

1. Initial Filings and Initial Decision

On August 3, 2021, the Commission issued a notice stating that MCS Industries had filed a complaint and setting the deadline for an initial decision as August 3, 2022, and the deadline for the Commission's final decision as February 17, 2023.

On August 26, 2021, MSC Mediterranean Shipping filed an answer denying the complaint's allegations and raising defenses.

On September 23, 2021, an initial decision was issued approving the confidential settlement agreement with Respondent COSCO Shipping Lines Co., Ltd.

Also on September 23, 2021, a scheduling order was issued, adopting the parties' proposed schedule and requiring discovery to be completed by January 27, 2022.

On December 8, 2021, an order was issued granting MCS Industries' motion to compel over a dozen different categories of information sought in discovery.

On December 21, 2021, a revised scheduling order was issued requiring discovery to be completed by March 22, 2022, and briefing completed by June 1, 2022.

On February 4, 2022, Complainant's motion seeking leave to file an amended complaint, expanding the timeframe to include the previous May 2020-April 2021 service contract, was granted. In that same order, Respondent's motion to dismiss or for summary disposition was denied, finding that the amended complaint raised plausible violations of the Shipping Act.

On March 4, 2022, an order on proposed revised schedule and discovery notice was filed which required, in relevant part, the parties: to "provide a joint status report addressing the status of discovery, the issues above, and a proposed request for overseas discovery by April 4, 2022" and to continue to exchange discovery in an expeditious fashion. Order on Proposed Revised Schedule and Discovery Notice at 2. On April 4, 2022, the parties filed a joint status report regarding the status of discovery and Swiss discovery issues.

On May 4, 2022, an order granting the request for a letter of request under the Hague Convention was issued, finding that the letter would be "the most appropriate and efficient process" for obtaining discovery, and attaching the letter of request "with minor modifications from the parties' proposal" for MCS Industries to translate and file with the appropriate Swiss authorities. Order Granting Request for Letter of Request under Hague Convention at 1-2.

On July 8, 2022, MCS Industries filed a notice of decision on letter of request with French and English translation of the June 29, 2022, Decision of the Judge in the Republic and Canton of Geneva, civil court, which rejected the request on the ground that this proceeding is administrative and therefore does not fall within the scope of application of the Hague Convention. On July 15, 2022, the parties filed a joint status report.

On July 29, 2022, the Commission issued a notice of extension of time stating that it "determined to extend the deadline for issuance of an initial decision in this proceeding from August 3, 2022, to February 3, 2023" and that "the time for issuance of the Commission's final decision is extended from February 17, 2023, to August 17, 2023." July 29, 2022, Notice at 1.

Also on July 29, 2022, an order was issued requiring MSC Mediterranean Shipping to produce all outstanding discovery by August 29, 2022, including the discovery ordered to be produced in the order granting the motion to compel issued on December 8, 2021. On August 26, 2022, MSC Mediterranean Shipping filed a motion seeking an extension of time and on September 6, 2022, it filed a notice of advice of the Swiss Federal Office of Justice. On September 2, 2022, MCS Industries filed an opposition to the motion for an extension of time.

On September 8, 2022, MSC Mediterranean Shipping was ordered to show cause "why a default decision should not be issued against it for failure to produce discovery." Order Denying Respondent's Motion for an Extension of Time and Order to Show Cause ("OTSC") at 1.

On September 22, 2022, MSC Mediterranean Shipping filed its response to the order to show cause ("OTSC Respondent Response"). On October 6, 2022, MCS Industries filed its response to the order to show cause ("OTSC Complainant Response"). On October 14, 2022, MSC Mediterranean Shipping filed a reply ("OTSC Respondent Reply").

On October 18, 2022, MSC Mediterranean Shipping filed a notice labeled as "Notice of Determination of the Swiss Federal Office of Justice that the Procedures of the Hague Evidence Convention Apply to this Proceeding and Must Be Used." On October 28, 2022, MCS Industries filed a letter objecting to the unsolicited notice.

On November 8, 2022, MSC Mediterranean Shipping filed a notice labeled as "Notice of Issuance of Formal Decision of The Swiss Federal Department of Justice and Police that the Hague Evidence Convention Procedures Apply to this Proceeding and Must Be Used" with a French document and English translation of a decision "of the Federal Department of Justice and Police FDJP," signed by a "Member of the Federal Council." Complainant did not respond to the November 8, 2022, filings.

On January 13, 2023, the Initial Decision was issued ordering that "a default decision with prejudice be entered against MSC Mediterranean Shipping because of its willful and deliberate failure to provide discovery" and further ordering that "MSC Mediterranean Shipping pay a total of $944,655, plus interest from July 31, 2021, in reparations to MCS Industries." I.D. at 23.

2. Commission Order and Remand Filings

On February 6, 2023, MSC Mediterranean Shipping filed exceptions to the Initial Decision. On February 28, 2023, MCS Industries filed a response to the exceptions.

On August 17, 2023, the Commission issued a second notice of extension of time, stating that "the Commission has determined to extend the deadline for issuance of the final decision in this proceeding from August 17, 2023, to February 16, 2024." Aug. 17, 2023, Notice at 1.

On January 3, 2024, the Commission issued an Order Partially Affirming Initial Decision on Default and Remanding for Further Proceedings. Regarding section 41302(d), the Commission remanded for determination "with the benefit of focused and prompt briefing from the parties, of whether 46 U.S.C. § 41302(d) provides an additional basis to support the imposition of default here." Commission Order at 27. Regarding reparations, the Commission remanded "for a 'determination of the amount of reparations' under 46 C.F.R. § 502.65(c) based on affidavits or documentary evidence that provides adequate detail as to the damages MCS actually suffered for the violations alleged in its operative complaint." Commission Order at 30 (citing 46 C.F.R. §§ 502.251 (Proof on award of reparation); 46 C.F.R. § 502.252 (Reparation statements)).

On January 4, 2024, a remand scheduling order was issued. On January 19, 2024, MCS Industries filed its remand brief, exhibits, and a motion for confidential treatment. On February 5, 2024, Mediterranean Shipping filed its remand opposition brief, exhibits, and a motion for confidential treatment.

C. Request for Confidential Treatment

Both parties filed requests for confidential treatment. Neither party objected to the other party's request for confidential treatment. Confidential treatment is sought for service contracts, service contract terms, non-public competitive pricing data, third-party invoices containing non-public competitive pricing and cost data, and other confidential business information.

Commission Rule 5 authorizes confidential treatment for confidential commercial information. The parties' requests for confidential treatment are narrowly tailored, excluding just a few lines from their briefs and specific exhibits or pages of exhibits. Accordingly, both motions requesting confidentiality are **GRANTED**. "Treating information as confidential does not affect the Commission's or the ALJ's ability to rely on that information to decide the claims." *Intermodal Motor Carriers Conference v. OCEMA,* Docket No. 20-14, 2024 WL 641501, at *7 n.12 (FMC Feb. 14, 2024) (citing 46 C.F.R. § 502.5(c)).

Neither party included sequential Bates numbers on their exhibits. However, each exhibit is clearly labeled with an exhibit number and within each exhibit there is a unique number sufficient to identify the page cited. For example, MCS Industries' table in Exhibit 4 lists the Exhibit 5 Bates numbers, which start with PEX5, so that the Exhibit 5 documents supporting each row of the table can be quickly and easily located. Moreover, the documents in Exhibit 5 are well-organized as they are arranged chronologically, shipment by shipment. Therefore, the exhibits will be accepted as submitted.

II. ANALYSIS AND CONCLUSIONS OF LAW

A. Arguments of the Parties

Complainant MCS Industries asserts that MSC Mediterranean Shipping's undue delays in this action constitute an additional independent basis under 46 U.S.C. § 41302(d) for the decision on default and that the declaration and exhibits accompanying their brief provide detailed evidence of the ocean freight costs underlying MCS Industries' request for reparations of $1,152,677. Brief at 1-6.

Respondent MSC Mediterranean Shipping contends that MCS Industries has failed to provide competent evidence to justify any reparations award and that 46 U.S.C. § 41302(d) provides no basis for a default finding. Opposition at 2-15.

B. Discussion

The Commission remanded only two narrow issues: (1) whether the delay sanction provision at 46 U.S.C. § 41302(d) is an additional basis to support default in this case and (2) the submission of evidence sufficient to support the claimed reparations. Commission Order at 25-30. The delay sanction will be discussed prior to addressing reparations. Each discussion includes the relevant law, arguments of the parties, and analysis.

1. Delay Sanction

a. Relevant Law

The Commission remanded for consideration of whether the delay sanction provided at 46 U.S.C. § 41302(d) is an additional basis to support default in this case. Commission Order at 25. Section 41302(d) states:

> Sanctions for Delay. - If, within the period for final decision under subsection (c), the Commission determines that it is unable to issue a final decision because of undue delay caused by a party to the proceeding, the Commission may impose sanctions, including issuing a decision adverse to the delaying party.

46 U.S.C. § 41302(d).

The Commission stated:

> This provision authorizes what would amount to a default sanction if the Commission determines that a party's "undue" delay has caused the agency to be unable to issue a final decision within the period it has set to do so. Section 41302(c) specifically applies to final decision periods in proceedings initiated under "this section or section 41301," and section 41301 is the "Complaints" section describing the initial procedure for adjudications. This makes it clear that section 41302(d), which specifically applies to final decision periods established under section 41302(c), also applies to adjudications like the current case.
>
> In this case, the deadline for final decision has been extended twice, resulting in a delay of almost one full year. The Secretary's initial Notice in August 2021 set a deadline for the final decision of February 17, 2023. FMC Docket No. 21-05, Doc. 2. The ALJ's First Order, which Mediterranean neither appealed nor complied with, was issued in December 2021. The ALJ's Second Order, which Mediterranean neither appealed nor complied with, was issued on July 29, 2022. On that same day, the Secretary extended the final decision deadline to August 17, 2023. FMC Docket No. 21-05, Doc. 49. In September 2022, the ALJ issued the Third Order, which offered Mediterranean the option of simply producing the outstanding discovery in lieu of responding to the order to show cause. Mediterranean chose to resist the order, with several filings in late 2022. In January 2023, the ALJ issued the Initial Decision on Default, and Mediterranean filed Exceptions in February 2023. In August 2023, the Secretary again extended the final decision deadline, this time to February 16, 2024. FMC Docket No. 21-05, Doc. 67.
>
> In this situation, imposing the sanction of default for the delay Mediterranean has caused may well be appropriate under 46 U.S.C. § 41302(d). Mediterranean's repeated failures to comply with discovery orders appear to have been the primary, if not the exclusive, cause of the two extensions which currently have set the final decision deadline back about a year, to February 2024. Obviously, the Commission cannot now issue a final decision by the initial deadline of February

> 2023, nor by the second deadline of August 2023. The Decision at issue here did not discuss the effect of Mediterranean's delay on the final decision deadline specifically. But the ALJ did discuss the effects of that delay at some length in explaining how it prejudiced the complainant (first *Webb* factor), noting that it "significantly delayed this proceeding." Decision at 19. And she returned to the subject in finding that Mediterranean's conduct had prejudiced the adjudication system (second *Webb* factor), describing the failure to meet a number of deadlines, which "caus[ed] multiple revisions of the schedule to accommodate the delays." *Id*. at 20. It may be that Mediterranean's failure to produce the discovery ordered was not the sole cause of the first extension of the final decision deadline in July 2022, since MCS and the ALJ did sign off on the initial effort to get documents from the Swiss court using a Hague Convention procedure in the preceding few months. But regardless, it seems likely that Mediterranean's failure to comply with the Second Order, also issued in July 2022, eliminated any chance of meeting the original February 2023 deadline for a final decision, and Mediterranean's continued resistance to producing the discovery also made the August 2023 deadline impossible to meet.
>
> At a minimum, 46 U.S.C. § 41302(d) merits careful consideration because it reflects clear Congressional concern that causing undue delay to FMC proceedings may well merit the most extreme sanction: a "decision adverse to the delaying party." That concern may support the imposition of the default at issue here even if that result is based primarily on the discovery sanctions described in 46 C.F.R. § 502.150(b).

Commission Order at 25-27.

b. Arguments of the Parties

MCS Industries argues that: "since late November 2021, and well past that initial August 3, 2022 deadline, virtually every filing in this action was a direct result of Mediterranean's failure to comply with its discovery obligations;" Mediterranean belatedly raised the Swiss legal issue; Mediterranean's discovery-related delays necessitated extensions of deadlines by the Commission; and the procedural history of this action clearly supports sanction pursuant to Section 41302(d) and a decision on default against Mediterranean. Brief at 2-4.

MSC Mediterranean Shipping contends that: Congress did not intend Section 41302(d) to apply to litigation pauses caused by a foreign blocking statute; MSC has engaged in good faith efforts to expedite this case; and the extensions of time in this case are not unusual in civil complaint proceedings before the Commission. Opposition at 11-15.

c. Analysis

The question posed by section 41302(d) is whether the Commission was "unable to issue a final decision because of undue delay caused by a party to the proceeding." 46 U.S.C. § 41302(d). If so, the Commission "may impose sanctions, including issuing a decision adverse to the delaying party." *Id.* The parties did not identify, and the undersigned has not located, any decisions invoking this delay sanction.

All parties appearing in Commission proceedings are entitled to due process. Moreover, as MSC Mediterranean Shipping points out, not all Commission cases are resolved within the initial deadlines imposed by the Commission. To violate this section, the delay muse be "undue." For example, MCS Industries' filing of an amended complaint almost five months into the proceeding could have delayed the proceeding. However, as explained in the order permitting the amended complaint, "allowing the amendment would 'be more efficient and cost-effective than filing a new, separate complaint against Respondent, and would allow the overlapping issues to be addressed in a streamlined fashion.'" Order on Motion to Amend Complaint and Motion to Dismiss at 2 (citing Complainant's motion). Therefore, any delay caused by filing of the amended complaint would not be undue.

MSC Mediterranean Shipping had a right to vigorously defend itself and the undersigned agreed to issue a letter of request under the Hague convention. It was not until Mediterranean failed to comply with the July 29, 2022, order requiring production of documents, after the decision from the Judge in Switzerland was received, that Mediterranean's delay providing discovery became undue. Moreover, that order explained the consequences of further delays, stating:

> Respondent MSC Mediterranean Shipping is alleged to be one of the largest container lines in the world. It has voluntarily chosen to conduct business in United States ports and is regulated by the Federal Maritime Commission. Respondent has opposed providing relevant discovery which it was ordered to produce in the order granting motion to compel. It has delayed the proceeding by insisting that Swiss law prohibits discovery disclosure. But, parties appearing before the Commission are entitled to relevant evidence needed to adjudicate the proceeding. Failure to provide discovery may result in procedural sanctions, from an inference that the discovery would have been adverse to Respondent's interests to a decision on default.

Order Requiring Production of Discovery at 4 (citations omitted). MSC Mediterranean Shipping was again warned in the OTSC that failure to produce the required discovery could result in sanctions including a decision on default. OTSC at 1-2.

Although the title of section 41302 is "Investigations," it applies to complaint proceedings, as explained by the Commission.

> Section 41302(c) specifically applies to final decision periods in proceedings initiated under "this section or section 41301," and section 41301 is the "Complaints" section describing the initial procedure for adjudications. This makes it clear that section 41302(d), which specifically applies to final decision periods established under section 41302(c), also applies to adjudications like the current case.

Commission Order at 25.

This delay sanction is not in tension with section 41108(c)(2)'s approach to international discovery disputes, as argued by MSC Mediterranean Shipping, because legitimate discovery disputes are not "undue." Here, the international discovery dispute was heard and resolved by both the undersigned, compelling the discovery, and the court in Switzerland, rejecting the request as outside the scope of the Hague Convention. Only when MSC Mediterranean Shipping refused to comply with the July 29, 2022, order requiring production of documents, after the decision from Switzerland was received, did the delay became undue. Therefore, delays after July 29, 2022, unduly delayed this proceeding. Notably, MSC Mediterranean Shipping made six filings after this date: August 26, 2022, Motion for an Extension of Time; September 6, 2022, Notice of Advice; September 22, 2022, OTSC Respondent Response; October 14, 2022, OTSC Respondent Reply; October 18, 2022, Notice of Determination; and November 8, 2022, Notice of Formal Decision. None of these filings indicated a willingness to produce the discovery ordered. Rather than comply with the rulings of the undersigned and the Swiss court, "Mediterranean appears to have gone around the court to the Swiss executive branch, looking for a different answer." Commission Order at 21. Indeed, Mediterranean continues to argue that it should not be required to produce the discovery, even after the Commission has also rejected its arguments.

Not only were the delays undue, but they were caused by MSC Mediterranean Shipping. Indeed, if the decision on default had not been issued, the case might still be pending as it was effectively at an impasse. Mediterranean failed to produce over twelve categories of discovery relevant to MCS Industries' claims, which were necessary to proceed to a decision on the merits. I.D. at 18. Therefore, without the decision on default, it would not have been possible for the Commission to issue a final decision. Moreover, the undue delays prevented the Commission from meeting its August 17, 2023, final decision deadline.

Given the delays caused by Mediterranean's refusal to provide discovery, a sanction under section 41302(d) is appropriate. This provision authorizes a sanction up to "issuing a decision adverse to the delaying party." 46 U.S.C. § 41302(d). For the reasons outlined in the Initial Decision and Commission Order, a lesser sanction would not be effective. I.D. at 19; Commission Order at 22-23. Therefore, the delay sanction in section 41302(d) is found to be an additional basis for imposition of a decision adverse to MSC Mediterranean Shipping and an award of reparations.

2. Reparations

a. Relevant Law

The Commission also remanded for "a 'determination of the amount of reparations' under 46 C.F.R. § 502.65(c) based on affidavits or documentary evidence that provides adequate detail as to the damages MCS actually suffered for the violations alleged in its operative complaint. *See also* 46 C.F.R. §§ 502.251 (Proof on award of reparation); 502.252 (Reparation statements)." Commission Order at 30.

The Commission relied on the Federal Rules, stating that "where the damages claimed are of that less certain nature, the general rule for courts applying the analogous Federal Rule 55 is that even where a default judgment is to be entered, the plaintiff must provide evidence to justify a damages award." Commission Order at 28.

Federal courts allow damages based on detailed affidavits or documentary evidence. For example:

> Although the Court's entry of default against an absent defendant establishes the defendant's liability, the Court is required to make an "independent determination of the sum to be awarded." Accordingly, Plaintiff must prove its entitlement to the amount of monetary damages requested. "In ruling on such a motion, the court may rely on detailed affidavits or documentary evidence to determine the appropriate sum for the default judgment."

GAG Enterprises, Inc. v. Rayford, 312 F.R.D. 230, 234 (D.D.C. 2015) (citations omitted).

The Shipping Act requires that the "Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation" of the Act. 46 U.S.C. § 41305(b). Pursuant to Commission Rule 65(c), the "presiding officer may require additional information or clarification when needed to issue a decision on default, including a determination of the amount of reparations or civil penalties where applicable." 46 C.F.R. § 502.65(c).

Commission Rules provide additional guidance regarding proof for an award of reparations.

> If many shipments or points of origin or destination are involved in a proceeding in which reparation is sought (See § 502.63), the Commission will determine in its decision the issues as to violations, injury to complainant, and right to reparation. If complainant is found entitled to reparation, the parties thereafter will be given an opportunity to agree or make proof respecting the shipments and pecuniary amount of reparation due before the order of the Commission awarding reparation is entered. In such cases, freight bills and other exhibits bearing on the details of all shipments, and the amount of reparation on each, need not be produced at the original hearing unless called for or needed to develop other pertinent facts.

46 C.F.R. § 502.251 (Proof on award of reparation).

> When the Commission finds that reparation is due, but that the amount cannot be ascertained upon the record before it, the complainant shall immediately prepare a statement in accordance with the approved reparation statement in Exhibit No. 1 to this subpart, showing details of the shipments on which reparation is claimed. This statement shall not include any shipments not covered by the findings of the Commission. Complainant shall forward the statement, together with the paid freight bills on the shipments, or true copies thereof, to the respondent or other person who collected the charges for checking and certification as to accuracy. Statements so prepared and certified shall be filed with the Commission for consideration in determining the amount of reparation due. Disputes concerning

> the accuracy of amounts may be assigned for conference by the Commission, or in its discretion referred for further hearing.

46 C.F.R. § 502.252 (Reparation statements).

Complainants have the burden of proving entitlement to reparations.

> As the Federal Maritime Board explained long ago: "(a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation."

James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist., 30 S.R.R. 8, 13 (FMC 2003) (quoting *Waterman v. Stockholms Rederiaktiebolag Svea*, 3 F.M.B. 248, 249 (1950)).

Reparations will only be awarded based on actual damages. *Tractors & Farm Equipment Ltd. v. Cosmos Shipping Co.,* Docket No. 81-57, 26 S.R.R. 788, 798 (ALJ Nov. 23, 1992), admin. final, Dec. 31, 1992. Actual damages means "compensation for the actual loss or injuries sustained by reason of the wrongdoing." *Cal. Shipping Line, Inc. v. Yangming Marine Transport Corp.*, Docket No. 88-15, 25 S.R.R. 1213, 1230, 1990 WL 427466, at *23 (FMC Oct. 19, 1990). "That does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained." *MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, Docket No. 16-16, 2022 WL 2209421, at *3 (FMC June 10, 2022).

b. Arguments of the Parties

MCS Industries asserts that it seeks "reparations equaling amounts in excess of its service contract rates with Mediterranean that Complainant had to spend during the terms of those service contracts on non-service-contract-based purchases of ocean carriage in order to ship cargo between port pairs covered by its service contracts with Mediterranean." Brief at 4. MCS Industries relies on the declaration under penalty of perjury of its logistics analyst and detailed exhibits, including: the relevant service contracts (Brief, Exhibits 1-3); a table listing: the Bates number of the supporting documents, contract year, intermediary, container number, origin, destination, vessel/voyage, year and month of the shipment, number of TEUs, ocean freight cost, contract rate, and excess cost (Brief, Exhibit 4); and freight bills, sea waybills, invoices, and other documents supporting the amounts claimed (Brief, Exhibit 5).

MSC Mediterranean Shipping contends that: Complainant is required to support its claim of reparations with competent evidence, and MSC is entitled to challenge that evidence with its own evidence and to a hearing at which it can cross-examine Complainant's affiant; Complainant's evidence does not support its reparations claim; Complainant's unsupported claim for reparations is inconsistent with claims it has made previously; Complainant's affiant has no personal knowledge as to the period of the original complaint; and Complainant's reparations claims should be denied for failure of proof; alternatively, MSC is entitled to a hearing to cross-examine Complainant's affiant and challenge its evidentiary showing. Opposition at 2-11.

c. Analysis

In its amended complaint, MCS Industries sought an FMC investigation; an order finding violations of the Shipping Act; a cease-and-desist order applicable to the remaining term of the 2021 service contract; reparations with interest, reasonable attorneys' fees, and "any other sum the FMC determines to be proper;" and other relief as the FMC deems just and proper. Amended Complaint at 24-25 ¶¶ 1-5. The only relief granted in the Initial Decision was reparations.

Federal courts have discussed determination of damages in the case of default.

> A defaulting defendant is deemed to admit every well-pleaded allegation in the complaint. *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 63 (2d Cir.1971), *rev'd on other grounds*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973). Although the default establishes a defendant's liability, the court is required to make an independent determination of the sum to be awarded unless the amount of damages is certain. *Adkins v. Teseo*, 180 F.Supp.2d 15, 17 (D.D.C.2001); *Chudasama v. Mazda Motor Corp*., 123 F.3d 1353, 1364 n. 27 (11th Cir.1997); *SEC v. Mgmt. Dynamics, Inc*., 515 F.2d 801, 814 (2d Cir.1975). Moving for a default judgment, the plaintiff must prove its entitlement to the requested damages. *Oberstar v. FDIC*, 987 F.2d 494, 505 n. 9 (8th Cir.1993). In ruling on such a motion, the court may rely on detailed affidavits or documentary evidence to determine the appropriate sum for the default judgment. *United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir.1979). When the damages cannot be calculated with relative simplicity, however, the court may order an evidentiary hearing. *Cablevision Sys. New York City Corp. v. Lokshin*, 980 F.Supp. 107, 111-12 (E.D.N.Y.1997). Finally, the movant is entitled to all reasonable inferences from the evidence offered. *Au Bon Pain Corp. v. Artect, Inc*., 653 F.2d 61, 65 (2d Cir.1981).

Flynn v. Mastro Masonry Contractors, 237 F. Supp. 2d 66, 69 (D.D.C. 2002).

Thus, the question is whether MCS Industries has properly supported its reparations claim. MCS Industries explains its request for reparations:

> As detailed in the Declaration and its exhibits (and consistent with the allegations in MCS Industries' Verified Amended Complaint in this action), MCS Industries' service contracts with Mediterranean for the periods May 2020-April 2021 (the "2020 Service Contract") and May 2021-April 2022 (the "2021 Service Contract" and, collectively with the 2020 Service Contract, the "2020 and 2021 Service Contracts") set minimum quantity commitments ("MQCs") of 1,400 twenty-foot equivalent units ("TEUs") and 728 TEUs, respectively. *See* Decl. ¶¶ 4-5, 7-8 & Exs. 1-3. However, despite MCS Industries' intent to use the full volumes of cargo space for which it contracted with Mediterranean in the 2020 and 2021 Service Contracts, see Decl. ¶¶ 6, 9, 14, and despite the efforts of MCS Industries and its logistics agent, Expeditors International of Washington, Inc. ("Expeditors") to attempt to book space with Mediterranean pursuant to the 2020 and 2021 Service Contracts (and repeated complaints to Mediterranean regarding its failure to

provide contracted space), Mediterranean carried only approximately 1,101 TEUs of MCS Industries' cargo during the term of the 2020 Service Contract and only approximately 492 TEUs of MCS Industries' cargo during the term of the 2021 Service Contract. *See* Decl. ¶¶ 10-13.

Exhibit 4 to the Declaration lists the details of shipments of containers of MCS Industries cargo that were carried during the terms of the 2020 and 2021 Service Contracts between the port pairs covered by the 2020 and 2021 Service Contracts, respectively, pursuant to arrangements with ocean transportation intermediaries or suppliers (and not pursuant to the 2020 and 2021 Service Contracts or a service contract between MCS Industries and another vessel-operating common carrier) in order to meet MCS Industries' ocean shipping needs. *See* Decl. ¶¶ 15-18 & Ex. 4. Exhibit 5 compiles the invoices for those shipments for the Presiding Officer's reference. See Decl. Ex. 5.

As reflected in Exhibit 4, the ocean freight costs for the shipments listed in Exhibit 4 during the term of the 2020 Service Contract, totaling 299 TEUs, exceeded Mediterranean's rates for such carriage in the 2020 Service Contract by a total of $400,509. *See* Decl. ¶ 16 & Ex. 4. The ocean freight costs for the shipments listed in Exhibit 4 stemming from the time period that was the focus of the initial Verified Complaint in this action (i.e., May through July 2021), totaling 123.5 TEUs, exceeded Mediterranean's rates for such carriage in the 2021 Service Contract by a total of $463,936. *See* Decl. ¶ 17 & Ex. 4. The ocean freight costs for the shipments listed in Exhibit 4 that were carried later in the term of the 2021 Service Contract (specifically, during December 2021 through April 2022—the remainder of the term of the 2021 Service Contract starting with the month in which MCS Industries sought leave to file its Verified Amended Complaint in this action), totaling an additional 112.25 TEUs, exceeded Mediterranean's rates for such carriage in the 2021 Service Contract by a total of $288,232. *See* Decl. ¶ 18 & Ex. 4.

In total, Exhibit 4 to the Declaration reflects shipments of MCS Industries cargo carried during the terms of the 2020 and 2021 Service Contracts between the port pairs listed in the 2020 and 2021 Service Contracts that cost MCS Industries a total of $1,152,677 more than such shipments would have cost under the rates in the 2020 and 2021 Service Contracts. Decl. ¶ 19 & Ex. 4. MCS Industries respectfully submits that this evidence is more than sufficient to justify the Presiding Officer's award of reparations in this action, especially given that the reparations are being awarded as a sanction.

Brief at 4-6.

MCS Industries' reparations claim will be reviewed to determine whether it is consistent with previous claims; whether an oral hearing is necessary; and whether there is competent evidence of the reparations sought.

i. Previous Claims

In its amended complaint, MCS Industries claims damages of "at least $400,000 more" for "299 TEUs on the relevant lanes via the spot market or from other carriers at significantly increased prices" than set forth in the 2020 service contract. Amended Complaint at 24 ¶ 119. In addition, MCS Industries claimed "at least $400,000 more" for "123 TEUs on the relevant lanes via the spot market or from other carriers at significantly increased prices" than set forth in the 2021 service contract for the first three months of the 2021 service contract. Amended Complaint at 24 ¶ 120.

The order to show cause required MSC Mediterranean Shipping to show cause why a default decision should not be issued against it for failure to produce discovery, and also stated that "Complainant should identify the dollar amount of reparations that they are seeking." OTSC at 2. MCS Industries' response addressed the reparations it was seeking, stating:

> The Presiding Officer's Order to Show Cause instructed Complainant to provide in this response the amount of reparations that Complainant is seeking in this action. As detailed in its Amended Complaint, Complainant seeks reparations for actual damages that it incurred in connection with the period May 2020 through July 2021, which encompasses the 2020-2021 "shipping year" and the first three months of the 2021-2022 "shipping year". Complainant is seeking reparations equaling amounts in excess of its service contract rates with Mediterranean that Complainant had to spend on "spot market" purchases of ocean carriage in order to ship cargo between port pairs covered by its service contracts with Mediterranean that should have been carried by Mediterranean at service contract rates. For the 2020-2021 shipping year, Complainant has calculated such reparations for Mediterranean's shortfall to total $480,719. For the first three months of the 2021-2022 shipping year, Complainant has calculated such reparations for Mediterranean's shortfall to total $463,936, for a grand total of $944,655 in reparations sought, plus interest pursuant to 46 U.S.C. Section 41305(a).

OTSC Complainant Response at 18-19.

In its remand brief, MCS Industries seeks a total of $1,152,677, calculated by adding $400,509 for 299 TEUs in the 2020 service contract, plus $463,936 for 123.5 TEUs for May through July 2021 (first three months of the 2021 service contract), and adding $288,232 for 112.25 TEUs for the remainder of the 2021 service contract. Thus, MCS Industries is seeking $864,445 for the two time periods addressed in the amended complaint, May 2020 to July 2021, and a total of $1,152,677 for all three time periods.

MSC Mediterranean Shipping objects to the additional $288,232 for December 2021 to April 2022, arguing that MCS Industries "did not include this amount in its own reparations calculation produced in discovery, in any brief filed in this proceeding, or in its prior reparations submissions relied on in the Initial Decision." Opposition at 8.

Federal Rule 54(c) regarding judgments states that a "default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings." Fed. R. Civ. P. 54(c). However, courts have awarded ongoing damages when parties were on notice of the ongoing nature of the damages. For example:

> Where a complaint demands a specific amount of damages *and* unspecified additional amounts, ... so long as a defendant has notice that additional unspecified damages may be awarded if the case proceeds to judgment, general allegations in the complaint may suffice to support default judgment in an amount that is proven, either by way of exhibits, affidavits, and other documentation in support of a motion for default judgment, or at a hearing. *Tr. of the Nat'l Automatic Sprinkler Indus. Welfare Fund v. Harvey*, No. GJH-15-521, 2016 WL 297425, at *5 (D. Md. Jan. 21, 2016) (emphasis in original). Indeed, "the purpose of Rule 54(c)'s prohibition on damages that 'exceed in amount' or 'differ in kind' from that sought in the complaint is to allow the defendant to be able to 'decide on the basis of the relief requested in the original pleading whether to expend the time, effort, and money necessary to defend the action.'" *Id.* (quoting 10 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2663 (3d ed. 1998)). Thus, Rule [54(c)] "does not preclude an award of damages that accrued during the pendency of the action [where] such damages were explicitly requested in the complaint, and sufficiently established by the affidavits submitted by plaintiffs." *Id.* (quoting *Ames v. STAT Fire Suppression. Inc.*, 227 F.R.D. 361, 362 (E.D.N.Y. 2005)). In those circumstances, a defendant is "put on notice that [the] plaintiff was seeking such damages when defendant was served with the complaint" and "[t]hat notice was renewed when defendant was served with [the plaintiff's] motion for default judgment...." *Id.* (quoting *Ames*, 227 F.R.D. at 362).

Nat'l Elec. Benefit Fund v. Allran/Hemmer Elec., LLC, No. GJH-16-1184, 2017 WL 1273922, at *3 (D. Md. Jan. 6, 2017); *see also CMA CGM S.A. v. Ocean Line Logistics Inc.*, No. 220CV06210FWSRAO, 2022 WL 3009461, at *7 (C.D. Cal. June 3, 2022) (awarding additional daily fees that have accrued per container per day and updated import surcharges where the first amended complaint made clear that contractual damages were ongoing); *Stafford v. Jankowski*, 338 F. Supp. 2d 1225, 1228-29 (D. Kan. 2004) (due process concerns were satisfied where requested damages were included in motion for a default judgment).

As of October 6, 2022, when MCS Industries filed its OTSC response, MSC Mediterranean Shipping was on notice that MCS Industries sought $944,655 in reparations for the two time periods addressed in the amended complaint. When MSC Mediterranean Shipping made the decision not to provide the discovery required, it was not on notice of the amount of the claim for damages *after* the first three months of the 2021 service contract period. Therefore, even though the amended complaint indicated that the violation was ongoing, because the amount of damages from December 2021 to April 2022 was not provided prior to the Initial Decision, that amount is now not recoverable.

This determination is made based on the notice provided, not, as argued by MSC Mediterranean Shipping, on the basis of information provided in discovery. *See, e.g.*, Opposition at 8-9. Discovery was not completed because of MSC Mediterranean Shipping's refusal to provide discovery and the issue of liability was resolved by the default. The defaulting party is "deemed to admit every well-pleaded allegation in the complaint." *Boland v. Providence Constr. Corp.*, 304 F.R.D. 31, 35 (D.D.C. 2014); *Herbin v. Seau*, 317 F. Supp. 3d 568, 573 (D.D.C. 2018).

MSC Mediterranean Shipping was on notice of the reparations claims for the time periods covered in the amended complaint. As noted above, the amended complaint sought "at least $400,000" for both the 2020 and 2021 service contract periods. In response to the OTSC, the amount requested was increased to $480,719 for the 2020 service contract, plus $463,936 for the beginning of the 2021 service contract for a total of $944,655. This is the maximum amount that MCS Industries can recover because it is the amount for which MSC Mediterranean Shipping was on notice when deciding whether to provide the discovery in response to the OTSC, prior to the Initial Decision.

This finding is consistent with the Commission Order which states:

> Mediterranean claims that the reparations award was improper because the amounts MCS sought in response to the order to show cause were about 20% more than those in the amended complaint, Exceptions at 49-50, but that claim is unconvincing. The operative complaint here simply alleged that Mediterranean's misconduct had resulted in MCS paying "at least $400,000" more for each of the two shipping years in question, plus unspecified "other injuries." Decision at 22-23; Amended Complaint at 24. Then, in providing more detail in response to the order to show cause, MCS listed amounts of $480,719 and $463,936 for the two years, amounts that are consistent with the earlier "at least" caveat. A reparations award would not be improper because of this relatively modest change.

Commission Order at 30.

MCS Industries now seeks $400,509 for the 2020 service contract, plus $463,936 for the first three months of the 2021 service contract. The amount sought for the 2020 service contract has decreased and the amount sought for the beginning of the 2021 service contract is the same as the amounts MCS Industries requested in its OTSC response. The next questions are whether an oral hearing is necessary and whether these amounts alleged during these two time periods are supported by competent evidence. Because the $288,232 for the remainder of the 2021 service contract is excluded here, it is not discussed further below.

ii. Oral Hearing

MSC Mediterranean Shipping asserts that the reparations claims should be denied for failure of proof; or alternatively, that it is entitled to an oral hearing to cross-examine the affiant and challenge the evidentiary showing. Opposition at 10-11.

An oral hearing is permitted but not required by Federal courts when determining damages in a default. "The court may conduct a hearing regarding the scope of damages, Fed. R. Civ. P. 55(b)(2), but is not required to 'as long as it ensure[s] that there [is] a basis for the damages specified in the default judgment.'" *Boland v. Providence Constr. Corp.*, 304 F.R.D. 31, 35-36 (D.D.C. 2014) (quoting *Elite Terrazzo Flooring*, 763 F.Supp.2d at 67 (alterations in original) (quoting *Transatlantic Mar. Claims Agency, Inc. v. Ace Shipping Corp., Div. of Ace Young Inc.*, 109 F.3d 105, 111 (2d Cir.1997))).

In Commission proceedings, reparations are typically awarded without an oral hearing. Pursuant to the Commission's Rules, in determining the amount of reparations, the Commission may rely on "freight bills and other exhibits bearing on the details of all shipments" and "paid freight bills." 46 C.F.R. §§ 502.251, 502.252. Rule 251 states that in Commission proceedings where the complainant is found entitled to reparation, the parties may be given an opportunity to agree or make proof respecting the shipments and pecuniary amount of reparation due. "In such cases, freight bills and other exhibits bearing on the details of all shipments, and the amount of reparation on each, need not be produced at the original hearing unless called for or needed to develop other pertinent facts." 46 C.F.R. § 502.251. Rule 252 states that when "the Commission finds that reparation is due, but that the amount cannot be ascertained upon the record before it," the complainant shall "prepare a statement . . . showing details of the shipments on which reparation is claimed" and the "statement, together with the paid freight bills on the shipments" shall be forwarded to the respondent "for checking and certification as to accuracy. . . . Disputes concerning the accuracy of amounts may be assigned for conference by the Commission, or in its discretion referred for further hearing." 46 C.F.R. § 502.252.

Ms. Montesano's declaration is consistent with Commission Rules, and attaches the relevant service contracts (Brief, Exhibits 1-3); a statement (in this case a table) listing: the page number of the Exhibit 5 documents supporting the charge, contract year, intermediary, container number, origin, destination, vessel/voyage, year and month of the shipment, number of TEUs, the actual ocean freight cost, the contract rate, and the excess cost for each spot rate shipment (Brief, Exhibit 4); and, freight bills and other documents supporting the amounts claimed for each shipment (Brief, Exhibit 5). While Commission Rules permit further hearing, such hearing is not required and is unnecessary to resolve the two remanded issues. Indeed, Commission Rules specifically state that the "presiding officer will determine whether an oral hearing is necessary." 46 C.F.R. § 502.62(a)(5).

MSC Mediterranean Shipping had an opportunity to depose key MCS Industries witnesses. To the extent that Mediterranean's discovery was not complete, that was caused by its own actions and refusal to provide discovery. Additionally, an oral hearing was not scheduled for resolution of the proceeding, including liability and reparations, as shown by the December 21, 2021, Revised Scheduling Order, which provided deadlines and requirements for submitting briefs and documentary evidence. Revised Scheduling Order at 1-3.

The evidence submitted by MCS Industries is sufficient to determine its actual injury. An oral hearing would only delay resolution of the proceeding further and is not necessary for a decision on the two issues remanded. Therefore, the request for an oral hearing is denied.

iii. Competent Evidence

MSC Mediterranean Shipping contests the evidence on numerous, often overlapping, bases. These are addressed below while evaluating the (a) affiant, (b) shipping rate differentials, (c) port pairs, (d) timing, (e) number of shipments, and (f) conclusions.

(a) Affiant

MSC Mediterranean Shipping asserts that MCS Industries' affiant does not have personal knowledge because she was on maternity leave from May 9 to August 9, 2021, and "not engaged in day-to-day operations during her leave of absence" and because she relies on the booking agents' actions in asserting that they "'diligently' attempted to book space with MSC during that period." Opposition at 9; *see also* Opposition, Exhibit 1, Schantzenbach Depo. at 21, 37.

MCS Industries relies on a declaration signed by its logistics analyst, Brittany Montesano. On May 5, 2020, Ms. Montesano signed the 2020 service contract on behalf of MCS Industries and she is listed as the contact person. Brief, Exhibit 1 at 7, 10. On June 22, 2020, Ms. Montesano signed the amendment to the 2020 service contract on behalf of MCS Industries and is listed as the contact person. Brief, Exhibit 2 at 7, 10. On April 13, 2021, Ms. Montesano signed the 2021 service contract on behalf of MCS Industries and is listed as the contact person. Brief, Exhibit 3 at 7, 10. On December 23, 2021, Ms. Montesano signed the verification for the amended complaint under penalty of perjury. On January 18, 2024, Ms. Montesano signed the declaration under penalty of perjury. The amended complaint and declaration are consistent with Commission requirements for verification of documents. 46 C.F.R. § 502.6.

Ms. Montesano states in her declaration that she has been a logistics analyst with MCS Industries since January 2016 and that she read and verified the amended complaint in this action. Brief, Montesano Decl. at 1. The deposition testimony in the record further establishes that she is the only logistics analyst at MCS Industries. Opposition, Exhibit 1, Schantzenbach Depo. at 18. It is clear from the declaration, exhibits, and deposition transcripts in the record that Ms. Montesano had personal knowledge, including from review of corporate records, of the basis for the reparations claim.

MCS Industries and Ms. Montesano do not need to provide factual evidence supporting liability—that was resolved by the default. Rather, Ms. Montesano's affidavit is used to provide context for MCS Industries' claim for reparations. The reparation claim is focused on the number of shipments contracted for, the number provided, and the cost of obtaining alternate shipping on the spot market. Ms. Montesano did not need to be present when each shipment occurred, and her knowledge may include shipments that occurred while she was on maternity leave. As the only logistics analyst for MCS Industries and the contact person and signatory of the service contracts, she is an appropriate affiant for the question of reparations. Moreover, the statements in her declaration and the spot market rates in the Exhibit 4 table are all established by contemporaneous documents such as freight bills, sea waybills, and invoices which support the claimed reparations.

(b) Shipping Rate Differential

MSC Mediterranean Shipping argues:

> The submission is simply a calculation as to a claimed amount based on unexplained invoice charges presented without any context. This is essentially the same showing Complainant made before the Initial Decision and which the Commission found inadequate: unsubstantiated allegations of damages based on

> the difference between spot market rates and contract rates for cargo that Complainant has never tied to MSC or to its claims that MSC failed to carry cargo that it was contractually obligated to carry.

Opposition at 4. This is incorrect on multiple levels.

MCS Industries has consistently alleged that its damages included the increased cost of shipping on the spot market above the prices it would have received under the service contracts for the shortfall of 422 TEUs from May 2020 to July 2021. Amended Complaint at 23-24 ¶¶ 119-121; OTSC Complainant Response 18-19; Brief at 4-6. However, MCS Industries now supports that claim with a declaration, the service contracts, a table of shipments made under spot rates, and over 700 pages of supporting documents such as freight invoices. The Commission did not find the declaration and exhibits inadequate – rather, they did not see them. Moreover, the Commission did not find that calculating reparations based on the difference between spot market rates and contract rates is inadequate.

Mediterranean asserts that MCS Industries has not established that "the reparations claimed relate to cargo that MSC refused to carry after being requested to do so by Complainant;" that there "is no competent evidence as to when that cargo was ready to be carried, what steps Complainant took to have it carried . . . or why and how it was ultimately carried at the spot rates;" and that the "failure of proof is total." Opposition at 4-5. MSC Mediterranean Shipping also argues that "Complainant must provide competent evidence that none of this cargo could have been shipped under contract rates with another carrier" and that MCS Industries "does not tie the invoices to specific cargoes that MSC allegedly refused to carry." Opposition at 6. These arguments miss the mark.

MSC Mediterranean Shipping does not point to caselaw that limits actual injury to shipments that occurred in spite of the Shipping Act violation. The amended complaint states that at times, MCS Industries was forced to "forgo shipments entirely" and MCS Industries testimony establishes that if there is not sufficient space available, it may wait to send shipments. Amended Complaint at 7 ¶ 30, 8 ¶ 37, 23 ¶ 117; Opposition, Exhibit 1, Schantzenbach Depo. at 144. Under Respondent's theory, a complainant would not recover any reparations for shipments it had to forgo. However, if a respondent agrees to ship 200 containers and only ships 50, and the respondent violated the Shipping Act by not shipping the remaining 150 containers, then the complainant should be entitled to reparations for the 150 containers not shipped. This would be true whether or not those 150 containers were ever shipped. The goal of awarding damages is to make the injured party whole. Therefore, regarding calculation methods for reparations claims that come before the Commission "[t]he method chosen depends on the evidence available and which calculation more accurately measures the actual loss." *MAVL Capital*, 2022 WL 2209421, at *3. Nonetheless, MCS Industries did make sufficient shipments on the spot market during the timeframe and port pairs in the amended complaint, so that in this case there is concrete spot market pricing data supporting the reparations claim.

There are multiple ways to establish damages where a violation of a service contract is established. The complainant in a recent proceeding, OJ Commerce, presented evidence of actual injury under two alternate methodologies: lost profits and shipping rate differentials. *OJ Commerce, LLC v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft A/S & Co. KG*, Docket No. 21-11, 2023 WL 3969857, at *43 (ALJ June 7, 2023). In that case, reparations were not limited to "those containers it was able to ship profitably outside of a carrier contract, through spot rates" but rather included the lost profits, or benefit, that it would have received from being able to ship its full allotment of containers under the service contract. *OJ Commerce*, 2023 WL 3969857, at *53. There, assessing injury through calculating lost profits most accurately measured OJ Commerce's actual loss, so there was no need to consider shipping rate differentials damages in further detail. *OJ Commerce*, 2023 WL 3969857, at *56. In that case, the complainant was not able to make the planned shipments due to the Shipping Act violation, so actual costs of shipping on the spot market were not available. Here, MCS Industries was able to provide evidence of the actual additional cost it incurred by having to ship on the spot market instead of through the rates negotiated in the service contracts.

MSC Mediterranean Shipping points to the Commission statement that the "'damages appear to depend on unspecified charges for bookings MCS says it made on certain shipping routes.'" Brief at 1 (quoting Commission Order at 28). This just required that MCS Industries establish the spot market charges with supporting evidence, as it has now done, and is not a commentary on the proper method for calculating reparations.

To the extent that MSC Mediterranean Shipping is arguing that MCS Industries would not have been able to ship the number of containers agreed to in the service contract, that argument relates to liability: whether or not the shortfall was due to a Shipping Act violation. At this stage of this proceeding, liability is not at issue and the well-pled factual allegations in the amended complaint are accepted. To the extent that Mediterranean is arguing that MCS Industries would need to tie each spot shipment to a request for MCS Industries to carry that specific shipment, Mediterranean has not provided any caselaw to support its position. To the extent that Mediterranean is arguing that shipping rate differentials are not an appropriate measure of MCS Industries' actual injury, Mediterranean has also not provided any caselaw to support this position. MCS Industries establishes that shipping rate differentials appropriately measures their actual injury and Mediterranean's arguments in opposition are not persuasive.

(c) Port Pairs

MSC Mediterranean Shipping does raise a legitimate issue regarding the allegations in the Amended Complainant regarding port pairs and the reparations sought. Specifically, MSC Mediterranean Shipping asserts that MCS Industries "has never alleged that MSC failed to carry contracted cargo from Fuzhou." Opposition at 4. The amended complaint states that during the 2020 service contract, the alleged violations "were concentrated on shipments originating from Qingdao, Tianjin, and Ningbo, but not Jakarta or Fuzhou," and for the beginning of the 2021 service contract, "Respondent provided the contracted quantity of space for shipments originating from Fuzhou" but "Respondent failed to meet its obligations with respect to Complainant's cargo from Qingdao and Tianjin." Amended Complaint at 18 ¶ 93.

In reviewing MCS Industries' Exhibit 4 table, reparations are sought for shipments to Qingdao, Tianjin, Ningbo, and Jakarta, but not to Fuzhou. Brief, Exhibit 4, Column 5. Therefore, the argument about Fuzhou is a red herring. However, the amended complaint does not allege violations from the port of Jakarta. Rather, the only times Jakarta is mentioned are in the list of ports covered by the 2020 service contract and the statement that there were no shortfalls or demand for peak season surcharges for Jakarta. Amended Complaint at 6 ¶ 25, 18 ¶ 93.

Therefore, it is not clear that shipments from Jakarta were part of the violation. Moreover, no evidence establishes that spot market rates for shipments from Jakarta properly measure the Shipping Act violations here. The Exhibit 4 table shows one shipment from Jakarta, for which it seeks $2,738.50[2] in reparations. The sea waybill for this shipment confirms that it was received and loaded in Jakarta. Brief, Exhibit 6, at PEX5-0450. MCS Industries has not established that it is entitled to reparations for the shipment from Jakarta. Therefore, this shipment will be removed from the calculation of reparations. The other port pairs are supported by the evidence provided.

(d) Timing

MSC Mediterranean Shipping focuses on the timing of the shipments. For example, it argues that the December 8, 2021, order on motion to compel addressed a shorter timeframe and only two ports. However, that order was issued before MCS Industries' December 23, 2021, motion seeking leave to file an amended complaint, which was not granted until February 4, 2022. The amended complaint extended the allegations to the prior (May 2020 to April 2021) shipping year and specifically identified the ports at issue. Of course the discovery order was based on the ports and timeframe then at issue. Now, however, it is the timeframe and ports in the amended complaint that are relevant.

MSC Mediterranean Shipping also argues that MCS Industries' claims under the 2021 contract "focused heavily" on the 10-week period between May 2021 and July 8, 2021, and that MSC carried all the cargo it was contractually obligated to carry in July 2021. Opposition at 5-7. However, the amended complaint is not so limited. The amended complaint states that "[a]cross all contracted lanes, Respondent fell far short of providing 60.67 TEUs in each of May, June, and *July* 2021" and that in July 2021, an MSC Mediterranean Shipping employee stated that "cargo with higher rates may have priority" and that agreeing to pay the peak season surcharge, "helps with space." Amended Complaint at 8 ¶ 36 (emphasis added), 9 ¶ 43, 14-15 ¶¶ 70-71, 17 ¶ 87. At this stage, MCS Industries is not required to provide evidence of booking requests nor to provide evidence supporting the Shipping Act violations. Thus, the amended complaint clearly alleged violations in July 2021.

MSC Mediterranean Shipping also alleges that "Complainant has previously conceded there were no issues after June 2021" from Tianjin. Opposition at 5. The deposition testimony established that MCS Industries received its shipping allocation for Tianjin in July but also that it received none of its contracted shipments from Tianjin in May and only about half in June. Opposition, Exhibit 1, Schantzenbach Depo. at 112; Opposition, Exhibit 2, Master Depo. at 55. Additionally, MCS Industries was forced to "forgo shipments entirely" and wait to send other shipments. Amended Complaint at 7 ¶ 30, 8 ¶ 37, 23 ¶ 117; Opposition, Exhibit 1, Schantzenbach Depo. at 144.

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[2] This amount is not entitled to confidential treatment. It is from the excess cost column and does not disclose the freight cost paid, service contract rate, or any other details about the shipment.

The Exhibit 4 table shows that reparations are sought from Tianjin for the 2021 service contract term for three shipments in May 2021, ten shipments in June 2021, and three shipments in July 2021. This trend is consistent with the spot market shipments trailing slightly the dates in the service contract. Moreover, the invoices in Exhibit 5 show that for the three shipments listed for July, two left Tianjin on June 29, 2021, and arrived on July 22, 2021, while the third shipment left on July 2, 2021, and arrived on August 5, 2021. Opposition, Exhibit 5 at PEX5-0693; PEX5-0695; PEX5-0701; PEX5-0702. Reparations are not sought for any subsequent shipments from Tianjin, not even in the shipments previously excluded which occurred from December 2021 to April 2022. Thus, the deposition testimony supports the requested reparations from Tianjin. Similarly, relying on spot market shipments in August 2021 is reasonable even though the violations are only established through July 31, 2021, because of delays in finding space on the spot market.

The amended complaint supports the timeframe for which reparations are sought, excluding December 2021 to April 2022. Indeed, the spot market shipments are weighted toward the earlier timeframes which may underestimate the damages as spot market rates generally increased from May 2020 to July 2021. *See* Brief, Exhibit 4. Moreover, MCS Industries has established the number of shipments it was unable to make at the service contract rates. The shipments that are used to compare costs on the spot market do not need to precisely match the timing of the denied shipments, as long as they are between the port pairs and during the timeframe (May 2020 to July 2021) alleged in the amended complaint and as long as the number of shipments for which reparations is sought does not exceed the number involved in the violation.

(e) Number of Shipments

MCS Industries is only entitled to reparations for the number of shipments it was entitled to ship in the service contracts, minus the number of shipments it carried under the service contracts. The amended complaint alleges that MSC Mediterranean Shipping provided 1101 of 1400 TEUs under the 2020 service contract, a 299-TEU shortfall. Amended Complaint at 7 ¶¶ 29-30, 24 ¶ 119. The amended complaint also alleges that MSC Mediterranean Shipping provided 59 of 182 TEUs under the first three months of the 2021 service contract, a 123-TEU shortfall. Amended Complaint at 8 ¶ 35, 24 ¶ 120. Therefore, the Amended Complaint alleges a shortfall of 299 plus 123 which equals 422 TEUs.

A TEU is a twenty-foot equivalent unit. Amended Complaint at 6 ¶ 24; Brief, Exhibits 1-3 at 1. The service contracts do not specify how different size containers should be counted. Mediterranean asserts that "TEUs are measured in whole numbers with limited exceptions for instances when the parties contractually agree to count additional space associated with the use of high cube FEUs. The contracts between the parties confirm the commitments contemplate full standard TEUs." Opposition at 7 n.9.

The Exhibit 4 table lists the following amounts for TEUs: 1, 2, 2.25, and 2.53. At least some of the shipments listed as 2.25 TEUs were for 40-foot containers, that may have been more properly listed as 2 TEUs. *See, e.g.*, Brief, Exhibit 5 at PEX5-0057; PEX5-0363; PEX5-0718. However if so, this would only under count MCS Industries' damages. The invoices related to the two shipments listing 2.53 TEUs show that both of these containers were 45-foot containers.

Brief, Exhibit 5 at PEX5-008, PEX6-0012. The evidence only supports finding 2.25 TEUs (2.25 times 20 equals 45) for these two shipments. For the timeframe of the amended complaint, adding the TEU column results in a sum of 422 TEUs, the shortfall alleged in the amended complaint. After removing the Jakarta shipment, the table shows reparation amounts for 419.75 TEUs. As this is less than the shortfall, this number is reasonable to support the reparations request.

(f) Conclusion

MCS Industries provides evidence of actual spot market rates it paid for shipments from the port pairs and during the timeframe of the violation alleged in the amended complaint. The only exception is the one shipment from Jakarta. Subtracting the excess cost sought for Jakarta from the $400,509 sought for the 2020 service contract equals $397,770.50. This amount, when added to $463,936 for the first three months of the 2021 service contract, equals $861,706.50. This amount can also be obtained by removing the December 2021 to April 2022 rows and the Jakarta row from the Exhibit 4 table and adding the remaining amounts in the "Excess Cost" column.

C. Calculation of Reparations and Interest

A complaint seeking reparations must be filed within three years after the claim accrues. 46 C.F.R. § 502.62(a)(4)(iii); *see also* 46 U.S.C. § 41305(b) and 46 U.S.C. § 41301(a). The initial complaint in this proceeding was filed on July 28, 2021. The amended complaint, filed on February 4, 2022, alleges violations of the 2020 service contract, which began in May 2020, well within the required three years for filing a complaint.

The Shipping Act permits reparations for actual injury and defines "actual injury" to include "the loss of interest at commercial rates compounded from the date of injury." 46 U.S.C. § 41305(a). The Commission recently stated that "with respect to multiple shipments, the ALJ should be able to determine the reasonable date or dates of injury," concluding that:

> [I]t would not appear to be unreasonable to determine that the mid-point date of the period of all eligible shipments was the date of injury for the claim, because such a date may award [Complainant] approximately the same amount of interest as being calculated using each shipment date, by evening out the earlier and later dates of injury.

Color Brands, LLC v. AAF Logistics, Inc., Docket No. 22-18, 2024 WL 246193 at *3 (FMC Jan. 18, 2024).

The Initial Decision calculated interest from July 31, 2021, and the Commission did not address this date. The parties have not argued that a different date should apply, although MSC Mediterranean Shipping contends that the shipping shortfalls were focused on particular timeframes. *See* Opposition at 5, 10. The amended complaint alleges violations of the Shipping Act through July 31, 2021. The reparations amount "can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences." *Tractors & Farm*, 26 S.R.R. at 798-99. Complainant has the burden of proof and has not established that an earlier date should apply. Therefore, it is reasonable to calculate interest based on a date of injury of July 31, 2021.

As explained above, MCS Industries' declaration and exhibits, which are appropriately considered in calculating reparations in a case in which default judgment is entered, establish actual injury for the 2020 service contract of $397,770.50 and for the first three months of the 2021 service contract of $463,936. Adding these two time periods together, MCS Industries has established actual injury of $861,706.50. Accordingly, MCS Industries is entitled to reparations in the amount of $861,706.50 from MSC Mediterranean Shipping.

III. ORDER

Upon consideration of the record, the arguments of the parties, the findings and conclusions set forth above, in the Initial Decision, and in the Commission Order, and the default determination, it is hereby

ORDERED that Complainant's motion for confidential treatment and Respondent's motion for confidential treatment be **GRANTED**. It is

FURTHER ORDERED that the delay sanction in the Shipping Act of 1984, 46 U.S.C. § 41302(d) provides an additional basis for the default decision with prejudice against MSC Mediterranean Shipping. It is

FURTHER ORDERED that MSC Mediterranean Shipping pay a total of $861,706.50, plus interest from July 31, 2021, as reparations to MCS Industries.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

HUBBELL INCORPORATED AND HUBS, INC., *Complainants*

v.

DSV AIR & SEA, INC. AND DSV OCEAN TRANSPORT A/S, *Respondents*.

DOCKET NO. 23-09

Served: February 16, 2024

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

[Notice Not to Review served 3/19/2024, decision administratively final]

On January 25, 2024, Complainants Hubbell Incorporated and HUBS, Inc. and Respondents DSV Air & Sea, Inc. and DSV Ocean Transport A/S filed a joint motion seeking approval of a settlement, confidential treatment of the settlement agreement, and voluntary dismissal of the complaint ("Motion") with a copy of the confidential settlement agreement. The parties state that the settlement resolves both this proceeding and a related action pending in Delaware Federal District Court and was reached during a mediation with the Commission's Office of Consumer Affairs & Dispute Resolution Services ("CADRS"). Motion at 1-2.

Using language borrowed in part from the Administrative Procedure Act, Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b); *see* 5 U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of

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

> the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A AM. JUR. 2D *Compromise and Settlement* § 3 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

The parties state:

> In this action, Hubbell and DSV, both sophisticated corporate Parties, arrived at the Settlement Agreement through an in-depth, CADRS facilitated mediation and extensive, arm's length negotiations in which counsel for both Parties and representatives of both Parties participated, and which involved careful consideration of the relative strengths of their positions weighed against the risks and costs of continued litigation. The Parties submit that the Settlement Agreement does not contravene any law or public policy, does not violate the Shipping Act, is neither unjust nor discriminatory, and is free of fraud, duress, or undue influence. The Settlement Agreement does not contemplate any adverse effects on any non-parties or the shipping public and is free of any other defects which might make it unapprovable.

> The Settlement Agreement is intended to amicably resolve the contested business disputes between the Parties and the Parties have determined that the Settlement Agreement is fair and reasonable and reflects the Parties' desire to resolve their issues without the need for further, unnecessary expenditure of time and resources by the Parties and the FMC. For these reasons, the Parties respectfully request that the Settlement Agreement be approved and, on that basis, that Hubbell's Verified Complaint against DSV be dismissed.

Motion at 4-5.

Based on the representations in the joint motion and other documents filed in this matter, the parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The parties are represented by counsel, have engaged in arms-length settlement discussions, and participated in a mediation with CADRS. The proceeding would require potentially expensive discovery and briefing. The parties have determined that the settlement reasonably resolves the issues raised in the complaint and in the related action in Delaware without the need for costly and uncertain litigation. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991).

The confidential settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

Upon consideration of the motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the joint motion to approve the settlement agreement between Complainants Hubbell Incorporated and HUBS, Inc. and Respondents DSV Air & Sea, Inc. and DSV Ocean Transport A/S be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. It is

FURTHER ORDERED that the request for voluntary dismissal be **GRANTED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

COAST CITRUS DISTRIBUTORS D/B/A OLYMPIC FRUIT & VEGETABLE; AMAZON PRODUCE NETWORK, LLC; REFIN TROPICALS, S.A.; JW FRESH, S.A.; SEMBRÍOS DE EXPORTACIÓN SEMBRIEXPORT, S.A.; AND BRESSON S.A., *Complainants* v. NETWORK SHIPPING LTD., INC., *Respondent*.	**DOCKET NO. 23-06**

Served: February 20, 2024

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

[Notice Not to Review served 3/22/2024, decision administratively final]

On January 26, 2024, Complainants Coast Citrus Distributors d/b/a Olympic Fruit & Vegetable; Amazon Produce Network, LLC; Refin Tropicals, S.A.; JW Fresh, S.A.; Sembríos De Exportación Sembriexport, S.A.; and Bresson S.A. and Respondent Network Shipping Ltd., Inc. filed an unopposed joint motion seeking approval of a settlement, confidential treatment of the settlement agreement, and voluntary dismissal of the complaint ("Motion"). The attached confidential settlement agreement was not dated or signed by both parties and the parties were contacted to ensure the record contained the final version. On February 5, 2024, the parties resubmitted the confidential settlement agreement, dated February 1, 2024, and signed by counsel for both Complainants and Respondent.

Using language borrowed in part from the Administrative Procedure Act, Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b); *see* 5 U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

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

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A AM. JUR. 2D *Compromise and Settlement* § 3 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

The parties state:

> In this action, the parties, all sophisticated corporate entities, with the advice and assistance of their respective counsel, arrived at the Settlement Agreement through arm's length negotiations and support this motion and the relief that it seeks. *See* Confidential Exhibit A. The Settlement Agreement does not contravene any law or public policy and is neither unjust nor discriminatory. It does not

> contemplate any adverse effects on any third party or the shipping public. Instead, the Settlement Agreement is a fair and reasonable resolution of the disputes between the parties and reflects their desire to resolve their issues without the need for costly and uncertain litigation. For these reasons, Complainant respectfully requests that the Settlement Agreement be approved and, on that basis, the Complaint in this matter be dismissed with prejudice.

Motion at 3-4.

Based on the representations in the joint motion and other documents filed in this matter, the parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The parties are represented by counsel and have engaged in arms-length settlement discussions. The proceeding would require potentially expensive discovery and briefing. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991).

The confidential settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

Upon consideration of the motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the joint motion to approve the settlement agreement between Complainants Coast Citrus Distributors d/b/a Olympic Fruit & Vegetable; Amazon Produce Network, LLC; Refin Tropicals, S.A.; JW Fresh, S.A.; Sembríos De Exportación Sembriexport, S.A.; and Bresson S.A. and Respondent Network Shipping Ltd., Inc. be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. It is

FURTHER ORDERED that the request for voluntary dismissal be **GRANTED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 24-03

IN THE MATTER OF ATTORNEY MARCUS NUSSBAUM

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into between the Federal Maritime Commission and Mr. Marcus Nussbaum.

RECITALS

WHEREAS, in *Ovchinnikov v. Hitrinov*, FMC Docket Nos. 15-11 & 1953(I), Order Affirming the Initial Decision on Different Grounds, 2023 WL 1963462, at *2, *10-12 (FMC Feb. 8, 2023) ("*Ovchinnikov*"), the Federal Maritime Commission ("FMC" or "Commission") stated that Marcus Nusbaum, an attorney who had appeared in five FMC matters over the past decade, had engaged in alleged conduct that may violate FMC practice rules in at least three of those matters: *Crocus Investments v. Marine Transport Logistics, Inc.*, FMC Docket No. 15-04; *Ovchinnikov*, and *Andrew v. Marine Transport Logistics, Inc.*, FMC Docket No. 20-12;

WHEREAS, the Commission elected not to proceed as to the alleged misconduct as part of *Ovchinnikov* but retained the option to do so at a later time (*Ovchinnikov*, 2023 WL 1963462, at *12);

WHEREAS, on January 10, 2024, pursuant to 46 C.F.R. § 502.91, the Commission issued an Order Directing Attorney Marcus Nussbaum to Show Cause ("Order") why the Commission should not impose a sanction of revocation or at least suspension of Mr. Nusbaum's permission to practice before the agency on the basis of potential violations of the certification requirements of 46 C.F.R. § 502.6 and the professional conduct requirements of 46 C.F.R. § 502.26 of the Commission's Rules of Practice, based on the alleged misconduct described in the Order at 3-4, and detailed in *Ovchinnikov*, 2023 WL 1963462, at *11;

WHEREAS, the Commission has jurisdiction over Mr. Nussbaum and the authority to act on the alleged misconduct by Mr. Nussbaum;

WHEREAS, Mr. Nussbaum represents that he is competent to enter into this Settlement Agreement and has had the opportunity to consult with legal counsel;

WHEREAS, Mr. Nussbaum does not admit that he committed the misconduct alleged herein;

WHEREAS, the Commission and Mr. Nussbaum have engaged in discussions and believe it beneficial to resolve this proceeding subject to the terms and conditions set forth herein to avoid the burden of continuing formal proceedings; and

WHEREAS, Mr. Nussbaum has agreed to undertakings with respect to the alleged misconduct that was the basis of the Order, as set forth and described above;

NOW THEREFORE, in consideration of the premises herein, the Commission and Mr. Nussbaum hereby agree upon the following terms and conditions set forth herein.

AGREEMENT

1. Mr. Nussbaum will refrain from practicing before the FMC for a period of no less than one year from the date this Settlement Agreement is approved by the Commission.

2. Should Mr. Nussbaum resume practice before the FMC after the expiration of the one-year period, Mr. Nussbaum agrees that he will comply with the FMC's Rules of Practice.

3. Should Mr. Nussbaum seek to practice before the FMC before expiration of the one-year period or fail to comply with the provisions of this Settlement Agreement, the Commission may re-institute the Docket No. 24-03 proceeding.

4. Mr. Nussbaum waives any rights to a hearing or to present evidence regarding the Commission's allegations.

5. No formal findings of a violation have been made as the parties have instead entered into this negotiated Settlement Agreement and this Settlement Agreement is not to be construed as a formal revocation and/or suspension proceeding.

6. This Settlement Agreement contains the entire agreement between the FMC and Mr. Nussbaum with regard to the matters set forth herein and shall be binding upon both parties.

7. This Settlement Agreement is immediately effective as of the date the Commission approves it.

8. Upon approval by the Commission, this Settlement Agreement will be placed in the public docket in FMC No. 24-03.

IN WITNESS WHEREFORE, the Parties have caused this Settlement Agreement to be executed by Mr. Nussbaum and the FMC's authorized representative as witnessed below.

Marcus Nussbaum, Esq.

Date: 2/7/2024

ON BEHALF OF THE FEDERAL MARITIME COMMISSION

David Eng, Secretary
Office of the Secretary

FEDERAL MARITIME COMMISSION

VISUAL COMFORT & CO., *Complainant*

v.

COSCO SHIPPING LINES (NORTH AMERICA) INC., *Respondent*.

DOCKET NO. 24-01

Served: March 8, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's February 6, 2024, Order that the complaint against COSCO Shipping Lines (North America) Inc. be dismissed and granting Complainant's motion to amend complaint has expired. Accordingly, the corresponding portion of the ALJ's Order on Motion to Amend Complaint and Substitute Respondent, and Motion to Dismiss has become administratively final.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

RAHAL INTERNATIONAL INC., *Complainant* v. HAPAG-LLOYD AG, HAPAG-LLOYD (AMERICA), LLC, AND HAPAG-LLOYD USA, LLC, *Respondents* AND HAPAG-LLOYD AG AND HAPAG-LLOYD (AMERICA), LLC, *Third-Party Complainants* v. MAHER TERMINALS, LLC, GCT NEW YORK LP, AND GCT BAYONNE LP, *Third-Party Respondents*.	**DOCKET NO. 23-05**

Served: March 15, 2024

ORDER OF: Linda S. Harris CROVELLA, *Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

[Notice Not to Review served 4/16/2024, decision administratively final]

On February 26, 2024, Complainant Rahal International Inc. ("Rahal"), Respondents and Third-Party Complainants Hapag-Lloyd AG and Hapag-Lloyd (America), LLC (collectively, "Hapag-Lloyd"), filed a joint motion seeking approval of a confidential settlement agreement and dismissal with prejudice of the complaint between them ("Motion"). The Motion also seeks dismissal without prejudice of Hapag-Lloyd's Third-Party Complaint against Maher Terminals, LLC ("Maher"), GCT New York LP, and GCT Bayonne LP (collectively "GCT").[2] A copy of the

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

[2] As noted in earlier filings and orders, GCT converted to limited liability companies and changed their names on August 31, 2023. Memorandum of Law in Support of Third-Party Respondents' Motion to Dismiss at n.1; Order on Third-Party Respondents' Motion to Dismiss at n.2.

confidential settlement agreement and a public version of the settlement agreement were also filed. The motion would resolve the entire proceeding before the Commission.

Using language borrowed in part from the Administrative Procedure Act, Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b); *see* 5. U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A AM. JUR. 2D *Compromise and Settlement* § 3 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

Rahal and Hapag-Lloyd, "sophisticated corporate entities," state that they "engaged in arm's length negotiations and support the Motion and the relief that it seeks." Motion at 4. They further state:

> The Settlement Agreement does not undermine any law or public policy and is free of fraud, duress, undue influence, mistake, or other defects. Further, the Settlement Agreement is a fair and reasonable resolution of this dispute between Rahal and Hapag and reflects their mutual desire to resolve their issues without the need for costly litigation and the Commission's resources.

Id. at 4-5.

The Motion also seeks, and the terms of the agreement include, a dismissal without prejudice of the Third-Party Complaint against Maher and GCT. Third-Party Respondents Maher and GCT did not join in the Motion or sign the Confidential Settlement Agreement but were served with the Motion[3] when the documents were filed by electronic mail on February 26, 2024. None of the Third-Party Respondents filed an opposition to the Motion or objected to the Confidential Settlement Agreement. The Third-party Respondents have filed answers to the Third-Party Complaint but did not participate in the Confidential Settlement Agreement. The dismissal without prejudice of the Third-Party Complaint is appropriate under Commission Rule § 502.72(a)(3) and (c).

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991).

The confidential settlement agreement has been reviewed by the undersigned and the request for confidentiality in the settlement agreement is reasonable. The undersigned notes that the agreement is only binding on the parties to it, and nothing in the confidentiality provision should be construed as binding on the Commission. Accordingly, this confidential settlement agreement will be treated by the Commission in the same manner as other confidential settlement agreements, and the Commission will have the opportunity to review the settlement agreement.

[3] A "public version" of the settlement agreement was included, but Rahal and Hapag-Lloyd redacted the agreement in its entirety.

Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

Based on the representations in the joint motion and other documents filed in this matter, the parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The parties are represented by counsel and have engaged in arms-length settlement discussions. The proceeding would require all parties to brief the matter, review of the parties' briefing, and an initial decision would be subject to exceptions or appeals. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. Accordingly, the settlement agreement is approved.

Upon consideration of the motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the motion to approve the settlement agreement between Complainant Rahal and Respondents Hapag-Lloyd be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. The settlement agreement should be maintained in the Secretary's confidential files. It is

FURTHER ORDERED that the Complaint filed by Rahal be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that the Third-Party Complaint filed by Hapag-Lloyd be **DIMISSED WITHOUT PREJUDICE**.

Linda S. Harris Crovella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

TIR AUTO TRANSPORT LLC, *Complainant* v. V&S BROTHERS INC. AND V&S CARGO INC., *Respondents*.	**DOCKET NO. 23-07**

Served: March 18, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's February 14, 2024, Initial Decision Approving Settlement Agreement has expired. Accordingly, this decision has become administratively final.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

HUBBELL INCORPORATED AND HUBS, INC., *Complainants*

v.

DSV AIR & SEA, INC. AND DSV OCEAN TRANSPORT A/S, *Respondents*.

DOCKET NO. 23-09

Served: March 19, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Chief Administrative Law Judge's February 16, 2024, Initial Decision Approving Settlement Agreement has expired. Accordingly, this decision has become administratively final.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

COAST CITRUS DISTRIBUTORS D/B/A OLYMPIC FRUIT & VEGETABLE; AMAZON PRODUCE NETWORK, LLC; REFIN TROPICALS, S.A.; JW FRESH, S.A.; SEMBRÍOS DE EXPORTACIÓN SEMBRIEXPORT, S.A.; AND BRESSON S.A., *Complainants*

v.

NETWORK SHIPPING LTD., INC., *Respondent*.

DOCKET NO. 23-06

Served: March 22, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Chief Administrative Law Judge's February 20, 2024, Initial Decision Approving Settlement Agreement has expired. Accordingly, this decision has become administratively final.

David Eng
Secretary

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

D.F. YOUNG, INCORPORATED, *Complainant*

v.

WALLENIUS WILHELMSEN LOGISTICS AS, K/N/A WALLENIUS WILHELMSEN OCEAN AS AND WALLENIUS WILHELMSEN LOGISTICS AMERICAS, LLC, *Respondents.*

DOCKET NO. 23-14

Served: March 27, 2024

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION APPROVING CONFIDENTIAL SETTLEMENT AGREEMENT[1]

[Notice Not to Review served 4/29/2024, decision administratively final]

On March 11, 2024, Complainant D.F. Young, Inc. and Respondents Wallenius Wilhelmsen Logistics AS, k/n/a Wallenius Wilhemsen Ocean AS, and Wallenius Wilhelmsen Logistics America, LLC filed a joint motion seeking approval of a confidential settlement agreement and dismissal with prejudice ("Motion") with a copy of the confidential settlement agreement.

Using language borrowed in part from the Administrative Procedure Act, Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b); *see* 5 U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of

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

> the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A Am. Jur. 2d *Compromise and Settlement* § 3 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

The parties state that they "engaged in settlement discussions at various points in time following the filing of the amended complaint, ultimately concluding the Confidential Settlement Agreement accompanying this memorandum." Motion at 2; *see also* February 28, 2024, Respondents' Motion for Extension of Time to file Answer (the parties "are actively engaged in settlement discussions" and that there is a "high probability" that they will be able to resolve the issues in this proceeding).

The parties state:

> In this action, the parties, both sophisticated corporate entities, arrived at the Confidential Settlement Agreement through arm's length negotiations and support this motion and the relief that it seeks. The Confidential Settlement Agreement does not contravene any law or public policy, and is neither unjust nor

> discriminatory. It does not contemplate any adverse effects on any third parties or the shipping public. Instead, the Confidential Settlement Agreement is a fair and reasonable resolution of the dispute between the parties and reflects their desire to resolve their issues without the need for costly and uncertain litigation. For these reasons, the parties respectfully request that the Confidential Settlement Agreement be approved and, on that basis, the complaint in this matter be dismissed with prejudice.

Motion at 3.

Based on the representations in the joint motion and other documents filed in this matter, the parties have established that the settlement agreement, dated March 2024, does not appear to violate any law or policy, or contain other defects which might make it unapprovable. The parties are represented by counsel and have engaged in arms-length settlement discussions. The proceeding would require potentially expensive discovery and briefing. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991).

The confidential settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

Upon consideration of the motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the joint motion to approve the settlement agreement between Complainant D.F. Young, Inc. and Respondents Wallenius Wilhelmsen Logistics AS, k/n/a Wallenius Wilhemsen Ocean AS, and Wallenius Wilhelmsen Logistics America, LLC be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. It is

FURTHER ORDERED that the request for dismissal with prejudice be **GRANTED**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

A CUSTOMS BROKERAGE, INC.

Claimant,

v.

CARGOCARE LOGISTICS USA, INC. AND CARGOCARE LOGISTICS AMERICA, INC.,

Respondents.

Docket No. 1987(I)

Served: April 4, 2024

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman;* Rebecca F. DYE, Louis E. SOLA, Max S. VEKICH, *Commissioners*. Carl W. BENTZEL, *Commissioner,* concurring.

Order Reversing the Initial Decision

On July 17, 2023, the Small Claims Officer ("SCO") issued an Initial Decision ("I.D.") finding that Respondents Cargocare Logistics America, Inc. ("CC America") and Cargocare Logistics USA, Inc. ("CC USA") had violated 46 U.S.C. § 41102(c) and were jointly and severally liable to Claimant A Customs Brokerage, Inc. ("ACB") in the amount of $20,970. Having reviewed the I.D., the record of this case, and the relevant law, the Commission now reverses the I.D. and orders this case DISMISSED WITH PREJUDICE.

I. BACKGROUND

A. <u>The transportation at issue</u>

Claimant A Customs Brokerage, Inc. ("ACB") is a customs broker that paid ocean freight charges for three shipments on behalf of its client, Brian Trading Co., LLC ("Brian Trading") upon their arrival at the port of Miami from Cochin, India. I.D. at 1. The containers were shipped from India by Cargocare Logistics PVT

Ltd. ("CC India"), a registered non-vessel-operating common carrier ("NVOCC"). *Id.* The delivery agent on the bills of lading was Respondent CC America. *Id.* ACB had handled shipments of this kind on behalf of Brian Trading before, and the delivery agent on earlier shipments had been Respondent CC USA,[1] but for these three shipments, the delivery agent was CC America. *Id.*

Upon the arrival of the shipments in Miami, CC America as a delivery agent notified ACB. The arrival notice directed, in red font, that ACB should "[p]lease remit payment to the new company: Cargocare Logistics America, Inc. Paycargo: Cargocare Logistics America Incorporated" — that is, to CC America. Nevertheless, ACB paid the freight charges of $20,970 to the incorrect party, CC USA. I.D. at 6, PF 27, 29.

The correct party, CC America, notified ACB that it would not release the containers until its bill had been paid, so ACB paid another $20,970 to CC America. I.D. at 6-7; PF 31-32. ACB sought both to get a refund from Respondents[2] and to cancel its payment via Paycargo but was unsuccessful. I.D. at 7, PF 33. ACB's claim against CC USA's bond was denied as not arising from a covered event. I.D. at 8; PF 38. ACB then filed the instant informal complaint with the Commission, alleging that CC America and CC USA's conduct violated 46 C.F.R. § 515.23 and seeking a refund of the $20,970 it paid in error to CC USA.

B. <u>Proceedings Before the SCO</u>

CC America filed a response to the complaint and consented to the use of informal procedures. CC USA did not file a response, even when ordered to do so by the SCO. The SCO attempted unsuccessfully on several occasions to elicit a response from CC USA and warned it that its lack of response could lead to the entry of a default judgment. ACB and CC America filed responses to the SCO's discovery requests and order for supplemental information. The SCO, satisfied that the record was complete, entered a default judgment against CC USA.

In the Initial Decision ("I.D."), the SCO made 38 factual findings (which she termed "Pertinent Facts Established by the

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[1] At the time of the events at issue, CC USA was a registered NVOCC, but its bond coverage was terminated on October 27, 2021, and its Federal Maritime Commission (FMC) registration was cancelled. I.D. at 4, Pertinent Facts Established by the Record ("PF") 7.

[2] CC USA was found to have been served by mail to its registration address, but it never participated in this case. I.D. at 2.

Record" and cited as "PF"; for the sake of consistency, we adopt the same abbreviation) that, taken together, led her to conclude that both CC USA and CC America violated 46 U.S.C. § 41102(c).[3] Of relevance to this case, the SCO found that:

- CC America is a licensed NVOCC;
- Chase Lao owns an 80% share of CC America and is one of its two directors and its VP, Secretary, CFO, and designated FMC contact person;
- CC USA was a licensed NVOCC until October 27, 2021, when its bond coverage was terminated and, as a result, its FMC license was cancelled;
- Sue Lao owns an 80% share of CC USA and is one of its two directors, its Secretary, Treasurer, CFO, and designated FMC contact person;
- Chase Lao and Sue Lao are sisters and reside at the same address;
- CC America and CC USA are both corporations registered with the California Secretary of State at mailing addresses that are the same as the Lao sisters' residential address;
- CC India is a registered NVOCC based in Mumbai, India;
- Joy Varghese Pareckattil is CC India's Chairman, owner, and designated FMC contact person;
- Joy Varghese Pareckattil is also the President and other director of CC America and CC USA, and owns the other 20% share of both entities; and
- The duplicate payments made in error to CC USA were deposited in a bank account it held at Bank of America.

See I.D. at 4-7, PF 3-37.

The SCO ordered the refund to ACB of $20,970, and that CC USA and CC America were jointly and severally liable. On

[3] ACB, like the other parties to this case, is unrepresented. Its complaint asserted a violation of 46 C.F.R. § 515.23, which is inapplicable as it pertains to claims against ocean transportation intermediaries ("OTIs"). Consistent with Commission precedent, the SCO construed the pro se pleadings liberally, and opted to analyze the well-pleaded allegations of the complaint through the lens of 46 U.S.C. § 41102(c). The decision to construe the pleadings liberally was not an error. And in the context of default judgments, if a complaint is unanswered, "[w]ell[-]pleaded factual allegations in the complaint not answered or addressed will be deemed to be admitted." 46 C.F.R. § 502.62(b)(6)(i).

August 17, 2023, we requested to review the Initial Decision pursuant to 46 C.F.R. § 502.227.

II. DISCUSSION

A. Relevant Law

It is well established that to prevail in a proceeding under the Shipping Act, a complainant bears the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.203; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 WL 9966245, at *14 (FMC Dec. 17, 2014). Under the preponderance standard, a complainant must show that their allegations are more probable than not. *Crocus Investments, LLC v. Marine Transport Logistics, Inc.*, Docket No. 15-04, 2021 WL 3732849, at *3-4 (FMC Aug. 18, 2021) (Order Affirming Initial Decision on Remand).

When reviewing an initial decision, the Commission has "all the powers which it would have had in making the initial decision." 46 C.F.R. § 502.227(a)(6). The Commission may, on its own motion, reopen a proceeding for the purpose of taking further evidence and may remand a case to the presiding officer. 46 C.F.R. § 502.230(a), (d).

The Shipping Act at 46 U.S.C. § 41102(c) prohibits common carriers, marine terminal operators, and ocean transportation intermediaries from failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property. The Commission's regulation at 46 C.F.R. § 545.4 further requires § 41102(c) claimants seeking reparations to prove that the claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis, are unjust and unreasonable, and that the complained-of practice or regulation is the proximate cause of the claimed loss.

B. CC USA

The default judgment against CC USA must be vacated because CC USA could not have violated the Shipping Act. CC USA acted as neither an NVOCC or freight forwarder nor as a delivery agent for the shipments. To violate 46 U.S.C. § 41102(c), "[a] common carrier, marine terminal operator, or ocean transportation intermediary" must "fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property."

The only reason CC USA is involved in this proceeding was because of Claimant ACB's erroneous transfer of freight charges to CC USA's bank account, when CC USA was never involved in Claimant's shipments as an NVOCC, freight forwarder, or a delivery agent. While Claimant's predicament caused by its own mistake is understandable, Claimant should go to an appropriate court if it wants to seek a legal remedy against CC USA as an erroneous recipient of funds with respect to Claimant's bank transaction.

The facts and allegations demonstrate CC USA could not have violated the Shipping Act at 46 U.S.C. § 41102(c). The default judgment against CC USA was erroneous, and the Complaint against CC USA should have been dismissed.

C. <u>CC America</u>

Similarly, CC America cannot have violated the Shipping Act in this case because it acted as a delivery agent, not as an NVOCC, MTO, or even an ocean freight forwarder. Pursuant to 46 U.S.C. § 40102(19), an ocean freight forwarder is "a person that . . . in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers[,] and . . . processes the documentation or performs related activities incident to those shipments." In other words, to be an ocean freight forwarder, CC America would have had to dispatch the cargo from the United States, but in this case it handled the import cargo in the United States as delivery agent for CC India, which acted as the NVOCC for the shipments in question. Accordingly, CC America could not have violated the Shipping Act on these facts.

In addition, even if we extend our review to include the NVOCC (CC India) for which CC America acted as a delivery agent, CC America's actions and thus the NVOCC's actions were reasonable. On behalf of the NVOCC, CC America notified ACB of the shipments' arrival and specifically asked ACB to pay CC America. CC America or the NVOCC did not mislead ACB about the relevant payment details or induce it to make a payment to CC USA. Assessing and collecting outstanding freight charges was indisputably within the range of lawful activities for the NVOCC and its delivery agent CC America as specified in the Commission's regulation at 46 C.F.R. § 515.2(k)(11) (an

NVOCC's services include "collecting freight monies from shippers and paying [ocean common carriers] as a shipper on NVOCC's own behalf").

D. <u>Joint and Several Liability</u>

The SCO ordered that CC USA and CC America jointly and severally pay reparations to Claimant based on the finding that CC USA, CC America, and CC India "appear to have acted as one entity, with intertwined operations," such that CC India had constructive possession of the erroneous payment. I.D. at 12-13. Although the SCO does not have to accept every bit of evidence as true and may make reasonable inferences, more than mere speculation is required. *Martin David Thibeaux v. Chris Smith/Chris Smyth, Robert Ewing, Traderland, LLC, and Trailermania*, FMC Docket No. 1988(I), at 9 (citing *Waterman S.S. Corp. v. General Foundries, Inc.*, 26 S.R.R. 1424, 1994 WL 279898 (FMC June 13, 1994)). To prevail in an action under the Shipping Act, a complainant must prove its case by a preponderance of the evidence, *i.e.*, that its allegations are more probable than not.

The evidence demonstrated that CC America repeatedly asked CC USA to return the erroneously paid freight charges to the Claimant. CC America's owner repeatedly asked CC USA's owner by stating:

> Please pay back the $20K; The small claims court named CC USA and CC America. You received $20K; They paid to CC USA by mistake; If the bank froze the account, please forward proof; You are no longer in business. But everyone is chasing after CC America; You can file bankruptcy for the company if in debts. Now everyone is chasing after me, when I have nothing to do with it.

Responding to CC America's owner, CC USA's owner wrote back:

> This is related to the business account, like I have told you before, the bank freeze the account, not allowing transfer out; Those money are not in my pocket, I didn't use one cent of it, …; Money in the account but since CC USA still owes money to BOA, so they don't allow money to go out. I want to return the money for sure.

See CC America's Response to Complaint, Exhibit G.

Further, CC USA and CC America are separately incorporated and licensed separately by the Commission. The facts and evidence do not support that CC USA, CC America, and CC India acted as one entity with intertwined operations. On the contrary, the facts and evidence demonstrate that one corporation was in financial trouble and winding down its business with its business bank account frozen by the bank. And another corporation was established by a different owner to act as CC India's delivery agent or its new business partner in the United States.

In any event, CC USA could not have violated the Shipping Act provision because it acted neither as an NVOCC or freight forwarder nor as a delivery agent with respect to the shipments in question. As discussed above, the Complaint against CC USA should have been dismissed.

Nor did CC America violate the Shipping Act provision. CC America and the NVOCC CC India acted reasonably in providing transportation service to Claimant ACB or its customer. The order of joint and several liability with respect to CC USA and CC America was erroneous.

III. CONCLUSION

IT IS ORDERED that the Initial Decision is reversed, and the case is dismissed with prejudice.

By the Commission.

David Eng
Secretary

Commissioner BENTZEL, concurring:

In my view, the Small Claims Officer's determination should be reversed only because of the legal distinction between Commission's lack of jurisdiction over a delivery agent and our jurisdiction over regulated entities operating as an NVOCC.

However, I cannot restrain myself from comment on the issue proposed on whether if CC America and CC USA were operating under authority as an NVOCC whether they could be jointly and severally liable. Clearly, in this case we have two companies registered as CC America and CC USA. CC America is licensed as an NVOCC. CC USA had its license revoked in October 2021. The two respective entities are owned by sisters, they do their work in the same place, which also functions as their primary residence. CC USA could not provide service as an NVOCC because license was revoked so, in my view, shifted her focus to unregulated FMC activities such as the function of delivery agent. While this might satisfy legal requirements, I believe that CC America and CC USA "appear to have acted as one entity, with intertwined operations" – I mean conceivably how could two sisters living and working together in the same field not be.

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

MSRF, INC., *Complainant*

v.

HMM CO. LTD., *Respondent*.

DOCKET NO. 22-20

Served: April 15, 2024

ORDER OF: Linda S. Harris CROVELLA, *Administrative Law Judge*.

ORDER DENYING RESPONDENT'S PETITION FOR ATTORNEY FEES[1]
[Notice Not to Review served 5/16/2024, decision administratively final]

I. INTRODUCTION

A. Overview

On January 25, 2024, Respondent HMM Co. Ltd. ("HMM") filed a Motion for Attorney's Fees[2] (hereafter, "Petition") in this proceeding which became administratively final on December 22, 2023. Complainant MSRF, Inc. ("MSRF") filed its Response in Opposition to Respondent's Motion for Attorney's Fees ("MSRF Opposition to Attorney Fees") on February 14, 2024.

MSRF manufactures and imports gourmet foods and gifts. MSRF commenced this proceeding by filing a complaint alleging that HMM, a vessel-operating ocean common carrier, violated 46 U.S.C. §§ 41102(c) and 41104(a)(2), (5), (9), and (10) of the Shipping Act of 1984, as amended ("Shipping Act"). Specifically, MSRF alleged that HMM "refused to provide MSRF enough commitments in its advance service contracts, instead providing only a fraction of the space MSRF needed at substantially higher prices;" then "proceeded to breach its limited commitments by refusing to honor its service contract;" which forced MSRF to purchase space on the spot market at higher prices; meanwhile reselling "the capacity allotted to MSRF . . . to other shippers on the same spot marked at substantially higher rates than those to which it agreed in the service contract." Complaint at 5-7.

HMM denied the allegations and raised numerous affirmative defenses, including lack of jurisdiction; failure to state a claim under which relief may be granted; failure to allege essential

[1] This order will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this order within twenty-two days of the date of service of the order. 46 C.F.R. § 502.254(h).
[2] Respondent's Motion for Attorney's Fees is being accepted and referenced as a Petition for Attorney Fees.

elements under the various sections of the Shipping Act alleged; that the service contract at issue "contains Complainant's exclusive remedies;" the Federal Maritime Commission ("Commission" or "FMC") does not have "the authority to award damages for a breach of contract claim;" HMM's conduct was reasonable; third parties were responsible for any alleged damages; and "Complainant has failed to mitigate its damages." Answer at 8-9.

On November 22, 2023, the Initial Decision ("ID") issued, denying MSRF's claims, concluding that:

> MSRF entered into a service contract with HMM, which was amended 14 times, yet MSRF's claims primarily rely on the service contract as originally enacted, prior to the amendments. Many of the 14 amendments were at the initiation or for the benefit of MSRF, including the addition of shipping lanes and the continuation of 2021 prices during the contract extension. The duration of the service contract was extended by amendment, and through the end of the contract, HMM carried almost double the minimum quantity commitment of cargo ("MQC"). MSRF fails to acknowledge the ongoing communication and negotiation between parties that led to the amendments from which MSRF derived a substantial financial benefit. MSRF does not claim (and the evidence also does not support) that any kind of collusion or undue pressure led it to agree to these amendments.

Initial Decision at 2-3.

On December 26, 2023, the Commission issue a Notice Not to Review the Initial Decision.

B. Procedural History

On August 19, 2022, the Commission issued a notice of filing of complaint and assignment, initiating this proceeding. On September 13, 2022, HMM filed an answer to the complaint. On September 26, 2022, the case was reassigned to the undersigned. On October 6, 2022, a scheduling order issued.

On November 29, 2022, MSRF filed a motion requesting an extension of time for the parties to complete the depositions of fact witnesses, to which HMM consented. On November 30, 2022, the extension of time was granted.

On December 15, 2022, the parties filed a joint motion for entry of a confidentiality stipulation and a proposed protective order ("Protective Order Motion"). On January 4, 2023, an order granting the confidentiality stipulation and protective as revised issued. On January 13, 2023, an amended scheduling order issued.

On April 21, 2023, MSRF filed a motion for summary decision, in addition to proposed findings of fact, appendix, and a motion for confidential treatment.[3] On April 24, 2023, the undersigned issued an order *sua sponte*, accepting MSRF's motion for summary decision as its initial brief. On May 12, 2023, HMM filed its opposition brief, proposed findings of fact, response to MSRF's proposed findings of fact, appendix, and a motion for confidential treatment. On May 24, 2023, MSRF filed a reply brief, response to HMM's proposed findings of fact, and motion for confidential treatment.

On May 26, 2023, an order to correct filings issued due to both parties over-designating testimony and documents as confidential, as well as designating as confidential information that it had previously made public. The parties were ordered to resubmit confidential and public appendices, proposed findings of fact, missing table of contents and confidential request table, if not previously submitted, and supplemental motions for confidentiality.

On June 5, 2023, HMM filed a motion to strike portions of MSRF's reply brief, or alternatively, for leave to file a sur-reply, asserting that MSRF improperly raised both new facts and new arguments in its reply brief. On June 9, 2023, MSRF filed an opposition to HMM's motion to strike, but assented to HMM filing a sur-reply.

On June 9, 2023, MSRF submitted the requested filings, including a corrected public and confidential version of its appendix (exhibits labeled as "CX"), a corrected response to HMM's proposed findings of fact, and a supplemental motion for confidential treatment. Also on June 9, 2023, HMM submitted the requesting filings, including a corrected public and confidential version of its appendix (exhibits labeled as "RX"), proposed findings of fact, a table of contents for its appendix, and a revised motion for confidential treatment.

On June 12, 2023, an order issued denying HMM's motion to strike and allowing HMM to file a sur-reply. On June 22, 2023, HMM filed a sur-reply.

On November 22, 2023, the initial decision was issued, denying MSRF's claims and dismissing the complaint. No exceptions were filed, and on January 25, 2024, Respondent HMM filed the Petition.[4] On February 20, Complainant filed a timely response to the Petition.

II. DISCUSSION

A. Burden of Proof

The successful party in a private party complaint proceeding under 46 U.S.C. § 41301(a) may petition for an award of attorney fees after the decision becomes administratively final.

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[3] The email to which these filings were attached indicated that a Motion for Summary Judgment was also attached, but it was not. The missing motion was then provided attached to an email dated April 24, 2023.

[4] A timely petition is filed "within 30 days after a decision becomes final. For purposes of this section, a decision is considered final when the time for seeking judicial review has expired or when a court appeal has terminated." 46 C.F.R. § 502.254 (c). "In most instances, an aggrieved party has sixty days to seek judicial review of a Commission decision." Statement of Commission, *supra*, at 2, n.7 (FMC 2021), citing 28 U.S.C. §§ 2342(3)(B), 2344.

Howard Coble Coast Guard and Maritime Transportation Act of 2014, 46 U.S.C. § 41305(e), Commission Docket No. 15-06; Statement of Commission *On Attorney Fees*, Commission Docket No. 21-14 (FMC 2021). The "fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); 46 C.F.R. § 502.254(d). *See also*, *Blum v. Stenson*, 465 U.S. 886, 895 n. 11 (1984) ("[Courts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates."). Here, HMM filed the petition and has the burden of proof. Moreover, Commission Rule 254 states that the appeal of an award of attorney fees is governed by the procedures in 46 C.F.R. § 502.227. 46 C.F.R. § 502.254(h).

B. Arguments of the Parties

HMM asserts that it is eligible for an award of attorney fees because it was the prevailing party when the Initial Decision by the undersigned denied the complaint against HMM, and it subsequently became the final decision when no exceptions were filed, and the Commission served Notice to Not Review dated December 26, 2023. HMM also asserts that it is entitled to attorney fees because "the overarching consideration, three general principles, and several factors" discussed in the Statement of the Commission all favor such an award. Petition at 14, citing Statement of Commission at 3. Specifically, HMM states that an award serves the purposes of the Shipping Act—the overarching consideration—"by discouraging frivolous cases brought by improper motivations or which are factually and legally unsustainable." Petition at 14. It further contends that "[t]he three general principles contained in the Guidelines support the exercise of discretion in granting the [Petition]." *Id.* at 15. Those three general principles are discussed in more detail below. Finally, HMM states that "[t]he Guidelines identify five non-exclusive factors: frivolousness and objective unreasonableness…, motivation, litigation misconduct, deterrence, and compensation" and all favor an award of attorney fees.

MSRF contends that HMM is not eligible for attorney fees because while the complaint was denied, it was not dismissed with prejudice. MSRF states that only "proceedings dismissed by the Commission with prejudice materially alter the legal relationship of the parties because any action so dismissed cannot be brought again." Response at 6, referencing *Baltic Auto Shipping, Inc. v. Hitrinov*, Docket No. 14-16, 2017 WL 492488 (FMC Oct. 2017) at *9. MSRF further asserts that neither the overarching consideration, nor the principles or factors on which the decision-maker can rely, support an award of attorney fees.

C. Eligibility for Attorney Fees

On March 1, 2016, the Commission amended its Rules and Regulations governing the award of attorney fees to implement the statutory amendments made by the Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-282, § 402, 128 Stat. 3022 (Dec. 18, 2014); see generally Docket No. 15-06.

§ 502.254 provides:

(a) *General*. In any complaint proceeding brought under 46 U.S.C. 41301…the Commission may, upon petition, award the prevailing party reasonable attorney fees.

(b) Definitions.

Attorney fees means the fair market value of the services of any person permitted to appear and practice before the Commission in accordance with subpart B of this part.

Decision means:

(1) An initial decision or dismissal order issued by an administrative law judge;
(2) A final decision issued by a small claims officer; or
(3) A final decision issued by the Commission.

46 C.F.R. § 502.254

"The term 'prevailing party'…is a 'legal term of art,' and is 'interpreted…consistently'" and the premise is "'the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.'" Final Rule, 81 Fed. Reg. 10,511-12 (Mar. 1, 2016) (citing *Smyth v. Rivero*, 282 F.3d 268, 274 (4th Cir. 2002) (citations omitted) and *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.,* 489 U.S. 782, 792-93 (1989)).

"A [respondent] prevails 'whenever the plaintiff's challenge is rebuffed, irrespective of the precise reason for the court's decision.'" *The Highland Consulting Grp. V. Soule*, 19-CV-81636-RLR/BER (Feb. 8, 2024) (rec. of Mag.), citing *CRST Van Expedited, Inc. v. E.E.O.C.*, 578 U.S. 419, 431, 136 S. Ct. 1642, 1651 (2016) (other citations omitted). In *CRST*, the Supreme Court noted that parties "come to court with different objectives" and in filing a complaint, "[a] plaintiff seeks a material alteration in the legal relationship between the parties." *Id.* Similarly, [t]he defendant…seeks to prevent this alteration to the extent it is in the plaintiff's favor." *Id.* Moreover, "[t]he defendant may prevail even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason." *Id.*

MSRF asserts that because its complaint was not dismissed with prejudice, there is no material alteration of the legal relationship of the parties, citing to fee petition orders in cases that were dismissed with prejudice for failure to prosecute (*Edaf Antillas, Inc. v. Crowley Caribbean Logistics, Inc.,* Docket No. 14-04, 2016 WL 5110081 (F.M.C. Sept. 14, 2016) ("*Edaf*"), and on a motion to dismiss (*Logfret, Inc. v. Kirsha, B.V. Leendert Johanness Bergwerff a/k/a Hans Bergwerff, and Linda Sieval*, Docket No. 18-10, 2020 WL 13512913 (ALJ Feb. 20, 2020), aff'd 2020 WL 3468691 (F.M.C. June 22, 2020)). If MSRF's argument that an administratively final decision denying a complaint on the merits cannot be considered a material alternation of the legal relationship of the parties were accepted, a respondent who rebuffed a complaint after adjudication on the merits would not be eligible for attorney fees. This interpretation of the phrase is not consistent with the Commission's statement in *Edaf* that "Rule 72 states that a dismissal for failure to prosecute or obey an order will be considered an adjudication on the merits. 46 C.F.R. § 502.72(b)." *Supra* at *4. Moreover, MSRF does not argue that it could bring the action again. In addition, as discussed above, the definition of decision includes an "initial decision . . . issued by an administrative law judge." 46 C.F.R. § 502.254. Accordingly, an adjudication on the merits that results in an administratively final decision that is not appealed must result in a material alteration of the legal relationship of the parties.

In the case *sub judice*, there was a material alteration of the legal relationship of the parties in the form of a determination on the merits and a denial of the complaint (there was no dismissal without prejudice, as MSRF's argument implies), which became administratively final when MSRF did not appeal the Initial Decision and the Commission issued a Notice Not to Review. Applying the definition of a prevailing party in *CRST*, HMM prevailed by successfully rebuffing MSRF's complaint. As the prevailing party in the case, HMM is eligible for attorney fees.

D. Entitlement to Attorney Fees

The next step in the inquiry is whether HMM is entitled to attorney fees. In the Final Rule, the Commission stated that the "primary consideration in determining entitlement to attorney fees is whether such an award is consistent with the purposes of the Shipping Act, and any factors the Commission relies upon in individual cases should be consistent with these purposes." Final Rule, 81 Fed. Reg. at 10,509 10,515 (citing to *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n. 19 (1994)). In making such a determination, the Commission noted that "the Shipping Act's several purposes provide support for treating prevailing complainants and prevailing respondents in an even-handed manner…." *Id*. at 10,514.

In *Edaf*, the Commission discussed the application of the Third Circuit list of "nonexclusive factors" that the Supreme Court in *Fogerty* agreed "may be used to guide courts' discretion…" including "'frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.'" *Edaf* 2016 WL 5110081 at *5 citing *Fogerty* at 534 n.19 (quoting *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 156 (3d Cir. 1986) (internal quotations omitted).

HMM asserts that MSRF's complaint was "meritless and frivolous because the Complaint was copied from an unrelated action." Petition at 5. It also contends that copying allegations from another complaint demonstrates that the claims are objectively unreasonable. Petition at 16. Further, HMM argues that MSRG "knew its central factual allegation was false" because MSRF agreed to and then benefitted from the 10-week extension of the contract. *Id*. Thus, HMM asserts that because the contract was extended, MSRF "knew at all times that its basic contention that HMM failed to carry the MQC was false." *Id*. HMM also contends that "all five of MSRF's Shipping Act claims were found to have no factual or legal basis or were abandoned" which demonstrates that they were frivolous, meritless, and objectively unreasonable. *Id*.

No authority is cited by HMM regarding why using another complaint as a template is frivolous, and none has been found by the undersigned. The use of other cases' pleadings as templates is not prohibited by law or regulation, and especially in a first-time filing with a court or agency with which one is not familiar, is practical. Using another case pleading as a template is not "*per se* objectively unreasonable and frivolous" as urged by HMM. Petition at 17 n.13. It is hard to imagine that any person—from a large law firm to a *pro se* litigant—does not from time to time use previous pleadings as templates.

"The mere fact that respondent has prevailed does not render a complainant's claims objectively unreasonable, otherwise prevailing respondents would be per se entitled to attorney fees, an approach the Commission has rejected." *Logfret*, *supra* at *4 (citations omitted).

As HMM stated during the course of the proceeding and in petition, it had a year-long service contract with MSRF, and by the final two weeks of the service contract, it had accepted less than half of the amount of forty-foot equivalent units (FEUs) that it had agreed to ship from Asia to the United States. Petition 3-5. MSRF contends that while HMM offered the extension of the contract in the final few weeks of the original contract duration, and then in the 10-week extension period shipped more than the originally contracted FEUs, "[t]hat HMM later provided additional space pursuant to Amendment 13, does not erase the harm that MSRF suffered during the initial period of the Service Contract." MSRF Opposition to Attorney Fees at 11. HMM is correct that MSRF failed to prove that this series of events violated the Shipping Act, but there was no finding that the claims were frivolous, and there is none now. This factor does not weigh in favor of attorney fees.

The factual scenario presented by the underlying case of space accommodation issues during a period recognized by the Commission and by Congress as posing significant supply chain issues is one that is developing in terms of case law and regulation. *See* Federal Maritime Commission 60th Annual Report for Fiscal Year 2021, at 24 ("The COVID-19 pandemic had a significant impact on the global supply chain, including service contract negotiation and implementation."), 25 ("During the fiscal year, the Commission received 113,068 new service contracts and 645,014 contract amendments, compared to 45,164 and 779,884, respectively, in FY 2020."); Ocean Shipping Reform Act of 2022, Pub. Law 117-146—June 16, 2022 (amendments regarding space accommodations at 46 U.S.C. Section 41102 (d)(1), and (2)(A)(i),(ii) and (B), Section 41104 (a)(1)(A), B(3), (D), and G(14)).

The Commission noted in its affirmation of the denial of attorney fees in *Logfret*, "[a]s the ALJ pointed out, there is little Commission caselaw discussing that scenario." *Supra* at 5. The same is true in the underlying case. Neither party in its briefing relied on case authority that was on all four squares with the underlying case. What MSRF alleged, albeit unsuccessfully—the refusal of HMM to ship 25 FEUs from Asia to the United States during the original term of the agreement, and belief that during that time space that should have been allotted to them was being sold to other shippers willing to pay higher spot market prices—was not a wholly unreasonable argument to make. *See, generally* Complaint; Opposition to Attorney Fees at 3.

HMM argues that MSRF "knew at all times that its basic contention that HMM failed to carry the MQC [minimum quantity commitment] was false." As detailed above, MSRF alleged that it was denied space during the original duration of the service contract, resulting in it having to resort to the spot market during most of that 12-month period, in violation of the Shipping Act. While the argument did not succeed, HMM has not shown that the allegations "were meritless when made." Factually, it is accurate that HMM did not accept the full MQC, or even half of it, during the original duration, "[a]lthough this was the smallest MQC HMM could consider…." Opposition Brief at 5. Legally, an argument could have been made that the denial of space allocation during that time was a violation of the Shipping Act, but in the instant case, MSRF did not succeed in doing so. This factor does not support attorney fees for HMM.

Next, HMM goes through each count of the original complaint and the Initial Decision and asserts that the claims were "devoid of legal or factual merit." Petition at 18. While this argument has been addressed above and found not sufficient to support attorney fees, two of the counts warrant further discussion.

HMM argues that "Count III, alleging violations of Section 41101(a)(5), was expressly abandoned by MSRF. ID at 20." Petition at 19. The Initial Decision said: "In its Brief, MSRF states it is no longer pursing Count III of the Complaint, which alleged a violation of 46 U.S.C. § 41104(a)(5)." ID at 19; MSRF Brief at 1 n. 1. HMM, as a result, did not discuss Count III in its Opposition Brief. Opposition Brief at Table of Contents (i). Moreover, HMM provides no authority for its contention that withdrawing a claim in an initial brief proves that it was "unreasonably alleged" or amounts to "litigation misconduct" as it later asserts, evoking *Edaf* without comparing the two cases. Petition at 22.

MSRF asserts that unlike the complainant in Edaf, it "was fully engaged in the underlying proceedings; complied with the Presiding Officer's briefing schedule by filing its Brief, CPFF, and appendix; met all deadlines; made corrections to its filing when it was asked to do, and constantly communicated with the Commission and HMM's attorneys when it was required to do so." MSRF Opposition to Attorney Fees at 9.

In *Edaf*, a Commission case where attorney fees were granted after the case was dismissed for failure to prosecute, there was a wholesale abandonment of the case by complainant when it failed to file its brief, failed to respond to an order to show cause, and then failed to file a response to the petition for attorney fees. Without more, it is hard to see how a clear statement in the initial briefing that one is abandoning a claim while continuing to pursue others is anything more than a realization that the evidence revealed during discovery did not support continuing it. HMM has not elicited sufficient evidence for this factor to weigh in its favor.

HMM also argues that "Count IV appeared to be implicitly abandoned when MSRF omitted this claim in its Reply Brief." Petition at 19. Because Count IV was not withdrawn and was included in MSRF's Initial Brief but not discussed in MSRF's Reply Brief, it was briefly analyzed and dismissed in the Initial Decision. ID at 20, 28-29; Reply Brief at 3. HMM asserts that both Counts II and IV "were thus copied from the MCS Complaint without any supporting facts or legal theories in this case and then were abandoned at the end of the case." *Id*. As stated in the Initial Decision, it was unclear if MSRF intended to abandon Count IV or simply failed to address it in the Reply Brief that HMM moved to strike. Regardless, HMM does not provide sufficient evidence to find that the failure to address Count IV in the Reply Brief supports attorney fees.

HMM also asserts that copying from a complaint and revising the damages spreadsheet downward is proof that the claims "were improperly motivated" because "it is obvious that MSRF simply copied allegations it knew were false hoping HMM would settle, the very definition of improper motivation." Petition at 21.

MRSF counters that it, like the complainant in *Logfret*, is "protective of its business interests and willing to guard these interests through enforcement of all potentially applicable legal remedies" MSRF Opposition to Attorney Fees at 12. In addition, it did not seek "'to knowingly gamble on an unreasonable legal theory in order to achieve a secondary gain,' such as leveraging a settlement." *Id.*, citing *Logfret,* 2020 WL 3468691 at *7.

No facts beyond using a complaint as a template and revising the damages spreadsheet are mentioned to support the conclusion regarding motivation, and those alone do not establish that the complaint was improperly motivated. As noted by MSRF in its opposition, "HMM fails to cite to any case, administrative decision, or statute/rule" that "[u]sing another complaint as a template" or "[a]mending a damages spreadsheet" is "unlawful or improper," *Supra* at 12-13.

HMM next asserts that MSRF's "conduct of this case greatly increased the time and cost of resolving this matter." Petition at 21. In support of this contention, HMM refers to a consent motion to extend time to complete the deposition of fact witnesses, a damages summary that MSRF revised and replaced, MSRF's initial brief filing, and HMM's motion to strike MSRF's reply brief or file a sur-reply (the motion to strike was denied and a sur-reply was granted).

While the document submitted by MSRF as an initial brief was unconventional (it was styled as a Motion for Summary Decision that was filed on the due date of the brief and accepted for that purpose), there is no evidence that it was meant to harass HMM and it did not cause any delay. MSRF admits that it "erroneously titled its Opening Brief as a Motion for Summary Decision, just like HMM erroneously title the instant papers as a motion rather than a petition as the statute requires." MSRF Opposition to Attorney Fees at 14.

Regarding MSRF's initial brief, while it did make it more difficult for HMM to know what to address in its opposition, MSRF suffered the brunt of that error. Other than demonstrating that its attorneys had no experience with proceedings before the FMC, there was no evidence that MSRF willfully tried to delay the proceedings or harass HMM. MSRF's filing of a timely but unconventional brief, proposed findings of fact, and appendix is not akin to *Edaf*, where the complainant filed no brief, proposed findings of fact or appendix, and then failed to respond to an order to show cause "why its complaint should not be dismissed for failure to prosecute or failure to comply with its discovery responsibilities." *Edaf* 2016 WL 5110081 at *2. HMM sums up its argument that "[t]he litigation misconduct factor clearly supports granting the [Petition]" by speculating "that MSRF probably assumed [HMM] would just settle the case." Petition at 22. Such speculation without evidence, does not support finding this factor in favor of awarding attorney fees.

The remainder of HMM's contentions also are not indicative of harassment or intentional creation of delay. MSRF alleged Shipping Act violations, HMM answered the complaint, and the parties engaged in discovery. HMM did not file a motion to dismiss or a motion for summary judgment. The case proceeded to briefing within the year set by the Commission for an initial decision to issue. Any perceived delay in the proceeding was insignificant and attributable to both parties. For example, the parties jointly requested an amended discovery and briefing schedule, and both parties' appendices and motions for confidentiality were ordered to be revised because they did not provide good cause for the wholesale redactions of their public filings. Moreover, it is unclear how the damages summary that MSRF prepared and then revised to reflect a lower amount of what it believed were its damages created delay, and as with most of its assertions, HMM does not cite to any authority or go beyond bare assertions to explain it. MSRF states that it "amended its damages spreadsheet because it recognized certain charges needed to be adjusted. Once it found these errors, MSRF's counsel immediately relayed such information to HMM's counsel and amended its damages spreadsheet—how this is misconduct is hard to fathom." MSRF Opposition to Attorney Fees at 14. There is no litigation misconduct, harassment, or intentional delay proven by these facts.

HMM asserts that it "would not be moving for its attorney's (sic) fees and costs in this matter if MSRF's claims had merit" (nor would it be eligible to do so) "but the discovery of the MSC Complaint proves that MSRF's claims were entirely baseless and simply copied from another case." Petition at 22. HMM then argues that "MSRF had access to all of the important facts and information …before it filed the Complaint…" and discovery was unnecessary for it "to prove or disprove" this case. *Id.* This argument is put forth to support its contention that the Commission should award attorney fees because it would "have no impact on those with colorable allegations, though perhaps they will need to draft their own complaints" and "would promote the efficient use of the Commission's resources by discouraging baseless filings." *Id.* HMM also argues it should be compensated because it had to defend itself over "meritless and inflated claims copied from another case.: *Id.* at 23. Finally, it claims that awarding it fees would not be inconsistent with Federal caselaw. *Id.* at 24.

MSRF contends that its "claims were based on plausible interpretations of the law and genuine arguments" and awarding attorney fees would "have a detrimental effect on complainants raising potential violations of the Shipping Act." It further asserts that because HMM did not show the claims were "meritless, frivolous or unreasonable" it should not be compensated. Finally, it distinguishes the federal cases which HMM cites.

The Commission found in *Baltic Auto* that "even if we agreed that deterring frivolous claims was consistent with the purposed of the Shipping Act, an award would not be warranted in this case." *Supra*, 2017 WL 4924883 at *12. There, as here, the claims were not found to be frivolous. And, as the Commission agreed with the Administrative Law Judge in *Logfret*, "the 'purposes of the Shipping Act are met when complainants are able to raise potential violations, even under unusual or unique circumstances, without the chilling impact of having to pay Respondents' attorney fees.'" *Supra,* 2020WL 3468691 at *7, quoting Order Denying Pet. 2020 WL 948583 at *6. The federal court cases are distinguishable from the case *sub judice* and attorney fees are not found appropriate.

IV. ORDER

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

ORDERED that Respondent HMM, Co. Ltd.'s Fee Petition be **DENIED**.

Linda S. Harris Crovella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

SEAFAIR USA LLC, *Complainant* v. STERLING CONTAINER LINE LTD. AND ATLANTIC FORWARDING LTD., *Respondents*.	**DOCKET NO. 22-34**

Served: April 15, 2024

ORDER OF: Alex M. CHINTELLA, *Administrative Law Judge*.

INITIAL DECISION[1]

[Notice Not to Review served 5/16/2024, decision administratively final]

I. INTRODUCTION

A. Overview

This proceeding began on December 15, 2022, when the Federal Maritime Commission ("Commission" or "FMC") issued a notice of filing of complaint and assignment, indicating that Complainant SeaFair USA, LLC ("SeaFair") had filed a complaint against Respondents Sterling Container Line Ltd. ("Sterling") and Atlantic Forwarding Ltd. ("Atlantic"). The complaint alleges that Respondents violated 46 U.S.C. §§ 41102(a), 41102(c), 41104(a)(4)(A), and 41104(a)(2)(A) regarding their practices and the billing and payment of charges on shipments of cargo, including the provision of services in the liner trade that are not in accordance with the rates, charges, classifications, rules, and practices contained in Sterling's tariff. On December 26, 2022, Respondents filed an answer denying the allegations and raising affirmative defenses.

In or around May 2021, Respondents engaged SeaFair as their destination agent, in which capacity SeaFair provided document turnover and destination services in the United States for shipments carried under Sterling's house bills of lading issued by various branch offices of Atlantic, acting as agent for Sterling. In exchange for the document turnover services, Respondents paid SeaFair $55 per bill of lading. As part of its destination services, SeaFair collected destination charges related to steamship lines, associated terminals, and logistics companies from the consignees and their forwarding agents associated with the shipments. SeaFair alleges that Respondents failed to pay certain document-turnover fees and that, in those instances where SeaFair was not able, through reasonable efforts, to obtain payment of

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

destination charges from consignees, it is entitled to reimbursement for those fees from Respondents pursuant to the indemnification provision of its terms of service.

Since commencement of this action, Respondents have paid the outstanding document-turnover fees to SeaFair. SeaFair now seeks an order directing Respondents to cease and desist from violating the Shipping Act, a civil penalty of not less than $25,000, and an order directing Respondents to indemnify SeaFair against any payments owed to Mediterranean Shipping Company, S.A. ("MSC") for outstanding destination charges that have been billed to SeaFair. SeaFair also seeks reparations in the form of interest on the late document-turnover fee payments and attorneys' fees incurred in connection with claims made by SeaFair against Respondents' surety for the unpaid document-turnover fees and reimbursement of uncollected destination charges.

According to Respondents, the root cause of the dispute is not their refusal to reimburse SeaFair, but SeaFair's disorganized billing practices, which prevented SeaFair from timely collecting destination charges from consignees. Respondents' position is that they engaged SeaFair to collect destination charges and so had no obligation to pursue payment from the consignees for the purpose of reimbursing SeaFair for charges it should have billed to consignees directly.

As explained below, SeaFair has not established that Respondents violated the Shipping Act. Respondents' refusal to indemnify SeaFair for unpaid destination charges did not involve any fraud or concealment for the purpose of obtaining transportation at less than applicable rates. It does not constitute provision of service at rates different from those set forth in Sterling's tariff, nor does it constitute an unfair or unjustly discriminatory practice. Finally, SeaFair has not established that Respondents have failed to establish, observe, and enforce just and reasonable regulations and practices with respect to payment of document-turnover fees or collection of destination charges.

B. Procedural History

On December 15, 2022, the Commission issued a notice of filing of complaint and assignment initiating this proceeding. On December 26, 2022, Respondents filed an answer. A scheduling order was issued on January 18, 2023 and the parties began discovery. On June 26, 2023, an order was issued denying SeaFair's motion to compel, noting that discovery had closed and that no further motions related to discovery would be permitted.

The next day, SeaFair filed a motion to amend its complaint and for an extension to the scheduling order. On July 6, 2023, the motion to amend was denied and the briefing schedule was modified. On July 28, 2023, SeaFair filed its brief, proposed findings of fact, and appendix. On August 28, 2023, Respondents filed their opposition brief, proposed findings of fact, appendix, and response to proposed findings of fact. On September 12, 2023, SeaFair filed its reply brief and a response to Respondents' proposed findings of fact, along with a supplemental appendix.

On September 22, 2023, Respondents filed a motion for leave to file a sur-reply and supplement the record. The case was reassigned to the undersigned on October 4, 2023, and leave to file a sur-reply was granted on October 10, 2023. Respondents filed their sur-reply and supplemental appendix on October 20, 2023.

C. Arguments of the Parties

SeaFair asserts that: Respondents are obligated to pay the document-turnover fees; SeaFair is not responsible for paying the MSC charges and is entitled to contractual or common-law indemnification from Respondents for the MSC charges; Sterling is obligated to collect unpaid destination charges from its shippers and reimburse SeaFair; SeaFair is not responsible for collecting destination charges; and Respondents' failure to pay document-turnover fees, refusal to indemnify SeaFair, and failure to collect destination charges violated the Shipping Act. Opening Brief of SeaFair USA LLC ("Brief") at 11-20; SeaFair USA LLC's Reply Brief ("Reply") at 21-34.

Respondents contend: SeaFair was obligated to collect destination charges from the third-party consignees on Sterling house bills of lading; enforcement of SeaFair's indemnification provision is a contractual issue outside the Commission's jurisdiction; the alleged conduct does not constitute a Shipping Act violation; SeaFair abandoned its claim for unpaid destination charges and the dispute over document-turnover fees is moot; and the dispute results from SeaFair's lack of organization, which led third-party consignees and their agents to be confused by SeaFair's unclear and untimely invoicing. Opposition Brief of Respondents ("Opposition") at 14-35; Respondents' Sur-Reply ("Sur-Reply") at 10-16

D. Evidence

Under the Administrative Procedure Act, an administrative law judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 98-102 (1981). This initial decision is based on the pleadings, exhibits, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations in the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent that individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

SeaFair alleges that MSC is not willing to redirect its unpaid invoices to Sterling after repeated requests. Brief at 13. SeaFair argues that since it is not a shipper, consignee, nor a person having beneficial interest in the cargo and does not have a direct contractual relationship with MSC, MSC's invoicing of SeaFair could violate the Shipping Act. Id. SeaFair also alleges that MSC, through subsidiaries, owns 96% of Atlantic and Sterling's shares. Id. In its opening brief, SeaFair makes no further argument regarding this purported relationship. To the extent SeaFair is seeking reparations for MSC's purported violations of the Shipping Act, this issue is not properly before the Commission because MSC is not a party to this proceeding.

Respondents point out that SeaFair is identified as the consignee on certain MSC bills of lading but stops short of arguing that SeaFair is directly responsible for the destination charges as a shipper, consignee, or person having a beneficial interest in the cargo. Opposition at 15-16. SeaFair argues that these bills of lading are counterfactual. Reply at 31. Given that the parties appear to concede the general nature of their arrangement with respect to each other and to the shipments at issue, and the fact that MSC is not a party to this proceeding, I have not made any factual findings about the accuracy of who MSC has identified as a "merchant" or "consignee" on each of the MSC bills of lading and invoices that comprise SeaFair's claim.

II. FINDINGS OF FACT ("FOF")

1. Complainant SeaFair USA LLC ("SeaFair") is a Florida limited liability company with its principal place of business at 3740 West 104th Street, Suite 16, Hialeah Gardens, FL 33018.

2. Respondent Sterling Container Line Limited ("Sterling") is a company organized under the laws of Hong Kong with its principal place of business at Flat/Rm 722, 7/F, Metroplaza, Tower 2, 223 Hing Fong Road, Kwai Fong, N.T., Hong Kong. Sterling is a foreign Non-Vessel-Operating Common Carrier ("NVOCC") registered with the Federal Maritime Commission ("FMC") under no. 016481. The bond is held by United States Fire Insurance Company ("USFIC").

3. Respondent Atlantic Forwarding Ltd. ("Atlantic") is a company organized under the laws of Switzerland with its principal place of business at Grosspeteranlage 29, 4052 Basel, Switzerland. Atlantic is an ocean transportation intermediary; it is not registered with FMC.

4. Sterling's tariff states: "Carrier does not operate terminals at origin or destination. Except as otherwise provided in tariff rate items, all shipments will be subject to the origin and destination terminal charges assessed by the underlying ocean carrier, including demurrage charges, whose vessel will be clearly identified on bills of lading." SFOB-APP-18-0024.

5. In or around May 2021, Respondents engaged SeaFair to act as their destination agent, including to handle document turnover and destination services, in the United States for shipments carried under Sterling's house bills of lading ("HBLs") issued by various branch offices of Atlantic who were acting as agents of Sterling. SeaFair Proposed Finding of Fact ("SF-PFF") 10; *see also* Complainant's Appendix 19.

6. Pursuant to the agreement between Respondents and SeaFair, SeaFair's compensation for the document turnover service was $55 per bill of lading. Respondents were billed and paid the document turnover fees for shipments not subject to this complaint. *See* Brief at 3 and Respondent's Response to Complainant's Statement of Facts at 3.

7. Destination services included collection of charges related to steamship lines, associated terminals, and logistics companies from the consignees and their forwarding agents associated with the shipments issued under Sterling HBLs. *Id.*

8. On March 1, 2022, SeaFair filed a claim with Sterling's surety, USFIC, pursuant to 46 C.F.R. § 515.23(b), copying Respondents, based on allegedly unpaid (or partially paid) invoices. SFOB-APP-03-0001 - SFOB-APP-03-0003; SFOB-APP-03-0009 - SFOB-APP-0116; SFOB-APP-04-0001. The invoices consist of various unpaid destination charges and unpaid $55 documentation-turnover charges. SFOB-APP-05-0001 - SFOB-APP-05-0017. The demand totaled $138,422, which included $1,975 in attorneys' fees. The claim references a February 19, 2022 demand letter from SeaFair to Respondents, but this letter is not part of the record.

9. On March 9, 2022, Atlantic paid $115,417.05 based on certain invoices provided by SeaFair. RX-APP-03-014.

10. On March 21, 2022, Respondents wrote in response to SeaFair's demand, disputing 29 remaining invoices. Respondents made various arguments, including that certain charges lacked authorization evidence (Invoice Nos. MIAD048089 and MIAD048805). RX-APP-03-001 to RX-APP-03-007

11. Respondents argued that invoice MIAD047333 was duplicative. *Id.*

12. Respondents argued that certain charges were not applicable to the shipments at issue (MIAD048384, MIAD048385, MIAD048392, and MIAD048409). *Id.*

13. Respondents had not been able to verify certain invoices (MIAD048551, MIAD048994, MIAD048991, MIAD048988, MIAD048552, MIAD048553, MIAD048557, MIAD048554, MIAD048555, and MIAD048556). *Id.*

14. Respondents further claimed that certain invoices included charges for terminated shipments (MIAD048505, MIAD048511, MIAD048512, MIAD048513, MIAD048527, MIAD048528, MIAD048533, MIAD048534, MIAD048535, MIAD048540, MIAD048542, and MIAD048544). *Id.*

15. Finally, Respondents claimed that certain invoices listed in the claim had not been received. *Id.*

16. By August 3, 2022, some of the disputed invoices had been resolved. For five of the invoices (MIAD048089, MIAD048384, MIAD048385, MIAD048392, and MIAD048409), SeaFair issued a credit. SFOB-APP-06-002 - SFOB-APP-06-0008

17. For four of the invoices (MIAD047333, MIAD048994, MIAD048991, and MIAD048988), the consignee has since paid the invoice. *Id.*

18. Respondents approved six of the invoices (MIAD048551, MIAD048552, MIAD048557, MIAD048554, MIAD048555, and MIAD048556) for payment. *Id.*

19. The parties continued to dispute the invoices that included allegedly terminated shipments. *Id.* The remaining disputed invoices for document-turnover fees totaled $8,920.

20. Respondents also identified one invoice (MIAD048805) that they insisted SeaFair should collect from the consignee, who had not yet paid. *Id.*

21. In an August 3, 2022 letter to Respondents, SeaFair rejected the argument regarding collecting charges directly from consignees. SeaFair cited its Terms and Conditions of Service. These terms and conditions are hyperlinked in SeaFair's emails and provide, in relevant part:

> 1. Definitions.
> (a) "Company" shall mean SEAFAIR USA, LLC, its subsidiaries, related companies, agents and/or representatives;
> (b) "Customer" shall mean the person for which the Company is rendering service, as well as its agents and/or representatives, including, but not limited to, shippers, importers, exporters, carriers, secured parties, warehousemen, buyers and/or sellers, shipper's agents, insurers and underwriters, break-bulk agents, consignees, etc. It is the responsibility of the Customer to provide notice and copy(s) of these terms and conditions of service to all such agents or representatives;
> (c) Documentation" shall mean all information received directly or indirectly from Customer, whether in paper or electronic form;
> (d) "Ocean Transportation Intermediaries" ("OTI") shall include an "ocean freight forwarder" and a "non-vessel operating carrier";
> (e) "Third parties" shall include, but not be limited to, the following: "carriers, truckmen, cartmen, lightermen, forwarders, OTIs, custom brokers, agents, warehousemen and others to which the goods are entrusted for transportation, cartage, handling and/or delivery and/or storage or otherwise."
>
> 2. Company as Agent. The Company acts as the "agent" of the Customer for the purpose of performing duties in connection with the entry and release of goods, post entry services, the securing of export licenses, the filing of export documentation on behalf of the Customer and other dealings with Government Agencies: as to all other services. Company acts as an independent contractor.
>
> 11. Indemnification/Hold Harmless. The Customer agrees to indemnify, defend, and hold the Company harmless from any claims and/or liability, fines, penalties and/or attorneys' fees arising from the importation or

> exportation of customers merchandise and/or any conduct of the Customer, including but not limited to the inaccuracy of entry, export or security data supplied by Customer or its agent or representative, which violates any Federal, State and/or other laws, and further agrees to indemnify and hold the Company harmless against any and all liability, loss, damages, costs, claims, penalties, fines and/or expenses, including but not limited to reasonable attorney's fees, which the Company may hereafter incur, suffer or be required to pay by reason of such claims; in the event that any claim, suit or proceeding is brought against the Company, it shall give notice in writing to the Customer by mail at its address on file with the Company.
>
> 12. C.O.D. Cash Collect Shipments. Company shall use reasonable care regarding written instructions related to "Cash/Collect" on "Deliver (COD.)" shipments, bank drafts, cashier's and/or certified checks, letter(s) of credit and other similar payment documents and/or instructions regarding collection of monies but shall have not liability if the bank or consignee refuses to pay for the shipment.

SFOB-APP-06-0020; SFOB-APP-21-0001; see also emails from SeaFair, e.g., SFOB-APP-22-0002.

22. In the same August 3, 2022 letter to Respondents, SeaFair requested payment for an additional $327,033.52. SFOB-APP-06-0009.

23. Part of the new request consists of documentation fees in the amount of $5,500. *Id.*

24. The remainder of the new request consists of destination charges that SeaFair sought from Respondents on the basis that it was "contractually entitled to reimbursement pursuant to its Terms and Conditions of Service or, in the alternative, common law indemnity" *Id.*

25. Some of the invoices attached to SeaFair's August 3, 2022 letter (e.g. MIAD049832) contain the note: "Destination charges as per attached statement. Consignees failed to pay despite reasonable efforts by destination agent SeaFair USA LLC to…[the remainder of the sentence is cut off on the invoices]." SFOB-APP-06-0060.

26. Other invoices underlying the new request simply note charges for detention and carrier processing fees. SFOB-APP-06-0061.

27. Despite its statement in the August 3, 2022 letter that the destination charges at issue in the additional claim "were paid by SeaFair on behalf of Atlantic Forwarding and/or Sterling," they in fact consist of charges owed to Mediterranean Shipping Company, S.A. ("MSC") which have not been paid. *See* Respondent Appendices 9 and 10.

28. The underlying MSC invoices, which represent the destination charges at issue in this complaint, are for per diem, wharfage, congestion surcharges, chassis usage, and other

charges accrued between July 2021 and February 2022. SeaFair Appendix 10; SFOB-APP-08-0010 - SFOB-APP-08-0029.

29. SeaFair attempted to collect these unpaid MSC destination charges from Respondents' shippers between approximately December 9, 2021 and April 19, 2023. *See generally*, SFRB-APP-02-0001 - SFRB-APP-02-1758.

30. On October 14, 2022, SeaFair filed a second claim with Sterling's surety seeking to recover the charges identified in the August 3, 2022 letter. SFOB-APP-08-002. In this claim, SeaFair asserted that it is "contractually entitled to reimbursement pursuant to its Terms and Conditions of Service, or, in the alternative, under common law indemnity."

31. In response to the second surety claim, on November 28, 2022, Respondents asserted that they had already accepted the document-turnover invoices and would pay the outstanding fees in the amount of $5,500 (Invoice Nos. MIAD049648, MIAD049649, and MIAD049650), but rejected the claim for $321,533.52 in destination charges. Respondents requested additional supporting information including copies of bills of lading, the underlying details of the destination charges, and proof of payment. RX-APP-07-001 - RX-APP-07-004

32. On August 28, 2023, Respondents made a payment of $14,420 to SeaFair for outstanding document-turnover fees. RX-APP-12-001.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

The Shipping Act provides that a "person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Docket No. 02-04, 30 S.R.R. 991, 2006 WL 2007808, at *10-11 (FMC May 10, 2006)(the Commission was obligated to hear allegations particular to the Shipping Act, even were the complainant has already obtained an arbitration award for related breach of contract claims); *see also Cargo One, Inc. v. COSCO Container Lines Co.*, Docket No. 99-24, 28 S.R.R. 1635, 1645, 2000 WL 1648961, at *15 (FMC Oct. 31, 2000)(the Commission must address allegations of violations of the Shipping Act, which are within its exclusive jurisdiction; no common law remedy exists for such violations).

The Commission has an obligation to address Shipping Act claims, even if the relevant facts may also give rise to other claims between the parties. *MCS Industries, Inc. v. Mediterranean Shipping Company S.A.*, Docket No. 21-05, 2024 WL 95383, at *7 (FMC Jan. 3, 2024). The Commission has jurisdiction over Shipping Act claims even if a related proceeding is underway. *Id*. Shipping Act claims are distinct from breach of contract claims, entailing a different analysis of statutory standards that includes review of the carrier's broader practices beyond those directly affecting the complainant. *Id*. While breach of contract claims are resolved in court or as otherwise agreed by the parties, a claim for violation of the Shipping Act may only be resolved by the Commission.

The essence of the parties' disagreement is that SeaFair believes its terms and conditions of service require Respondents to pay the outstanding MSC invoices since it has been unable to collect those destination charges from Respondents' shippers. Respondents believe SeaFair is responsible for collecting the charges, and the reason it has not been able to do so is because it is disorganized. As discussed in section III.B below, this is primarily an argument over an alleged breach of contract. The Commission does not have jurisdiction to resolve this aspect of the dispute, and so this decision is limited to addressing the arguments and evidence regarding violations of the Shipping Act. The parties' agreement, and their arguments regarding that agreement, are discussed to the extent necessary to distinguish the Shipping Act claims, which must be addressed in this proceeding, from the breach of contract claims, which may not be.

2. Burden of Proof

To prevail in a proceeding to enforce the Shipping Act, a complainant bears the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.203; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, Docket No. 08-03, 2014 WL 9966245, at *14 (FMC Dec. 17, 2014). Under the preponderance standard, a complainant must show that their allegations are more probable than not. *Crocus Investments, LLC v. Marine Transport Logistics, Inc.,* Docket No. 15-04, 2021 WL 3732849, at *3-4 (FMC Aug. 18, 2021). It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, Docket No. 93-15, 26 S.R.R. 1173, 1180 (ALJ Dec. 9, 1993), adopted in relevant part, 26 S.R.R. 1424, 1994 WL 279898 (FMC June 13, 1994).

B. Discussion

1. Section 41102(a) – Use of unjust means to obtain transportation at less than the rates that would otherwise apply.

SeaFair's first claim is that Respondents violated 46 U.S.C. § 41102(a) by knowingly and willfully withholding payment to their destination agent, SeaFair, for money SeaFair advanced on their behalf to Mediterranean Shipping Company, S.A. ("MSC"), thereby attempting to obtain ocean transportation for property at less than the charges that would otherwise apply. Brief at 16. Section 41102(a) provides:

> (a) Obtaining transportation at less than applicable rates.--A person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any

> other unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.

46 U.S.C. § 41102(a).

A § 41102(a) claim requires proof of three elements: (1) knowing and willful conduct; (2) through which, either "directly or indirectly," by means of the actions enumerated in the statute or through "any other unjust or unfair device or means;" (3) respondent obtained or attempted to obtain ocean transportation at lesser rates. *Muhammad Rana v. Michelle Franklin, d.b.a. "The Right Move*," *Inc*., Docket No. 19-03, 2022 WL 1744905 at *7-9 (FMC May 25, 2022). The first element – knowing and willful conduct – is established if the respondent had "knowledge of the facts of the violation" and acted either intentionally or with "reckless disregard, plain indifference, or purposeful or obstinate behavior akin to gross negligence." *Rose Int'l, Inc. v. Overseas Moving Network, Int'l,* FMC Docket No. 96-05, 2001 WL 865708, at *47, *59 (FMC June 1, 2001) (citations omitted).

SeaFair contends that "[b]y not settling the MSC charges, Sterling and Atlantic have knowingly and willfully obtained ocean transportation for property at less than the rates or charges that would otherwise apply." Brief at 16. Respondents acknowledge that they did not pay the MSC charges, but correctly argue that SeaFair has not presented sufficient evidence from which to conclude their failure was knowing or willful within the meaning of the statute. The MSC charges, consisting of per diem, wharfage, congestion surcharges, and chassis usage fees, were billed to SeaFair between July 2021 and February 2022. FOF 27-28. But there is no evidence that Respondents became aware of the MSC charges until SeaFair made a demand for reimbursement in an August 3, 2022 letter regarding a claim previously filed against Sterling's surety for unpaid document-turnover fees. FOF 22. And as noted on SeaFair's invoices, SeaFair had previously tried to collect from the third-party consignees directly ("Consignees failed to pay despite reasonable efforts by destination agent SeaFair USA LLC …."). FOF 25. I do not find that Respondents "willfully" failed to pay charges when those charges were initially billed to other parties and then presented for the first time in connection with a claim against Sterling's surety.

Even if Respondents actions were willful, Seafair also fails to establish the second and third elements of a § 41102(a) claim. The second element requires that a respondent used false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means to obtain ocean transportation at less than otherwise applicable rates. *Rana v. Franklin,* 2022 WL 1744905 at *7-9. Here, SeaFair does not allege that Respondents engaged in false billing, misclassification of cargo, or any other conduct specifically enumerated in § 41102(a), so the question is whether Respondents' actions may be considered any "other unjust or unfair device or means" within the meaning of statute.

"[F]raud or concealment is a necessary ingredient in the proof of an unjust or unfair device or means . . . It is such fraud or concealment that in fact makes the practice unjust or unfair. Whether an act constitutes an unfair or unjust device . . . depends on its similarity to false billing, false classification or the other prohibited conduct." *United States v. Open Bulk Carriers*, 727 F.2d 1061, 1064 (11th Cir. 1984). Knowingly making claims that one knows or should know are false supplies the required element of fraud or concealment. *Id.* at 1065.

By itself, a failure to pay ocean transportation charges does not establish the second element of a § 41102(a) claim, because that alone does not establish that fraud or deceit were used to avoid paying the applicable rates. 46 C.F.R. § 545.2; *see also Open Bulk Containers*, 727 F.2d at 1064 (openly combining cargos to obtain lower rates and reduce deadfreight penalties was not an unjust or unfair device). Further, showing that a respondent was deceitful or dishonest in some respect unrelated to obtaining or attempting to obtain lower rates is not sufficient – fraud or concealment must be the means by which the respondent obtained or tried to obtain lower rates. *Open Bulk Containers*, 727 F.2d at 1064.

SeaFair has not presented any evidence of fraud or concealment on the part of Respondents. SeaFair has established that Respondents have refused to pay the MSC charges described in SeaFair's second claim against Sterling's surety, in which SeaFair asserted that it is "contractually entitled to reimbursement pursuant to its Terms and Conditions of Service, or, in the alternative, under common law indemnity." FOF 30. But this constitutes a failure to pay ocean transportation charges of the sort that does not support a § 41102(a) claim. Rather, the refusal to pay was openly communicated in a response letter to SeaFair, in which Respondents acknowledged the accuracy of the invoices for document-turnover fees but disputed the destination charges, requesting additional supporting information including copies of bills of lading, the underlying details of the destination charges, and proof of payment. FOF 31.

The third element is established by showing that respondent obtained or tried to obtain ocean transportation for less than the otherwise applicable rates or charges. *OC Int'l Freight*, Docket No. 12-01, 2014 WL 5316336, at *6 (FMC July 31, 2014). The evidence does not support a conclusion that Respondents' dispute of the MSC destination charges was an attempt to obtain ocean transportation for less than applicable rates. The evidence shows that Respondents engaged SeaFair as their destination agent in part for the purpose of collecting the applicable charges from their shippers – an action inconsistent with an intent to circumvent such charges. FOF 5 and 7. Respondents did not bill these charges to their shippers themselves because SeaFair did so, and there is no evidence Respondents were even aware of the unpaid charges until SeaFair filed a claim with Sterling's surety. FOF 22, 24, 25, and 27-30. SeaFair has failed to meet its burden of proof with respect to each element of its § 41102(a) claim, which is therefore denied.

2. Sections 41104(a)(2)(A) and 41104(a)(4)(A) – The filed rate doctrine and unfair or unjustly discriminatory practices

SeaFair also claims that Sterling's failure to settle the MSC charges and bill their shippers for those charges constitutes provision of services to their customers at rates or charges lower than their tariff in violation of 46 U.S.C. § 41104(a)(2)(A). And since the non-paying customers have paid less than the customers who paid the destination charges, SeaFair further alleges that Respondents' actions are unfair and unjustly discriminatory in violation of 46 U.S.C. § 41104(a)(4)(A). The relevant portion of the statute provides:

> (a) In general.--A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not—
>
> * * *
> (2) provide service in the liner trade that is—
>
> (A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title, unless excepted or exempted under section 40103 or 40501(a)(2) of this title; or
>
> * * *
>
> (4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of—
>
> (A) rates or charges;

46 U.S.C. § 41104(a).

The basis of SeaFair's claim is that when Sterling's customers refused to pay MSC's destination charges, SeaFair was entitled to indemnification from Sterling pursuant to the indemnification provision of SeaFair's Terms and Conditions of Service; and by not settling the MSC charges and not billing its customers for the corresponding charges, Respondents have provided services to the non-paying customers at rates or charges lower than the customers who did pay the destination charges, thereby providing services at rates or charges lower than Sterling's tariff, and in a manner that is unjustly discriminatory. Brief at 17-19.
Section 41104(a)(2)(A) encompasses the Commission's filed rate doctrine, which is applicable to both tariff rates and service contract rates.

In describing the filed rate doctrine, the Commission has confirmed that the doctrine holds that a carrier must charge the rates duly filed under law in the carrier's tariffs and if those rates are reasonable under the applicable law the carrier must charge them notwithstanding misrepresentations by carriers' agents, ignorance of the filed rates by the shippers, or virtually any other defense that shippers could raise against the carriers' demands for payment of the duly filed tariff rates. *Total Fitness Equipment, Inc. v. Worldlink Logistics, Inc.,* Docket No. 1831(F), 1998 WL 940255, at *4-5 (FMC Dec. 10, 1998); *petition for review denied per curiam* 203 F.3d 54 (table) (D.C. Cir. 1999). A violation of the Shipping Act can be found despite the filed rate doctrine. That is, there are substantive violations that may arise in the context of, but apart from, filed rate collections. *Id*. at *10.

Sterling's tariff states: "Carrier does not operate terminals at origin or destination. Except as otherwise provided in tariff rate items, all shipments will be subject to the origin and destination terminal charges assessed by the underlying ocean carrier, including demurrage charges, whose vessel will be clearly identified on bills of lading." SFOB-APP-18-0024. This tariff rule is applicable to the shipments carried by MSC (the VOCC or "underlying ocean carrier") and the MSC charges for which SeaFair is seeking indemnification ("destination terminal charges…including demurrage charges") – Sterling's shippers are responsible for the origin and destination terminal charges assessed by MSC pursuant to Sterling's tariff. But it does not follow that, simply because some shippers have not paid these charges, Respondents have violated the Shipping Act. Respondents engaged SeaFair to act as their destination agent, including to handle document turnover and destination services in the United States for shipments carried under Sterling's HBLs issued by various branch offices of Atlantic who were acting as agents of Sterling. Pursuant to this agreement, SeaFair billed Respondents' shippers, and attempted to collect the unpaid MSC invoices. That is, through their agent SeaFair, Respondents did bill their shippers in accordance with their tariff.

SeaFair has not cited any authority in support of its theory that a carrier's failure to successfully collect a charge made pursuant to a tariff or service contract results in a violation of § 41104(a)(2)(A). This approach would seem to expose a carrier to a Shipping Act violation whenever a shipper failed to pay an invoice. In fact, there is no evidence that Respondents directly billed any of their shippers for any destination charges at issue – that was SeaFair's role. And SeaFair has presented no evidence that Respondents even had knowledge of the unpaid destination charges until SeaFair filed a claim with their surety.

Similarly, with respect to §41104(a)(4), SeaFair's approach would expose carriers to Shipping Act violations whenever a shipper failed to pay a charge on the basis that shippers who had paid their invoices were thereby unjustly discriminated against. This is not a situation where Respondents selected certain shippers and declined to bill them for certain destination charges as a way of conferring a commercial advantage. Again, it was SeaFair that invoiced Respondents' shippers for the MSC destination charges, and there is no evidence Respondents even became aware of the charges until the surety claim.

Whether SeaFair is entitled to contractual or common law indemnification arising out of the shippers' non-payment is essentially a breach of contract claim. The Commission has an obligation to address Shipping Act claims, even if the relevant facts may also give rise to other claims between the parties. *MCS Industries, Inc. v. Mediterranean Shipping Company S.A.*, Docket No. 21-05, 2024 WL 95383, at *7 (FMC Jan. 3, 2024). But Shipping Act claims are distinct from breach of contract claims, entailing a different analysis of statutory standards that includes review of the carrier's broader practices beyond those directly affecting the complainant. *Id*. While breach of contract claims are resolved in court or as otherwise agreed by the parties, a claim for violation of the Shipping Act may only be resolved by the Commission.

SeaFair's arguments with respect to its § 41104(a) claims are premised on its terms and conditions of service, which provide:

> 11. Indemnification/Hold Harmless. The Customer agrees to indemnify, defend, and hold the Company harmless from any claims and/or liability, fines, penalties and/or attorneys' fees arising from the importation or exportation of customers merchandise and/or any conduct of the Customer, including but not limited to the inaccuracy of entry, export or security data supplied by Customer or its agent or representative, which violates any Federal, State and/or other laws, and further agrees to indemnify and hold the Company harmless against any and all liability,

> loss, damages, costs, claims, penalties, fines and/or expenses, including but not limited to reasonable attorney's fees, which the Company may hereafter incur, suffer or be required to pay by reason of such claims; in the event that any claim, suit or proceeding is brought against the Company, it shall give notice in writing to the Customer by mail at its address on file with the Company.
>
> 12. C.O.D. Cash Collect Shipments. Company shall use reasonable care regarding written instructions related to "Cash/Collect" on "Deliver (COD.)" shipments, bank drafts, cashier's and/or certified checks, letter(s) of credit and other similar payment documents and/or instructions regarding collection of monies but shall have not liability if the bank or consignee refuses to pay for the shipment.

SFOB-APP-06-0020. *See also* Brief at 13-14, 17-8; Reply at 11-12, 21-22, 32 (making arguments based on the above terms). A claim for contractual indemnification, or for common law indemnification, is not the type of claim over which the Commission has jurisdiction. *Cf. Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, Docket No. 09-01, 2011 WL 7144008, at *12 (FMC Aug. 1, 2011) (Commission did not have jurisdiction to decide a crossclaim based on breach of a stock purchase agreement and state law in the absence of any alleged Shipping Act violation on the part of the crossclaim defendant). SeaFair may be correct that Respondents' failure to collect from their shippers or pay MSC's outstanding charges is a violation of the terms and conditions Respondents agreed to, but without evidence supporting a Shipping Act violation, SeaFair cannot obtain relief in this proceeding:

> [The] Commission does not exercise the authority of a court of law or of equity. We administer and enforce the requirements of the Shipping Act and related Acts. When pleadings come before us in which violations of the Act are heavily veiled in common law pleadings it becomes difficult to distill the activities alleged to be in violation of the Act from those which indicate the possible violations of some common law obligation.

European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc., 19 F.M.C. 148, 151 (FMC 1976). In such instances, the Commission will review the entire record to identify those facts that relate to violations of the Shipping Act that may be properly resolved in this forum. *Id*.

There is no dispute that MSC billed SeaFair for destination charges related to shipments on Sterling HBLs, that some of Sterling's shippers have failed to pay those charges, that SeaFair tried, but was unsuccessful in collecting those charges, and that Respondents have not paid the MSC charges themselves or pursued their shippers for the unpaid charges. Whether this constitutes a breach of their agreement, or otherwise entitles SeaFair to a common law or equitable remedy such as indemnification or unjust enrichment, it not a question I have authority to answer. The evidence shows that Respondents did bill their shippers in accordance with their tariff, through their agent SeaFair, whom they engaged for that purpose. The record therefore does not support a conclusion that they have provided service not in accordance with the rates and charges in their tariff pursuant to § 41104(a)(2). As to the remaining issue – who is responsible for further collection activities or ultimate payment – that is a matter of agreement between SeaFair and Respondents that is not properly part of this proceeding. The evidence also shows that Respondents did not bill any of their shippers directly, and that Respondents were not aware of the unpaid MSC destination charges prior to SeaFair's surety claim. The record therefore does not support a conclusion that Respondents unfairly discriminated with respect to service pursuant to a tariff pursuant to § 41104(a)(4).

3. Section 41102(c) – Failure to establish and enforce just and reasonable regulations and practices.

SeaFair also alleges a violation of 46 U.S.C. § 41102(c) in that Respondents (1) failed to pay document-turnover fees, (2) failed to indemnify SeaFair in accordance with SeaFair's Terms and Conditions of Service, and (3) failed to recover unpaid destination charges from their shippers after SeaFair was unable to collect. Brief at 19.

Section 41102(c) of the Shipping Act, previously section 10(d)(1), states that a "common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

On December 17, 2018, after notice and comment, the Commission issued Rule 545.4, specifying the elements of a section 41102(c) claim. Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018). Rule 545.4 states:

> 46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:
>
> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
>
> (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
>
> (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
>
> (d) The practice or regulation is unjust or unreasonable; and
>
> (e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4.

As to the first element, the term *ocean transportation intermediary* means an ocean freight forwarder or a non-vessel-operating common carrier. 46 U.S.C. § 40102(20); 46 C.F.R. § 515.2(m). "The term 'non-vessel-operating common carrier' means a common carrier that - (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(17); 46 C.F.R.

§ 515.2(m)(2). To be an NVOCC on a particular shipment, an entity must meet the Shipping Act's definition of "common carrier" on the shipment.

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

46 U.S.C. § 40102(7). There appears to be no dispute that Sterling is an NVOCC and was acting as a common carrier with respect to the shipments at issue in SeaFair's complaint, with Atlantic acting as its agent. Nor does there appear to be any dispute that the document-turnover fees and destination charges are connected with receiving, handling, storing, or delivering property.

The issue is whether SeaFair has presented sufficient evidence to conclude that Respondents' failure to pay document-turnover fees, indemnify SeaFair against MSC's destination charges, or collect unpaid charges from its shippers occurred on a normal, customary, and continuous basis and were unjust or unreasonable.

First, SeaFair has not presented sufficient evidence to conclude that Respondents' failure to pay document-turnover fees was its customary practice, or that it was unreasonable. In its statement of facts, SeaFair asserted that: "Pursuant to the agreement between Respondents and SeaFair, SeaFair's compensation for the document turnover service is $55 per bill of lading. The existence of the agreement is evidenced by Respondents being billed and paying the document turnover fees for shipments not subject to this lawsuit." Brief at 3. If the course of dealing between the parties is sufficiently unambiguous to establish an agreement to pay a specific amount of money for a specific set of services – and SeaFair is correct that it is – it is difficult to conclude that the same course of dealing establishes a customary refusal to pay for those services at all.

The only unpaid document-turnover fees about which any evidence has been presented are those that are the subject of the two claims SeaFair filed with Sterling's surety. On the first claim, filed March 1, 2022, the total combined unpaid document-turnover fees and destination charges were $136,447 (the total claim was $138,422, which included $1,975 in attorneys' fees). FOF 8. Eight days after the claim was filed, Sterling paid Atlantic $115,417.05, disputing the remaining balance reflected on 29 invoices that constituted a mix of destination charges and document-turnover fees. FOF 9-10. Respondents later approved six of the document-turnover-fee invoices (MIAD048551, MIAD048552, MIAD048557, MIAD048554, MIAD048555, and MIAD048556) for payment, but continued to dispute the invoices that included allegedly terminated shipments. FOF 18-19. In their November 28, 2022 response to the second surety claim, Respondents asserted that they had already accepted the document-turnover invoices and would pay the outstanding fees in the amount of $5,500 (Invoice Nos. MIAD049648, MIAD049649, and MIAD049650). FOF 31. These circumstances do not demonstrate a customary, unjust refusal to pay document-turnover fees – at most, they demonstrate a delay in paying certain document-turnover fees, including some fees that may have been legitimately disputed.

As to the second unfair practice alleged by SeaFair – Respondents' failure to indemnify SeaFair against MSC's destination charges – there is similarly insufficient evidence to conclude this is unjust or unreasonable within the meaning of the statute or that it occurred on a normal, customary, and continuous basis. Indeed, there are only two instances of failure to indemnify for which evidence has been presented, and those instances are in connection with the first and second surety claims. While SeaFair notes that the underlying invoices were billed over a period between July 2021 and February 2022, there is no evidence that Respondents customarily refused to indemnify SeaFair during throughout that time period – the evidence shows that the unpaid destination-charge invoices, about which Respondents apparently had no contemporaneous knowledge, were presented in two claims. On March 1, 2022, SeaFair filed its first claim with Sterling's surety, USFIC, pursuant to 46 C.F.R. § 515.23(b), which included claims for unpaid destination charges. FOF 8. As previously discussed, Respondents paid some charges but disputed 29 remaining invoices. FOF 9-10. It is not clear from the evidence what percentage, if any, of Respondents' $115,417.05 payment reflected unpaid destination charges. Respondents made various arguments concerning the disputed invoices, including that certain charges lacked authorization evidence, were duplicative, or included charges not applicable to the shipments at issue. FOF 10-15. For some invoices, SeaFair issued a credit. FOF 16. For others, the consignee paid the invoice. FOF 17. For these invoices at least, Respondents' refusal to indemnify SeaFair against the unpaid charges – either because they were incorrect or because they were appropriately paid by the shippers – appears reasonable.

SeaFair's second surety claim for $327,033.52 consisted mostly of the unpaid MSC destination charges at issue in this proceeding, with SeaFair again claiming it was "contractually entitled to reimbursement pursuant to its Terms and Conditions of Service or, in the alternative, common law indemnity." FOF 22, 24. Respondents argue that SeaFair's failure to collect these charges is not the result of any action on their part, but of SeaFair's disorganized and confusing billing practices.

In support of this, Respondents point to a July 14, 2021 email from an Atlantic affiliate to SeaFair's Michael Andres, Branch Manager, that was critical of SeaFair's services. Atlantic's complaints included SeaFair's failure to pay MSC demurrage charges on time, unspecified customer complaints, failure to answer calls, untimely container releases, and inadequate customer assistance. SFOB-APP-22-0002-0003. Mr. Andres responded on July 27, 2021, generally acknowledging these issues. Id. Respondents allege that SeaFair ultimately terminated Mr. Andres, along with two other SeaFair employees identified as Import Coordinators, and in September 2021 filed a lawsuit against them in the United States District Court for the Southern District of Florida, alleging a variety of federal and state trade secret violations. *See SeaFair USA, LLC v. Michael Andres, Helen Madrid, Samuel Salva, Michael Andres CHB, Inc.*, Case. 1:21-cv-23406 (September 22, 2021)). Respondents attempt to tie these issues to this proceeding by pointing out that each of the 20 MSC MBLs identified by SeaFair at SFOB-APP-12-0001 – SFOB-APP-12-0380 (produced for the purpose of showing that SeaFair was listed on these MBLs as agent for SeaFair, not as the shipper or consignee; see Brief at 6 and 12) were issued between June and August of 2021, with 18 listing Michael Andres as the main SeaFair point of contact.

Respondents also provide a limited selection of emails detailing consignee complaints directed to SeaFair alleging lack of MBL or container numbers on invoices, attempting to collect charges that consignees had already paid directly to MSC, and late or unclear invoices. Opposition at 9-10; RX-APP-06-001 – RX-APP-06-014. SeaFair of course disputes that its billing practices were disorganized. Reply at 12-14. I did not make any factual findings regarding these allegations of disorganization at SeaFair because Respondents did not tie the customer complaints to specific disputed charges that are at issue in this proceeding, relying instead on the overlapping time period – but this is insufficiently precise for me to be able to determine that the complaints about SeaFair's practices are relevant. Nor is the volume of complaints sufficiently large in relation to the total number of shipments as to give rise to an inference (although this seems to be what Respondents suggest) that disorganization permeated the entire SeaFair operation such that the accuracy of its billing is generally questionable. I have summarized this dispute over SeaFair's billing practices only to reinforce my assessment that the dispute between the parties is essentially a contractual one. SeaFair argues that its terms and conditions require Respondents to pursue unpaid MSC invoices from its shippers and reimburse or indemnify SeaFair for any amounts paid to or demanded by MSC. Respondents in turn argue that SeaFair has not adequately fulfilled its obligations as destination agent pursuant to the parties' agreement.

And standing on its own, the indemnification provision of SeaFair's terms and conditions is insufficient to support a conclusion that Respondents' refusal to indemnify is unreasonable or unjust. Indemnity claims are unripe until the alleged indemnitee's liability has been fixed by a judgment or settlement. *Window Specialists, Inc. v. Forney Enterprises, Inc*., 26 F. Supp. 3d 52, 57 (D.D.C. 2014). 27. And despite its claim in the complaint that the destination charges at issue here consist of charges advance by SeaFair on behalf of Respondents' shippers, they in fact consist of charges owed to MSC which have not been paid or settled. FOF 27. Given the uncertainty of the amounts owed, I do not find that it is unreasonable for Respondents to refuse to pay SeaFair pursuant to the indemnity provision. Whether their failure to pay is a breach of SeaFair's terms and conditions is not a question I can answer in this proceeding. For the reasons stated in section III.B.2. above, common law indemnity and breach of contract claims are not properly part of this proceeding because the Commission's jurisdiction is limited to claims arising under the Shipping Act.

Similarly, the evidence does not support a finding that Respondents' refusal to collect charges directly from their shippers was unjust or unreasonable. Respondents engaged SeaFair to act as their destination agent, which services included collection of the destination charges billed by MSC. FOF 5, 27. SeaFair attempted to collect these unpaid MSC destination charges between approximately December 9, 2021 and April 19, 2023. FOF 29. It is of course accurate to say that Respondents did not collect the MSC destination charges. But where the parties had agreed that SeaFair would undertake collection of destination charges, and where there is apparently no explicit agreement (or course of dealing) regarding the circumstances under which Respondents would do so, there is no evidentiary basis to conclude their refusal pursue delinquent accounts here is unreasonable. While it is possible that SeaFair has a breach of contract claim, given its terms and conditions, or some other common law or equitable remedy, its claim is only viable under a Shipping Act theory if it satisfies the elements of the statute. As between SeaFair and Respondents, the rights and obligations with respect to collection of destination charges pursuant to their agreement is, again, a matter of interpretation of their contract. There is insufficient evidence to conclude that Respondents' actions were a customary practice that was unjust or unreasonable within the meaning of §41102(c).

4. Conclusion

As explained above, SeaFair has not established a violation of 46 U.S.C. § 41102(a) because there is no evidence that Respondents used fraud or concealment to obtain ocean transportation at rates less than would otherwise apply. Its claims under §§ 41104(a)(2)(A) and 41104(a)(4)(A) fail because the evidence shows that Sterling did bill its shippers in accordance with its tariff through its destination agent, SeaFair, and there is no indication that Respondents unjustly discriminated against certain shippers. Finally, the evidence does not support a finding that Respondents have failed to establish and observe just and reasonable regulations and practices pursuant to § 41102(c). The parties' dispute arises out of an alleged breach of their agreement, and the evidence does not support a Shipping Act violation.

Because a violation of the Shipping Act is not established, it is not necessary to reach the issue of damages. However, even if SeaFair had established a violation, it is not clear that it would be entitled to the remedies it seeks. For example, typically, civil penalties under 46 U.S.C. § 41107 are awarded in proceedings initiated by the Commission's Bureau of Enforcement. *See, e.g., Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC – Possible Violations of 46 U.S.C. § 41102(c)*, 4 F.M.C.2d 53, 96-97 (ALJ April 22, 2022). Civil penalties are payable to the United States Government, not to individual complainants. 46 U.S.C. § 41107.

Respondents argue that SeaFair abandoned its reparations request. While I do not find this to be the case, I do note that SeaFair's evidentiary presentation as to which MSC destination charges it has advanced, which are still due, and the exact amount of those fees is not clear. In its complaint, SeaFair sought reparations in the amount of $335,953.52, consisting of unpaid amounts from the first and second surety claims. Complaint at ¶ 32. SeaFair claimed this amount included unpaid document-turnover fees and destination charge it had already paid. Complaint at ¶¶ 7-9, 15, and 19. But in its brief, SeaFair backtracks from this assertion, saying only that it has "incurred liabilities," and requesting an order that Respondents settle the MSC charges directly with MSC or through paying SeaFair. In its proposed findings of fact, SeaFair states the unpaid destination charges total $294,283.88, the amount owed to MSC. Brief at 5. But this does not match the amount shown in the MSC statement of account for SeaFair ($307,136.88). SFOB-APP-9-0001. And the spreadsheets supporting the summary statement of account add up to yet a different amount ($264,276.88). Complainant Appendices 9.1-9.5. Since I have not found a violation, I have not attempted to tally the 2,860 pages of underlying MSC invoices. SFOB-APP-10-0001 – SFOB-APP-10-0001 – SFOB-APP-10-2860. I point out this uncertainty to note that, if I had found a Shipping Act violation giving rise to an entitlement to reparations, I would likely not be able to calculate the appropriate amount based on the record currently before me. 46 U.S.C. § 41305(b) (the Act requires the Commission to "direct the payment of reparations to the complainant for actual injury caused by a violation of this part"); *see also MAVL Capital Inc. v. Marine Transport Logistics, Inc*., No. 16-16, 2022 WL 2209421, at *3 (F.M.C. June 10, 2022) (actual damages means "compensation for the actual loss or injuries sustained by reason of the wrongdoing" which complainants must show to a reasonable degree of certainty).

IV. ORDER

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

ORDERED that SeaFair's Complaint be **DENIED**. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED.**

Alex M. Chintella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

RAHAL INTERNATIONAL INC., *Complainant*

v.

HAPAG-LLOYD AG, HAPAG-LLOYD (AMERICA), LLC, AND HAPAG-LLOYD USA, LLC, *Respondents*

AND

HAPAG-LLOYD AG AND HAPAG-LLOYD (AMERICA), LLC, *Third-Party Complainants*

v.

MAHER TERMINALS, LLC, GCT NEW YORK LP, AND GCT BAYONNE LP, *Third-Party Respondents*.

DOCKET NO. 23-05

Served: April 16, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's March 15, 2024, Initial Decision Approving Settlement Agreement has expired. Accordingly, this decision has become administratively final.

David Eng
Secretary

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

WAY INTERGLOBAL NETWORK, LLC, *Complainant* v. SHENZHEN UNIFELIX SCM LIMITED, *Respondent*.	**DOCKET NO. 22-28**

Served: April 19, 2024

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION[1]
[exceptions filed by Respondent 6/10/2024, final decision pending]

I. INTRODUCTION

A. Overview

This proceeding began on October 21, 2022, when the Federal Maritime Commission ("Commission" or "FMC") issued a notice of filing of complaint and assignment indicating that Complainant Way Interglobal Network, LLC ("Way") had filed a complaint against Respondent Shenzhen Unifelix SCM Limited ("Shenzhen Unifelix," "Shenzhen" or "Unifelix"). The complaint alleges that Shenzhen Unifelix violated the Shipping Act of 1984 ("Shipping Act"), specifically, 46 U.S.C. § 41102(c) and (d), 46 U.S.C. § 41103(a), and 46 U.S.C. § 41104(a)(1), (a)(4)(E), and (a)(10). On January 20, 2023, Shenzhen Unifelix filed an answer denying the allegations and raising affirmative defenses.

Shenzhen Unifelix provided transportation services for Way as a non-vessel operating common carrier ("NVOCC"), a type of ocean transportation intermediary. The dispute involves twenty specific containers ("20 Containers"), although Shenzhen Unifelix transported more than ninety other containers for Way. The 20 Containers were shipped from China to ports in California, and then transported via rail to Chicago, Illinois. The parties' March 22, 2022, agreement, titled "Transport Contract," stated that Shenzhen Unifelix would be responsible for coordinating Way's sea freight and trucking and that payment would be provided from Way to Shenzhen Unifelix within seven days after receiving the goods at Way's warehouse in Elkhart, Indiana. Shenzhen Unifelix began transport of the 20 Containers in May 2022, and the last of the 20 Containers departed from China on June 25, 2022.

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

As explained more fully below, in June 2022, Shenzhen Unifelix attempted to unilaterally change the terms of the agreement. For example, Shenzhen Unifelix emailed Way writing that "our company requires to change the contract terms, our company will no longer provide Trucking delivery service at the destination port," citing to payment disputes regarding other containers. CX 44-45. Way replied that the payment terms were seven days after receiving the containers and Shenzhen Unifelix could not change terms during transport. CX 44. Way also reiterated that it would not sign a new contract and it was Shenzhen Unifelix's responsibility to move the containers from China to the door in Elkhart, Indiana. CX 44. There is no credible evidence in the record of any agreement by Way to a change in terms to the parties' March 2022 Transport Contract.

The evidence shows that Shenzhen Unifelix told Way that it would release the pickup numbers for the 20 Containers, which were then at the Chicago railyards, if Way paid the 20 Containers' sea freight, which was not due under the Transport Contract until after delivery to Indiana. On September 14, 2022, Way paid the agreed amount and Shenzhen Unifelix accepted this payment but then told Way that it would not release the pickup numbers until demurrage charges for other containers, on other bills of lading, had been paid.

As explained below, Way established an unreasonable practice in violation of section 41102(c) as Commission precedent is clear that holding a shipment for charges unrelated to that shipment is unreasonable. In addition, Way has established a refusal to deal in violation of section 41104(a)(10) for refusal to deliver the containers to Indiana. Shenzhen Unifelix repeatedly violated its NVOCC duties by failing to do what it said it would do. For example, Shenzhen Unifelix said it would release the 20 Containers after it received the sea freight, but it did not; Shenzhen Unifelix said that it would transport the 20 Containers to Way's warehouse in Elhart, Indiana, but it did not; and Shenzhen Unifelix tried to unilaterally change the Transport Contract terms.

The evidence does not establish violations of two other Shipping Act sections alleged by Way, including sections 41102(d) (discrimination) and 41103(a)(1) (disclosure of information). Two additional violations alleged in the complaint, 46 U.S.C. §§ 41104(a)(1) and 41104(a)(4)(E), were not discussed in the brief and are dismissed as abandoned. In addition, Way's breach of contract arguments are dismissed for lack of jurisdiction.

In its complaint, filed while the events of this case were still ongoing and none of the 20 Containers had yet been delivered or released, Way sought a million dollars in damages. In its brief, Way seeks reparations totaling $357,398.85 for both the 20 Containers and other containers, doubled for an award of $714,797.70. Brief at 39-41. As explained below, Way has only established actual injury of $163,031.25, consisting of $111,235 for demurrage plus $51,796.25 for rail yard storage and service charges, for the 20 Containers. Way has not established that reparations for trucking fees or other containers should be awarded. Way has established that double damages are appropriate. Therefore, Way is awarded reparations of $326,062.50, plus interest.

B. Procedural History

On October 21, 2022, the Commission issued a notice of filing of complaint and assignment initiating this proceeding. On December 7, 2022, Shenzhen Unifelix filed a motion to dismiss the complaint. On January 4, 2023, an order was issued denying the motion to dismiss. Shenzhen Unifelix then filed its answer on January 20, 2023.

The parties began discovery. On June 8, 2023, and on August 29, 2023, in response to request from the parties, orders were issued revising the schedule of briefing and other deadlines.

On September 8, 2023, Way filed its brief with proposed findings of fact ("Brief") and appendix. On October 6, 2023,[2] Shenzhen Unifelix filed its opposition brief with proposed findings of fact ("Opposition"), response to Complainant's proposed findings of fact ("SResp/WPFF"), appendix, and objections to evidence ("Objections"). On October 13, 2023, Way filed a response to Shenzhen Unifelix's objections to evidence ("Objections Response"). On October 20, 2023, Way filed its reply brief with its response to Shenzhen Unifelix's proposed findings of fact ("Reply").

Way's appendix is marked with "CX" Bates stamps. Shenzhen Unifelix's appendix, filed afterwards, was also marked with "CX" Bates stamps. As a result, two separate documents could be pointed to for any given CX number. Therefore, to avoid confusion, Shenzhen Unifelix's appendix pages will be referred to in this decision using an "RX" prefix, followed by the number marked on the actual appendix page. In the future, parties should not submit duplicate bates stamp pages, as the purpose of Bates stamps is to create unique identifiers. Typically, CX would be utilized for complainant's exhibits and RX would be utilized for respondent's exhibits.

C. Arguments of the Parties

Way asserts that this is "a straightforward matter involving the wrongful detention of 20 containers by Respondent because of unpaid demurrage charges on unrelated containers," arguing that Shenzhen Unifelix's actions violated 46 U.S.C. §§ 41102(c)&(d), 41103(a)(1), and 41104(a)(10); Unifelix's actions were cumulatively a breach of the Transport Contract; and Way is entitled to damages. Brief at 1, 27-41; Reply at 23-30.

Shenzhen Unifelix contends that it was "faced with a large number of shipments, uncontrollable port and rail delays and a customer that refused to pay promptly," arguing that its actions did not violate 46 U.S.C. §§ 41102(c)&(d), 41103(a)(1), or 41104(a)(10); its actions were not a breach of contract; and Way's claim for damages is not supported by the evidence or the law. Opposition at 6, 10-19.

[2] Respondent emailed its filings on October 6, 2023. The email was not received by the Commission. Respondent forwarded the October 6, 2023, email to the Commission on October 9, 2023. Way states that it received the filing on October 7, 2023, and objects that it was not timely. Reply at 1. Consistent with Commission Rule 502.2(b)(2), the filing date is when the email was transmitted. 46 C.F.R. § 502.2(b)(2). Therefore, the filing was timely.

D. Evidence

Under the Administrative Procedure Act, an administrative law judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 98-102 (1981). This initial decision is based on the pleadings, exhibits, briefs, proposed findings of fact, and replies thereto filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations in the complaint or defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent that individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

Parts of documents in the record that were not in English as required by Commission Rule 7 were not considered. *See, e.g.*, CX 110; RX 437. Additionally, the record is longer than necessary because Way submitted multiple copies of the same documents. *See, e.g.*, CX 221-24 and CX 622-24; CX 472-78 and CX 1310-16; and CX 833-34 and RX 4609-10. This duplication was purposeful on the part of Way, who explains that it "attempted to group relevant documents together as they relate to each container, which has resulted in some duplication of documents, but which will make it easier to match the appropriate documentation to each container." Brief at 3. This duplication of documents was well-intentioned and logical organization of appendices is appreciated, although it did result in exhibits being included multiple times including emails that were included twenty times. Particularly for cases with more shipments, it may be preferable to organize evidence so that there are not multiple copies of the same piece of evidence, but here this organization served its purpose well. Similarly, Respondent is encouraged to "cite to Complainants' appendix rather than include a second copy of the same document in its own appendix," which will help limit the size of the record. Initial Order at 3.

Specific findings of fact are covered next, in part two, prior to the analysis and conclusions of law in part three, and the order in part four.

II. FINDINGS OF FACT ("FOF")

A. Relevant Entities

1. Way is a limited liability company organized and existing under the laws of the State of Indiana, with its principal place of business in Indiana. Complaint ¶ 1.

2. Way entered into a relationship with Shenzhen Unifelix to handle container shipments from Way's supplier in China of component parts used by Way in the assembly of recreational vehicles in the United States. Complaint ¶ 8.

3. Way's local warehouse is located in Elkhart, Indiana. SResp/WPFF ¶ 8.

4. Shenzhen Unifelix is a Chinese company operating as a foreign based Non-Vessel Operating Common Carrier ("NVOCC") as defined under 46 U.S.C. § 40102, located in Shenzhen, Guangdong, China, with FMC organization number 030415. Complaint ¶ 2; Answer ¶ 2.

5. Shenzhen Unifelix's United States agent is Celestial Freight Solutions Inc. ("Celestial Freight"), located in Santa Fe Springs, CA. Complaint ¶ 2; Answer ¶ 2.

B. Agreement

6. On March 22, 2022, Way and Shenzhen Unifelix signed and date stamped an agreement titled "Transport Contract," which also stated: "The agreement is valid for one year and will be renewed if no objection of both parties. This agreement will come into effect from the date of signature and stamp." CX 1-2.

7. The Transport Contract identified Way as "Party A" and Shenzhen Unifelix as "Party B" and provided:

> I, Party B [Shenzhen Unifelix] has the responsibility for Party A [Way]'s *trucking, and sea freight* export services.
>
> II, Party A [Way] should fill the "BOOKING FORM" before shipping, transportation extras charges, the loading address of factory, loading time, container type, container quantity, port of loading, port of delivery, closing time should be showed on the "BOOKING FORM"; Party B [Shenzhen Unifelix] *will arrange booking and trucking* according to Party A's instruction. If Party A [Way] need to cancel the booking in emergency or delay to load the container, Party A [Way] should notify Party B [Shenzhen Unifelix] before three days of pick-up the empty, otherwise Party A must afford the responsibility for any loss due to Party A's late notification which caused overnight charge or ERS.
>
> III, The transportation charge is according to the price marked on "BOOKING FORM" which has confirmed by both parties, it could not be amended without both parties' confirmation. If any party needs to amend the charge, the two parties need to negotiate and confirm again before transportation. *The two parties can not alter any charge when cargo is transporting*. . . .
>
> V, Payment terms: *Within 7 days after receiving the goods at Party A [Way]'s local warehouse.*
>
> VI, Party B [Shenzhen Unifelix] has responsibility for the integrity and security of Party A's cargo during the pick-up and transport process, if have any loss or damage (exclude the force majeure), Party B [Shenzhen Unifelix] shall be liable for compensation to Party A.

> VII, Both parties have the rights to make supplementary clause to this agreement, based on long term mutual interests & development during the cooperation; the supplementary clauses need to be confirmed by both parties, and obey it. The defiant party should bear all the responsibility. . . . The agreement is valid for one year, and will be renewed if no objection of both parties. This agreement will come into effect from the date of signature and stamp.

CX 1-2 (emphases added).

C. Shipments[3]

8. Way's claims relate to the handling of twenty specific containers: TCNU6557513, TCNU7351126, TLLU4212160, TLLU5558286, GAOU6616340, TLLU5672365, TCNU6134091, TGBU9704789, TXGU7117086, TXGU7120114, CLHU8963040, FANU1742269, TXGU7119812, TXGU7120330, TXGU7118550, BEAU4986763, UACU5979959, TXGU7118415, TXGU7120120, TCNU6756449 (collectively "the Containers" or "the 20 Containers"). Complaint ¶ 13; Answer ¶ 13.

9. The 20 Containers were shipped from China between May 22, 2022, and June 25, 2022. SResp/WPFF ¶ 12.

10. The house bill of lading for each of the 20 Containers states that the port of loading is China, the port of discharge is California, and the place of delivery is Chicago, IL or Joliet, IL. RX 344; RX 349; RX 355; RX 358; RX 363; RX 366; RX 368; RX 370; RX 375.

11. The nine house bills of lading containing the 20 Containers, and their respective master bills of lading, are as follows:

House BL #	Container #s Part of the 20 Containers	Container #s Not Part of 20 on this HBL	Laden on Board Date	Cite	Carrier; Carrier Master BL#; Cite
UFS22050294	CLHU8963040	FFAU2109816; DFSU7477262; FCGU1986678; TCNU6790588; BMOU5536533; BEAU4938831; NIDU5206253; TCNU1491199; HLBU2046978	June 1, 2022	RX 344	Hapag-Lloyd ("HPL"); HLCUSHA220587648; RX 433

[3] Quotations from emails have been edited to improve readability by adding, where appropriate, periods, commas, and spaces; for example, in numbers and between sentences.

UFS22050423	UACU5979959	HLBU2182059; SLSU8061770; HLBU2424234; TCNU4310930; UACU5980651; FANU1503412; GESU6421681; FANU1609739; FANU1703724; FANU1017909; FANU1412884; UACU5171338; CAAU5508204; TGHU6072330	May 22, 2022	RX 349	HPL; HLCUSZX2205BMPQ7; RX 433
UFS22060012	FANU1742269	BEAU4965884; CAIU8472577	June 1, 2022	RX 355	HPL; HLCUSZX2204DQEV2; RX 434
UFS22060015	TXGU7118415; TXGU7119812; TXGU7120330	N/A	June 18, 2022	RX 358	HPL; HLCUSZX2205BCUP3; RX 433
UFS22060016	TXGU7117086; TXGU7120114	N/A	June 4, 2022	RX 363	HPL; HLCUSZX2205AZUI1; RX 434
UFS22060019	BEAU4986763; TXGU7118550; TXGU7120120	N/A	June 18, 2022	RX 366	HPL; HLCUSZX2205BCVY3; RX 434
UFS22060180	TCNU7351126; TLLU4212160; TLLU5558286; GAOU6616340; TLLU5672365; TCNU6134091; TGBU9704789	N/A	June 11, 2022	RX 368	ONE; ONEYSZPCH5728803; RX 434
UFS22060445	TCNU6557513	TGCU5307431; TGHU6466288; KKFU8053448; DRYU9415119; TGCU5306374; TCNU4925220	June 18, 2022	RX 370	ONE; ONEYSZPCG3939900; RX 434
UFS22060607	TCNU6756449	UACU5206199; HLXU8169128; UETU5915434; HLBU1011473; HLBU1597810; UACU5353918; FANU1504466;	June 25, 2022	RX 375	HPL; HLCUSZX2206AQDP1; RX 434

		RFCU5091673; FANU1496890			

See also RX 541 (listing the 20 Containers along with HBL number, associated invoice numbers, sea freight, arrival date at Chicago port, and status of shipment); RX 338 (includes carrier invoice numbers).

12. The carrier for each of the 20 Containers was either HPL (Hapag-Lloyd) or ONE (Ocean Network Express). RX 433-34.

13. The 20 Containers began arriving in the United States at various ports in California on June 20, 2022, and by July 19, 2022, all of the 20 Containers had arrived in California. SResp/WPFF ¶ 20; *see also* CX 150.

14. The 20 Containers were afterwards loaded onto a train for transportation to the railyard in Chicago between mid-August and October 2022. SResp/WPFF ¶ 42; *see also* RX 541.

15. In addition to these 20 Containers, Shenzhen Unifelix shipped other containers for Way. For example, on July 25, 2022, Shenzhen Unifelix emailed Way, providing a status update regarding 112 containers, including the 20 Containers. CX 42-43.

D. Communications and Transportation

16. On June 13, 2022, Shenzhen Unifelix emailed Way concerning a container that was not part of the 20 Containers, writing: “Can you pay freight today? I would like to ask whether your company always pays the freight on Monday?” and providing details for a total due of USD 17,226. CX 9.

17. On June 14, 2022, Shenzhen Unifelix emailed Way again, with the same subject “Freight bill-PO#022321C64,” writing: “Can you pay today? It’s important.” CX 8.

18. Later on June 14, 2022, Shenzhen Unifelix emailed Way, with the same subject, writing:

> Thank you very much for trusting our company and arranging business for our company. I will try to do better in the future. According to the contract, our payment term should be within 7 days after receiving the goods. But the shipping company requires us to pay the sea freight within 7 days after the shipment, as one can imagine, Our boss is under great financial pressure. Payment terms of this contract. I got it through a lot of hard work. We are honored to cooperate with a large company like you. Now there are many containers to arrive at the port, We need to arrange the radio release immediately and then arrange the truck delivery. Looking for a truck driver, we have to pay the truck driver’s freight immediately. They will help us deliver the goods, so only if you can pay on time, can our company have the funds to arrange the next step as soon as possible. This is also a challenge. So I would like to ask you for help**.** Can you pay our freight as soon as possible according to the terms of the contract. I am working hard to ensure that the containers can arrive at your warehouse on time

> (Sometimes I work until 3-4 a.m). Next, many containers will arrive at the port. I also hope you can pay the freight of the containers as soon as possible according to the terms of the contract. I also appreciate your help. thank you very much.

CX 6-7.

19. Way replied to Shenzhen Unifelix on June 14, 2022, writing: "We are working on our cash payments for the week, we will have more of an update later this week." CX 6.

20. As of June 16, 2022, all but 8 of the 20 Containers had already departed from China. *See* FOF 11. As of June 25, 2022, all of the 20 Containers had departed from China. *Id.*

21. In early July, Way believed that Shenzhen Unifelix was providing inaccurate invoicing and inflated claims of balances due, so it performed an extensive audit, which was delayed due to the lack of backup documentation for invoices. CX 7390.

22. On July 12, 2022, Shenzhen Unifelix emailed its US agent, Celestial Freight, regarding Way, with subject line "PRE-ALERT //:YANTIAN TO CHICAGO UFS22050294 10*40HQ TERMS-CIF" and writing: "Please hold all containers for this clients and wait for our further notice." CX 90; SResp/WPFF ¶ 27. House bill of lading UFS22050294 included container # CLHU8963040, which was one of the 20 Containers. FOF 8, 11.

23. A Shenzhen Unifelix summary noted the following status of the 20 Containers:

Shpmt	Container No.	Status	Cite
1	BEAU4986763	JUL-19 arrived OAKLAND, wait on rail to Chicago	CX 150
2	CLHU8963040	JUN-27 arrived OAKLAND, wait on rail to Chicago	CX 150
3	FANUl742269	No status provided	CX 150
4	GAOU6616340	JUL-08 arrived at LA, wait on rail to Chicago	CX 150
5	TCNU6134091	JUL-03 arrived at LA, wait on rail to Chicago	CX 150
6	TCNU6557513	JUL-10 arrived at LA, wait on rail to Chicago	CX 150
7	TCNU6756449	JUL-17 arrived at LA, wait on rail to Chicago	CX 150
8	TCNU7351126	JUL-08 arrived at LA, wait on rail to Chicago	CX 150
9	TGBU9704789	JUL-08 arrived at LA, wait on rail to Chicago	CX 150
10	TLLU4212160	JUL-08 arrived at LA, wait on rail to Chicago	CX 150
11	TLLU5558286	JUL-08 arrived at LA, wait on rail to Chicago	CX 150
12	TLLU5672365	JUL-08 arrived at LA, wait on rail to Chicago	CX 150
13	TXGU7117086	JUL-04 arrived OAKLAND, wait on rail to Chicago	CX 150
14	TXGU7118415	JUN-23 arrived OAKLAND, wait on rail to Chicago	CX 150
15	TXGU7118550	JUN-20 arrived OAKLAND, wait on rail to Chicago	CX 150
16	TXGU7119812	JUN-20 arrived OAKLAND, wait on rail to Chicago	CX 150
17	TXGU7120114	JUL-03 arrived OAKLAND, wait on rail to	CX 150
18	TXGU7120120	JUN-23 arrived OAKLAND, wait on rail	CX 150
19	TXGU7120330	JUN-20 arrived OAKLAND, wait on rail to Chicago	CX 150
20	UACU5979959	JUN-22 arrived OAKLAND, wait on rail	CX 150

24. On July 19, 2022, Way emailed Shenzhen Unifelix, stating:

> I received information today from several of our vendors/suppliers that you have approached them for payment of freight. I also learned you shared information regarding payments from WAY to Uniflex that is incomplete and inaccurate. These misleading statements to our vendors are slanderous and threatening in nature, and sheds WAY in a bad light to long time suppliers. These actions, combined with documented issues we have raised to your attention over the past 2 weeks regarding inaccurate invoicing, inflated claims of balances due, and other actions by Uniflex continue to raise significant concerns regarding your ability to perform services effectively to the degree you have been engaged to date. Similar concerns have been raised by our CFO, seemingly without effect given your most recent actions.
>
> I prefer to resolve these issues constructively when possible, and propose the following:
>
> We have already prepared a $706,500 payment for shipments received to date following an extensive audit by our finance group of your invoices, and will release the payment this week. We anticipate as additional deliveries are received and related invoices are verified, we will be releasing appox. $200 k in payments weekly in coming weeks.
>
> WAY can commit to this provided your commitment to the following via return email:
>
> Currently held shipments are immediately released. Your confirmation that no claims have been made on our shipments by your carriers that would result in further delivery delays. Any communication by Uniflex with any supplier of Way that extends beyond the routine execution of shipment will immediately cease. We regard this point to be a very serious issue, and will defend our interests aggressively.
>
> I hope we can move forward in a constructive and mutually beneficial manner.

CX 105.

25. On July 20, 2022, Shenzhen Unifelix replied to Way's July 19, 2022, message stating:

> Please find attached is the billing list of the 46 containers that already delivered to you, in the list, that show the delivery date, ocean freight, delivery freight and the payment deadline of each container, as well as the overdue days as of today (20/07/2022), the total overdue amount is USD 746,617. The [delivered] container with the longest overdue days have been reached 29 day! Your company has seriously breached the contract. Please

> pay as soon as possible according to the contract. Paying the freight of the delivered containers is the premise for us to continue to solve the problem.
>
> Unifelix has not harassed suppliers and slandered your company. Our company collects the ocean freight from the shipper on the BL in accordance with Chinese law, which is allowed by Chinese law, on the premise that your company has not paid the freight.
>
> If you can pay the freight, our lawyer will stop asking the factory to pay the freight and stop taking the next legal measures against the factory. Please arrange the payment according to the contract as soon as possible**.** If you fail to pay the freight of 46 containers that have been delivered before July 22, 2022, we will continue to use legal weapons to safeguard our legitimate rights and interests.

CX 49-50.

26. On July 21, 2022, Way responded to Shenzhen Unifelix, stating: "We will be making the 700+k payment on Friday and once more containers are recd we will pay according to [the] agreement. We were late due to Owen continuing sending incorrect info. Our plan is pay accordingly after Friday." CX 47.

27. By July 21, 2022, Way had processed a payment of $746,617 to Shenzhen Unifelix. CX 46; CX 11. On July 21, 2022, Way emailed Shenzhen Unifelix, stating: "Our CEO asked our finance dept to give Top priority to your balance; Attached is the bank slip of 46 balance 746,617 USD which the amount was revised on 19th July by Unifelix, let you (sic) know if you get the pmt. so you are happy now. thank you." CX 46.

28. On July 22, 2022, Shenzhen Unifelix emailed Way, stating:

> Because your company did not perform the payment as agreed in the contract, the longest overdue invoice has been reached 29 days, it has brought great trouble to our company.
>
> Therefore, for the balance containers, *our company requires to change the contract terms, our company will no longer provide Trucking delivery service at the destination port*. Pls request your other trucking company to arrange delivery. We also can recommend trucking company/REGENT LOGISTICS INC to you, you can work with Regent directly.
>
> In addition, there are 53 containers arrived in the Chicago rail way station so far. Please pay us the ocean [freight] for these 53 containers. As we receive ocean freight from your side, we will telex release these containers to your trucker at the first time. Please find attachment the revised contract.
>
> Our [financial] team will prepared the document and send the freight invoices of the 53 arrived containers to your finance Kim, please inform Kim to check the email.

> *Please understand and sign the new contract*. We hope to solve this problem peacefully through communication.

CX 44-45 (emphases added); *see also* SResp/WPFF ¶ 32 (Shenzhen Unifelix acknowledged that it "requested" that Way arrange truck transport to its warehouse).

29. On July 22, 2022, Way replied to Shenzhen Unifelix, stating: "Our terms are 7 days AFTER we rec containers per agreement!" CX 44. Later on July 22, 2022, Way replied to Shenzhen Unifelix again, stating: "You can't change agreement terms with containers in transit. We are not going to sign a new contract and you are expected to abide by the existing contract for any containers you have moved. Your responsibility is to get product from China to door Elkhart." CX 44.

30. As of July 22, 2022, email, all of the 20 Containers were sitting at various ports in California waiting to be loaded onto rail and transported to Chicago, Illinois. SResp/WPFF ¶ 33.

31. On July 23, 2022, Way replied again to Shenzhen Unifelix, stating: "We are pd up to date and you have binding agreement." CX 44.

32. On July 25, 2022, Shenzhen Unifelix emailed Way, stating:

> 1. Today we received a notice from the bank that the freight of 46 containers that you paid on July 21, 2022 has arrived in our bank account.
>
> 2. There are 8 containers that was pre-pulled by the truck company in June, we will notice the truck company to delivery them to your warehouse within this week. *The freight of these 8 containers, can be paid to our company within 7 days after receiving the goods according to the original contract*.
>
> 3. Due to your breach of contract, you did not perform the payment in accordance with the original contract, which caused great trouble to our company. *Now we requests to re-sign the contract*. (Please see attachment the new contract).
>
> 4. Because your company did not perform the payment agreement in accordance with the original contract, which cause the containers were stranded in the port, the demurrage charge and the detention charge incurred were borne by your company. Our company reminded you many times in the previous email (please see the attachment email record), please bear the all the extra expenses at the destination port caused by breach of contract.
>
> 5. For the balance 104 containers, we will not provide the delivery service anymore. Your company needs to entrust your trusted truck company to arrange delivery. We will release the container to your truck company after we receive the ocean freight.

CX 11 (emphases added).

33. Late on July 25, 2022, Shenzhen Unifelix again emailed Way, stating:

> Pls find enclosed shipments list include ocean freight for your reference and following details.
>
> 1.There are 8 containers were pre-pulled by our trucking company in June and will delivery to your warehouse this week.
>
> 2.There are 48 containers already arrived Chicago port.
>
> 3.There are 56 containers is on the way and will arrive Chicago port very soon.
>
> The total ocean freight amount is USD 1,676,090 not include trucking fee as attachment for the balance 112 containers. Pls confirm and [advise] us your payment date.

RX 448-50.

34. On July 26, 2022, Way responded to Shenzhen Unifelix, writing: “Please submit Way your invoice lists w/o any mistakes in detail as below” and asking for particular invoices. “Our finance team needs something to verify and manage your wires, please explain us in the zoom call[.]” RX 449.

35. On July 26, 2022, Shenzhen Unifelix emailed Way, stating in part:

> There are 8 containers that were pre-pulled by the trucking company before, we have informed our trucking company to make appointment and delivery containers to your nominated warehouse this week. *The freight of these 8 containers, can be paid to our company within 7 days after receiving the goods according to the old contract*. Please check the attachment shipment list for ocean freight and delivery charge of these 8 containers, and the invoice per container have been sent to your finance Kelly by separate email. . . .
>
> We would like to gentle remind you again that because of your previous breach of contract and failured to fulfill the payment term as agreed in the contract. That caused such more issues and it also caused our company get into big trouble. Your company have responsibility to bear any excharge occured and improve your work. So that our company and your company can work together to sort out this case. Because you broked the contract firstly, *your company have to arrange trucking by yourselves for the balance 104 containers*. For the 67 arrived containers, pls pay us ocean freight firstly, we will release containers to your nominated trucking company as your payment arrived our account. We hope that we can deal with this case asap through good communicate with each other.

RX 447-48 (spelling as in original; emphases added).

36. On July 26, 2022, Way emailed Shenzhen Unifelix, expressing frustration regarding invoices, stating: "I have to continue to emphasize that the accuracy of the invoicing we have received continues to be a major issue, which delays your payment and creates significant confusion. I have attached a recent example where invoicing has been generated well in advance of any receipt of product. . . . Accurate and fully supported invoices will be the most effective way to get Unifelix paid timely." CX 6081.

37. On July 27, 2022, Shenzhen Unifelix responded to this point in blue text, writing:

> We already emphasized some times that we will not provide any trucking service for the balance 104 container due to you broked the contract firstly in previous email record. Wayne and Gary also are aware of this situation. Your company need to pick up containers from Chicago railyard by your other nominated trucking company. That mean that we will release container to you as we receive payment from you. Otherwise we can't release any containers to you. So we should send invoice to you in advance of any receipt of product. So that you can process payment to us before you pick up containers. This is not invoice issue. This is accurate operation process.

CX 6080-81.

38. On July 28, 2022, Shenzhen Unifelix emailed Way, writing:

> We already sent shipments list and ocean freight of invoice for every container as per your instruction. We also reminded and emphasized to your company many times by email that we will not release containers to you until your payment arrived our account. Your company need to arrange trucking by yourselves, we will not provide any trucking service to you. . . . As we informed you before, there are 67 containers arrived Chicago railyard, storage charge and demurrage charge continue to increase on a daily basis. You need to process this payment of 67 arrived containers a priority and then pick up them urgently.

CX 6079.

39. On July 30, 2022, Way processed a wire payment to Shenzhen Unifelix for $983,780 for 65 invoices unrelated to the 20 Containers. CX 6074-77.

40. On August 1, 2022, Shenzhen Unifelix emailed Way stating: "We already finished trucking for 8 containers last week, these 8 containers trucking fee is total USD 66,500 as attachment charge detail. Pls pay payment to us this week according to old contract" and "There are more three containers already arrived Chicago port as attachment we updated. And the other balance 34 containers are way to Chicago and [estimated] time of arrival will be this week. There are only 2-3 free days for every container, you should pay full freight USD 758,810 (USD 75,8810 = USD 692,310 + USD 66,500) to us within this

week and pick up containers, to avoid occur [demurrage] charge and storage charge. We also need to spend 3-5 days to processing telex release as your payment arrive our account." CX 6073-74.

41. Comments in the August 1, 2022, email, from Way, state that "The charges are far beyond typical drayage – we'll need the related invoices and supporting detail to understand the charges and process accordingly" and "No other carrier requires this amount of time to arrange telex release – we look to Unifelix to eliminate this delay." CX 6074.

42. On August 1, 2022, Shenzhen Unifelix notified Way that 19 of the 20 Containers were in California. SResp/WPFF ¶ 38; CX 149-50.

43. From mid-August to October 2022, the 20 Containers were loaded onto a train for transportation from the ports in California to the railyard in Chicago. CX 163; CX 308; CX 373; CX 410; CX 441; CX 473; CX 525; CX 564; CX 605; CX 649; CX 696; CX 741; CX 806; CX 928; CX 1013; CX 1092; CX 1145; CX 1267; CX 1324; CX 1422; *see also* SResp/WPFF ¶ 42.

44. Demurrage charges for the 20 Containers began to accrue after they arrived at the Chicago rail station, while they were waiting for trucking transportation to Complainant's warehouse in Indiana. SResp/WPFF ¶ 44.

45. On August 9, 2022, Shenzhen Unifelix emailed Way, asking for $144,635 for 8 containers already delivered to Way's warehouse and adding "We will send detention charge of carrier invoice to support these charge asap and explain with you." Shenzhen Unifelix also requested payment of $147,100 for 10 containers that had arrived at the Chicago railyard, telling Way to "pick them up asap" and asking what "detail do we need sent to you to verify the availability of those containers?" RX 542.

46. In the same August 9 email, Shenzhen Unifelix referred to "the remaining 29 containers," which containers included the 20 Containers, and noted "these containers will arrived Chicago very soon, sea freight amount is USD 426,670. Pls pay these container sea freight with above charge together, we can't wait you any more time. Pls pay attention to above payment issues and this formal notice about the late payment fee, if you still delay over and over again. We will not release any containers to you until you clear charge and late payment fee to us." RX 542.

47. On August 29, 2022, Shenzhen Unifelix emailed Way, writing "Adding more information: Pls pay payment to us asap, so that we can process telex release BL to you accordingly as your payment arrive our account." RX 540.

48. On September 2, 2022, Shenzhen Unifelix emailed Way, writing that Way should pay sea freight of $118,540, delivery charge of $26,095, and "additional charge" of $26,635 for 8 delivered containers. Shenzhen Unifelix also wrote: "For the final 20 containers, you should pay all Sea Freight of 20 container together, we will process telex release BL to you as payment arrive our around." CX 87-88.

49. On September 9, 2022, Shenzhen Unifelix emailed Way, stating:

> Pls note following charge list:
> 8 containers Sea Freight: USD 118,540
> 8 containers Delivery Charge: USD 26,095
> 8 containers additional Charge: USD 26,635
> 20 containers Sea Freight: USD 294,000
> Total: USD 465,270

CX 84.

50. On September 9, 2022, Way emailed Shenzhen Unifelix, writing:

> [A]fter review of your invoices we show the following and propose a payment under protest of $449,575 for execution Monday, September 12 to secure release of the 20 remaining containers per the following analysis:

	Container Count	Total Due Per Unifelix	Total Proposed by Way	Notes
Sea Freight	28	412,540.00	412,540.00	Rates per container verified by Way, 14 containers currently available for pickup in Chicago, 6 containers remain inbound from LA/Oakland
Delivery Fee	8	26,095.00	10,400.00	Way is proposing $1300 per container, which is at the high end of the local drayage rates charged by carriers out of Chicago. Charges listed by Unifelix that average more than $3200/container are significantly above market.
Additional Costs	8	26,635.00	26,635.00	While Way has received detailed description of the charges, Way has not received carrier invoice copies or other objective evidence substantiating the charges. Payment for these charges are under protest.
Total Charges		**$465,270.00**	**$449,575.00**	

> Provided email acknowledgement from Unifelix of agreement to release the remaining 20 containers for pick up with receipt of payment of $449,575, we will release wire payment with confirmation to Unifelix upon wire execution Monday. The parties each do not waive, but reserve all rights and remedies.
>
> We look for you[r] email acknowledgement per the detail above to move forward.

CX 82-83.

51. On September 9, 2022, Shenzhen Unifelix replied to Way, writing:

> Chinese have a holiday from Sep 10 to Sep 12 . . . . Yes, Pls pay USD 449,575 to us on next Monday (Sep 12). After holiday, we will work with carrier to process telex release BL to you on Sep 13 as payment USD 449,575 arrive our account. We will send support docs and detail explanation to you for all delivery charge as we resume to work next week. You can check and process the remaining charge USD 15,695 of delivery charge to us after you confirm.

CX 82.

52. On September 13, 2022, a payment of $449,575 to Shenzhen Unifelix was initiated by Way. CX 85.

53. On September 14, 2022, Way emailed Shenzhen Unifelix, writing: "Since payment has been sent as agreed. Please provide the pickup numbers for the remaining 20 containers ASAP." CX 169. Later on September 14, 2022, Unifelix replied to Way, writing: "The delivery fee is still unpaid in USD 15,695, please pay it ASAP[.] UNIFELIX has not received the remaining expenses. *our company's finance department does not agree to telex release the bill of lading*." CX 168 (emphasis added). The $15,695 delivery fee referenced was not a fee for containers on the bills of lading for the 20 Containers, rather this fee corresponded to containers that had already been delivered to Way's Indiana warehouse. CX 165-66 (listing the container numbers and respective house bills of lading generating this delivery fee, which did not overlap with the 20 Containers or their bills of lading); *see also* CX 82-84.

54. As of September 14, 2022, the sea freight for all of the 20 Containers had been paid by Way. CX 449; *see also* Opposition at 11 (acknowledging Way's September 14, 2022 payment of sea freight for the 20 Containers). Both parties agree as well that the "only invoices issued by Respondent for the 20 Containers were Debit Notes for 'OCEAN FREIGHT PREPAID.'" SResp/WPFF ¶ 78.

55. Also as of September 14, 2022, all but 1 of the 20 Containers had arrived in Illinois, with the final of the 20 Containers arriving in Illinois on October 22, 2022.

56. The pickup numbers were required for Way to remove the 20 Containers from the Chicago rail station. SResp/WPFF ¶ 57. Without the pickup numbers being released, the 20 Containers continued to accrue demurrage charges. SResp/WPFF ¶ 58.

57. On September 15, 2022, at 12:24 A.M., Way emailed Shenzhen Unifelix, stating:

> 1. Your company agreed in writing (see attached) to release the containers with payment of the agreed amount. You are now legally obligated to do so.

> 2. Your company also agreed to provide additional support to the extraordinary charges for local drayage that are in question
>
> > a. The support you have provided to date is an agreed fee schedule
> >
> > b. Since the actual charges are well in excess of that fee schedule, adequate support has not yet been provided
>
> We have performed based on the attached agreement. You are now legally obligated to release our containers without delay, as you agreed in writing.

CX 446-47. Shenzhen Unifelix replied to this email, writing "Please check the bill provided to us by the truck company at the destination port, We have applied for telex release bill of lading to the shipping company, but please also pay USD 15,695 to our company ASAP, thank you." CX 446.

58. On September 15, 2022, at 6:50 A.M., Shenzhen Unifelix emailed Way, writing: Bank confirmed us that payment arrived our account this afternoon. We will apply with carrier to telex release BL tomorrow morning. We will update to you as available." CX 449.

59. On September 15, 2022, at 7:41 A.M., Shenzhen Unifelix emailed Celestial Freight and Mr. Dong Ngo at Ba-Shi Tuexin Logistics Co., writing: "Dear Dong, Pls be sure to collect all charge from consignee/WAY INTERGLOBAL NETWORK LLC before they pick up container. Thank you!" CX 94-95.

60. On September 15, 2022, at 11:05 A.M., Mr. Ngo replied to Shenzhen Unifelix and Celestial Freight, writing: "Celestial Freight is cnee on our bill. Invoices will be sent to Celestial for payment. You would need to make sure your agent collects before releasing to final customer if payment is issue." CX 94; *see also* CX 100 (Unifelix's Sept. 22, 2022, reply to Mr. Ngo, stating "Pls confirm us that your company and carrier HPL will hold containers until consignee clear all demurrage charge.")

61. On September 15, 2022, at 7:38 A.M., Shenzhen Unifelix emailed its agent, Celestial Freight, with subject "*ATTENTION TO THE FINAL 20 CONTAINERS FOR Way Interglobal*," stating:

> Consignee is under very bad reputation, they delay for a long time to process payment to us. We pushing them every very day. Consignee have [responsibility] to bear all demurrage charge, storage charge and per diem. We will arrange telex release for MBL#SZPCH5728803 tomorrow morning. *But pls hold all PU# of 20 containers in your hand until consignee clear all demurrage charge at destination to carrier. Don't release to consignee*. I only receive carrier demurrage invoice as below and attachment. Pls help to forward them to consignee today and push them to pay to carrier directly.
>
> UFS22050434 USD 26,765
> UFS22050690 USD 44,270

UFS22050740	USD 11,130
UFS22050783	USD 3,530
UFS22060607	USD 24,390
UFS22050423	USD 54,315
MSK INVOICE	USD 76,540

> We also will help to push consignee to process payment. If you have other demurrage invoice, pls send them to consignee and CC to us.

CX 112 (emphases added).

62. For the demurrage totals listed in Shenzhen Unifelix's September 15 email (FOF 61), the $76,540 owed to Maersk did not include the 20 Containers, nor did the containers in such invoice overlap with the bills of lading for the 20 Containers. FOF 12. Also for the $140,010 in demurrage charges listed for UFS22050434, UFS22050690, UFS22050740, UFS22050783, and UFS22050423, none of these included the 20 Containers, nor did they overlap with the bills of lading for the 20 Containers. CX 5378-82; FOF 8, 11; *see also* SResp/WPFF 59 (Shenzhen Unifelix acknowledged it was "[u]ndisputed that the listed containers were not part of the 20 containers currently being litigated").

63. On September 16, 2022, at 11:22 A.M., Way emailed Shenzhen Unifelix, stating: "We have yet to receive release of the containers as communicated yesterday. Please provide immediately per your commitment." CX 449.

64. On September 16, 2022, at 1:40 P.M. Shenzhen Unifelix emailed Way, stating:

> We already telex released BL today. But destination carrier informed that your company still not pay all demurrage charge for a long time. They will not release PU# to you until you clear all demurrage charge. You should clear all destination demurrage charge with carrier to pick up containers. This is destination charge that you have [responsibility] to pay due to you delay a long time to pick up containers. This is carrier HPL & MSK's action that is out of our control. Our US agent Celestial [Freight] already sent carrier invoice to you. Pls check. Your company or your trucking company can pay payment to carrier MSK and HPL directly.

CX 451.

65. On September 17, 2022, at 2:32 A.M. Way replied to Shenzhen Unifelix, stating: "The local dridge [sic] company nor Celestial has standing with any of these loads. They have no right to hold them and if that's the issue we're going to escalate this to the authorities. I expect full release of all containers immediately based upon your commitment in our agreement. Anything less than compliance will be escalated." CX 450.

66. On September 16, 2022, at 2:52 P.M. Shenzhen Unifelix emailed Way, stating:

> We already telex released BL today.

> But the shipping company requires you to pay the container rent generated by the container at the destination port, UNIFELIX have repeatedly reminded WAY that the container has arrived at the port of destination and asked WAY to pay ASAP, but WAY company have not paid[.]
>
> Please note. The way company seriously violates the contract, We have repeatedly reminded WAY to pay ASAP according to the contract and told WAY that all losses caused by breach of contract should be borne by WAY resulting in additional costs at the port of destination, which should be paid by WAY company, Because it's not our UNIFELIX company's problem, So far, our UNIFELIX company has not received the delivery fee your WAY company owe us USD 15,695. WAY company has defaulted again. Please pay USD 15,695 to our UNIFELIX account ASAP Thank you.

CX 450. The $15,695 delivery fee referenced was not a fee for containers on the bills of lading for the 20 Containers. CX 165-66.

67. On September 21, 2022, Shenzhen Unifelix emailed Way, writing: "Have any feedback about the demurrage charge? Pls request Mike or your trucking company speed up to clear all demurrage charge to shipping line (ONE, HPL, YML, MSK). Otherwise your trucking company is [] impossible to pick up final 20 containers from shipping lines. Thank you!" CX 6750. Later on September 21, Way replied to Shenzhen Unifelix, writing "This is up to you, you are [] broker. Any delays are on [you]." CX 6750.

68. On September 22, 2022, at 6:32 A.M., Shenzhen Unifelix emailed Celestial Freight and Northstar Freight, regarding "CTN#TCNU6557513," that:

> Pls note following shipping's cargo tracking, why can consignee pick up this container yesterday? We not release PU# to consignee. *You need to hold this container until consignee clear all demurrage*, we're very worry that consignee will not pay demurrage charge.

CX 97 (emphasis added).

69. On September 22, 2022, at 10:17 A.M., Northstar Freight replied to Shenzhen Unifelix and Celestial Freight, writing: "If you didn't provide the P/U # to your customer I don't understand why ONE released the container to the trucker. Without pick up # container can not be released." CX 97.

70. Also on September 22, 2022, Shenzhen Unifelix emailed Mr. Ngo, writing: "we keep pushing consignee to pay demurrage. Pls confirm us that your company and carrier HPL will hold containers until consignee clear all demurrage charge. . . . We'd better to emphasize with shipping lines to hold containers until consignee all demurrage charge." CX 100 (sentence as in original).

71. Later on September 22, 2022, Mr. Ngo replied writing: "It's a tough spot, shipment was fully released before arrival, We have to release PU# to Celestial before containers LFD

since I have no idea if/when these would be picked up. I Have already spoken with SSL & they will not hold cargo once pick up# released. Since Celestial is cnee on our bill, Celestial responsibility to either hold pick up# from end customer and/or advise trucker to NOT deliver until all charges are cleared. As previously advised, I need to know the date trucker plan to pick up in advance (2-3 days in advance) in order to get final storage invoice from carrier, otherwise it will bill after the fact." CX 99.

72. On September 23, 2022, Shenzhen Unifelix emailed Way regarding container TXGU7118415, stating: "PU# will be held until line demurrage is cleared for your shipments. CX 934; *see also* SResp/WPFF 67.

73. On September 26, 2022, Shenzhen Unifelix emailed Way writing:

> As I explained with you before. We already telex released BL. But your company not pay demurrage charge to shipping lines, so destination shipping lines hold your containers, not our company.
>
> Pls find enclosed update demurrage charge list. For the demurrage amount in blue background, our US agent already received shipping lines' invoice and forwarded to you. For the demurrage charge no blue background, we help you to calculate the demurrage directly. For the containers in green [background], these are final 20 container and wait to pick up.
>
> Pls request your trucking company help to apply discount and process payment to shipping lines directly. We think that your trucking company apply discount for all container from the same shipping lines together. This will have a greater chance to get the biggest discount.
>
> Pls deal with this case urgently and pick up final 20 containers asap. Pls note that final 20 containers are increasing demurrage charge every day.

CX 175.

74. Way was diligent about requesting and re-requesting pickup numbers, so that it could move containers out at the earliest date possible. *See, e.g.*, CX 445 ("Since payment as been sent as agreed . . . [p]lease provide the pickup numbers for the remaining 20 containers ASAP."); CX 449; CX 174 ("When can we expect the remaining 9 PU #'s to be provided?").

75. Way signed the verification to the complaint on Sept. 29, 2022, and the complaint was received by the Commission on October 3, 2022. Complaint at 8.

76. On October 10, 2022, Celestial Freight emailed Way, copying Shenzhen Unifelix, providing pickup numbers and locations for 11 out of the 20 Containers. CX 174 (including: BEAU4986763, CLHU8963040, FANU1742269, TCNU6557513, TCNU6756449, TXGU7117086, TXGU7118550, TXGU7119812, TXGU7120114, TXGU7120120, and TXGU7120330).

77. Later on October 10, 2022, Way replied to Shenzhen Unifelix asking when the remaining nine pickup numbers would be provided. CX 174.

78. On October 13, 2022, Celestial Freight emailed Way providing the pickup number for one additional container. CX 454 (providing the pickup number for TCNU6134091).

79. On October 21, 2022, this case was assigned Docker No. 22-28 and the Commission issued a notice of filing of complaint and assignment.

80. On October 24, 2022, Celestial Freight emailed Way and provided the pickup number and locations for another 7 of the 20 Containers. CX 423 (including: TCNU7351126, TLLU4212160, TLLU5558286, GAOU6616340, TLLU5672365, TGBU9704789, and TXGU7118415).

81. On November 2, 2022, the final pickup number was provided to Way. CX 1462-64; *see also* SResp/WPFF ¶ 74.

82. Once the pickup numbers were available, Way also was diligent about arranging for drayage to remove each of the 20 Containers from the Chicago railyard, to avoid incurring additional demurrage charges. *See, e.g.*, CX 178, CX 326, CX 391, CX 428, CX 456, CX 497, CX 540, CX 588, CX 631, CX 675, CX 720, CX 767, CX 877, CX 961, CX 1051, CX 1108, CX 1207, CX 1281, and CX 1340]; *see also* SResp/WPFF ¶ 75.

83. The following demurrage charges for the 20 Containers are supported by the evidence:

	Container No.	Demurrage Fees	Cite; *see also* CX 7402-03; CX 7411-12
1	BEAU4986763	$6,230	CX 182; *see also* CX 177
2	CLHU8963040	$6,050	CX 327
3	FANUl742269	$8,750	CX 393
4	GAOU6616340	$6,050	CX 403
5	TCNU6134091	$6,050	CX 403
6	TCNU6557513	N/A	N/A
7	TCNU6756449	$5,690	CX 516; *see also* CX 544
8	TCNU7351126	$6,050	CX 403
9	TGBU9704789	$6,050	CX 403
10	TLLU4212160	$6,050	CX 403
11	TLLU5558286	$6,050	CX 403
12	TLLU5672365	$6,050	CX 403
13	TXGU7117086	$7,490	CX 824; CX 881
14	TXGU7118415	$4,610	CX 943
15	TXGU7118550	$6,050	CX 177
16	TXGU7119812	$6,050	CX 943
17	TXGU7120114	$6,050	CX 1173; CX 1209
18	TXGU7120120	$3,530	CX 177
19	TXGU7120330	$6,230	CX 943
20	UACU5979959	$2,155	CX 1459
	TOTAL	**$111,235**	

84. The evidence also supports the following rail storage and services charges, which accrued on 7 of the 20 Containers, and which were paid by Way, as detailed below. SResp/WPFF ¶ 76 ("Undisputed that the amounts were billed and paid").

	Container No.	Rail Fees	Cite (by container, by category); *see also* CX 7402-03; CX 7411-12
1	BEAU4986763	$8,825.00	CX 180-81, CX 1489
2	TCNU6134091	$12,200.00	CX 457-61, CX 1496
3	TCNU6756449	$7,475.00	CX 542-43, CX 1505
4	TXGU7117086	$250.00	CX 879-80, CX 1514
5	TXGU7119812	$8,825.00	CX 1110-11, CX 1521
6	TXGU7120120	$5,171.25	CX 1283-84, CX 1527
7	TXGU7120330	$9,050.00	CX 1342-43, CX 1531
	TOTAL	**$51,796.25**	

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

The Shipping Act provides that a "person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Docket No. 02-04, 2006 WL 2007808, at *11 (FMC May 10, 2006); *see also Cargo One, Inc. v. COSCO Container Lines Co.*, Docket No. 99-24, 2000 WL 1648961, at *15 (FMC Oct. 31, 2000).

Way argues that Shenzhen Unifelix's actions were a breach of the Transport Contract, stating that "[a]s noted in the Order denying Unifelix's Motion to Dismiss, supplemental jurisdiction exists over Way's breach of contract claims." Brief at 35. Shenzhen Unifelix argues that "exercising supplemental jurisdiction over a non-existent claim would not be a productive use [of] the Commission's resources" and argues that "Way has not articulated a viable contractual claim." Opposition at 17-18.

Way misrepresents the order denying the motion to dismiss. First, Way's complaint did not allege a breach of contract. Second, the order denying the motion to dismiss never mentions supplemental jurisdiction. Rather, Shenzhen Unifelix argued that the complaint should be dismissed because the alleged violations were actually an alleged failure to fulfill service obligations while Way asserted that references to the service contract do not divest the Commission of its jurisdiction and it is appropriate for the Commission to examine the service contract in determining the reasonableness of the Respondent's actions. *See* Order Denying Motion to Dismiss at 3. The order found that: the complaint alleged Shipping Act violations, the Commission has an obligation to determine whether an entity has violated the Shipping Act, and even though part of the transport was by rail that the complaint alleged a maritime contract (i.e. maritime transportation). Order Denying Motion to Dismiss at 3-4.

Way did not allege a breach of contract claim in the complaint. Moreover, the Commission has jurisdiction over Shipping Act claims. That facts supporting a Shipping Act claim might also support a contract claim in another court does not divest the Commission of jurisdiction, but that does not mean that the Commission then has jurisdiction over the contract claim. As the Commission recently explained, “Shipping Act claims are distinct from breach of contract claims, entailing a different analysis of statutory standards that includes review of the carrier’s broader practices beyond those directly affecting the complainant.” *MCS Industries, Inc. v. Mediterranean Shipping Company S.A.*, Docket No. 21-05, 2024 WL 95383, at *7 (FMC Jan. 3, 2024). Therefore, Way’s breach of contract claim is dismissed for lack of jurisdiction.

2. Burden of Proof

To prevail in a proceeding to enforce the Shipping Act, a complainant bears the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.203; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, Docket No. 08-03, 2014 WL 9966245, at *14 (FMC Dec. 17, 2014). Under the preponderance standard, a complainant must show that their allegations are more probable than not. *Crocus Investments, LLC v. Marine Transport Logistics, Inc.*, Docket No. 15-04, 2021 WL 3732849, at *3 (FMC Aug. 18, 2021) (Order Affirming Initial Decision on Remand). It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, Docket No. 93-15, 26 S.R.R. 1173, 1180 (ALJ Dec. 9, 1993), adopted in relevant part, 1994 WL 279898 (FMC June 13, 1994).

3. Objections to Evidence

Shenzhen Unifelix filed a document labeled Objections to Evidence which objected to the report of Way’s expert, Mr. Guasto, arguing that the report was not produced prior to Way’s brief, it offers legal opinions, and is unsupported by the evidence. Objections at 1-3. The objections do not request that the report be stricken. Way filed a response which asserts that Shenzhen Unifelix, likewise, did not produce a report of its expert prior to filing its brief, the objections do not specify which legal opinions it contests, and Way’s response highlights evidence supporting the factual claims. Objections Response at 3-7.

Shenzhen Unifelix did not request that the report be stricken and there is no basis to do so. Moreover, to the extent that the expert relied on underlying evidence, such as the Transport Contract, the underlying evidence is more persuasive than the expert’s opinion of the evidence. Therefore, the objections impact the weight of the expert report but not its admissibility. In the future, it is preferred that such objections and responses thereto be included as sections of the parties’ briefs, not as separate filings.

B. Shipping Act Definitions

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including common carriers, which are subject to sections 41104(a)(3) and (10) at issue in this proceeding. The Shipping Act defines the term common carrier:

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

46 U.S.C. § 40102(7).

The statutory definitions are echoed in the Commission's regulations:

> *Common carrier* means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:
>
> (1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and
>
> (2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . . .

46 C.F.R. § 515.2(e).

The Shipping Act also provides that the term "ocean transportation intermediary" means "an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(20). The term non-vessel-operating common carrier is then defined as a common carrier that "(A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(17).

On June 16, 2022, while 12 of the 20 Containers were in transit, the Ocean Shipping Reform Act of 2022 ("OSRA 2022") was enacted. OSRA 2022 revised parts of the Shipping Act. Those sections, and the OSRA 2022 changes, are addressed below. The Shipping Act sections at issue here include: (1) section 41102(c) regarding unjust and unreasonable practices, (2) section 41102(d) regarding discrimination, (2) section 41103(a)(1) regarding disclosure of information, and (4) section 41104(a)(10) regarding refusal to deal. In addition, OSRA 2022 changes impact potential reparations, discussed after the Shipping Act sections.

C. Discussion

1. Section 41102(c): Unjust and Unreasonable Practices

a. Relevant Law

Section 41102(c) of the Shipping Act, previously section 10(d)(1), states that a "common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). On December 17, 2018, after notice and comment, the Commission issued Rule 545.4, specifying the elements of a section 41102(c) claim. Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64480 (Dec. 17, 2018). Rule 545.4 states:

> 46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:
>
> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
>
> (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
>
> (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
>
> (d) The practice or regulation is unjust or unreasonable; and
>
> (e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4.

Failure of an NVOCC to "carry out [an] obligation it was paid to perform" may constitute a violation of section 41102(c). *Bimsha Int'l v. Chief Cargo Servs., Inc.*, 2013 WL 9808692, at *5 (FMC Sept. 4, 2013), *aff'd sub nom. Chief Cargo Servs. v. FMC*, 586 Fed. Appx. 730 (2nd Cir. 2014). As an example, the Commission noted an NVOCC was held to have violated section 10(d)(1) "when it refused to release the cargo at destination port unless additional money was paid, and instructed its agent to place the shipment on hold." *Bimsha Int'l*, 2013 WL 9808692, at *5 (citing to *Brewer v. Maralan*, Docket No. 99-19, 29 S.R.R. 6, 9 (FMC Jan. 3, 2001)); *see also Corpco Int'l Inc. v. Straightway, Inc.*, Docket No. 97-05, 1998 WL 940257, at *7 (FMC June 8, 1998) (affirming "the ALJ's conclusion that Straightway violated section 10(d)(1) of the Act by forcing its customer to pay additional transshipment costs to obtain the negotiable bill of lading necessary to effect the delivery of certain cargo.") The Commission similarly affirmed that an NVOCC had violated section 10(d)(1) "by withholding and aborting a shipment to coerce payment of debt for other shipments." *Petra Pet, Inc. v. Panda Logistics Ltd.*, Docket No. 11-14, 2013 WL 9808694, at *6 (FMC Oct. 31, 2013).

In *Adenariwo*, the Settlement Officer ("SO") found a Section 41102(c) violation where the vessel-operating common carrier had refused to release a container based on storage charges assessed for another container. *Adenariwo v. BDP Int'l*, Docket No. 1921(I), 2013 WL 12618258 (SO Mar. 7, 2013) ("*Adenariwo (SO)*"), *aff'd* 2014 WL 13110647 (FMC Feb. 20, 2014), *partially aff'd on other grounds sub nom*. *Adenariwo v. FMC*, 808 F.3d 74 (D.C. Cir. 2015). The Commission affirmed the Settlement Officer's decision, reasoning:

> The SO properly found that Zim violated § 10(d)(1) of the Shipping Act, 46 U.S.C. §41102(c), relying primarily on *Colgate Palmolive Co. v. The Grace Line*, 14 S.R.R. 600, 602 (FMC 1974), in which the Commission stated that ""the

> merits of each claim must be considered *in toto* and independent of claims under any other bill of lading." The SO properly reasoned that, while the law permits carriers to exercise valid maritime liens and hold a shipment for charges that accrue on that specific shipment's bill of lading, holding a shipment for charges unrelated to that shipment is unreasonable.

Adenariwo v. BDP Int'l, 2014 WL 13110647 at *1 (FMC Feb. 20, 2014) ("*Adenariwo (FMC)*") (footnotes omitted).

Regarding maritime liens, there is clear and consistent precedent that disputes over unrelated shipments, including shipments on separate bills of lading, cannot be used by a carrier as justification for refusing to release the cargo. As explained in *Bernard & Weldcraft*:

> A carrier can withhold delivery of cargo to compel the shipper to pay freight money that is <u>lawfully</u> owed and has a cargo lien which the carrier can assert if necessary, which lien the carrier loses if it surrenders the cargo. Conversely, if a shipper or consignee induces the carrier to surrender the cargo and thus lose its lien, and thereafter refuses to pay the lawful freight money owed because the shipper or consignee has outstanding disputes with the carrier on earlier unrelated shipments, and withholds payment of the lawful freight as a means to coerce the carrier to settle the disputes on earlier unrelated shipments, the shipper or consignee has acted unlawfully, in violation of section 10(a)(1) of the 1984 Act. Thus, disputes over earlier unrelated shipments cannot be used by either a carrier or a shipper as justification for refusing to release the cargo or to pay lawful freight money.

Bernard & Weldcraft Welding Equip. v. Supertrans Int'l, Docket No. 02-12, 2003 WL 136313, at *14 n.14 (ALJ Jan. 8, 2003) (underline in original; citations omitted), admin. final Feb. 12, 2003; *see also Petra Pet, Inc. v. Panda Logistics Ltd.*, Docket No. 11-14, 2012 WL 11914703, at *17 (ALJ Aug. 14, 2012) ("*Petra Pet (ALJ)*") *aff'd* 2013 WL 9808694 (FMC Oct. 31, 2013) (a lien against cargo "cannot be applied . . . beyond the amount of freight stipulated in the bill of lading" (quoting *American Steel Barge Co. v. Chesapeake & O. Coal Agency Co.*, 115 F. 669, 672 (1st Cir. 1902)).

The Commission has also provided specific guidance on factors to consider in determining whether demurrage and detention charges violate section 41102(c) in the Demurrage and Detention Rule, which went into effect May 18, 2020. 85 Fed. Reg. 29638 (May 18, 2020). Commission Rule 545.5 provides in pertinent part:

> (a) *Purpose.* The purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and § 545.4(d) in the context of demurrage and detention.
>
> (b) *Applicability and scope.* This rule applies to practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, the terms demurrage and detention encompass any charges, including "per diem," assessed by ocean common carriers, marine terminal operators, or ocean

transportation intermediaries ("regulated entities") related to the use of marine terminal space (*e.g.*, land) or shipping containers, not including freight charges.

(c) *Incentive principle*—(1) *General.* In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.

(2) *Particular applications of incentive principle*—(i) *Cargo availability.* The Commission may consider in the reasonableness analysis the extent to which demurrage practices and regulations relate demurrage or free time to cargo availability for retrieval. . . .

(iii) *Notice of cargo availability*. In assessing the reasonableness of demurrage practices and regulations, the Commission may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The Commission may consider the type of notice, to whom notice is provided, the format of notice, method of distribution of notice, the timing of notice, and the effect of the notice. . . .

46 C.F.R. § 545.5.

b. Parties' Arguments

Way asserts that: the Commission has found that the actions of a common carrier, such as Shenzhen Unifelix, which holds cargo hostage for unrelated freight and demurrage charges, has violated 46 U.S.C. 41102(c); Shenzhen Unifelix's own communications with its agent, Celestial Freight, demonstrate that it acted unreasonably when it wrongfully and repeatedly refused to release the 20 Containers to Way well after all charges related to the 20 Containers had been paid, under protest, by Way; the lien upon cargo exists upon that cargo alone and a carrier who holds up cargo and exacts any charge unrelated to that cargo before its release has violated its duties under the Shipping Act; as demonstrated by the timeline over which these actions occurred, and the numerous coerced payments demanded by Shenzhen Unifelix, these actions were normal, customary, and continuous; and even though its status with the ocean carriers is as a shipper, this does not relieve it of its duties to Way as an NVOCC and as a common carrier under the Shipping Act. Brief 27-32; Reply at 25-28.

Shenzhen Unifelix contends that: it was not holding the cargo "hostage," rather it was just adhering to the terms of contract governing the delivery of the cargo; the only terms that changed from how the initial 46 containers were handled was that instead of Shenzhen Unifelix arranging and paying the truckers for transport to Way's warehouse and then billing Way for those services after delivery, Way paid the truckers directly and Way also had to pay the ocean freight prior to the release of the cargo instead of after the cargo was delivered to Way's warehouse; the payment of the ocean freight prior to the release of cargo was part of the terms of the shipment as agreed by both parties and therefore requiring payment of ocean freight prior to their release was appropriate; and Way cites cases for the proposition that a carrier should not withhold shipments for debts on unrelated earlier shipments, but Way has not submitted any evidence to suggest that the other shipments in this current action were either earlier or unrelated. Opposition at 10-12.

c. Analysis

To succeed in a claim for reparations alleging a violation of section 41102(c), five elements must be shown. Each is addressed below, including whether: (i) Shenzhen Unifelix is a common carrier in connection with the 20 Containers; (ii) the practice at issue, holding cargo for unrelated charges, relates to or is connected with the receiving, handling, storing, or delivering of property; (iii) the practice is unreasonable; (iv) the practice is occurring on a normal, customary, and continuous basis; and (v) proximate cause. The only element over which there is a significant dispute is the reasonableness element.

i. Common Carrier

The first element requires that the respondent be an ocean common carrier, marine terminal operator, or ocean transportation intermediary. Way asserts that Shenzhen Unifelix is an NVOCC and common carrier. Brief at 28. Shenzhen Unifelix does not contest this element. The evidence demonstrates that Shenzhen Unifelix is an NVOCC with respect to the 20 Containers shipped for Way. FOF 4. An NVOCC is a type of ocean transportation intermediary. 46 U.S.C. § 40102(20). Therefore, this first element of 41102(c) is met.

ii. Receiving, Handling, Storing, or Delivering of Property

Way does not directly address the element requiring that the practice be related to or connected with the receiving, handling, storing, or delivering of property, although it frequently mentions issues with the delivery of the 20 Containers. Brief at 9-14, 40. Shenzhen Unifelix similarly does not address this factor but discusses deliveries. Opposition at 7-10.

The evidence shows that the practices at issue involve Shenzhen Unifelix's handling, storing, and delivery of Way's cargo from China to the United States. The element requiring that the practice in dispute be related to or connected with the receiving, handling, storing, or delivering of property is thus demonstrated.

iii. Unjust or Unreasonable Practice

(a) Parties' Arguments

Way alleges that Shenzhen Unifelix unreasonably held cargo hostage for unrelated freight and demurrage charges; when Way paid the charges related to the 20 Containers, Shenzhen Unifelix had no right to continue to refuse the release of the 20 Containers; and Shenzhen Unifelix failed to provide timely notice of cargo availability, to justify the charges assessed, or to provide supporting documents. Brief at 27-32. In its reply, Way asserts that Shenzhen Unifelix offers no case law to support its argument that the 20 Containers were related to the other containers; and after Unifelix finally provided the pickup numbers, Way acted with reasonable diligence in arranging for truck transportation to remove the 20 Containers from the Chicago yard to avoid incurring additional demurrage charges. Reply at 25-28.

Shenzhen Unifelix asserts that it did not hold the cargo hostage, rather it reasonably refused to extend itself beyond the contractually mandated terms so insisted on payment before delivery and on Way arranging its own trucking; Way's cases can be distinguished because they involve "earlier unrelated shipments" and these shipments were contemporaneous and transported under the same arrangement; its actions were "eminently reasonable, lawful, and reasonably related considering the number of containers, the amount of demurrage at stake, and Way's prior failure to pay;" there was no enforceable contract requiring Unifelix to arrange drayage since the Transport Contract is not an enforceable contract; fees were imposed by the shipping lines and only passed through; and notification was provided for all containers prior to their last free day. Opposition at 10-15.

(b) Agreement

Way asserts that the Transport Contract was a binding agreement that did not change and could not be unilaterally changed by Shenzhen Unifelix. Brief at 3-4, 6-7, 37-38.

Shenzhen Unifelix takes the alternating positions in briefing that there was no agreement;[4] but also that Shenzhen Unifelix was adhering to a new agreement, which terms had changed from the earlier agreement.[5] Shenzhen Unifelix asserts that the changed terms, including Way arranging for trucking *and* paying of ocean freight prior to the release of the cargo, were "part of the terms of the shipment as agreed by both parties," despite Shenzhen Unifelix presenting no reliable evidence of agreement to these "changed" terms by Way. At the same time, Shenzhen Unifelix points to the document stamped and signed by both parties, just three months prior to the shipment of the 20 Containers, and asserts this not to be a binding contract. *See, e.g.*, Opposition at 10-11. Shenzhen Unifelix's argument continues: "[o]nce Way failed to pay promptly upon demand, Unifelix reasonably refused to extend itself beyond the *contractually mandated* terms. It therefore then insisted on payment before delivery, and insisted that Way arrange its own trucking." Opposition at 11 (emphasis added).

Shenzhen Unifelix relies on the declaration of its Operations Manager, Ms. Huang, who states that the "conclusion of those discussions resulted in Way agreeing to arrange picking up

[4] *See, e.g.*, Opposition at 11 ("Way has argued that the terms of the contract were improperly changed after the cargo was underway. This is incorrect. While the initial 20 containers were delivered directly to Way's warehouse and Unifelix did not try to collect ocean freight until after delivery, *this was not done pursuant to a binding contract*.") (emphasis added).

[5] *See, e.g.*, Opposition at 10 ("Way alleges that Unifelix held 'the cargo hostage' despite the fact that Unifelix *was just adhering to the terms of contract* governing the delivery of the cargo. *The only terms that changed from how the initial 46 containers were handled* was that instead of Unifelix arranging and paying the truckers for transport to Way's warehouse and then billing Way for those services after delivery, Way paid the truckers directly. Way also had to pay the ocean freight prior to the release of the cargo instead of after the cargo was delivered to Way's warehouse.") (emphases added).

the containers from the rail yards and paying ocean freight prior to the release." RX 982.[6] However, the contemporaneous correspondence does not show that Way agreed to such changes. The contemporaneous correspondence is more credible than the current assertion of Shenzhen Unifelix's employee. Further, in its Answer, responding to Way's assertion that on or about March 22, 2022, Way entered into a service contract with Unifelix, Shenzhen Unifelix "admits that it entered into a service contract with Way" and states that the contract speaks for itself. Answer ¶ 8.

The evidence shows the existence of an agreement between Way and Shenzhen Unifelix, covering the 20 Containers. This Transport Contract agreement was signed by both parties on March 22, 2022, and valid for one year. FOF 6. Among the agreement's terms were that Shenzhen Unifelix had responsibility for Way's "trucking, and sea freight export services" thus rendering this door delivery. FOF 7 (also specifying Shenzhen Unifelix "will arrange booking and trucking"). The agreement's payment terms were "[w]ithin 7 days after receiving the goods at Party A [Way]'s local warehouse." FOF 7. Regarding changes to the agreement, the agreement specified that if "any party needs to amend the charge, the two parties need to negotiate and confirm again before transportation. The two parties can not alter any charge when cargo is transporting." FOF 7.

Shenzhen Unifelix asserts, based on Mr. Kardian's Declaration, that the Transport Contract is not an NVOCC Service Arrangement ("NSA") or a NVOCC Rate Arrangement ("NRA"), but rather a memorandum of understanding. CX 971-72. However, the agreement does not have to be an NRA or an NSA to provide guidance regarding the parties' expectations. Moreover, it is not necessary to determine whether the agreement was a binding contract, as this is a Shipping Act claim, not a breach of contract claim. The agreement can be used to evaluate reasonableness.

In contemporaneous communications, Shenzhen Unifelix referred to the contract, for example requesting changes to payment timing on June 14, 2022, and trucking responsibilities on July 22, 2022, which requests would not be needed but for a binding agreement already having been in place. FOF 18; FOF 28 ("our company requires to change the contract terms"). Shenzhen Unifelix also repeatedly refers in contemporaneous communications to a contract existing between the parties. *See, e.g.*, CX 6-7 ("according to the contract"); CX 6132 ("we have signed a contract"); CX 12-13 ("as agreed in the contract"); *see also* Reply at 23-24. Indeed, in contemporaneous communications, Shenzhen Unifelix directly affirms both the May 2022 contract itself, and also the specific terms it now seeks to dispute. *See, e.g.* CX 6-7 (On June 14, 2022, "According to the contract, our payment term should be within 7 days after receiving the goods" and "We need to arrange the radio release immediately and then arrange the truck delivery."); CX 44-45 (On July 22, 2022, "Please understand and sign the new contract."); CX 11 (On July 25, 2022, "The freight of these 8 containers, can be paid to our company within 7 days after receiving the goods according to the original contract.").

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[6] The record contains a signed copy of Ms. Huang's Declaration without Bates numbers. Way objects as the signed version was submitted late, on October 9, 2023. Reply at 1-3. There is no evidence that the slight delay caused any prejudice. The objection to the Declaration is denied.

By the time the last of the 20 Containers left China, there is no contemporaneous evidence of any mutually agreed upon change to this agreement. Rather, the record shows Shenzhen Unifelix's request for a change and Way's rejection of any change. FOF 29 ("We are not going to sign a new contract and you are expected to abide by the existing contract for any containers you have moved. Your responsibility is to get product from China to door Elkhart."). The first time Shenzhen Unifelix indicates it will no longer provide trucking for Way was on July 22, 2022, after all 20 Containers had left China and were in California. FOF 23, 28; CX 332.

Shenzhen Unifelix began the transport of the 20 Containers with the May 2022 agreement in place. "All cargo carried for compensation moves on some form of transportation agreement, express or implied." *Investigation of Tariff Filing Practices*, 7 F.M.C. 305, 321 (FMC Aug. 2, 1962). Shenzhen Unifelix then attempted to unilaterally change this agreement, by refusing to provide trucking services to Way's warehouse in Indiana, and also by demanding payment in advance of such delivery, rather than seven days after delivery to Way's warehouse. Because Shenzhen Unifelix refused to provide trucking services between the Chicago railyard and Way's Indiana warehouse, Way was forced to instead arrange trucking for this final leg, once it was able to secure the release of the containers.

(c) Reasonableness

Shenzhen Unifelix intermingles arguments concerning the existence of a contract and the reasonableness of its actions. However, as addressed above, there was an agreement between the parties and no mutually agreed upon changes to this agreement. The primary question to be determined is whether the practice alleged by Way, that Shenzhen Unifelix held cargo for unrelated freight and demurrage charges, is unreasonable. The evidence shows that Shenzhen Unifelix held the 20 Containers based on demands for unrelated charges and that such conduct is unreasonable under Section 41102(c).

Commission law is clear that "transportation of cargo cannot be aborted or cargo held to coerce payment of debt for other shipments." *Petra Pet (ALJ)*, 2012 WL 11914703, at *22; *Bernard & Weldcraft Welding*, 2003 WL 136313, at *14 n.14 (disputes over earlier unrelated shipments cannot be used by a shipper as justification for refusing to release the cargo); *Tienshan v. Tianjin Hua Feng Transport*, Docket No. 08-04, 2011 WL 7144007, at *17 (ALJ Mar. 9, 2011) ("An NVOCC that holds cargo hostage to its demands for money allegedly owed for prior shipments violates section 10(d)(1)."), admin. final April 12, 2011. Similarly, Commission case law indicates that cargo cannot be held to obtain additional fees or to collect an unreasonable debt. *Corpco Int'l*, 1998 WL 940257, at *7 ("Straightway violated section 10(d)(1) of the Act by forcing its customer to pay additional transshipment costs to obtain the negotiable bill of lading necessary to effect the delivery of certain cargo."); *Total Fitness Equipment, Inc. v. Worldlink Logistics, Inc.*, 1998 WL 940255 (FMC Dec. 10, 1998) (attempting to collect an unreasonable debt by refusing the release of cargo was a violation of 10(d)(1)).

Indeed, the facts here strongly mirror those in *Adenariwo*, where the Commission affirmed that the Settlement Officer had properly found a violation of 41102(c). *Adenariwo (FMC)*, 2014 WL 13110647, at *1. In *Adenariwo*, the complainant alleged that pursuant to the order of Zim, the vessel operating common carrier, a container "was unreasonably held by Zim's agent Lansal until payment for storage charges for a separate container shipment was made."

Adenariwo (FMC), 2014 WL 13110647, at *1. In its opposition, "Zim pointed to the general lien clause in the terms and conditions of shipment, and said that its refusal to release the second shipment based on outstanding charges on a separate shipment was reasonable pursuant to its contractual rights." *Adenariwo (FMC)*, 2014 WL 13110647, at *1.

The Settlement Officer had first noted that "the Commission has stated that each bill of lading is a separate transaction under the Shipping Act" and therefore held that the law permitted Zim "to exercise a valid maritime lien and hold a shipment based on the charges that accrued on the bill of lading covering that specific shipment." *Adenariwo (SO)*, 2013 WL 12618258, at *6. The Settlement Officer therefore held that Zim violated 41102(c) because the "act of holding a shipment for an unrelated shipment's charges is an unreasonable practice under the Shipping Act." *Adenariwo (SO)*, 2013 WL 12618258, at *6. The Commission affirmed the decision, noting that "while the law permits carriers to exercise valid maritime liens and hold a shipment for charges that accrue on that specific shipment's bill of lading, holding a shipment for charges unrelated to that shipment is unreasonable." *Adenariwo (FMC)*, 2014 WL 13110647, at *1 (footnote omitted). The Commission also affirmed an award of damages to Adenariwo, although the D.C. Circuit held that Adenariwo's damages ought not be reduced by mitigation. *Adenariwo v. FMC*, 808 F.3d 74, 76 (D.C. Cir. 2015).

Here, Way had paid the full sea freight for the 20 Containers as of September 14, 2022. FOF 54. Shenzhen Unifelix accepted the payment, but nevertheless refused to release the 20 Containers, until charges corresponding to other containers, on separate bills of lading, had been paid. Specifically, Shenzhen Unifelix's September 15, 2022, email directed its agent, Celestial Freight, to "hold all PU# of 20 containers in your hand until consignee clear all demurrage charge at destination to carrier." FOF 61. Shenzhen Unifelix then listed container demurrage charges of $76,540 owed to Maersk and $140,010 in other demurrage charges, which did not include the 20 Containers, nor did these overlap with the bills of lading for the 20 Containers. FOF 61-62. Thus, the facts are similar to those in *Adenariwo*.

Shenzhen Unifelix asserts that the other containers were not earlier or unrelated, but rather contemporaneous and transported under the same arrangement with Way. Opposition at 12. Neither party provides caselaw clarifying precisely what is meant by "unrelated shipments," for example, whether any fee demanded for any other container would be "unrelated." But, at a minimum, shipments on other bills of lading are "unrelated." *Adenariwo (FMC)*, 2014 WL 13110647, at *1. That is sufficient for a determination here, as Shenzhen Unifelix repeatedly held the 20 Containers, demanding payments involving separate bills of lading.

Shenzhen Unifelix further asserts that its actions were "eminently reasonable, lawful and reasonably related considering the number of containers, the amount of demurrage at stake and Way's prior failure to pay. Unifelix was facing an existential threat to its business, and therefore took necessary and reasonable steps to exercise its lien to ensure Way paid its debts." Opposition at 13. But, there was no valid lien on the 20 Containers, based on demurrage accrued for other containers. *Petra Pet (ALJ)*, 2012 WL 11914703, at *17, *24 ("a maritime lien secures money lawfully owed for the carriage of that particular shipment" and once "those shipments were released, any maritime lien expired."). Moreover, the overall pattern was that Way continued to make large payments to Shenzhen Unifelix, even processing payments under protest in order to keep the flow of containers moving. *See, e.g.*, FOF 27 (in mid-July 2022, Way processed a

$746,617 payment to Shenzhen Unifelix); FOF 39 (in late July 2022, Way processed a $983,780 payment to Shenzhen Unifelix); FOF 52 (in mid-September 2022, Way processed a payment under protest of $449,575 to Shenzhen Unifelix).

Adding to the unreasonableness of Shenzhen Unifelix's conduct, it repeatedly promised that it would release the 20 Containers once the sea freight was paid. FOF 32, 35, 37, 40, 48, 51. But then as soon as the sea freight payment had been received, it prevented their release, via its instruction to its agent to hold containers pending fees for unrelated containers. FOF 61. Furthermore, per the Transport Contract, Way did not even owe sea freight until seven days *after* Shenzhen Unifelix had delivered the 20 Containers to its Indiana warehouse – something Shenzhen Unifelix never accomplished. FOF 7, 82. Way's payment in advance of the terms agreed shows its good faith and attempt to keep containers moving. By contrast, Shenzhen Unifelix's unreasonable conduct, holding containers to obtain payments for other containers, is inconsistent with the incentive principle, leaving containers in transit longer than necessary. This element of unreasonableness is met.

iv. Normal, Customary, and Continuous Basis

Way asserts that Shenzhen Unifelix wrongfully and repeatedly refused to release the 20 Containers to Way well after all charges related to the 20 Containers had been paid. Brief at 30. Shenzhen Unifelix does not address this element. Opposition 1-19.

The evidence shows that Shenzhen Unifelix repeatedly communicated that it would not release one or more of the 20 Containers to Way until unrelated fees were paid, although sometimes varying the unrelated fees it demanded. *See, e.g.*, FOF 53, 60-61, 64, 66-68. The 20 Containers arrived on different dates and were separately detained, so the unreasonable practice occurred multiple times. Moreover, Shenzhen Unifelix repeatedly asserted that it could, and had, unilaterally changed the terms of the parties' agreement. *See, e.g.*, CX 44-45; CX 11.

Additionally, the evidence shows that Shenzhen Unifelix did not just fail to release these 20 Containers but that it threatened not to release other containers to obtain payments. For example, on August 9, 2022, Shenzhen Unifelix requested various payments across 47 containers and stated: "We will not release *any* containers to you until you clear charge and late payment fee to us." RX 542 (emphasis added). And, on September 21, 2022, Shenzhen Unifelix stated that Way would have to "clear all demurrage charge to shipping line (ONE, HPL, YML, MSK)" warning that "[o]therwise your trucking company [is] impossible to pick up final 20 containers from shipping lines." FOF 67; FOF 12 (note that the 20 Containers were shipped by HPL and ONE, not by YML or MSK).

Shenzhen Unifelix's unreasonable practice of holding containers based on demands for fees for other containers was thus well-established, and the evidence shows it to be normal, customary, and continuous. This element is met.

v. Proximate Cause

Way argues that "these violations proximately caused significant damage to Way." Brief at 39. Shenzhen Unifelix does not directly address this element, although it claims that it was "faced with a large number of shipments, uncontrollable port and rail delays and a customer that refused to pay promptly." Opposition at 4.

In September, when Shenzhen Unifelix refuses to release the container pickup numbers, the reasons cited by Unifelix are to collect more money from Way for other bills of lading, not shipping congestion. CX 11; CX 49-50. Therefore, the contemporaneous correspondence does not support that shipping congestion caused Shenzhen Unifelix's refusal to release the pickup numbers or to deliver the 20 Containers.

Shenzhen Unifelix's unreasonable practice of holding containers based on demands for fees for other containers was the proximate cause of the delay in releasing the 20 Containers at issue here. Once the pickup numbers were released, Way was diligent about arranging for drayage to remove each of the 20 Containers from the Chicago railyard, despite trucking being Shenzhen Unifelix's responsibility. FOF 82. While Shenzhen Unifelix notified Way when the containers arrived, without Shenzhen Unifelix releasing the pickup numbers, Way could not act on that notice. Shenzhen Unifelix's failure to pick up and deliver the containers to Way's warehouse in Elkhart, as promised, or even to release the pickup numbers for the 20 Containers, caused the demurrage and railyard fees that accrued. Therefore, this element is met for the 20 Containers.

As a result, all five Section 41102(c) elements have been established. Way's reparations request is discussed below, in section III.D.

2. Section 41102(d): Discrimination

In its complaint, Way alleges that Shenzhen Unifelix "engaged in unfair or unjustly discriminatory action in violation of 46 U.S.C. § 41102(d)." Complaint, ¶ 19. In briefing, Way combines its discussion of Section 41102(d) with the Section 41102(c) discussion. Brief at 27-32. Shenzhen Unifelix argues that Section 41102(d) "prohibiting retaliation and other discriminatory actions" are not "applicable to the facts of this case." Opposition at 10.

Way cites to Section 41102(d), which was added as part of OSRA 2022. Section 41102(d) states:

> (d) Retaliation and Other Discriminatory Actions.—A common carrier, marine terminal operator, or ocean transportation intermediary, acting alone or in conjunction with any other person, directly or indirectly, may not:
>
> > (1) retaliate against a shipper, an agent of a shipper, an ocean transportation intermediary, or a motor carrier by refusing, or threatening to refuse, an otherwise-available cargo space accommodation; or
> >
> > (2) resort to any other unfair or unjustly discriminatory action for-
> >
> > > (A) the reason that a shipper, an agent of a shipper, an ocean transportation intermediary, or motor carrier has-(i) patronized another carrier; or (ii) filed a complaint against the common carrier, marine terminal operator, or ocean transportation intermediary; or

(B) any other reason.

46 U.S.C. § 41102(d) (2023). Prior to OSRA 2022, retaliation and discrimination were addressed in Section 41104(a), which stated that:

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

46 U.S.C. § 41102(a)(3) (effective Dec. 4, 2018, to June 15, 2022).

Way's arguments do not mention retaliation or discrimination. Rather, Way contends that the invoices submitted by Shenzhen Unifelix "failed to provide the information required by 46 U.S.C. § 41102(d)" showing that such charges comply with all provisions of part 46 C.F.R. § 545 and applicable provisions and regulations; the invoices failed to provide the information necessary to explain the invoice, i.e. "who is being charged, for what, by whom, and how disputes can be addressed in a timely fashion;" and Shenzhen Unifelix's actions are a clear violation of the Commission's directives and are unreasonable as a matter of law. Brief at 32. However, section 41102(d) does not relate to providing information nor to the reasonableness of practices. Way has not provided evidence or argument that Shenzhen Unifelix retaliated against it or had "unfair or discriminatory" practices. Therefore, the Section 41102(d) claim is dismissed.

3. Section 41103(a)(1): Disclosure of Information

Way alleges that: Shenzhen Unifelix engaged in a smear campaign against Way by contacting its suppliers and demanding payments for freight and demurrage, and also by contacting freight forwarders and other companies within Way's supply chain and claiming that Way had a bad reputation for paying its bills; by spreading false and inaccurate information about the shipments and Way's payments, Shenzhen Unifelix created a false cloud of uncertainty related to Way causing other entities in the supply chain to demand payment from Way directly; this resulted in unlawful coercion of payments by Way for charges on unrelated containers in order to secure the release of the 20 Containers being wrongfully held by Shenzhen Unifelix; and Shenzhen Unifelix attempts to change the standard of a violation of Section §41103(a)(1) by claiming it disclosed "truthful" information. Brief at 33; Reply at 29.

Shenzhen Unifelix asserts that: Section 41103(a)(1) prohibits disclosing very specific information regarding shipments without permission of the shipper or consignee; here, no information was disclosed regarding the "nature, kind, quantity, destination, consignee, or routing of any property" that was tendered to Shenzhen Unifelix; rather, the allegation is that Shenzhen Unifelix informed Way's suppliers that Way was not paying its bills; because the suppliers were the shippers of the cargo, they had potential liability to the carriers for Way's unpaid invoices; notification was not only permitted under this code section it was reasonable and appropriate; and while Way complains that the disclosures were false, Way has not put forward evidence to suggest that it had paid the invoices at the time of the disclosures. Opposition at 15-16.

Section 41103(a)(1) states that:

> (a) Prohibition.—A common carrier, marine terminal operator or ocean freight forwarder, either alone or in conjunction with any other person, directly or indirectly, may not knowingly disclose, offer, solicit, or receive any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier, without the consent of the shipper or consignee, if the information – (1) may be used to the detriment or prejudice of the shipper, the consignee, or any common carrier . . . .

46 U.S.C. § 41103(a)(1) (previously section 10(b)(13)).

As the Commission explained:

> In order to establish a violation of section 10(b)(13), the following elements must be shown: (1) disclosure of information concerning the nature, kind, quantity, destination, consignee or routing of property tendered or delivered to a common carrier; (2) that such disclosure was knowingly made by a common carrier or ocean freight forwarder, either alone or in conjunction with any other person; and (3) that the information disclosed is of the type that could be used to the detriment or prejudice of the shipper, consignee, or any common carrier, or could improperly disclose its business transaction to a competitor. In order to receive reparations for a violation of section 10(b)(13), a complainant must show that disclosure of information caused actual injury.

DNB Exports LLC. v. Barsan Global Lojistiks Ve Gumruk Musavirligi A.S., 33 S.R.R. 670, 679 (FMC 2014) (footnote omitted).

Way cites one case discussing Section 41103(a)(1) and claims that the "the standard doesn't prohibit the disclosure of false information" but rather it "prohibits the disclosure of *any* information that was used for the detriment or prejudice of Way." Reply at 29 (emphasis added). However, that cited case focused on whether the information was disclosed to "someone who might reasonably be expected to act to the detriment or prejudice of Complainant," stating:

> Successful ocean shipments require coordination with employees, agents, and contractors. There are no allegations here that there was information disclosed to Complainant's competitor or someone who might reasonably be expected to act to the detriment or prejudice of Complainant. Indeed, in reading the complaint, the lack of coordination between the Respondent's local movers, storage facility, and new movers appears to be one of the concerns. The objection, here, seems to focus on the handling of the shipment, not the sharing of information. Complainant's section 41103(a)(1) claim thus does not state a plausible claim for relief.

Dukart v. Ocean Star Int'l Inc., Docket No. 20-03, 2020 WL 3994385, at *13 (ALJ July 10, 2020) (Initial Decision Granting Voluntary Dismissal), admin. final Aug. 11, 2020.

Way does not provide clear cites regarding what evidence supports this allegation. Its expert, Mr. Guasto, cites a July 19, 2022, email and states that providing "information of this nature to a client's vendors is in violation of industry standards and is a knowing disclosure of information that was used to the detriment or prejudice of Way." CX 7408. The evidence shows that on July 19, 2022, Way sent an email to Shenzhen Unifelix stating that they "received information today from several of our vendors/suppliers that you have approached them for payment of freight. I also learned you shared information regarding payments from WAY to Uniflex that is incomplete and inaccurate." CX 105. While hearsay such as this email are admissible in agency adjudications, the information has limited reliability as it lacks key data, such as who was contacted and what was said. Thus, this email alone is not sufficient to establish a violation based on inappropriate disclosure of information.

Similarly, Way's expert declaration, from Mr. McKenna, stating that Shenzhen Unifelix's lawyers would collect ocean freight from suppliers according to Chinese law is hearsay with limited reliability and details. CX 7390-92. Shenzhen Unifelix told Way that "If you can pay the freight, our lawyer will stop asking the factory to pay the freight and stop taking the next legal measures against the factory." CX 50. It is difficult to see how contacting the shipper would constitute a violation of a section which requires the communication to be "without the consent of the shipper" and which "may be used to the detriment or prejudice of the shipper." 46 U.S.C. § 41103(a)(1).

Therefore, the hearsay evidence presented is insufficient to show what precisely Shenzhen Unifelix communicated to third parties. What communications are in the record are not of the type that could be used to the detriment or prejudice of the shipper, consignee, or any common carrier, or could improperly disclose its business transaction to a competitor. Therefore Way has not carried its burden of proof and this claim is denied.

The evidence shows that disclosures were made to the shippers, consignees, agents, and third parties who Shenzhen Unifelix believed would be involved in releasing the containers. Although the failure to release the containers was unreasonable here, as discussed above, the communication of whether or not to release containers, communicated to appropriate parties, is not a Shipping Act violation without more. Moreover, communication was about payment and release of the containers and not the "nature, kind, quantity, destination, consignee, or routing of any property" as required by this section of the Shipping Act. 46 U.S.C. § 41103(a)(1). Accordingly, Way has not established a violation of Section 41103(a)(1).

4. Section 41104(a)(10): Refusal to Negotiate or Deal

Way asserts that Shenzhen Unifelix refused to deal because it (a) failed to provide backup for the invoices and (b) refused to complete the drayage of the 20 Containers from the rail yard to Way's facility, which it describes as "an effort to shut out Way." Brief at 33-34.

Shenzhen Unifelix contends that it had no obligation to arrange trucking to Way's warehouse since the Transport Contract is not a binding agreement; instead, the shipments were governed by the house bill of lading which called for "shipment to the railyards in Chicago and Joliet" and Shenzhen Unifelix also had a legitimate, transportation related concern about doing further business with Way because it failed to pay its freight bills on time. Opposition at 16-17.

Section 41104(a)(10) prohibits a common carrier from unreasonably refusing to deal or negotiate. 46 U.S.C. § 41104(a)(10). OSRA 2022 added clarifying language, not relevant here, that specifies this prohibition includes "with respect to vessel space accommodations provided by an ocean common carrier." 46 U.S.C. § 41104(a)(10).

The Commission has discussed refusals to negotiate or deal, finding that a common carrier should "refrain from 'shutting out' any person for reasons having no relation to legitimate transportation-related factors." *New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans*, Docket No. 00-11, 2002 WL 33836158, at *5 (FMC June 28, 2002), *aff'd sub nom. New Orleans Stevedoring Co. v. FMC*, 80 Fed. App'x 681 (D.C. Cir. 2003). The Commission has stated that "in determining reasonableness, the agency will look to whether a marine terminal operator gave actual consideration to an entity's efforts at negotiation." *Canaveral Port Authority – Possible Violations of Section 10(b)(10)*, Docket No. 02-02, 2003 WL 723336, at *18 (FMC Feb. 24, 2003). "Refusals to deal or negotiate are factually driven and determined on a case-by-case basis," although the ultimate burden of persuasion remains with the complainant to show that the refusal to deal or negotiate was unreasonable. *Canaveral Port Authority*, 2003 WL 723336, at *13, *18. To establish a violation of section 41104(a)(10), the Complainant must establish that (a) Respondent is a common carrier, (b) Respondent refused to deal or negotiate, and (c) such refusal was unreasonable.

Shenzhen Unifelix is an NVOCC, a type of common carrier, so the first element is met. The question is whether Shenzhen Unifelix refused to deal or negotiate and whether any refusal was unreasonable regarding proving backup invoices or completing delivery of the 20 Containers.

First, Way alleges that required backup for the invoices were not provided to it and that it was "virtually impossible for Way to verify the sums actually due" for the shipments. Brief at 31, 33, 35. Shenzhen Unifelix asserts that "Way initially did not respond to invoices or repeated emails seeking payment, but, in the end, paid the invoices less a discount that it demanded with no legitimate explanation" and that ocean freight and demurrage were not conflated because they were charged at different times by different entities. Opposition at 7, 14-15.

Way contends that failing to provide backup evidence of the invoiced charges constitutes refusal to deal, although it does not cite any caselaw supporting that interpretation. Brief at 33, Reply at 29 ("Unifelix failed to credibly refute that Way also objected to demurrage fees but couldn't even object to them directly because Unifelix would not provide the ocean carrier bills of lading nor the true invoices from the related ocean carriers."). Shenzhen Unifelix does not directly address this argument. However, it is not clear that refusal to provide certain documents is an unreasonable refusal to deal, and Way does not provide sufficient analysis to make such a finding under these facts.

The evidence shows recurring disagreement and delays concerning billing. However, it does not show that Shenzhen Unifelix ceased communicating with Way about billing. In contemporaneous communications, Way requested information to verify charges and claimed that Shenzhen Unifelix was providing incomplete, inaccurate, and/or unsupported invoice information. *See, e.g.*, CX 6074 ("The charges are far beyond typical drayage – we'll need the related invoices and supporting detail to understand the charges and process accordingly");

CX 47; CX 51; RX 449; CX 6081. In contemporaneous communications, Shenzhen Unifelix claimed that Way was late in making payments. *See, e.g.*, CX 44-45 ("the longest overdue invoice has been reached 29 days, it has brought great trouble to our company"); CX 11; CX 49-50. Moreover, Shenzhen Unifelix asserts that many of these are just pass-through charges. Opposition at 14. While the parties had differing views on the invoices, the record shows frequent communication between the parties regarding the billing status, which constitutes evidence of continued negotiations.

Shenzhen Unifelix's argument that it had a legitimate, transportation related concern about Way's ability to pay is not supported by the record which shows that although Way was occasionally late with payments, particularly while conducting its audit of the invoices, that even when Way paid all of the charges for the 20 Containers, Shenzhen Unifelix continued to refuse to provide trucking from the railyard to the warehouse (in addition to refusing to release the containers). Thus, this stated justification is not supported by the evidence and is not legitimate.

Therefore, the evidence does not show a lack of backup invoices sufficient to violate the Shipping Act as a refusal to negotiate or deal. However, the evidence also does not show that any delay in Way's payments justified a change to or altered the terms of the parties' agreement.

Next, Way asserts that the Shenzhen Unifelix refused to fulfill its obligations to provide the final leg of drayage from the rail yard to Way's facility, even after Way paid, under protest, all related charges for the 20 Containers and that Shenzhen Unifelix therefore failed to deal in good faith, which was unreasonable, relying on the recent decision in *OJ Commerce*. Brief at 33-35 (citing *OJ Commerce v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft A/S*, Docket No. 21-11, 2023 WL3969857 (ALJ June 7, 2023)).

Shenzhen Unifelix asserts that it "had no obligation to arrange trucking to Way's warehouse" but rather that the house bill of lading called for shipment to the railyards in Chicago and Juliet. Opposition at 16. Moreover, Shenzhen Unifelix contends that *OJ Commerce* does not apply because there was no obligation to provide trucking and Shenzhen Unifelix "had a legitimate, transportation related concern about doing further business with Way because it failed to pay its freight bills on time." Opposition at 17.

As discussed earlier, when the 20 Containers departed, Shenzhen Unifelix had an agreement to provide transportation to Way's warehouse in Indiana. Therefore, Shenzhen Unifelix had an obligation to provide trucking services and it refused to do so for these 20 Containers. Effectively, Shenzhen Unifelix abandoned the containers part way through their transport. In the case cited by the parties, respondent halted shipments under the service contract and stopped negotiating a new service contract on a particular date in retaliation for OJ Commerce's actions. *OJ Commerce*, 2023 WL3969857, at *26-28. Here, Shenzhen Unifelix refused to complete the delivery of the containers as agreed to in the Transport Contract. This refusal to deliver the containers as promised constitutes a refusal to deal. The final question is whether the refusal to deliver the containers was unreasonable.

As discussed above, Shenzhen Unifelix attempted to unilaterally change the terms of the parties' agreement while the containers were in transport, in an effort to obtain payment for other containers. Even after payments had been agreed upon and made, Shenzhen Unifelix refused to deliver the 20 Containers to Way's warehouse. For the same reasons discussed above, this conduct was unreasonable. Moreover, any delays of Way's payment while it audited the charges does not justify the refusal to complete delivery. Therefore, the refusal to complete the transportation is not justified by legitimate transportation-related factors. Accordingly, Shenzhen Unifelix's attempt to unilaterally change the agreement and its refusal to deliver the 20 Containers to Way's warehouse was an unreasonable refusal to deal. Thus, this is another way in which Shenzhen Unifelix violated the Shipping Act with regard to the 20 Containers. Therefore, Way has established that Shenzhen Unifelix violated Section 41104(a)(10).

D. Reparations

1. Parties' Arguments

Way seeks reparations of $144,898.85 for the 20 Containers, "consisting of the additional trucking charges, additional rail storage charges, and demurrage." Brief at 40. Way also seeks a total of $212,500 for shipments that were not part of the 20 Containers, "consisting of $10,400 in delivery fees for 8 unrelated containers, $26,635 in additional costs for 8 unrelated containers, $76,540 charges on 19 unrelated containers, and $98,925 for demurrage charges for unrelated containers." Brief at 39. Way contends as well that Shenzhen Unifelix's "violations proximately caused significant damage to Way, not only financially, but also in its customer relations." Brief at 39. Way asserts that its reparations totaling $357,398.85 should be doubled for an award of $714,797.70.

Shenzhen Unifelix asserts that Way is seeking to obtain free transportation; Way provides no argument regarding customer relation damages; and any demurrage was incurred due to Way's slow payment and failure to promptly pick up its cargo. Opposition at 18-19.

2. Relevant Law

The Shipping Act requires that the "Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation" of the Act. 46 U.S.C. § 41305(b). Complainants bear the burden of proving that they are entitled to reparations. *MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, Docket No. 16-16, 2022 WL 2209421, at *2 (FMC June 10, 2022). "As the Commission has explained: '(a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.'" *MAVL Capital*, 2022 WL 2209421, at *3 (citations omitted).

Reparations are awarded for actual damages. "Actual damages means 'compensation for the actual loss or injuries sustained by reason of the wrongdoing' which complainants must show to a reasonable degree of certainty." *MAVL Capital*, 2022 WL 2209421, at *3 (quoting *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, Docket No. 88-15, 1990 WL 427466, at *23 (FMC Oct. 19, 1990)). "That does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained." *MAVL Capital*, 2022 WL 2209421, at *3. "Actual injury" also includes the loss of interest compounded from the date of injury. 46 U.S.C. § 41305(a); *see also Gruenberg-Reisner v. Overseas Moving Specialists, Inc.*, Docket No. 1947(I), 2016 WL 11942284, at *10 (FMC Oct. 7, 2016).

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

Tractors & Farm Equipment Ltd. v. Cosmos Shipping Co., Docket No. 81-57, 26 S.R.R. 788, 798-99 (ALJ Nov. 23, 1992), admin. final, Dec. 31, 1992.

Demurrage and storage fees have been awarded as reparations in circumstances like the present. For example, in *Total Fitness*, the Commission awarded storage fees as damages, explaining that "holding up the cargo . . . was not an appropriate means of debt collection" and that the NVOCC's unreasonable actions were thus "the direct cause of the storage fees" complainant had to pay. 1998 WL 940255, at *12.

3. Analysis

Way asserts that it incurred damages specific to the 20 Containers for three categories: (a) demurrage charges of $111,235,[7] (b) rail yard and service charges of $51,796.25, and (c) trucking fees of $14,997.60. Brief at 40; CX 7411-12; CX 7402-03. Each of these will be evaluated in turn. Way also asserts that it is entitled to reparations for "wrongfully demanded payment of ocean freight and ocean carrier demurrage" for cargo shipments other than the 20 Containers; and that it is entitled to additional, or double, damages. Brief at 39-40. These latter assertions will be evaluated below. Although Way asserts reputational damage, it does not seek specific damages due to any damage to its reputation.

a. Demurrage

Way seeks $111,235 in demurrage charges, which it alleges it incurred due to Shenzhen Unifelix's unlawful refusal to release the 20 Containers after all claimed charges were paid by Way. Brief at 39-40; CX 7411-12; CX 7402-03. Way also presents detailed evidence supporting $111,235 in demurrage for the 20 Containers. FOF 83.

Shenzhen Unifelix does not contest the amount of the demurrage charges, other than to assert that "demurrage was incurred by Way due to its slow payment of the freight charges, and

[7] The total listed for demurrage charges for the 20 Containers is $78,105, which is the total that the Excel sum feature provides when container 6 is blank, as displayed at CX 7402 and CX 7411-12. However, that calculation excludes the first 5 containers. Therefore, it appears that listing $78,105 instead of $111,235 was merely a mathematical error.

failure to promptly pick up its cargo before demurrage began to accrue. All claimed damages were avoidable by Way if it had honored its obligations." Reply at 18-19.

The facts here are similar to the facts in *Total Fitness*, where the Commission awarded storage fees as damages. 1998 WL 940255, at *12. That decision found that the storage fees "arose from Worldlink's unreasonable decision to impose a double billing on the cargo and its refusal to release the cargo until the second billing was paid. As such, the storage fees accrued as a direct result of Worldlink's unreasonable practice. The storage fees, paid like the port fees in *Corpco* by the shipper, may therefore be awarded as damages arising as a consequence of the unreasonable practices of Worldlink described above." 1998 WL 940255, at *12. In the *Corpco* decision referenced, the "Commission ruled that the failure to pay the transshipment costs was an unreasonable practice, and that the port fees, which the shipper had paid, were attributable to the NVOCC's unreasonable practice and could therefore be awarded as damages." *Total Fitness*, 1998 WL 940255 (describing *Corpco*, 28 S.R.R. at 299-300).

Way has established that once the pickup numbers were available, it was diligent about picking up the 20 Containers from the Chicago railyard, to avoid incurring additional demurrage charges. FOF 82. Moreover, the evidence shows that $111,235 of demurrage was incurred for the 20 Containers. FOF 83; Brief at 40. Therefore, the evidence supports finding $111,235 of actual injury for demurrage for the 20 Containers.

b. Rail Yard and Service Charges

Way seeks $51,796.25 for rail yard storage and service charges for seven containers and provides citations to the invoices supporting these charges. Brief at 20, 27, 40; CX 7411-12; CX 1486-1532.

Shenzhen Unifelix argues that there was "unprecedented port and railroad congestion which contributed to the supply chain delays," that it was "trying to salvage an otherwise unmanageable situation," and that it was "faced with a large number of shipments, uncontrollable port and rail delays and a customer that refused to pay promptly." Opposition at 4-6. Shenzhen Unifelix also contends regarding the alleged rail damages of $51,796.25 that it is "[u]ndisputed that the amounts were billed and paid, but disputed that the charges would have been incurred if Way had picked up the cargo timely." SResp/WPFF ¶ 76.

The evidence does not support Shenzhen Unifelix's argument that the delays were caused by supply chain disruptions or Way's actions. Rather, as discussed above, the evidence shows that Shenzhen Unifelix sought to unilaterally force a change to the terms of the parties' agreement, held the 20 Containers to obtain payment for other containers, and refused to deliver the containers. Thus, here, the evidence shows that the delays were caused by Shenzhen Unifelix's unreasonable practices and refusal to deal. Therefore, reparations of $51,795.25 are reasonable for the rail yard storage and service charges.

c. Trucking Fees

Way seeks $14,997.60 for "additional trucking expenses" for the 20 Containers. Brief at 40; CX 7411-12; CX 7402-03. Shenzhen Unifelix asserts that Way is seeking free transportation as "those delivery fees were going to be paid by Way either directly to the trucking company, or indirectly through Unifelix. To reimburse Way for those fees would give Way free transportation for 20 containers from Illinois across state lines to Elkhart Indiana." Opposition at 18.

Rather than Shenzhen Unifelix arranging for trucking, Way ultimately had to arrange for and manage trucking of the 20 Containers. But, had Shenzhen Unifelix arranged for trucking as agreed, they would have invoiced Way, which would been responsible for payment. The evidence does not support that cost of trucking was included in the sea freight price. Rather, the course of dealing shows that Shenzhen Unifelix arranged for trucking and then invoiced Way. *See, e.g.*, FOF 40. Thus, Way would have had to pay for trucking, whether or not coordinated by Shenzhen Unifelix. Therefore, no reparations are owed for trucking fees.

d. Other Containers

Way seeks $212,500.00 in reparations for shipments other than the 20 Containers. Brief at 39. Shenzhen Unifelix contends that Way is seeking free transportation and that there is "no claim of improper withholding of the delivery of cargo." Opposition at 18.

Shenzhen Unifelix's argument that there is no claim of improper withholding of the delivery of cargo is confusing because that is a primary issue raised by the complaint. However, Shenzhen Unifelix may be referring to the other containers. The Complaint, and the Shipping Act violation found above, focuses on the 20 Containers. Damages for the other containers is outside the scope of this proceeding. Moreover, the evidence is insufficient to determine whether the Shipping Act was violated and, if so, what damages would be appropriate for the other containers. Therefore, Ways' request for reparations for containers other than the 20 Containers is denied.

e. Additional Damages

Way asserts that in addition to reparations for actual injury, Way is entitled to penalties under Rule 603 for violation of 46 U.S.C. 41104; damages are awardable under ancillary jurisdiction for breach of contract; and under section 41305(c), Way is entitled to damages of up to twice the amount of actual injury for violation of section 41102(c). Brief at 39-40. Shenzhen Unifelix does not specifically address these arguments, although it argues that all claimed damages were avoidable. Opposition at 18-19.

"Civil penalties must not be requested and will not be awarded in complaint proceedings." 46 C.F.R. § 502.62(a)(5). Rule 603 civil penalties are applicable to Commission enforcement proceedings and are payable to the Commission, not to individual complainants. 46 C.F.R. §§ 502.603, 502.605. Moreover, as discussed above, the Commission does not have subject matter jurisdiction for breach of contract claims. For the same reasons, the Commission cannot award damages for a breach of contract. Rather, relevant to the present action, the Commission is limited to issuing reparations for actual injury due to violation of the Shipping Act and additional damages pursuant to 46 U.S.C. § 41305(c).

Section 41102(c) violations only became subject to additional reparations on June 16, 2022, with the passage of OSRA 2022. OSRA 2022 amended the Shipping Act to include section 41102(c) among the violations for which additional reparations may be ordered under section 41305, which states that "the Commission may order the payment of additional amounts, but the total recovery of a complainant may not exceed twice the amount of the actual injury." 46 U.S.C. § 41305(c).

The first issue is whether OSRA 2022 applies here, which turns on the date the conduct occurred. The Supreme Court addressed whether provisions of the Civil Rights Act of 1991 ("CRA of 1991"), passed on November 21, 1991, should be "applied to conduct occurring before November 21, 1991," in which case, it "would operate 'retrospectively.'" *Landgraf v. USI Film Products*, 511 U.S. 244, 282 (1994). "The Supreme Court has clearly held . . . that *conduct* completed prior to November 21, 1991 is not subject to the provisions of the CRA of 1991 even if the lawsuit is commenced subsequent to that date." *Amin v. Quad/Graphics, Inc.*, 929 F. Supp. 73, 79 (N.D.N.Y. 1996) (emphasis added). Therefore, while conduct before the passage of OSRA 2022 is not subject to those amendments, conduct after the effective date is subject to OSRA 2022 and would not require retroactive application.

Here, the containers did not begin arriving in the United States until after OSRA passed on June 16, 2022. The evidence shows that the 20 Containers began arriving in the United States at various ports in California on June 20, 2022, and by July 19, 2022, all of the 20 Containers had arrived in California. FOF 13. The 20 Containers were afterwards loaded onto a train for transportation to the railyard in Chicago between mid-August and October 2022. FOF 14. Thus, when OSRA 2022 became law, the containers were in transit but had not arrived in the Chicago railyard, and could not have been released because they had not yet reached their destination. Thus, the conduct at issue, the delivery and release of the containers, did not occur until after June 16, 2022. Therefore, application of OSRA 2022 would not be retroactive as the violations occurred after enactment.

Way requests double damages in its brief but did not specifically refer to additional or double damages in its Complaint. It did, however, describe the factual basis of the violation and seek "reparations for the unlawful conduct described herein . . . pursuant to 46 U.S.C. 41305." Complaint at 7. The double damage provision is part of section 41305. Moreover, Federal Rule of Civil Procedure 54(c) states that except in default, "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c). Therefore, Way has sufficiently pled its request for double damages.

Way asserts that additional damages are appropriate because the violations were knowing and willful. Brief at 40. Shenzhen Unifelix does not address the appropriate standard.

The use of the word "may" indicates that additional damage amounts are discretionary. *American President Lines, Ltd. v. Cyprus Mines Corp*., Docket No. 91-27, 1994 WL 33488, at *14 (FMC Jan. 31, 1994) (Order on Review of Summary Judgment). Fact Finding 29 recommended adding section 41102(c) to the list of violations for which additional damages are available and if enacted, recommended that "the Commission should then develop guidance about under what circumstances it would order 'additional amounts' for violations of § 41102(c) [e.g., for certain types of cases (demurrage and detention only or other types of cases), or based on certain conduct (bad faith, willfulness)]." FMC Fact Finding No. 29, 2021 WL 3367606, at *2 (Jan. 1, 2021) (brackets in original).

The question is what factors are appropriate to consider when determining whether additional damages are appropriate, now that they are available for violations of section 41102(c). The additional damages do not appear to be compensation for actual damages nor for attorney fees, as both of those categories of damages are already available. Rather, it appears that the additional damages are meant to be akin to a penalty. In Commission enforcement proceedings, enhanced civil penalties are awarded "if the violation was willfully and knowingly committed." 46 U.S.C. § 41107(a). This standard is consistent with the recommendation in Fact Finding 29, which suggests consideration of bad faith or willfulness. Therefore, a standard of knowing and willful will be used to determine whether or not additional damages are appropriate here, as was done in *OJ Commerce*. 2023 WL3969857, at *2, *61.

The Commission has addressed the knowing and willful factor in the civil penalties context, stating:

> In order to prove that a person acted "knowingly and willfully," it must be shown that the person has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the Shipping Act, or purposeful or obstinate behavior akin to gross negligence. The Commission has further held that a person's "'persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a [person] was acting knowingly and willfully in violation of the Act."'

Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd., Docket No. 96-05, 2001 WL 865708, at *47 (FMC June 1, 2001) (citations omitted); *see also Pacific Champion Express Co., Ltd.*, Docket No. 99-02, 2000 WL 534633, at *10 (FMC April 21, 2000).

Here, not only did Shenzhen Unifelix repeatedly refuse to release the 20 Containers to obtain payment for other containers, it also repeatedly violated its NVOCC duties. On multiple occasions, Way paid an agreed upon amount and Shenzhen Unifelix accepted this payment, but then refused to honor a commitment it had made. For example, in July 2022, one day after receiving a payment of $746,617, Shenzhen Unifelix reneged on its commitment to provide trucking, announcing "our company requires to change the contract terms, our company will no longer provide Trucking delivery service at the destination port." FOF 27-28. Also, Shenzhen Unifelix accepted payment in full for the sea freight for the 20 Containers, but then refused to deliver the containers or release the pickup numbers until charges for other containers had been paid. FOF 27-28, 48-54, 57, 61. Thus, Shenzhen Unifelix negotiated resolution of the dispute in bad faith, promising to release containers upon payment and then failing to release them after payment was made. Therefore, doubling the actual injury is appropriate under these facts.

f. Date of Injury

The Shipping Act requires the Commission to award the loss of interest at commercial rates compounded from the date of injury. *See* 46 U.S.C. § 41305(a). Commission regulations establish that "interest granted on awards of reparation in complaint proceedings instituted under the Shipping Act of 1984 will accrue from the date of injury to the date specified in the Commission order awarding reparation." 46 C.F.R. § 502.253.

On September 14, 2022, Way paid the full sea freight for the 20 Containers, despite the containers not being delivered and payment not yet being due per the parties' agreement; but, Shenzhen Unifelix continued to refuse to deliver or release the containers for reasons found unlawful under the Shipping Act. It is therefore reasonable to find September 14, 2022 as the date of injury. *See Brewer v. Maralan*, Docket No. 99-19, 2001 WL 122035, at *4 (FMC Jan. 3, 2001) (affirming as the date of injury the date the shipper paid for the transportation of cargo, where respondent afterwards refused to release the cargo until additional money was paid).

IV. ORDER

Upon consideration of the record herein, the arguments of the parties, the findings and conclusions set forth above, and the determination that Shenzhen Unifelix violated the Shipping Act, sections 41102(c) and 41104(a)(10), it is hereby

ORDERED that Way's Complaint alleging that Shenzhen Unifelix violated the Shipping Act be **GRANTED**. It is

FURTHER ORDERED that Shenzhen Unifelix is ordered to pay Way reparations in the amount of $326,062.50, with interest on the reparations award running from September 14, 2022. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

IAN MILLS, *Claimant* v. CROWLEY LOGISTICS, INC., *Respondent*.	**DOCKET NO. 1995(F)**

Served: April 24, 2024

ORDER OF: Alex M. CHINTELLA, *Administrative Law Judge*.

ORDER PARTIALLY GRANTING CROWLEY LOGISTICS, INC.'S MOTION TO DISMISS[1]

[Notice Not to Review served 5/28/2024, order administratively final]

I. Introduction

This proceeding arises from a complaint filed with the Federal Maritime Commission ("FMC" or "Commission") in connection with a dispute over a container, which was shipped from the United States to Barbados. Claimant, Ian Mills, who is *pro se*, alleges that Respondent, Crowley Logistics, Inc. ("Crowley"), who arranged shipping services, violated section 41102 and section 41104 of the Shipping Act of 1984, as amended ("Shipping Act").

According to the complaint, the parties intended for Crowley to transport a 40-foot container, 98 dry goods, and a clip-on generator from Miami to Barbados. Complaint at 1. Mr. Mills sent the 98 dry goods to Crowley's warehouse and Crowley arranged to pick up the container from Mr. Mills's supplier. Complaint at 1-2. Mr. Mills alleges a clip-on generator was also picked up by Crowley's truck driver on November 19, 2021, but that this was accidentally omitted from the bill of lading. Complaint at 1. On December 14, 2021, when Mr. Mills discovered that the clip-on generator was not with the container in Barbados, he contacted Crowley, to request that the generator be returned or refunded. Complaint at 3. However, Crowley has yet to either return or refund the generator. Complaint at 4-5. Mr. Mills therefore requests reparations totaling $10,662 to reimburse the cost of the generator, transport a replacement generator, and for other losses stemming from this dispute and the absence of the generator. Complaint at 5.

Respondent confirms in its answer, filed July 3, 2023, ("Answer") that the parties intended for Crowley to transport a 40-foot container and 98 dry goods from Miami to Barbados,

[1] The dismissal of this proceeding's section 41102(c) claim will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227(c). Any party desiring to appeal must file such appeal no later than twenty-two days after service. 46 C.F.R. § 502.227(b)(1).

which shipment was detailed in a bill of lading. Answer at 1. Crowley also agrees that Mr. Mills sent the 98 dry goods to Crowley's warehouse and that Crowley arranged to pick up the container from Mr. Mills's supplier. Answer at 1, 5-6. However, Crowley contends that it never agreed to transport a clip-on generator, because the bill of lading does not list a clip-on generator. Answer at 2. Crowley also denies that it collected or received a clip-on generator. *Id.*

This action was initially filed by Mr. Mills as an informal proceeding. A Notice of Filing of Small Claims Complaint and Assignment was served on June 6, 2023. Crowley objected to informal proceedings under Subpart S in its Answer. Therefore, the proceeding is considered as a formal complaint, adjudicated pursuant to Subpart T. 46 C.F.R. § 502.311.

On July 3, 2023, in addition to filing its Answer, Crowley also filed a motion to dismiss ("MTD") asserting that Mr. Mills fails to state a claim under either Section 41102(c) or Section 41104(a)(4). MTD at 1. Crowley contends that there are only two possible factual scenarios, regarding the clip-on generator and the bill of lading, and neither can support an actionable claim. MTD at 2. Mr. Mills filed an opposition to the motion to dismiss July 18, 2023 ("Opposition").

For the reasons set forth below, Crowley's motion to dismiss regarding section 41102(c) is **GRANTED** and Crowley's motion to dismiss regarding section 41104(a)(4) is **DENIED**. Further, significant factual questions remain regarding Crowley's receipt of the clip-on generator. Therefore, the accompanying Order Regarding Completion of the Evidentiary Record directs parties to supplement the record as described therein.

II. Analysis

A. Motion to Dismiss Standard

Although the Commission's Rules of Practice and Procedure ("Rules") do not explicitly provide for motions to dismiss, Rule 12 of the Commission's Rules states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules, to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. Federal Rule of Civil Procedure 12(b) permits a party to raise, by motion, lack of subject matter jurisdiction (12(b)(1)), lack of personal jurisdiction (12(b)(2)), and failure to state a claim (12(b)(6)). Fed. R. Civ. P. 12; *see also* Mitsui *O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, Docket No. 09-01, 2011 WL 7144008, at *11 (FMC Aug. 1, 2011).

"In evaluating whether a complaint before the Commission states a cognizable claim under the Shipping Act, the Commission has relied on Federal Rules of Civil Procedure 12(b)(6) and the federal case-law interpreting it." *Cornell v. Princess Cruise Lines, Ltd.*, Docket No. 13-02, 2014 WL 5316340, at *6 (FMC Aug. 28, 2014) (citation omitted). Thus:

> To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

> defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, [556 U.S. 662, 678] (2009).

Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., Docket No. 09-01, 2011 WL 7144008, at *12 (FMC Aug. 1, 2011). As the Commission has explained:

> Under this standard, courts focus on the language in the complaint, and whether that language sets forth sufficient factual allegations to support the plaintiff's claim for relief. Indeed, "“[w]hile a complaint need not plead 'detailed factual allegations,' the factual allegations it does include "must be enough to raise a right to relief above the speculative level' and to "nudge . . . claims across the line from conceivable to plausible." This "“plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Courts also construe the factual allegations in the complaint in the light most favorable to the plaintiff and must grant the plaintiff the benefit of all inferences that can be derived from the facts as alleged in the complaint. The Commission need not, however, accept any inferences drawn by Complainants that are unsupported by the facts pleaded in the complaint. Moreover, the Commission need not "accept legal conclusions cast in the form of factual allegations."

Cornell, 2014 WL 5316340, at *6-7 (citations omitted); *see also Maher*, 2015 WL 9426189, at *12 ("[m]ere labels and conclusions or a 'formulaic recitation of the elements of a cause of action' will not suffice, nor will 'naked assertions devoid of further factual enhancement.'").

The Commission has clearly indicated that federal case law interpreting Federal Rule of Civil Procedure 12(b)(6), including *Twombly* and *Iqbal*, continues to apply to motions to dismiss filed in Commission proceedings. *Maher,* 2015 WL 9426189, at *6; *Cornell*, 2014 WL 5316340, at *6; *Mitsui,* 2011 WL 7144008, at *12.

B. Discussion

1. Section 41102(c)

Crowley asserts that Mr. Mills fails to state a claim under Section 41102(c) because this section requires that the challenged acts or omissions are occurring on a normal, customary, and continuous basis, but Claimant alleges only a single act or omission - losing and failing to ship one generator. MTD at 1. Mr. Mills contends that Crowley "has not established and/or enforced reasonable practices through omissions carried out on a normal basis" pointing to "clear evidence – based on the facts of this case" of Crowley's inadequate system for confirming receipt of property. Opposition at 3.

Section 41102(c) of the Shipping Act, previously section 10(d)(1), states that a "common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). On December 17, 2018, after notice and comment, the Commission issued Rule 545.4, specifying the elements of a section 41102(c) claim. Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64480 (Dec. 17, 2018) ("Final Interpretive Rule"). Rule 545.4 states:

> 46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:
>
> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
>
> (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
>
> (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
>
> (d) The practice or regulation is unjust or unreasonable; and
>
> (e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4. The Commission discussed the "normal, customary, and continuous" element of § 41102(c) in *HangZhou Gianwang Dress Co. v. RDD Freight Int'l Inc.*, affirming the ALJ's dismissal of the complaint, where this element had not been met. Docket No. 17-02, 2020 WL 5406762, at *3 (FMC Sept. 1, 2020). In *HangZhou*, the respondent released three of complainant's shipments to the same consignee without obtaining the original bill of lading or complainant's consent, which conduct occurred over two months. WL 5406762, at *5. The Commission concluded that "releasing three shipments of one shipper to one consignee over two months does not appear to be 'customary' or 'continuous' conduct . . . [n]or is there evidence that Respondent's conduct was 'often repeated,' systematic,' 'uniform,' and 'habitual.'" *HangZhou*, 2020 WL 5406762, at *5 (citing Final Interpretive Rule, 83 Fed. Reg. at 64479). The Commission also held the evidence did not establish the practice to be "normal," noting: "[a]lthough there is no intent requirement for § 41102(c) . . . that Respondent was apparently misled is relevant to whether its conduct was 'normal.'" 2020 WL 5406762, at *5.

Here, Mr. Mills alleges that the "Parties intended for the Respondent to transport a range of items from Miami to Barbados," including the 40-foot container, 98 dry goods, and a clip-on generator, "but accidentally omitted to include the clip on generator (stored in the Respondent's warehouse)" on the bill of lading. Complaint at 1. Mr. Mills also repeatedly refers in his Complaint and Opposition to the generator having been "lost" by Crowley. Complaint at 1-2, 4; Opposition at 3. Both the characterization of the generator as "lost" and "accidentally" omitted from the bill of lading point to this not having been "normal" conduct for Crowley. Further, Mr. Mills's allegations concern the loss of a single generator on a single occasion. This is below the bar already found insufficient to constitute customary or continuous conduct in *HangZhou*. *HangZhou*, 2020 WL 5406762, at *5-6.

In his Opposition, Mr. Mills provides additional factual support for the claimed acts or omissions occurring on a "normal, customary, and continuous basis," asserting:

> [Crowley] has not established and/or enforced reasonable practices through omissions carried out on a normal basis . . . by not having (or enforcing) an adequate system for confirming receipt of property that it collects (in contrast to items which are sent to it).
>
> This is clear because (a) the Respondent's Truck Driver used no system (receipts/logs etc) to confirm receipt of the generator (fortunately the Claimant has evidence from the supplier's paperwork); (b) the Respondent's focal point (Elizabeth Guia, logistics coordinator) had no way to determine whether the generator had or had not been collected; (c) the Respondent's internal investigation (between December 14 and December 20) revealed that the Respondent's warehouse team did not keep a record or photograph of what it received from the Truck Driver and couldn't confirm either way what was received; and (d) the Respondent's internal complaint procedure made no enquiries with the Claimant nor with the supplier of the generator (despite the Claimant having provided signed paperwork showing collection by the Respondent) nor appeared to follow up directly with the Truck Driver. All of this demonstrates omissions being carried out on a normal and continuous basis resulting in unreasonable practices overseeing the collection and handling of property.

Opposition at 3-4; *see also* Complaint at 1-2 (noting that Mr. Mills "asked for his property back but the Respondent said they couldn't find the generator (as they don't have adequate systems in place and/or enforced)." However, these factual allegations essentially describe the same isolated incident. As the Commission affirmed in *Crocus Investments, LLC v. Marine Transport Logistics, Inc.*, "Commission precedent has made clear that a single shipment or isolated act or omission does not show a pattern or practice." Docket No. 15-04, 2021 WL 3732849, at *8 (FMC Aug. 18, 2021), petition for review denied in *sub nom. Crocus Investments, LLC v. FMC*, 2022 WL 3012275 (D.C. Cir. 2022)); *see also Ngobros and Co. Nigeria Ltd.*, Docket No. 14-15, 2019 WL 7168688 (FMC Dec. 17, 2019) ("finding a [section 41102(c)] violation based on a single act or omission, is inconsistent with the original intent of Congress, the rules of statutory construction, and Commission precedent.").

Mr. Mills's factual allegations offered in its Opposition are also similar to those advanced in *Crocus*, in that Mr. Mills points to a range of possible failings within Crowley's systems. In *Crocus*, the complainant listed "multiple transgressions allegedly committed by Marine Transport ranging from charging for services it failed to provide, falsifying documents, unreasonably withholding cargo, committing conversion, mishandling and failing to account for funds held in escrow, and not following Crocus's instructions, among other things." *Id.* at *9. But the Commission ultimately found that the "normal, customary, and continuous" element had not been met, stating: "Crocus's approach would result in liability if a regulated entity's 'practice' was behaving unreasonably. That is not how § 545.4 is structured, and Crocus cannot combine disparate types of allegedly unreasonable behavior into a practice for purposes of § 41102(c)." *Id.*

Here as well, Mr. Mills's factual allegations regarding disparate systems and processes potentially related to the loss of the generator do not plausibly allege a claimed act or omission of Crowley that is normal, customary, and continuous as required for a section 41102(c) claim. Mr. Mills's section 41102(c) claim is therefore **DISMISSED**. Mr. Mills's factual allegations concerning systems utilized and the process by which the generator was lost do bear on fairness, however, and these allegations will be considered in the assessment of Mr. Mills's 41104(a)(4) claim that follows.

2. Section 41104(a)(4)

Crowley asserts that Mr. Mills fails to state a claim under Section 41104(a)(4) because Crowley did not load or land the freight, rather, according to Claimant, Crowley lost the generator; if the generator was never shipped, then Crowley also did not engage in any "service pursuant to a tariff" related to the generator; losing a generator is not "unfair or unjustly discriminatory;" and there is no allegation that Crowley treated Mr. Mills differently than any other customer. MTD at 1-2, 8. Mr. Mills contends that section 41104(a) prohibits a carrier from acting unfairly, directly or indirectly, in the matter of loading and landing freight for service pursuant to a tariff; here the parties had the intention for Crowley to load and land freight in accordance with a service pursuant to a tariff subject to putting in place a bill of lading once items were received; and when Crowley collected the generator but did not have a system in place (or implemented) for recording that, it became a matter of indirectly acting unfairly in relation to loading freight. Opposition at 4.

As relevant here, Section 41104(a)(4) of the Shipping Act, previously 10(b)(4)(D), states that a "common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of . . . (D) loading and landing of freight[.]" 46 U.S.C. § 41104(a)(4)(d).[2]

Here, Mr. Mills alleges that he presented information concerning the generator to Crowley, along with information concerning the 98 dry goods, for inclusion on the bill of lading; and that Crowley took possession of the clip-on generator, which was physically attached to the container that Crowley picked up and shipped for Mr. Mills. Complaint at 2-3; Opposition at 3. Mr. Mills further alleges that the generator was subsequently lost by Crowley and has neither been shipped nor returned to Mr. Mills. Complaint at 1-2, 4. The instant case is therefore similar to *Adair v. Penn-Nordic Lines, Inc.*, where an NVOCC received a motorcycle but did not ship the motorcycle, but initially lost it. Docket No. 1695(F), 1991 WL 383091, at *8-9 (ALJ Sept. 19, 1991), admin. final Oct. 24, 1991. The motorcycle was later located by the NVOCC in a warehouse, but the NVOCC refused to return the cargo to complainant until storage charges were paid. *Id.* at *9. The ALJ held that the "litany of misconduct" by the NVOCC demonstrated a 10(d)(1) violation and that "such conduct also would support a finding that Penn-Nordic engaged in 'any unfair or unjustly discriminatory practice' in the matter of 'the loading and landing of freight'" although concluding "it is unnecessary to determine . . . additional violations

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[2] On June 16, 2022, the Ocean Shipping Reform Act of 2022 ("OSRA 2022") passed, which revised portions of the Shipping Act, including section 41104(a)(4). However, because the relevant conduct here was completed prior to June 2022, the pre-OSRA version of 41104(a)(4) is applicable. *See Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994); *Amin v. Quad/Graphics, Inc.*, 929 F. Supp. 73, 79 (N.D.N.Y. 1996).

since Penn-Nordic can be found to have violated section 10(d)(1).” *Adair*, 1991 WL 383091, at *14.

Further, while Crowley seems to suggest that an element of discrimination is necessary to support a section 41104(a)(4) claim, some decisions have read this section so as to differentiate between an “unfair” practice and an “unjustly discriminatory” practice. For example, in *Symington Euro Car Transport Inc.*, where an NVOCC took money from complainant to ship a car, but never shipped the car, the ALJ found that the NVOCC’s “conduct constitutes an unfair practice in the matter of loading and landing of complainant's automobile.” Docket No. 92-47, 1993 WL 113704, at *5 (ALJ Mar. 17, 1993), admin. final Apr. 22, 1993.

Thus, while significant questions remain concerning this claim, these will be better resolved with additional information, including the process Crowley followed between the truck driver’s receipt of Mr. Mills’s container, with the generator allegedly attached, and the shipment of such container with no generator attached. At this stage of the proceeding, accepting Mr. Mills’s allegations as true, he has plausibly alleged a section 41104(a)(4) claim. Therefore Crowley’s motion to dismiss the 41104(a)(4) claim is **DENIED**.

3. Bill of Lading

Crowley asserts in its Motion to Dismiss that there are only two possible factual scenarios, neither of which can support an actionable claim. MTD at 2. Crowley proposes that under scenario one, if the parties intended for Crowley to transport the clip on generator but omitted the generator from the bill of lading by accident, then dismissal is appropriate because the bill of lading applies, along with its terms and conditions, notice period, statute of limitations, forum selection clause, and $500 limitation of liability; under scenario two, if the bill of lading does not apply to the generator because it was not listed on the bill of lading, then Crowley has no obligations related to the generator because there is no agreement to ship the generator. MTD at 2.

Mr. Mills contends that it is incorrect for Crowley to suggest the bill of lading was entered into prior to Crowley receiving the items, as only after all items were with Crowley, including Crowley signing for and collecting the generator, did Crowley create a bill of lading; it was Crowley’s fault for not including the generator in the bill of lading and not shipping it; and Claimant is not claiming that Crowley is liable under the bill of lading, but that Crowley is liable for violating the Shipping Act. Opposition at 4.

Crowley’s argument concerning the bill of lading misses the mark. Mr. Mills has alleged violations of the Shipping Act, and the Shipping Act is not limited by right or restrictions contained within a bill of lading. *See, e.g.*, Final Rule: Interpretive Rule on Demurrage and Detention, Docket No. 19-05, 85 Fed. Reg. 29638 at 29648 (May 18, 2020) (“Ocean carriers and marine terminal operators (and ocean transportation intermediaries) do not have an unbounded right to contract for whatever they want. They are limited by the prohibitions of the Shipping Act, one of which is section 41102(c).”). Furthermore, Crowley’s liability also is not bounded by dollar values contained within its bill of lading. Injured parties are compensated for actual injury in the case of Shipping Act violations. 46 U.S.C. § 41305(b). Accordingly, Mr. Mills’s section

41104(a)(4) claim will continue to be evaluated, aided by the additional discovery ordered, as described in the accompanying Order Regarding Completion of the Evidentiary Record.

C. Conclusion

For the reasons discussed, it is found that Mr. Mills has stated a plausible claim for relief with respect to his section 41104(a)(4) claim, however, Mr. Mills's section 41102(c) claim is dismissed. The parties are also encouraged to make use of the services of the Office of Consumer Affairs and Dispute Resolution Services (CADRS), to the extent that this may be helpful in resolving outstanding issues.

IV. Order

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

ORDERED that Respondent Crowley's motion to dismiss regarding section 41102(c) be **GRANTED**. It is

FURTHER ORDERED that Respondent Crowley's motion to dismiss regarding section 41104(a)(4) be **DENIED**.

Alex M. Chintella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

D.F. YOUNG, INCORPORATED, *Complainant*

v.

WALLENIUS WILHELMSEN LOGISTICS AS, K/N/A WALLENIUS WILHELMSEN OCEAN AS AND WALLENIUS WILHELMSEN LOGISTICS AMERICAS, LLC, *Respondents*.

DOCKET NO. 23-14

Served: April 29, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Chief Administrative Law Judge's March 27, 2024, Initial Decision Approving Confidential Settlement Agreement has expired. Accordingly, this decision has become administratively final.

David Eng
Secretary

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

L & A SHIPPING, INC., REVOCATION OF OCEAN TRANSPORTATION INTERMEDIARY LICENSE NO. 026495	**DOCKET NO. 24-02**

Served: May 14, 2024

ORDER OF: Alex M. CHINTELLA, *Administrative Law Judge*.

INITIAL DECISION REVOKING OCEAN TRANSPORTATION INTERMEDIARY LICENSE[1]
[Notice Not to Review served 6/14/2024, decision administratively final]

I. INTRODUCTION

A. Summary and Background

In this proceeding, the Bureau of Certification and Licensing ("BCL") and the Bureau of Enforcement, Investigations, and Compliance ("BEIC") at the Federal Maritime Commission ("FMC" or "Commission") contend that Respondent L & A Shipping, Inc. ("L & A Shipping") should have its ocean transportation intermediary ("OTI") license revoked. L & A Shipping, representing itself, requested a hearing on the proposed revocation of its license on January 7, 2024.

According to the Commission's Bureau of Trade Analysis ("BTA"), Respondent L & A Shipping was licensed by the Commission as an ocean freight forwarder and non-vessel operating common carrier ("NVOCC") on August 2, 2017. On or about August 31, 2020, BTA received notice that L & A Shipping's tariff was cancelled effective July 1, 2020. BTA subsequently sent a series of communications to L & A Shipping in 2020 through 2022, which produced no response from L & A Shipping.

As a result, BCL notified L & A Shipping on December 18, 2023, that it intended to revoke L & A Shipping's OTI license, because it had determined that L & A Shipping had violated 46 C.F.R. § 515.16(a)(1) of the Commission's regulations by failing to timely publish a tariff, as required by 46 U.S.C. § 40501; and 46 C.F.R. § 515.16(a)(2) by failing to respond to a lawful inquiry by the Commission.

B. Procedural History

L & A Shipping requested a hearing in connection with the proposed revocation, and the Secretary of the Commission assigned this proceeding to the Office of Administrative Law

[1] This initial decision will become final within 22 days of service of this decision in the absence of exceptions filed by either party or review by the Commission. 46 C.F.R. § 502.708(c).

Judges for adjudication. On January 8, 2024, the Secretary issued a Notice of Hearing Request and Assignment, stating that on December 18, 2023, BCL had notified L & A Shipping by letter that the Commission intended to revoke its OTI license, and that on January 7, 2024, L & A Shipping had requested a hearing on the proposed revocation pursuant to the Commission's Rules at 46 C.F.R. § 515.17 and 46 C.F.R. Part 502, Subpart X. The Secretary assigned this proceeding to the Office of Administrative Law Judges for adjudication, pursuant to Rule 702(a) at Subpart X. 46 C.F.R. § 502.702(a).

On January 18, 2024, a Notice and Initial Order ("Notice") was issued pursuant to Rule 702(b), notifying OE and BCL of L & A Shipping's hearing request. The Notice then instructed BEIC to file a copy of the notice given to L & A Shipping and a copy of BCL's materials supporting the notice, by February 19, 2024, as well as to serve the same documents on L & A Shipping pursuant to 46 C.F.R. § 502.702(b). The Notice also indicated that OE may file a brief outlining its legal arguments, proposed findings of fact, and additional information.

On February 16, 2024, BEIC filed the Notice of Revocation issued to L & A Shipping by BCL, and an appendix of materials supporting the Notice ("BEIC App."). BEIC indicated that it respectfully declined the opportunity to file a brief, and that it would submit its reply within 20 days of L & A Shipping's response. On February 22, 2024, a Notice and Scheduling Order was issued, establishing a deadline of March 25, 2024 for L & A Shipping to file any reply, and a deadline of 20 days after service of L & A Shipping's response for BEIC to file its reply.

No response was filed by L & A Shipping by March 25, 2024, or thereafter. In addition, no response was received from BEIC by its April 14, 2024 deadline.

Pursuant to Subpart X, Rule 708, the initial decision is due within 40 days of OE's reply deadline of April 14, 2024, *i.e.* within 40 day of the record being closed. 46 C.F.R. § 502.708(a); *see also* Final Rule: Hearing Procedures Governing the Denial, Revocation, or Suspension of an OTI License, 85 Fed. Reg. 5579, 5581 (Jan. 29, 2020).

C. Argument of the Parties

As noted, L&A Shipping has not participated in this proceeding since its request for a hearing on January 7, 2024. It has not submitted any arguments, nor has it provided any information concerning its plans for publishing a tariff, nor any explanation for its lack of response to Commission inquiries. The presiding officer's notices pursuant to 46 C.F.R. §§ 502.702 and 502.703 were served to the email address from which L & A Shipping transmitted its hearing request (lamineasbcompany@gmail.com) – since all parties are under a continuing obligation to provide the Commission with accurate and current contact information, including email addresses, I will presume that these orders reached L & A Shipping. 46 C.F.R. § 502.2(i).

BEIC submitted the required materials supporting notice of intent to revoke on February 16, 2024. BEIC did not submit proposed findings of fact or a brief in support of revocation. However, in its December 18, 2023 letter, BCL indicated its intent to revoke L & A Shipping's OTI license for failure to timely publish a tariff as required by 46 U.S.C. § 40501. BCL also noted that failure to respond to any lawful order or inquiry by the Commission is grounds for revocation or suspension of a license as set forth in 46 CFR § 515.16. BCL further provided a list of attempts to contact L & A Shipping by email and phone between September 25, 2020 and May 26, 2022, adding that L & A Shipping did not respond to any of these messages.

II. CONTROLLING AUTHORITY AND FACTUAL FINDINGS

A. Controlling Legal Authority

The Shipping Act grants authority to revoke an OTI's license under certain conditions:

> The Federal Maritime Commission, after notice and opportunity for a hearing, shall suspend or revoke an ocean transportation intermediary's license if the Commission finds that the ocean transportation intermediary –
>
> (1) is not qualified to provide intermediary services; or
>
> (2) willfully failed to comply with a provision of this part or with an order or regulation of the Commission.

46 U.S.C. § 40903(a). The relevant "provision of this part" is 46 U.S.C. § 40501, which requires common carriers to publish its tariffs:

> (a) Automated tariff system.--
>
> (1) In general.--Each common carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established. However, a common carrier is not required to state separately or otherwise reveal in tariffs the inland divisions of a through rate.

46 U.S.C. § 40501. The Commission's regulations, consistent with these statutory provisions, require NVOCCs[2] such as L & A Shipping to inform the Commission of the location of their tariffs and warns NVOCCs that failure to maintain a tariff will result in license revocation:

> (a) General. Unless otherwise exempted or excepted by § 520.13, all common carriers and conferences must keep open for public inspection in automated tariff systems tariffs showing all rates, charges, classifications, rules, and practices between all points or ports on their own routes and on any through transportation route that has been established.
>
> * * *
>
> (d) Notification.

[2] The Shipping Act provides that the term "ocean transportation intermediary" means "an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(20). The term non-vessel-operating common carrier is in turn defined as a common carrier that "(A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(17).

(1) Prior to the commencement of common carrier service pursuant to a published tariff, each common carrier and conference must electronically submit to BTA Form FMC–1 via the Commission's website www.fmc.gov.

(2) The common carrier and conference must include on Form FMC-1 its organization name, organization number, home office address, name and email address and telephone number of the firm's representative, the location of its tariffs, and the publisher, if any, used to maintain its tariffs.

(3) Any changes to the above information must be transmitted to BTA within 30 calendar days.

* * *

(e) Location of tariffs. The Commission will publish on its website, www.fmc.gov, a list of the locations of all common carrier and conference tariffs.

(f) NVOCC failure to maintain tariff. Failure to maintain a tariff will result in revocation of an NVOCC's license or suspension of a foreign-based unlicensed NVOCC's registration.

46 C.F.R. § 520.3.

Further, under the Commission's regulations, a license may be revoked or suspended for reasons including failure to respond to a Commission inquiry:

(a) Grounds. Except for the automatic revocation for termination of proof of financial responsibility under § 515.26, a license may be revoked or suspended after notice and an opportunity for a hearing under the procedures of § 515.17. The notice of revocation or suspension will provide, in detail, a statement of the facts supporting the action. The licensee may request a hearing on the proposed revocation or suspension by submitting to the Commission's Secretary, within twenty (20) days of the date of the notice, a statement of reasons why the license should not be revoked or suspended. Such hearing shall be provided pursuant to the procedures contained in § 515.17. Otherwise, the action regarding the license will become effective. A license may be revoked or suspended for any of the following reasons:

(1) Violation of any provision of the Act, or any other statute or Commission order or regulation related to carrying on the business of an ocean transportation intermediary;

(2) Failure to respond to any lawful order or inquiry by the Commission;

(3) Making a materially false or misleading statement to the Commission in connection with an application for a license or an amendment to an existing license;

(4) A Commission determination that the licensee is not qualified to render intermediary services; or

(5) Failure to honor the licensee's financial obligations to the Commission.

46 C.F.R. § 515.16(a).

B. Burden of Proof

Under the Administrative Procedure Act ("APA"), an Administrative Law Judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). The APA provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). The term "burden of proof" as used in the APA has been construed to mean burden of persuasion. *Revocation of Ocean Transportation Intermediary License No. 021899 - Trans World Logistics Corporation*, Docket No. 12-04, 2012 WL 11914708, at *2 (FMC July 20, 2012) (*citing Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994)). When "the party with the burden of persuasion establishes a *prima facie* case supported by 'credible and credited evidence,' it must either be rebutted or accepted as true." *Id*. As set forth in the Findings of Fact below, the materials filed by BEIC, which I find credible, establish a *prima facie* case, which L & A Shipping has not rebutted.

In addition, this initial decision addresses only material issues of fact and law. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

C. Findings of Fact ("FOF")

1. L & A Shipping was licensed as an ocean freight forwarder and NVOCC on August 2, 2017. BEIC App., Ex. 4 at BEIC12.

2. On August 28, 2017, BTA received an initial FMC-1 filing from L & A Shipping advising that its tariff was published by Distribution Publications, Inc. ("DPI"). BEIC App., Ex. 4 at BEIC012.

3. On or about August 31, 2020, BTA received notification from DPI advising that the tariff for L & A Shipping was cancelled effective July 1, 2020.

4. On September 25, 2020, the Service Contracts and Tariff Compliance ("SCTC") office staff in BTA emailed L & A Shipping, stating that a tariff cancellation notice had been received from DPI, advising that its tariff was cancelled effective July 1, 2020. BEIC

App., Ex. 2 at BEIC007. SCTC continued: "If your tariff is not cancelled but being published at another location, you must submit Form FMC-1 to notify us of the new location. If you are no longer operating as an NVOCC you must contact your surety agent to request cancellation of your NVOCC bond." *Id.* SCTC then requested a response within 10 business days and warned "Failure to publish a tariff and file Form FMC-1 is in violation of the Commission's regulations and will result in fines and/or penalties and may ultimately result in license revocation." *Id.* No response was received from L & A Shipping. BEIC App., Ex. 4 at BEIC012.

5. On November 10, 2020, SCTC staff sent a follow-up email to L & A Shipping, requesting a response within ten business days regarding its plans for publishing a tariff and submitting Form FMC-1. BEIC App., Ex. 2 at BEIC010, Ex. 4 at BEIC012. No response was received from L & A Shipping. BEIC App., Ex. 4 at BEIC012.

6. On November 19, 2020, SCTC staff sent another email to L & A Shipping, stating that the Commission's regulations require carriers to publish a tariff and submit Form FMC-1 to advise the public of the location of their tariff, and noting: "If you intend to keep your OTI license you must publish a tariff. If you do not comply with the Commission's regulations, your license could become subject to revocation. Your immediate attention to this matter is strongly encouraged." BEIC App., Ex. 2 at BEIC009-010, Ex. 4 at BEIC013. L & A Shipping did not respond to this message. BEIC App., Ex. 4 at BEIC012.

7. On February 3, 2021, SCTC again emailed L & A Shipping, writing:

> This is our 3rd attempt at trying to resole the issue of your tariff cancellation. It has been practically 7 months since your tariff was cancelled, and you have not responded to our previous e-mails. The Commission's regulations at 46 CFR Part 520.3 require NVOCCs to publish a tariff and file Form FMC-1 with this Commission to notify the public of the location of your tariff.
>
> You are operating in violation of the Commission's rules for Carrier Automated Tariff systems and continued violation of the Commission's regulations will result in enforcement action which could result in the revocation of your current OTI license.
>
> Again, we request a response to this e-mail within 10 business days or we will forward this matter to the Commission's Bureau of Enforcement for any action deemed appropriate.

BEIC App., Ex. 2 at BEIC009, Ex. 4 at BEIC013. No response was received from L & A Shipping. BEIC App., Ex. 4 at BEIC012.

8. On May 26, 2022, SCTC made a phone call to L & A Shipping and left a voicemail message. No response was received from L & A Shipping. BEIC App., Ex. 4 at BEIC013.

9. In June 2022, L & A Shipping was referred to BEIC for follow-up. BEIC App., Ex. 4 at BEIC013. L & A Shipping continued not to submit a Form FMC-1 filing. *Id.*

10. On September 19, 2023, BEIC referred L & A Shipping back to BTA. BEIC App., Ex. 4 at BEIC013.

11. In late 2023, BTA referred L & A Shipping's noncompliance to BCL, providing a background summary and stating that "since BTA's attempts at bringing L & A Shipping into compliance have been unsuccessful, we are forwarding this matter to BCL for whatever action deemed appropriate." BEIC App., Ex. 4 at BEIC013.

12. On December 18, 2023, BCL sent to L & A Shipping a notice of intent to revoke its OTI license. BEIC App., Ex. 1 at BEIC004.

III. DISCUSSION

A. The Evidence Supports a Finding that L & A Shipping's OTI License Should be Revoked

The materials submitted by BEIC support a finding that L & A Shipping's OTI license should be revoked, and no evidence of record contradicts the materials submitted in support of revocation. Pursuant to the Shipping Act, an OTI's license is subject to revocation, including for willfully failing to comply with a provision of the Shipping Act or any other statute, a Commission order, or regulation. 46 U.S.C § 40903(a). The Commission's regulations subject an OTI's license to revocation for, in pertinent part, a violation of any provision of the Shipping Act or any statute, a Commission order or regulation related to carrying on the business of an OTI, or failure to respond to any lawful order or inquiry by the Commission. 46 C.F.R § 515.16(a).

Here, L & A Shipping's tariff was cancelled as of July 1, 2020. FOF 3. If L & A Shipping intended to publish its tariff at a new location, it was required to file Form FMC-1 with the Commission to notify the public of the location of its tariff. 46 C.F.R. § 520.3. As this rule further specifies, "[f]ailure to maintain a tariff will result in revocation of an NVOCC's license." 46 C.F.R. § 520.3(f). There is no evidence in the record to support that L & A Shipping has either published a tariff or filed a Form FMC-1 subsequent to its cancellation on July 1, 2020. The record thus supports a finding that L & A Shipping failed to comply with the Commission's regulations at 46 C.F.R. § 520.3.

In addition, Commission regulations provide that an OTI license may be revoked for failure to respond to lawful orders or inquiries by the Commission. 46 C.F.R. § 515.16(a)(2). Here, the evidence demonstrates that L & A Shipping failed to respond to any of BTA's lawful inquiries, including its September 25, 2020 email, November 10, 2020 email, November 19, 2020 email, February 3, 2021 email, and May 26, 2022 voicemail message. FOF 4-8. L & A Shipping's conduct was thus contrary to the Commission's regulations at 46 C.F.R. § 515.16(a)(2).

As noted, L & A Shipping did not file a brief in this proceeding. But in his request for a hearing, Abdoulaye Bah, President of L & A Shipping, states that "I was not fully operational immediately after we obtained our shipping license." It is not clear what this means, or how it is relevant – if L & A Shipping was undertaking any OTI activities whatsoever, it was required to comply with the tariff-publication requirements. Mr. Bah also states that he "lost access to the email where most of the letters were sent." Again, this is unavailing. The regulations place the affirmative duty to update the licensee's email address on the licensee within 30 days – timely compliance with this requirement would have ensured receipt of BTA's emails. 46 C.F.R. § 520.3(d)(3). Finally, L & A Shipping states that it is "in the process of renewing its tariff." But no evidence has been presented that L & A Shipping's tariff has been published as required by the regulations, or that the notification requirements of 46 C.F.R. § 520.3 have been satisfied.

Based on the foregoing, the evidence supports a finding that L & A Shipping: failed to comply with the Commission's tariff-publication requirements (violating 46 U.S.C. § 40501(a) and 46 C.F.R. § 520.3); and also failed to respond to BTA's lawful inquiries (violating 46 C.F.R. § 515.16(a)(2)). Accordingly, pursuant to 46 U.S.C § 40903(a) and 46 C.F.R § 515.16(a), L & A Shipping's OTI license is revoked.

IV. ORDER

Upon consideration of the evidence of record, and for the reasons stated above, it is hereby

ORDERED that L & A Shipping's Ocean Transportation Intermediary License No. 026495 be **REVOKED**. It is

FURTHER ORDERED that L & A Shipping cease and desist any and all ocean transportation intermediary activities.

Alex M. Chintella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

MSRF, INC., *Complainant*

v.

HMM CO. LTD., *Respondent*.

DOCKET NO. 22-20

Served: May 16, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's April 15, 2024, Order Denying Respondent's Petition for Attorney Fees has expired. Accordingly, this order has become administratively final.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

SEAFAIR USA LLC, *Complainant*

v.

STERLING CONTAINER LINE LTD. AND ATLANTIC FORWARDING LTD., *Respondents*.

DOCKET NO. 22-34

Served: May 16, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's April 15, 2024, Initial Decision has expired. Accordingly, this decision has become administratively final.

David Eng
Secretary

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

M.E. DEY & CO., INC., *Complainant*

v.

HAPAG-LLOYD AG AND HAPAG-LLOYD (AMERICA) LLC,
Respondents and Third-Party Complainants

v.

CSX TRANSPORTATION, INC., *Third-Party Respondent*.

DOCKET NO. 22-35

Served: May 17, 2024

ORDER OF: Alex M. CHINTELLA, *Administrative Law Judge*.

ORDER GRANTING THIRD-PARTY RESPONDENT CSX TRANSPORTATION'S MOTION TO DISMISS THE THIRD-PARTY COMPLAINT AND RESETTING BRIEFING SCHEDULE[1]

[Notice of Commission Determination to Review served 6/14/2024, final decision pending]

I. Background

On December 23, 2022, the Federal Maritime Commission (the "Commission" or "FMC") issued a notice of filing of complaint and assignment initiating this proceeding. On January 17, 2023, Hapag-Lloyd America filed a motion to dismiss. On February 1, 2023, Dey filed a motion for leave to file an amended complaint adding the ocean carrier Hapag-Lloyd AG as a respondent (respondents/third-party complainants will be collectively referred to as "Hapag"). Hapag did not file an opposition to the motion for leave. On February 28, 2023, the Presiding Officer granted M.E. Dey & Co., Inc.'s ("Dey") motion for leave to amend its complaint and denied the motion to dismiss as moot. On March 1, 2023, the Commission issued a notice of filing of amended complaint and assignment. On March 27, 2023, Hapag filed an answer to Dey's Amended Complaint.

On March 31, 2023, the Commission's Bureau of Enforcement, Investigations, and Compliance ("BEIC") filed a motion to intervene in the proceeding. In its motion, BEIC advised

[1] Any party desiring to appeal the granting of a motion for dismissal must file such appeal no later than twenty-two (22) days after service of the ruling on the motion in question. 46 C.F.R. § 502.227 (b)(1). In the absence of appeal, this order shall become the order of the Commission thirty (30) days after date of service unless the Commission decides to review. 46 C.F.R. § 502.227(c).

the Commission that it "does not seek to participate in discovery, examination of witnesses, or the presentation of evidence" but sought to participate as a limited party to primarily participate in briefing and "reserving the ability to address jurisdictional or other procedural issues." On April 7, 2023, Hapag filed a response to BEIC's motion to intervene, stating that it takes "no position on the merits of the Motion. Respondents submit this reply solely for purposes of noting for the record their disagreement with the manner in which the facts relating to this proceeding are characterized in the Motion." On April 10, 2023, the Presiding Officer granted BEIC's motion to intervene.

On April 13, 2023, Hapag filed a motion for leave to file a third-party complaint against CSX Transportation, Inc. ("CSXT"). On April 27, 2023, the Presiding Officer denied Hapag's motion finding that while "[Hapag] sets forth factual allegations and further alleges 'causation and injury to complainants,' [Hapag] does not clearly allege a violation of the Shipping Act or OSRA." On May 4, 2023, Hapag filed a renewed motion for leave to file a third-party complaint. On May 8, 2023, the presiding officer granted Hapag's motion to file its third-party complaint, finding that, as revised, the complaint alleged violations of Sections 41102(c) and 41104(a)(14) of the Shipping Act. On May 12, 2023, the FMC published a notice of filing of third-party complaint. On June 5, 2023, counsel for CSXT entered a special appearance for the purpose of challenging the Commission's jurisdiction over CSXT and filed a motion to dismiss the third-party complaint. On June 20, 2023, Dey and Hapag filed oppositions to the motion, and CSXT filed a reply on June 27, 2023. This matter was reassigned to the undersigned on June 21, 2023. Discovery was subsequently completed, and the briefing schedule stayed at the request of the parties pending resolution of this motion.

Hapag's third-party complaint against CSXT consists of two counts. The first is an alleged violation of 46 U.S.C. § 41102(c), which prohibits a common carrier or marine terminal operator from failing to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, and delivering property." Hapag alleges that Dey contracted with Hapag to transport 16 containers from Rotterdam to Nashville. Third-Party Compl., ¶ 15. Hapag moved the containers by ocean transport from Antwerp, Belgium to Charleston, South Carolina, and they were transported by Hapag's subcontractor, CSXT, from Charleston to CSXT's rail terminal in Nashville, Tennessee under the same bill of lading. Id. at ¶¶ 16-17. CSXT "independently assessed, billed, collected, and retained the $136,500 in storage fees at issue [in Dey's complaint] without prior notice to or approval of [Hapag]." Id. at ¶ 41. Although the Third-Party Complaint does not explicitly connect these dots, it is reasonable to presume that Hapag contends that it was CSXT's "failure to permit Dey's motor carrier to provide its own chassis constitute[ing] an unreasonable practice that violates § 41102(c)," that resulted in the contested fees. See Third-Party Compl., ¶ 44. The argument being that it is not Hapag, but Hapag's subcontractor CSXT, that violated the Shipping Act and should be liable for any potential reparations to Dey. Id. at ¶ 43.

Count II is based on 46 U.S.C. § 41104(a)(14), which provides that "a common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not…assess any party for a charge that is inconsistent or does not comply with all applicable provisions and regulations, include subsection (c) of section 41102 or part 545 of title 46, Code of Federal Regulations (or successor regulations)." The factual basis of Count II echoes Count I – CSXT assessed the contested charges to Dey in violation of § 41102(c) – and is premised on the contention that CSXT is "any other person" for purposes of § 41104.

The parties' arguments with respect to jurisdiction fall into several broad categories. First, they disagree as to the appropriate standard for determining whether and to what extent the Commission may exercise jurisdiction over rail carriers such as CSXT. Second, they argue over the impact of *TCW v. Evergreen* on the relevant jurisdictional analysis. Finally, Hapag and Dey contend that CSXT's motion to dismiss is premature because the jurisdictional question is inextricably bound up with the merits of the case.

II. Analysis

A. Motion to dismiss standard

Although the Commission's Rules of Practice and Procedure ("Rules") do not explicitly provide for motions to dismiss, Rule 12 states that the Federal Rules of Civil Procedure ("FRCP") will be followed in instances that are not covered by the Rules, to the extent that application of the FRCP is consistent with sound administrative practice. 46 C.F.R. § 502.12. CSXT's motion to dismiss alleges that the third-party complaint fails to plausibly establish subject matter jurisdiction. Whether the third-party complaint sets forth sufficient facts to establish that CSXT is a regulated entity subject to the Shipping Act provisions at issue is a question of subject matter jurisdiction, and its failure to do so would require dismissal of the third-party complaint. The determination of whether there is Commission jurisdiction in this case requires an analysis of whether CSXT is "[e]ngaged … in the business of furnishing wharfage, dock, warehouse, or other terminal facilities." 46 U.S.C. § 40102(14). If CSXT is engaged in such business, the inquiry then turns to whether its activities are "in connection with a common carrier." *Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, FMC Docket No. 06-02, 2007 WL 2468431, at *4 (F.M.C. Aug. 2, 2007).

The Commission looks to FRCP 12(b)(1) when considering dismissals based on lack of subject matter jurisdiction. *MAVL Capital Inc. v. Marine Transport Logistics, Inc*., Docket No. 16-16, 2020 WL 6445041, at *4 (FMC Oct. 29, 2020). Under FRCP 12(b)(1), there are two types of jurisdictional attacks: (1) a factual attack, which challenges the existence of subject matter jurisdiction using material extrinsic from the pleadings, such as affidavits or testimony; and (2) a facial attack, in which a respondent's challenge is confined to whether the complainant has sufficiently alleged a basis of subject matter jurisdiction. *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc*., 524 F.3d 1229, 1232–33 (11th Cir. 2008); *see also Osborn v. United States*, 918 F.2d 724, 729-730 (8th Cir. 1990).

Where, as here, a respondent challenges the sufficiency of the allegations regarding subject matter jurisdiction—a facial challenge—a court will employ the *Twombly-Iqbal* "plausibility" standard, which is the same standard used to evaluate facial challenges to claims under FRCP 12(b)(6). *Pena v. Ortiz*, 521 F. Supp. 3d 747, 750 (N.D. Ill. 2021). Under this plausibility standard, the Commission will dismiss a claim if the complainant fails to plead "enough facts to state a claim for relief that is plausible on its face." *Maher Terminals, LLC v. the Port Auth. of New York and New Jersey*, Docket No. 12-02, 2015 WL 9426189, at *12 (FMC Dec. 18, 2015) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, (2007)). Facial plausibility requires factual content that allows a court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The factual content includes the facts alleged in the complaint, documents attached to or incorporated by reference in the complaint, and matters subject to official notice (including judicially noticeable facts and "technical or scientific facts within the general knowledge of the Commission"). *Id*. at *41 (*citing Farah v. Esquire Magazine*, 736 F.3d 528, 534 (D.C. Cir. 2013); *Chambers v. Time Warner, Inc*., 282 F.3d 147, 153 (2d Cir. 2002); 46 C.F.R. § 502.226(a)).

To allow the necessary inferences to be reasonably drawn, the complaint's factual allegations must be more than speculative, more than merely consistent with a respondent's liability, and must "nudge claims across the line from conceivable to plausible." *Id*. (*quoting Elemary v. Holtzmann*, 533 F. Supp. 2d 116, 130 (D.D.C. 2008)). The plausibility standard is not a probability requirement – while actual proof of the alleged facts may be improbable, and recovery may seem remote and unlikely, the standard does not require the pleading of specific evidence or extra facts beyond what is needed to make the claim plausible. *Id*.

While this standard does not require detailed factual allegations, it does require more than labels, conclusions, or a recitation of the elements of a cause of action. *Id*. The Commission need not accept as true legal conclusions or draw inferences that are not supported by the allegations. *Id*. Legal conclusions can provide the framework of the complaint, but they must be supported by factual allegations. *Id*. at *13. The factual allegations needed to reach plausibility will vary depending on the complexity of the case and require the presiding officer to draw on judicial experience and common sense. *Id*.

B. Jurisdiction over rail carriers

In its motion to dismiss the third-party complaint, CSXT argues that Hapag's allegations against CSXT under 46 U.S.C. 41102(c) are applicable only to common carriers, marine terminal operators, or ocean transportation intermediaries and its allegations under 46 U.S.C. 41104(a)(14) only to common carriers. As a "rail and intermodal transportation carrier," CSXT does not meet the statutory definitions for any of these regulated entities and so the Commission lacks jurisdiction over CSXT with respect to Hapag's claims. Further, in response to comments regarding its 2020 interpretive rulemaking on demurrage and detention, the Commission clarified that it lacks authority to address practices of railroads or rail facilities unless they fall within the statutory definition of common carriers, marine terminal operators, or ocean transportation intermediaries. Section 41102(c) jurisdiction extends to these entities whether their challenged practices occur at ports or inland but does not extend to their subcontractors or otherwise non-regulated entities such as CSXT. CSXT also argues that Hapag's allegations that its own delivery obligations had ended and CSXT was handling Dey's cargo suggests that CSXT's obligations to Dey arose not under Hapag's intermodal through bill of lading, but under a separate agreement over which the Commission would lack jurisdiction. And since § 41104(a) is applicable to common carriers; the language "a common carrier, either alone or in conjunction with any other person" in Section 41104(a) does not extend Commission jurisdiction to the activities of "other persons" who are not common carriers. Rather, this provision makes clear that Hapag may not evade responsibility for its agents' or subcontractors' practices.

In response to the motion, Hapag argues that a marine terminal operator provides terminal facilities – arrangements which ease transfer of goods at either end of a stage of transportation service – in connection with a common carrier; this includes railroads who perform port terminal services not covered by their line haul rates. Since CSXT was responsible for transferring Dey's containers from rail to motor transport at its Nashville facility, it is a marine terminal operator subject to Commission jurisdiction with respect to those containers. According to Hapag, the Commission's Interpretive Rule on Demurrage and Detention, which CSXT relies on its motion, is a non-binding interpretive rule displaced by the holding of *TCW v. Evergreen*.

Dey also filed a response to CSXT's motion, relying on *Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n*, in which the D.C. Circuit affirmed an interpretation of marine terminal operator that included an entity that did not operate any terminal facilities, but nevertheless had sufficient involvement to discriminate under the Shipping Act. Since CSXT has complete control over its Nashville facility and prevents the release of maritime cargo until demurrage and detention charges are paid, it is subject to Commission jurisdiction with respect to any such cargo.

In its reply, CSXT responded to the oppositions by arguing that while a rail carrier may in theory be a marine terminal operator for purposes of the Shipping Act, a complainant must allege sufficient facts to plausibly establish such status. And even under *Plaquemines*, there must be some connection between the entity's activities and a port or marine terminal. Hapag does not allege sufficient facts to connect CSXT's activities at its Nashville facility to any port or marine terminal, so its third-party complaint does not establish jurisdiction over CSXT as a marine terminal operator. Further, the Interpretive Rulemaking on Demurrage and Detention expresses the Commission's views on jurisdiction over inland rail terminal under through bills of lading, and *TCW v. Evergreen* does not address, much less depart from, this guidance.

Hapag's attempt to bring CSXT into this case by way of a third-party complaint is understandable – it is easier for the parties to have all their disputes adjudicated in one action, rather than Shipping Act liability before the Commission and contractual claims before a court or arbitrator. But an administrative agency's jurisdiction is limited by the statute which it administers. *Burlington Northern Railroad Company v. M.C. Terminals, Inc*., Docket No. 91-06, 1992 WL 366150, at *16, (FMC Oct. 1, 1992). And a claim for contractual indemnification, or for common law indemnification, is not the type of claim over which the Commission has jurisdiction in the absence of a cognizable Shipping Act violation. *Cf. Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, Docket No. 09-01, 2011 WL 7144008, at *12 (FMC Aug. 1, 2011) (Commission did not have jurisdiction to decide a crossclaim based on breach of a stock purchase agreement and state law in the absence of any alleged Shipping Act violation on the part of the crossclaim defendant). The Commission does not exercise the authority of a court of law or of equity – its jurisdiction is limited to administering and enforcing the requirements of the Shipping Act and related Acts. *European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc*., 19 F.M.C. 148, 151 (FMC 1976).

In *Pate Stevedore*, ALJ Kline granted third-party respondent Aetna Casualty and Surety Co.'s motion for summary judgment on the basis of jurisdiction, finding that even though Aetna succeeded to the rights and obligations of its insured, a marine terminal operator, under

Alabama's "direct action" statute (a statute permitting insurance contracts that allow for an injured party's direct right of action against an insurance carrier for any claims against its insured), and even though Aetna was asserting the rights of the marine terminal operator in a state court action, Aetna did not become a marine terminal operator for purposes of Shipping Act jurisdiction. *Pate Stevedore Co. of Mobile v. Alabama State Docks Dep't*, Docket No. 87-13, 24 S.R.R. 657, 666-669 (ALJ Dec. 2, 1987). Judge Kline agreed that it might be "worthwhile to have jurisdiction over an insurance company like Aetna under the facts of this case." *Id*. at 669. But the Commission's authority was limited to its authorizing statutes, which did not include insurance companies or direct-action defendants in the definition of marine terminal operators. *Id*. Notwithstanding the remedial nature of the Shipping Act and the possibly salutary effects of asserting jurisdiction over such parties, an agency cannot extend its jurisdiction outside of the scope authorized by Congress. *Id*. at 665 (*citing Austasia Intermodal Lines v. FMC*, 580 F.2d 642, 646-647 (D.C. Cir. 1978).

These considerations are particularly important when considering Commission jurisdiction over a railroad such as CSXT because railroads are subject to the jurisdiction of the Surface Transportation Board ("STB"), and the Commission must "refrain from intruding on that jurisdiction." *See Burlington Northern RR Co. v. M.C. Terminals, Inc.*, Docket No. 91-06, 1992 WL 366150, at *22 (ALJ Oct. 1, 1992) ("Congress long ago evinced the intention that the FMC steer clear of regulating activities of [Interstate Commerce Commission – now STB]-regulated carriers that might overlap FMC-regulation functions."). The Commission reaffirmed this cautionary principle in connection with the Interpretive Rule on Demurrage and Detention:

> [T]he Commission must be careful not to encroach into the jurisdiction of other agencies, such as the Surface Transportation Board, which is itself considering issuing guidance to railroads similar to that in the Commission's rule.

Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29638 at 29650 (Final Rule May 18, 2020) (citing Surface Transp. Bd., Policy Statement on Demurrage and Accessorial Rules and Charges (STB Oct. 4, 2019)).[2]

So in order to find that the Commission has jurisdiction over CSXT in connection with this case, I must find sufficient factual material in the third-party complaint from which to determine that CSXT was acting as a regulated entity with respect to the shipments at issue. As stated above, the third-party complaint alleges violations of 46 U.S.C. § 41102(c) and § 41104(a)(14). Third-Party Compl., ¶¶ 35-44 (Count I) and ¶¶ 45-48 (Count II). The jurisdictional scope of these provisions is limited to specific classes of regulated entities. Section 41102(c) provides that "[a] common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." And § 41104(a)(14) provides that a "common carrier, either alone or in conjunction with any other person," shall not "assess any party for a charge that is inconsistent or does not comply with all

[2] The STB subsequently issued a final policy statement, along with its final rule governing demurrage billing requirements, which can be accessed here: https://www.stb.gov/news-communications/latest-news/pr-20-03/ .

applicable provisions and regulations, including subsection (c) of section 41102 or part 545 of title 46, Code of Federal Regulations (or successor regulations)."

The terms *common carrier, marine terminal operator,* and *ocean transportation intermediary* are defined in the Shipping Act. The third-party complaint does not explicitly describe CSXT as any of these regulated entities, but the parties' briefs focus on CSXT's purported role as a marine terminal operator, so I will assume there is no contention that CSXT qualifies as a common carrier or ocean transportation intermediary. A *marine terminal operator* is defined as "a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier." 46 U.S.C. § 40102(15). The third-party complaint describes CSXT as a "rail and intermodal transportation carrier," providing "the inland portion of the through transportation" from Antwerp, Belgium to Nashville, TN via Charleston, SC. Third-Party Compl., ¶¶ 6, 8, 16. Hapag AG acted as the ocean common carrier from Antwerp to Charleston, and CSXT then transported the containers by rail from Charleston, SC to CSXT's facility in Nashville, TN under the same bills of lading. Third-Party Compl., ¶¶ 16-17, 37, 40. The demurrage charges at issue are those allegedly charged, collected, and retained by CSXT for storage of the containers at its railyard in Nashville. Third-Party Compl., ¶¶ 19, 28-33.

The Commission has opined on the issue of whether the inland portion of through transportation would be subject to Shipping Act jurisdiction for purposes of assessing the reasonableness of practices related to demurrage and detention in numerous cases, and its views were summarized in connection with its 2020 interpretive rulemaking on demurrage and detention, in response to comments about proposed language now codified as 46 C.F.R. § 545.5:

> Another scope-related comment involved the application of the rule outside of marine terminals. The American Cotton Shippers Association noted that ocean carriers, "responding to the demands of consumers, have crafted service contracts that incorporate inland movements and services" and "[t]hus the reasonableness of detention and demurrage practices and regulations, as they apply to inland movements in point-to-point service contracts, have an equally significant impact on the fluidity of all ocean-borne trade." It urges that the rule account for the inland components of ocean-borne shipping transactions and apply to point-to-point service contracts. Similarly, IMC Companies believes there is a "gray area of jurisdiction" in intermodal shipping, and requests "greater clarity directed to ocean carriers['] intermodal shipments moving on a through bill of lading with regard to application of the incentive principles the FMC has outlined."
>
> Nothing in the rule limits its scope to shipping activities occurring at ports or marine terminals. Rather, section 41102(c) concerns ocean carrier, marine terminal operator, and ocean transportation intermediary practices and regulations "relating to or connected with receiving, handling, storing, or delivering property." Ocean carrier demurrage and detention practices are subject to section 41102(c) and Commission oversight, regardless of whether the practices relate to conduct at ports or inland, with some caveats.

Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29638 at 29650 (Final Rule May 18, 2020). The commentary reiterates the unambiguous jurisdictional prerequisite of the statute – that it is applicable to ocean carriers, marine terminal operators, and ocean transportation intermediaries. The first of the two "caveats" is that the regulated entity must be acting in its regulated capacity with respect to the alleged violation:

> [N]ot everything an ocean carrier or marine terminal operator does is within the Commission's purview—an ocean carrier or marine terminal operator must be acting as a common carrier or marine terminal operator as defined by the Shipping Act with respect to the conduct at issue. This is often not a difficult question, but the further one gets away from the terminal, the more complicated the inquiry may become, and it is not a question that can always be answered in the abstract.

FMC Interpretive Rule, 85 Fed. Reg. 29638 at 29650 (*citing Auction Block Co. v. Fed. Mar. Comm'n,* 606 Fed. Appx. 347, 348 (9th Cir. 2015) ("The Commission reasonably concluded that it makes little sense to bring into its regulatory ambit all facilities operated by an entity merely because a single one of them is connected to international marine transportation."); *Crocus Investments, LLC v. Marine Transp. Logistics, Inc.*, 1 F.M.C.2d 403, 415 (FMC 2019) ("The approach supported by the text of section 41102(c) and Commission caselaw asks: was the respondent acting as a regulated entity with respect to the conduct at issue?")).

The second "caveat" is that the applicability of § 41102(c) to the inland segment of through transportation does not expand the Commission's jurisdiction to railroads outside of the context in which they are acting as marine terminal operators:

> Second, the Commission must be careful not to encroach into the jurisdiction of other agencies, such as the Surface Transportation Board, which is itself considering issuing guidance to railroads similar to that in the Commission's rule.
>
> Commenters were also concerned about railroads and railyards. To be clear, section 41102(c) of the Shipping Act applies to common carriers, marine terminal operators, and ocean transportation intermediaries. The Commission is without authority to address practices of railroads or rail facilities unless they fall within one of those statutory definitions. That said, if the practice at issue relates to rail but is nonetheless an ocean carrier practice, e.g., is contained in an ocean carrier tariff or service contact, then the guidance in the rule would likely apply.
>
> In sum, the rule is not limited, in its language or intent, to import shipments, nor is it limited solely to ocean carrier practices related to conduct at marine terminals. The precise outer bounds of the Commission's authority, however, is a subject better resolved in the context of a particular factual scenario.

FMC Interpretive Rule, 85 Fed. Reg. 29638 at 29650. So while there does not appear to be a bright-line test for assessing whether a rail carrier is acting as a marine terminal operator, relevant considerations are the connection of the rail carrier's conduct to operation of a marine terminal, and whether the practice is contained in an ocean carrier tariff or service contract.

As to the first considerations, the third-party complaint is silent as to any terminal services that may have been provided by CSXT at Charleston (information which is presumably available to Hapag), which could provide a basis for concluding that, at least at some point, CSXT acted as a marine terminal operator. The third-party complaint is unequivocal in its insistence that CSXT had already transported the goods from the terminal at Charleston, SC to its railyard in Nashville, TN before the alleged violation occurred. Third-Party Compl., ¶¶ 14, 16, 19, 28-29. It seems fair to say that CSXT's railyard in Nashville is not a marine terminal. And nothing in the third-party complaint ties CSXT's operation of its inland rail yard to operations at Charleston. CSXT obviously transported the containers from Charleston to Nashville, but this cannot be sufficient by itself to establish jurisdiction over CSXT's subsequent actions as a rail carrier. Otherwise, the Commission's stated principle that a party must be acting as a regulated entity with respect to the specific conduct at issue would be meaningless, and the Commission could simply assert jurisdiction over any party that picked up a container at a port, no matter how attenuated the actual dispute is from ocean shipping or marine terminal operations.

As to the second consideration, the third-party complaint includes factual allegations inconsistent with the contention that CSXT assessed the disputed charges pursuant to Dey's contract with Hapag. Hapag alleges that "[a]fter free time expired, Hapag's delivery obligations ended and CSX was handling and storing the cargo on behalf of [Dey]." Third-Party Compl., ¶ 38. CSXT "established the charges applicable to the storage of containers on its facility," and "independently" assessed, billed, collected, and retained the $136,500 in storage charges that are at issue Dey's complaint. Id. at ¶¶ 29-33. While I am sceptical of Hapag's factual contentions, for purposes of a motion to dismiss, I must assume these allegations to be true. If Hapag's contractual obligations to Dey ended once free time at CSXT's rail yard expired, at which point the disputed charges arose under some separate CSXT tariff or service contract, as Hapag apparently contends, then I cannot reasonably infer that the Commission has jurisdiction over disputes involving the CSXT charges. Without any facts from which to conclude that CSXT did act as a marine terminal operator with respect to the containers at issue in the complaint, and combined with Hapag's assertion that CSXT's charges were not pursuant to an ocean carrier service contract or tariff, Count I, for violation of § 41102(c), cannot be supported and must be dismissed for lack of jurisdiction.

With respect to Count II, § 41104 is expressly applicable only to common carriers, and Hapag does not allege that CSXT is a common carrier within the meaning of the Shipping Act.[3] Rather, Hapag alleges that CSXT is liable as "any other person" as described in § 41104(a)(14).

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[3] (7) Common carrier.--The term "common carrier"—

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

46 U.S.C. § 40102(7).

Third-Party Compl., ¶ 46. Besides being contrary to common usage ("either alone or in conjunction with any other person" is a phrase describing the potential liability of a "common carrier," not a list of other entities that might be liable), this theory that "any other person" may be liable for a violation of § 41104(a) has been rejected by the Commission:

> The 88-27 Complainants continue to argue that the Commission may reach the Associations under section 10(b)[4] because their alleged negotiation and enforcement of the Rules on Containers was done "in conjunction with" the carriers. This is a distortion of the statute. Section 10(b) forbids carriers from certain practices undertaken by the carriers alone or with other persons. It does not provide that if a carrier engages in one of the condemned activities "in conjunction with" someone else, that other person has violated the statute as well and is equally liable for reparations to an injured party. As section 10(a) shows, Congress did make all "persons" liable for some Shipping Act violations. In enforcing section 10(a), the Commission may reach any U.S. or foreign individual or enterprise. If Congress had wished to make a similar choice with respect to the practices covered by section 10(b), the statutory language would have so indicated. The legislative history of the 1984 Act reflects awareness on Congress's part that section 10(b) was more restricted in coverage than section 10(a).
>
> The phrase "in conjunction with" was carried over into section 10(b) from section 16 First of the 1916 Act. Although the legislative histories of the 1916 Act and the 1984 Act do not evince any specific purpose behind the phrase, the ALJ's surmise that it was meant to foreclose carriers from certain defenses is supported by precedent….These rebuffs of carrier efforts to shift responsibility for discriminatory practices to "other persons" are consistent with our conclusion that section 10(b) regulates only carrier practices.

Int'l Assoc. of NVOCCs v. Atlantic Container Line, Docket No. 81-5, 1990 WL 427461, at *12 (FMC Feb. 5, 1990) (internal citations omitted). Since CSXT is not a common carrier, Count II must be dismissed.

Nor does *Plaquemines* dictate a different result. In that case, the court held that even where the port district did not own or operate the marine terminal facilities, its control over access to those facilities, and assessment of fees for the purpose of funding essential fire and emergency services to those facilities, rendered it a "marine terminal operator" for purposes of the Shipping Act. *Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n*, 838 F.2d 536, 543 (D.C. Cir. 1988). Hapag's argument that CSXT "has complete control over [its]" Nashville rail yard does not make CSXT a marine terminal operator under the rationale of *Plaquemines* where the Nashville yard is not a marine terminal.

C. The applicability of *TCW v. Evergreen* and Intermodal Motor Carriers Conference

Hapag argues that *TCW v. Evergreen* establishes a nucleus-of-operative-fact test for jurisdiction over otherwise unregulated entities. Since the Commission has jurisdiction over

[4] Referring to former section 10(b) of the Shipping Act of 1984, now 46 U.S.C. § 41104(a).

Dey's claims against Hapag regarding CSXT's per diem charges to Dey, it also has jurisdiction over Hapag's third-party claims regarding those same charges.

Dey argues that the holding in *Intermodal Motor Carriers Conference*, establishes that Commission jurisdiction extends to "ocean common carriers and chassis used" in ocean transportation, including related detention and demurrage practices of rail carriers moving cargo under maritime contracts. Since CSXT's per diem charges at its Nashville facility arose under a maritime contract, the Commission has jurisdiction over Hapag's third-party claim against CSXT with respect to those charges.

CSXT contends that Dey and Hapag's reading of *TCW v. Evergreen* is overbroad – it applies to situations where the allegedly unregulated entity is the express agent acting at the direction and for the benefit of the ocean carrier or where it appears that the entity may in fact be regulated pending the outcome of discovery. That is not the case here, and *TCW v. Evergreen* does not overrule prior cases regarding subject matter jurisdiction. CSXT also argues that Dey's reliance on *Intermodal Motor Carriers Conference* is misplaced because that case affirms jurisdiction over ocean carrier practices affecting otherwise unregulated inland transportation, not the practices of nonregulated entities. Since CSXT is not a marine terminal operator or other regulated entity, this case is not relevant to the question of jurisdiction over CSXT.

As to *TCW v. Evergreen*, the Commission's decision, to the extent it's relevant here, appears to apply to situations where the party challenging jurisdiction is an agent acting on behalf of a regulated entity:

> As explained by the [Small Claims Officer ("SCO")], and supra, Respondent, Evergreen Joint Service Agreement is an ocean common carrier and thus undeniably subject to the requirements of section 41102(c). Evergreen Shipping Agency imposed the per diem charges at issue on the ocean common carrier's behalf, thereby acting as its agent. The SCO ruled that because the practice at issue occurred during the through transportation of international oceanborne shipping provided by a VOCC, the Commission has jurisdiction to adjudicate whether the charges imposed by the agent during the inland portion of the through transportation, which it then passed on to the VOCC, violate the Shipping Act…. Further, the SCO reasoned that "the claim against Evergreen-Agent arises "out of a common nucleus of operative facts" with the claim against Evergreen-Principal, over which the Commission has jurisdiction as a VOCC." *Id.*; *see also, Action Embroidery Corp. v. Atl. Embroidery, Inc.,* 368 F. 3d 1174, 1180 (9th Cir. 2004) ("A court may assert pendent personal jurisdiction over a defendant with respect to a claim for which there is no independent basis of personal jurisdiction so long as it arises out of a common nucleus of operative facts with a claim in the same suit over which the court does have personal jurisdiction").

TCW, Inc. v. Evergreen Shipping Agency (Am.) Corp., et al., Docket No. 1966(I), 2022 WL 18068977, at *4 (FMC Dec. 29, 2022). Hapag and Dey base their argument around the "common nucleus of operative facts" language, but the actual operative facts in *TCW* do not align with their argument. A review of the Small Claims Officer's decision reveals that the key "operative facts" on which the decision are based are the facts establishing the principal-agent relationship between VOCC Evergreen Line Joint Service Agreement and Evergreen Shipping Agency

(America) Corp. The SCO found that the facts showed not only that the disputed per diem charges occurred during the inland portion of through transportation (which is also the case here) but that Evergreen Shipping Agency (the agent) signed the agreement under which the per diem charges were imposed, collected the per diem charges, and passed them along to the VOCC (which is not the case here). *TCW, Inc. v. Evergreen Shipping Agency (Am.) Corp., et al*., Docket No. 1966(I), 2021 WL 794708, at *14–15 (SCO Feb. 19, 2021).

While *TCW* may stand for the proposition that a company carrying out the business of a regulated entity as its local agent or holding itself out as a regulated entity by entering agreements under its own name (but which are in fact for the benefit of the regulated entity) may be subject to Commission jurisdiction, it does not appear to stand for the proposition that the Commission will exert jurisdiction over any otherwise unregulated entity involved in some aspect of through transportation. And there is no factual allegation in the complaint that supports an argument that CSXT was acting as Hapag's agent with respect to the charges it assessed at its Nashville railyard. Rather, Hapag is careful to point out that its contractual obligations with respect to Dey's shipments had already ended, and CSXT acted on its own initiative and for its own benefit, without any input from or control by Hapag. Third-Party Compl., ¶¶ 29-33, 38.

As for *Intermodal Motor Carriers Conference,* the ALJ ruled that the Commission had jurisdiction over the complaint because it alleged violations of the Shipping Act by ocean common carriers and their agents at ports and inland intermodal terminals where they engage in the interchange of containers and chassis moving in international maritime commerce. *Intermodal Motor Carriers Conference v. Ocean Carrier Equipment Management Association Inc*., Docket No. 20-14, 2023 WL 1963455 at *19 (ALJ Feb. 6, 2023). But the decision goes on to observe that the Commission did not intend to extend jurisdiction over otherwise unregulated entities that were chassis providers, and that no such entities were parties to the case:

> Discussing the issue of section 41102(c) as it relates to chassis providers, the Commission noted in the Section 41102(c) Final Rule that section 41102(c) "does not cover chassis providers who do not otherwise fall within the definition of a regulated entity under the Shipping Act." Section 41102(c) Final Rule, 85 FR 29650 n.185. Therefore, this proceeding does not seek to adjudicate claims against chassis providers that are not FMC-regulated entities.
>
> *   *   *
>
> As noted above, this case is not about regulating non-FMC-regulated providers of chassis or IEPs, just as the Commission's action in *California Stevedore & Ballast Co. v. Stockton Port District* was not about regulating stevedoring. Docket No. 898, 7 F.M.C. 75, 81 (FMC Jan. 25, 1962) ("Respondents' second claim that section 15 does not apply, and that we lack power to strike down an unjust and unreasonable practice setting up a stevedoring monopoly, because we lack power to regulate the stevedoring business, is also without merit, and a plain non sequitur. Our action in condemning and preventing such unjust and unreasonable practices does not constitute regulation of stevedoring.").

Intermodal Motor Carriers Conference, 2023 WL 1963455 at *20-21.

The Commission has since affirmed this decision, cautioning that it may not circumscribe its jurisdiction too narrowly – this is important because no other forum has original jurisdiction over Shipping Act claims and because the "Commission is also uniquely positioned to judge whether its regulated entities' practices are reasonable and fair." *Intermodal Motor Carriers Conference, American Trucking Ass'n, Inc. v. OCEMA, et al*., Docket No. 20-14, 2024 WL 641501 at *12 (FMC Feb. 13, 2024) (further noting that the Commission's "experience monitoring ocean common carriers and expertise in assessing supply chain logistics and chassis-related issues is particularly relevant in this case"). The Commission further pointed out that it has repeatedly held that "its jurisdiction does not end at the port's boundary." *Id*. However, the Commission also noted that the individual ocean common carriers' status as regulated entities was not in dispute, and that the undisputed facts clearly demonstrated that the conference defendants were subject to Commission jurisdiction as they were operating solely under authority of their FMC-filed agreements, represented the interests of their ocean common carrier members, and acted on their behalf. *Id*. at 10. It was the inland practices of these indisputably regulated entities that was at issue in *IMCC*.

In contrast to the respondents in *IMCC*, CSXT is not an ocean carrier, or, generally, a marine terminal operator indisputably subject to the Shipping Act. It is a rail carrier generally subject to the jurisdiction of the STB. Jurisdiction over CSXT for purposes of this case must therefore depend on the specific facts pleaded in Hapag's third-party complaint. The fact that the alleged violations in this case occurred at CSXT's inland rail yard is not by itself determinative of the question of jurisdiction, but combined with Hapag's assertion that CSXT was not acting as its agent or pursuant to its contract with Dey, it appears Hapag has pleaded itself out of the Shipping Act. If CSXT was not acting as its agent, then *TCW* is inapplicable, and if there is no pleaded connection to an ocean carrier or operation of a marine terminal – other than the fact that CSXT had previously moved the containers from the terminal in Charleston to is inland rail yard pursuant its agreement with Hapag – then the conclusion that the Commission lacks jurisdiction over subsequent events at the Nashville rail yard, even under the broad jurisdictional scope reaffirmed in *IMCC*, seems unavoidable. On its face, Hapag's third-party complaint alleges that a rail carrier assessed demurrage on its own terms, unconnected to Hapag, at its inland rail yard, for which Hapag cannot recover under the Shipping Act.

D. The relationship of the jurisdictional analysis to the merits

Dey argues that CSXT's contention that it is not a regulated entity, despite acting as the subcontractor to an ocean carrier and assessing charges on cargo moving on the inland leg of ocean transportation, is bound up with merits of the claim, and so dismissal at this stage is premature. CSXT responds that its motion to dismiss is a facial challenge to Hapag's third-party complaint – even assuming all Hapag's alleged facts to be true, the third-party complaint does not plead sufficient facts to plausibly establish jurisdiction over CSXT and so dismissal is not premature. Dey relies on *Thompson Pipe Group, Inc. v. Omni Logistics LLC*, for the proposition that when a jurisdictional inquiry is bound up with the merits of a claim, a full trial may be necessary and dismissal premature. Docket No. 22-31, 2023 WL 2240480 at *3 (ALJ Feb. 24, 2023).

The Commission favors addressing "jurisdictional issues before addressing the merits of a case." *River Parishes Co., Inc. v. Ormet Primary Aluminum Corp*., 28 S.R.R. 751, 762 (1999).

At the same time, the Commission does recognize that an agency could bypass deciding a jurisdictional issue and proceed to decide the merits of a case when the merits and jurisdiction are intertwined and when the merits were so easy to decide that "the better use of administrative resources warrants a disposition on the merits without a finding of jurisdiction." *Id*. That is not the case here. Moreover, *Thompson Pipe Group* is readily distinguished from this case – in that case, Respondents were regulated entities and the question was whether they operated as non-vessel-operating common carriers (NVOCCs) on the relevant shipments. *Id*. In this case, the question is whether third-party respondents are regulated entities to begin with. Furthermore, the cases cited by the presiding officer in *Thompson Pipe* do not address the type of facial attack made by CSXT here, challenging the existence of subject matter jurisdiction based on the assumption that the facts in the third-party complaint are true. Rather, those cases discuss how a court should handle a factual challenge, noting that a court must assure itself that it has jurisdiction before proceeding with a case. In such a case, the defendant may submit affidavits and evidence or request an evidentiary hearing limited to jurisdiction. Once the evidence is submitted, the district court must resolve the jurisdictional question – the only exception is when it is so bound up with the merits that a full trial is necessary. *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990) (*citing Crawford v. United States*, 796 F.2d 924 (7th Cir. 1986)).

An example would be a case in which a plaintiff alleges that a government physician's failure to diagnose, treat, or warn of a condition caused the plaintiff to deteriorate. Whether and when the physician diagnosed the condition is central to the plaintiff's negligence claim, but it is also central to the question of when the plaintiff knew or reasonably should have known that the failure to diagnose was causing his condition to deteriorate. That is the point, for purposes of a tort claim against the government, when the plaintiff's claim accrues, and failure to initiate an administrative claim process within a certain period after accrual deprives the district court of jurisdiction. So a factual issue central to a jurisdictional challenge (that the plaintiff did not timely commence the administrative claims process) would in that case also be central to the merits of plaintiff's negligence claim (the timeliness of the diagnosis and treatment). *See Augustine v. United States*, 704 F.2d 1074, 1078–79 (9th Cir. 1983).

That is not the case here. CSXT's motion assumes the facts in the third-party complaint to be true and argues that the facts do not plausibly establish that it is a regulated entity (a marine terminal operator) over which the Commission has jurisdiction. There is nothing about that question that is so inextricably bound up with the question of whether CSXT's chassis policies and resulting demurrage charges constitute an unreasonable practice for purposes of § 41102(c) so as to make it impossible to assess whether the third-party complaint alleges that CSXT is subject to Shipping Act jurisdiction as a marine terminal operator.

III. Order and Briefing Schedule

For the reasons stated above, CSXT's motion to dismiss the third-party complaint is **GRANTED** and the third-party complaint is hereby **DISMISSED**. The parties previously stated that, in the event CSXT remained in the case, they would need additional time for discovery, and requested a stay of the briefing schedule on that basis. With CSXT dismissed, it appears that no further discovery is necessary, and briefing may resume. The parties are **ORDERED** to adhere to the following briefing schedule:

June 17, 2024	Complainant's Brief, Proposed Findings of Fact, and Appendix
July 17, 2024	Respondent's Brief, Proposed Findings of Fact, Appendix, and Response to Complainant's Proposed Findings of Fact
August 1, 2024	Complainant's Reply

Alex M. Chintella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[Docket No. FMC-2024-0008]

Investigation into Conditions Affecting United States Carriers in Connection with Canadian Ballast Water Regulation in the United States / Canada Great Lakes Trade

AGENCY: Federal Maritime Commission.

ACTION: Notice of investigation and request for comments.

SUMMARY: The Federal Maritime Commission (Commission) has initiated an investigation into conditions created by the Government of Canada (Canada) in connection with regulation of ballast water management systems that may adversely affect the operation of United States carriers in the United States / Canada Great Lakes trade.

DATES: Submit comments on or before June 21, 2024.

ADDRESSES: You may submit comments, identified by Docket No. FMC-2024-0008, by the following method:

Federal eRulemaking Portal: Your comments must be written and in English. You may submit your comments electronically through the Federal Rulemaking Portal at *www.regulations.gov.* To submit comments on that site, search for Docket No. FMC–2024–0008 and follow the instructions provided.

FOR FURTHER INFORMATION CONTACT: For questions regarding submitting comments or the treatment of any confidential information, contact David Eng, Secretary; Phone: (202) 523-5725; Email: Secretary@fmc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

Based on available information, it appears that conditions created by the Government of Canada (Canada) in connection with regulation of ballast water management systems may adversely affect the operation of United States carriers in the United States / Canada Great Lakes trade, in particular the carriers operating vessels that may become subject to regulation in September 2024, within the meaning of 46 U.S. Code, chapter 423 (Foreign Shipping Practices) (46 U.S.C. 42301-307). Title 46 U.S.C. 42302 authorizes the Federal Maritime Commission (Commission) to investigate these conditions, and chapter 423 authorizes the agency to take action in response.

II. Summary of Apparent Conditions

In 2020, the Lake Carriers Association (LCA) filed a petition with the Commission as to pending Canadian regulation of ballast water discharge on the Great Lakes. *See* FMC Docket No. 20-10, P1-20 - Petition of the Lake Carriers' Association Pursuant to Section 19 of the Merchant Marine Act, 1920. LCA's petition alleged that Canadian regulation scheduled to take effect in September 2024 would create conditions unfavorable to shipping by requiring U.S. vessels to install new ballast water management systems. LCA argued that this would impose a severe burden while offering negligible environmental benefits, since the relevant U.S. carriers (Lakers) take in but do not discharge ballast water in Canadian waters. The petition asked the Commission to investigate and adopt its own regulations in response. The Commission opened an investigation under 46 U.S. Code, chapter 421 (Regulations Affecting Shipping in Foreign Trade). *See* FMC Docket No. 20-10. In that Chapter 421 proceeding, the FMC sought and received comments, including from the Government of Canada. *See* FMC Notices, 85 FR 37453

(June 22, 2020), 87 FR 6173 (February 3, 2022); Comments of the Embassy of Canada, Government of Canada, Docket No. 20-10 (Doc. No. 3) (July 22, 2020).

Since at least 2020, the U.S. Environmental Protection Agency (EPA) has been engaged in rulemaking to consider similar regulation. *See* Vessel Incidental Discharge National Standards of Performance, 85 FR 67818 (Oct. 26, 2020) (to be codified in 40 CFR part 139); Supplemental Notice, 88 FR 71788 (Oct. 18, 2023). The EPA's October 2023 Supplemental Notice in that rulemaking indicates that the agency is considering issuing a final rule that is less restrictive than the regulation due to take effect in Canada, as it would require the type of ballast water systems at issue only for covered vessels built in the future. *See* 88 FR 71803-04 (explaining differences between proposed regulatory option and relevant Canadian regulation); *id*. at 71,808 ("EPA proposes to define a New Laker as a bulk carrier that operates exclusively on the Great Lakes and that is constructed after the effective date of [U.S. Coast Guard] regulations promulgated pursuant to [Clean Water Act] section 312(p)(5)(A)(i)").

In February 2024, the LCA filed a public letter in the Commission's Chapter 421 proceeding. *See* Docket No. 20-10 (Doc. 8) (Feb. 13, 2024). The letter urged the Commission to move forward promptly. The LCA emphasized that its members' Lakers would have to prepare to comply with the stricter Canadian rules before the compliance date of September 8, 2024, even though the EPA was unlikely to require them to meet the stricter standards. *Id*. At 2-3. In addition, the letter stated that these U.S.-flagged Lakers had been effectively prevented from applying for an exemption or extension from the Canadian regulation, because relevant procedures were not expected to be in place prior to July 2024, despite the impending compliance date. *Id*. At 2, 4. The letter confirmed that only five of the existing U.S. Lakers would be affected by the regulation in September 2024 (one post-2008 vessel already has the required equipment); the approximately 50 other U.S. Lakers were built prior to 2009. *Id*. Attachment C. However, the LCA argued that the five post-2008 Lakers would be compelled either to install the required equipment, a "multimillion dollar investment" that they might well need to remove later in light of changing U.S. requirements, or to "walk away from the business." *Id*. At 4.

In light of the above, the Commission will, on its own motion, open an investigation under 46 U.S. Code, Chapter 423 (Foreign Shipping Practices). *See* 46 CFR part 555. In particular, the Commission will investigate whether the laws, rules, policies, or practices of Canada result in conditions that "adversely affect the operations of United States carriers in United States oceanborne trade" and that "do not exist for foreign carriers of [Canada] in the United States under the laws of the United States." 46 U.S.C. 42302(a). Such conditions may exist here, in view of the LCA's allegations that U.S. carriers will suffer significant adverse effects from the impending Canadian regulation, but Canadian carriers operating in the United States are not subject to comparable requirements under U.S. law. Under 46 U.S.C. 42302(c), the Commission is to complete its investigation and render a decision within 120 days after it is initiated.

If the agency concludes that the standard of section 42302(a) is met, it is authorized to take certain actions to encourage remediation of those conditions. Specifically, the Commission may take actions "against any foreign carrier that is a contributing cause, or whose government is a contributing cause, to those conditions." 46 U.S.C. 42304(a). Potential actions include imposing limits and/or fees on Canadian-flagged vessels that visit U.S. ports and requesting that the U.S. Department of Homeland Security and the U.S. Coast Guard refuse clearance and deny entry of such vessels into the U.S., or detain such vessels. *See* 46 U.S.C. 42304, 42305. Any such fees could be substantial, as they are authorized by law at a level up to $2,559,636 per voyage. *See* 46 CFR 506.4. Under section 42304(b), the Commission "may consult with, seek the cooperation of, or make recommendations as to other appropriate agencies of the United States government" prior to taking such action. When the Commission initiates a Chapter 423 investigation, it will notify the U.S. Secretary of State and may request that the Secretary "seek resolution of the matter through diplomatic channels." 46 CFR 555.7. Before any action is taken under 46 U.S.C. 42304 or 42305, the relevant determination is submitted for Presidential review, within 10 days of receipt, under 46 U.S.C. 42306.

At this initial stage of the investigation, the Commission will focus on providing a route for interested parties, including the Government of Canada, as well as Canadian carriers operating in the Great Lakes trade, to provide information, perspectives, and proposed solutions.

III. Investigation and Initial Request for Comments

The Commission has determined that the above situation meets the threshold requirements for consideration under the relevant statutory and regulatory authority. *See* 46 U.S.C. 42302; 46 CFR 555.3, 555.5. The Commission has therefore determined to initiate an investigation into whether the situation has created conditions that adversely affect the operations of United States carriers as described above. *See* 46 U.S.C. 42302; 46 CFR 555.5, 555.6. To that end, the Commission has designated the General Counsel to lead an investigation into the conditions and to prepare a report on the investigation's findings and recommendations for Commission consideration.

Interested persons are requested to submit written comments containing arguments, experiences, and/or data relevant to the above-described conditions, with a particular focus on the situation of vessels that will become subject to the Canadian regulation described above in

September 2024. It would be especially helpful for the agency to receive comments addressing what options exist for carriers to seek an exemption from the Canadian regulations going into effect in September 2024, and whether any such processes differ based on whether the carrier is a U.S. carrier or a Canadian carrier.

The Commission's jurisdiction under 46 U.S.C. 42302 is broad, and the agency welcomes comments not only from the Government of Canada, but also from container shipping interests, bulk cargo interests, vessel owners, individuals and groups with relevant information on commercial and environmental considerations, and anyone else with relevant information or perspectives on this matter.

As the Commission proceeds with this investigation, it may determine to request additional comment or gather information through other means as authorized under 46 U.S.C. 42303 and 46 CFR 555.5, 555.6.

By the Commission.

Dated: May 16, 2024.

David Eng,
Secretary.

FEDERAL MARITIME COMMISSION

IAN MILLS, *Claimant*

v.

CROWLEY LOGISTICS, INC., *Respondent*.

DOCKET NO. 1995(F)

Served: May 28, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's April 24, 2024, Order Partially Granting Crowley Logistics, Inc.'s Motion to Dismiss that granted Respondent's motion to dismiss regarding the section 41102(c) claim has expired. Accordingly, the dismissal has become administratively final.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

M.E. DEY & CO., INC., *Complainant*

v.

HAPAG-LLOYD AG AND HAPAG-LLOYD (AMERICA) LLC, *Respondents and Third-Party Complainants*

v.

CSX TRANSPORTATION, INC., *Third-Party Respondent*.

DOCKET NO. 22-35

Served: June 14, 2024

NOTICE OF COMMISSION DETERMINATION TO REVIEW
[final decision pending]

Notice is given that, pursuant to 46 C.F.R. § 502.227, the Commission has determined to review the Administrative Law Judge's May 17, 2024, Order Granting Third-Party Respondent CSX Transportation's Motion to Dismiss the Third-Party Complaint and Resetting Briefing Schedule in this proceeding.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

L & A SHIPPING, INC., REVOCATION OF OCEAN TRANSPORTATION INTERMEDIARY LICENSE NO. 026495

DOCKET NO. 24-02

Served: June 14, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's May 14, 2024, Initial Decision Revoking Ocean Transportation Intermediary License has expired. Accordingly, this decision has become administratively final.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

IN THE MATTER OF INQUIRY REGARDING COMPLIANCE WITH THE CEASE AND DESIST ORDER IN DOCKET NO. 20-14	Special Investigation No. 24-02

Served: June 18, 2024

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*; Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, *Commissioners*. Max M. VEKICH, *Commissioner*, concurring.

Order Initiating a Non-Adjudicatory Investigation

[investigation ongoing]

The Federal Maritime Commission (Commission) investigates conduct that may violate the Shipping Act and the Commission's regulations. The Commission's Bureau of Enforcement, Investigations, and Compliance (BEIC) is charged with conducting investigations and recommending enforcement actions. 46 C.F.R.§ 501.3(f)(3)(ix).[1] After a review of evidence relevant to the inquiry or issue, BEIC may determine whether to recommend an enforcement action. Under its authority, the Commission may also determine that a formal investigation is necessary to properly exercise its regulatory duties and initiate a non-adjudicatory investigatory proceeding under Subpart R of the Commission's Rules of Practice and Procedure, 46 C.F.R. §§ 502.281-502.291. The Commission's designated representative may then issue orders or subpoenas compelling testimony or the production of documents relating to any matter under investigation. 46 C.F.R. § 502.286.

The Commission adjudicated certain claims alleged in a private party complaint in *Intermodal Motor Carriers Conference v. OCEMA*, FMC Docket No. 20-14. On February 13, 2024, the Commission found that the Respondents[2] in that action were engaged in restrictive practices that are unlawful under 46 U.S.C. § 41102(c) and issued an order directing Respondents to immediately cease and desist engaging in those practices. 2024 WL 641501 (FMC Feb. 13, 2024). The cease and desist order went into effect immediately upon issuance. There was no grace period, and to the extent that Respondents have not modified their conduct to conform to the order, they are in violation of the Shipping Act and the cease and desist order.

The Commission does not currently have reliable assurance that Respondents are complying with the cease and desist order, and is therefore exercising its authority to conduct a non-adjudicatory investigation and designates the Director of BEIC to conduct the investigation under the authority of 46 C.F.R. § 502.281. The BEIC Director may assign responsibility to other BEIC staff to assist in this non-adjudicatory investigation.

[1] 46 C.F.R.§ 501.3(f)(3)(ix) references BEIC's precursor, the Bureau of Enforcement.

[2] Respondents refers to all the parties in FMC Docket No. 20-14 who are subject to the cease and desist order.

In the Matter of Inquiry Regarding Compliance with Cease and Desist Order in Docket No. 20-14

This investigation will examine whether Respondents have altered their rules and practices as required by the cease and desist order and will address the following subjects in particular and related lines of inquiry concerning Respondents' operations in the four regions covered by the cease and desist order, Chicago, Los Angeles/Long Beach, Memphis, and Savannah:

(1) Contracts, rules and practices that designate an exclusive chassis provider for merchant haulage, which may include inquiries about:

(a) Changes to contracts, rules and practices made to comply with the cease and desist order;
(b) Decisions not to change contracts, rules or practices to comply with the cease and desist order;
(c) Communications with or notices sent to motor carriers, shippers or other interested or affected about changes made to conform to the cease and desist order;
(d) And other subjects related to continuing arrangements that designate an exclusive chassis provider for merchant haulage.

(2) Continuing contractual relationships and practices through which Respondents can use merchant haulage volume to lower their carrier haulage rates when motor carriers have no choice of chassis providers, which may include inquiries about changes to those arrangements made to comply with the cease and desist order or decisions not to alter those arrangements.

(3) Exclusivity rules, restrictions, and practices currently applied to chassis supplied for merchant haulage at the Pool of Pools (POP) that services the Ports of Los Angeles and Long Beach which may include inquiries about:

<u>In the Matter of Inquiry Regarding Compliance with Cease and Desist Order in Docket No. 20-14</u>

(a) Changes to those rules, restrictions, and practices made to comply with the cease and desist order or decisions not to make such changes;
(b) Volume discounts based on both carrier and merchant haulage when motor carriers must use a designated chassis provider;
(c) Respondents' practices in designating a particular chassis provider for merchant haulage moves; and
(d) Respondents' rules or practices for allowing motor carriers or shippers to designate (select) the chassis provider used for merchant haulage moves.

Pursuant to 46 C.F.R. § 502.281, the Director of BEIC is specifically authorized to invoke or utilize any or all of the Commission's compulsory processes authorized by law including but not limited to the issuance of subpoenas and the taking of evidence under oath to accomplish this non-adjudicatory investigation.

Pursuant to 46 C.F.R. § 502.291, the Commission orders that this investigation be public.

By the Commission.

David Eng
Secretary

In the Matter of Inquiry Regarding Compliance with Cease and Desist Order in Docket No. 20-14

Commissioner VEKICH, concurring:

I concur with the Commission's decision to initiate a non-adjudicatory proceeding relating to the cease and desist order in Docket No. 20-14. Exclusive arrangements often stifle competitive markets and prevent them from functioning efficiently. It is the Commission's role to safeguard the ocean-borne transportation system, and we must ensure that regulated entities abide by orders of the Commission. For this reason alone, I support the initiation of the non-adjudicatory investigation.

However, exclusive arrangements may be justified by corresponding benefits which can offset the anticompetitive impacts. I believe review of exclusive chassis arrangements should include a careful analysis of the benefits to the industry. There are indications that exclusive chassis arrangements give rise to improved safety and roadability of chassis due to enhanced safety inspections and maintenance and repair programs.

Given that the maritime industry's efficient operation is one of the primary charges of this Commission, I believe we should fully consider enhanced safety and roadability considerations as a potential justification for exclusive chassis arrangements.

FEDERAL MARITIME COMMISSION

MCS INDUSTRIES, INC., *Complainant*, v. MSC MEDITERRANEAN SHIPPING COMPANY S.A., *Respondent.*	Docket No. 21-05

Served: July 16, 2024

BY THE COMMISSION: Daniel B. MAFFEI, Chairman, Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, Max VEKICH, Commissioners.

Order Affirming Initial Decision on Remand

This case is before the Federal Maritime Commission (Commission or FMC) on Exceptions to an Initial Decision on Remand (Remand Decision) of the Administrative Law Judge (ALJ) dated February 16, 2024. The Remand Decision followed the Commission's Order Partially Affirming Initial Decision on Default and Remanding for Further Proceedings dated January 3, 2024 (January 2024 Order). The January 2024 Order upheld as to liability an earlier decision of the ALJ imposing default on Respondent MSC Mediterranean Shipping Company S.A. (Mediterranean), a vessel-operating common carrier, for its failure to comply with multiple discovery orders in a case filed by Complainant MCS Industries, Inc. (MCS), a shipper.

The Commission's January 2024 Order also remanded this matter to the ALJ for further consideration of two issues. First, the Commission remanded for a determination as to whether the sanctions available under 46 U.S.C. § 41302(d) for delay in the issuance of final FMC decisions are a potential additional basis for the imposition of default here. Second, the Commission remanded for the submission of evidence sufficient to support the reparations MCS seeks.

In the Remand Decision, the ALJ first determined that 46 U.S.C. § 41302(d) was an independent basis supporting the imposition of default in this matter. The ALJ found that section 41302(d) applied to private-party complaint actions like this one and that Mediterranean's conduct here had caused "undue delay" under that provision. Second, the ALJ determined that MCS had provided sufficient evidence to support an award of reparations. Although the ALJ denied MCS's request for reparations that were outside the scope of the amended complaint — about one quarter of the total requested — the ALJ awarded reparations in the amount of $861,706.50 plus interest.

We affirm the Remand Decision with respect to section 41302(d). The ALJ was correct to find that the delay sanction described in that provision applies to private-party complaint proceedings like this one, under the plain terms of the statute. In addition, the ALJ permissibly found that Mediterranean's conduct had caused undue delay in this matter, whether that determination is reviewed de novo or under an abuse of discretion standard. And the ALJ properly rejected Mediterranean's arguments that a section 41302(d) sanction cannot be imposed here because Swiss law bars the discovery production at issue and because such a sanction would ostensibly create tension with the notification provision of 46 U.S.C. § 41108(c).

We also affirm the Remand Decision as to reparations. The ALJ's reparations award was based on a declaration from MCS's sole logistics analyst and extensive supporting documentation. As explained below, the ALJ permissibly determined the overall scope and amount of reparations at issue, matters about which there now seems to be little dispute. Mediterranean does object that MCS's declarant lacked sufficient knowledge of the relevant activities in part of the time period at issue, that MCS failed to provide evidence sufficiently linking the violations to its replacement shipments, and that MCS failed to show it had mitigated its damages. It is true that MCS's evidentiary showing could have been more detailed in some respects. However, on the whole the evidence MCS has provided is sufficient to support the reparations the ALJ ordered in the context of this case and under the relevant legal standards. The ALJ also permissibly rejected Mediterranean's claim that it was entitled to an evidentiary hearing. Thus, the reparations award was within the ALJ's discretion, and in any case her analysis was well-reasoned and well-supported.

Finally, we deny Mediterranean's request for oral argument.

I. BACKGROUND

A. Procedural history prior to the ALJ's Initial Decision on Default

MCS, a U.S. shipper, initiated this case with a Complaint dated July 28, 2021, alleging that Mediterranean and COSCO Shipping Lines Co., Ltd. (COSCO), who are vessel-operating common carriers, had violated 46 U.S.C. § 41102(c) and several provisions of 46 U.S.C. § 41104(a) of the Shipping Act of 1984 in connection with their provision of ocean carriage services. Verified Complaint; January 2024 Order, Doc. 68 (Jan. 3, 2024) at 3.

On September 23, 2021, the ALJ issued a Scheduling Order that set the close of discovery for January 27, 2022. On that same day, the ALJ approved a proposed settlement agreement between MCS and COSCO. Initial Decision Approving Confidential Settlement Agreement.

On November 22, 2021, MCS filed a motion to compel discovery, and on December 8, the ALJ granted MCS's motion to compel. Order Granting Motion to Compel (First Order). This extensive Order required Mediterranean to produce additional information in connection with 14 topics, encompassing responses to document requests and interrogatories. First Order; January 2024 Order at 3. The ALJ rejected Mediterranean's general objections that sought to limit its discovery obligations to what it saw as "core issues" and to put the burden on MCS to justify its discovery. *Id*. She also ordered Mediterranean to provide further information about interactions related to MCS as well as conduct beyond the specific transpacific bookings at issue. *Id*.

Although Mediterranean did not administratively appeal the First Order issued in December 2021, it also did not comply with the Order. Instead, later in December Mediterranean moved to dismiss the complaint, and MCS moved to file an amended complaint. FMC Docket No. 21-05, Docs. 31-34, 36. On February 4, 2022, the ALJ denied Mediterranean's motion to dismiss and granted MCS's motion to amend the complaint. Order on Motion to Amend Complaint and Motion to Dismiss (MTD Order).

In late February 2022, Mediterranean filed a notice that raised issues related to the production of documents in Switzerland, and the parties filed a joint status report; then, on March 4, the ALJ issued an order directing the parties to submit further detail as to what procedure they were requesting for the production of that evidence. Order on Proposed Revised Schedule and Discovery Notice. On April 4, the parties filed a joint status report requesting that a letter be issued under Hague Evidence Convention procedures, and on May 4, the ALJ granted that request. Order Granting Request for Letter of Request Under Hague Convention.

On July 8, 2022, MCS filed a notice attaching the response from a Swiss court that rejected the Request as outside the scope of the Hague Evidence Convention because the relevant FMC proceeding is an administrative one. Notice of Decision on Letter of Request.

On July 29, 2022, the ALJ issued an Order Requiring Production of Discovery (Second Order). January 2024 Order at 4. The Second Order rejected Mediterranean's request that a new request be submitted to the Swiss Federal Office of Justice, explaining that the Swiss court had determined that its involvement was not needed. *Id*. Relying on federal court precedent, the ALJ noted that a party seeking to use Hague Evidence Convention procedures must show they are necessary, and that foreign law actually bars the discovery at issue, but here Mediterranean had failed to do so. *Id*. The ALJ cited recent federal court decisions that had rejected similar claims based on the same Swiss provision because there was no threat of criminal sanction in the U.S. cases, and she noted that the same was true as to the sanctions available here under 46 C.F.R. § 502.150(b). *Id*. Thus, the ALJ ordered Mediterranean to produce the outstanding discovery by August 29, 2022. Second Order at 4.

Although Mediterranean did not administratively appeal the Second Order issued in July 2022, it also did not comply with the Order. Instead, it proceeded to seek advice from the Swiss government, requesting an extension of time to facilitate that, and on September 6, 2022, it submitted a Notice of Advice of the Swiss Federal Office of Justice, attaching a communication from that Office. In essence, Mediterranean argued that the Swiss Federal Office had indicated that a new request for judicial assistance could be submitted despite the earlier ruling of the Swiss court, and it further argued that the Office's response supported Mediterranean's insistence that Hague Evidence Convention procedures apply. Notice of Advice at 1-2.

On September 8, 2022, the ALJ issued an Order Denying Respondent's Motion for an Extension of Time and Order to Show Cause (Third Order). January 2024 Order at 5. The Third Order directed Mediterranean to "either provide the required discovery or show cause why default judgment should not be entered against it." *Id*. The ALJ rejected Mediterranean's continued arguments that Swiss law barred it from producing the outstanding discovery, noting that the "advice" from the Swiss Federal Office of Justice did not compel the result Mediterranean sought, and that Mediterranean was seeking to relitigate an issue that had already been decided. *Id*. Accordingly, the ALJ directed Mediterranean to show cause why default should not be entered under 46 C.F.R. § 502.150(b), although the Order specifically noted that if Mediterranean produced the required discovery, the issue would be moot, and the case could proceed. *Id*.

Mediterranean did not provide discovery in response to the Third Order, but the parties did file responses. Mediterranean argued that further consultation with Swiss authorities was the proper course because it would otherwise risk criminal sanctions, that default was a drastic remedy not called for where it had a good faith belief in that risk, that the consultation procedure in 46 U.S.C. § 41108(c)(2) had not been used, and that in any event the agency lacked jurisdiction over the matter. Respondent Mediterranean Shipping Company S.A.'s Response to Order to Show Cause (Sept. 22, 2022) at 1-4; Reply with Respect to Order to Show Cause (Oct. 14, 2022). MCS argued that Mediterranean had violated multiple FMC discovery orders and that a default sanction was justified under the standards applicable to the analogous Federal Rule of Civil Procedure 37(b)(2). Complainant MCS's Response to Order to Show Cause (Oct. 6, 2022) at 1-2.

While a decision on the Order to Show Cause remained pending, Mediterranean filed further notices attaching materials from the Swiss government that it insisted showed Hague Evidence Convention procedures were required. Notice of Determination of the Swiss Federal Office of Justice (Oct. 18, 2022); Notice of

Issuance of Formal Decision of the Swiss Federal Office of Justice and Police That Hague Evidence Convention Procedures Apply to This Proceeding and Must Be Used (Nov. 8, 2022). MCS argued that Mediterranean was improperly attempting to relitigate the issues and that default remained the proper remedy. Response Letter of Complainant (Oct. 28, 2022).

B. The ALJ's Initial Decision on Default

On January 13, 2023, the ALJ issued the Initial Decision on Default (Default Decision), Doc. 64. The ALJ noted that 46 C.F.R. § 502.150(b) describes the remedies available for failure to comply with an FMC discovery order, and section 502.150(b)(3) authorizes the ALJ to issue "a decision by default against the disobedient party." Default Decision at 14. The ALJ pointed out that the Commission had previously approved dismissals of cases where a party had willfully failed to provide discovery. *Id*. First turning to the FMC's jurisdiction, the ALJ stated that Mediterranean's claims on that issue were untimely, but in any case, the FMC has jurisdiction over Shipping Act claims even if, as Mediterranean argued, a related proceeding is underway, such as an arbitration of a breach of contract claim required by a service contract. *Id*. at 14-16.

Next, the ALJ concluded that a default should be entered. *See* Default Decision at 17-22. The ALJ emphasized Mediterranean's failures to comply with FMC discovery orders and its failure to show Hague Evidence Convention procedures were required. *Id*. at 17. The ALJ focused on the three factors set out in *Webb v. District of Columbia*, 146 F.3d 964, 971 (D.C. Cir. 1998) — prejudice to the other party as a result of the conduct at issue, prejudice to the judicial system, and the need to deter similar conduct. Default Decision at 17-18. First, with regard to prejudice to MCS, the ALJ stressed that Mediterranean had failed to produce additional information as ordered in more than a dozen categories and that it had wrongly tried to limit the scope of discovery to less than what was required to evaluate MCS's claims. *Id*. at 18. The ALJ noted that the information wrongly withheld here would likely have led to additional discovery requests, significantly hampering MCS's ability to proceed. *Id*. at 19. The ALJ also found that Mediterranean's conduct had prejudiced MCS by delaying the proceeding. *Id*. Second, as to prejudice to the adjudicatory system, the ALJ emphasized that federal agencies must protect their integrity and the orderly conduct of business, citing an FMC case upholding a dismissal where complainant had failed to respond to discovery. *Id*. The ALJ listed case deadlines that had not been met because of Mediterranean's failure to provide the discovery ordered. *Id*. at 20. Third, as to deterrence, the ALJ noted that the most severe sanction had to be available to deter future misconduct. *Id*. at 21. The ALJ noted that Mediterranean had not specifically described the information it claimed was protected because it was located in Switzerland. *Id*. The ALJ found that Mediterranean's refusal to follow the determination of the Swiss court or the ALJ's orders supported a finding that its refusal was willful and deliberate. *Id*. The ALJ also found that the violations alleged in the case were significant, and that Mediterranean's conduct had to be addressed to deter similar conduct. *Id*. at 21-22.

Finally, the ALJ considered the appropriate remedy. *See* Default Decision at 22-23. She cited precedent authorizing the award of reparations following default of "specified liquidated amounts requiring little or no calculations." *Id*. The ALJ looked to MCS's complaint, as well as information in its order to show cause brief, and awarded $944,655 in reparations. *Id*. at 22.

C. The Commission's Order Partially Affirming the Initial Decision on Default and Remanding as to Two Issues

On January 3, 2024, after evaluating Mediterranean's exceptions to the ALJ's Default Decision, the Commission issued the January 2024 Order. As to liability, the Commission denied the exceptions and affirmed the Default Decision. January 2024 Order at 2. The Commission concluded that the ALJ had permissibly found Mediterranean's conduct merited default as a discovery sanction, whether the Default Decision was reviewed de novo or under an abuse of discretion standard. *Id*.

As a threshold matter, the Commission found that the ALJ had properly determined that the FMC has jurisdiction over MCS's claims and that those claims were adequately stated. *See* January 2024 Order at 11-14. That was so even though the parties had agreed in their service contracts to resolve disputes by arbitration, the Commission explained, because Shipping Act claims like those made by MCS are distinct and can still be pursued in an FMC adjudication. *Id*. at 11-13.

The Commission also concluded that the ALJ's decision to impose default as a discovery sanction was within her discretion and, in any event, it was well-reasoned and well-supported by the record. *See* January 2024 Order at 14-24. First, the Commission noted, Mediterranean had failed to comply with multiple orders, dating back to December 2021, that it provide substantial outstanding discovery. *Id*. at 14-17. The ALJ had properly rejected Mediterranean's repeated claims that Swiss law bars it from providing that discovery under FMC procedures. *Id*. at 14-16, 21-22. In addition, the Commission found, the ALJ had properly determined that all three factors set out in the *Webb* decision for the evaluation of default as a discovery sanction were present. *Id*. at 17-23. In particular, the ALJ had permissibly found that Mediterranean's conduct had prejudiced MCS in this case, that it had prejudiced the FMC's adjudicatory system by creating burdens and delays, and that its willfulness presented a need to deter potential future misconduct. *Id*. at 17-22. Finally, the Commission determined that the ALJ's Default Decision showed that lesser sanctions would not be adequate to address this situation. *Id*. at 22-23.

After affirming the decision as to liability, the Commission remanded the matter to the ALJ for further consideration of two issues. *See* January 2024 Order at 25-30. First, the Commission remanded for consideration of whether the sanctions available under

46 U.S.C. § 41302(d) for delay in the issuance of final FMC decisions were an additional basis to impose default in this proceeding. *Id*. at 25-27. Second, as to the appropriate remedy, the Commission remanded for the submission of evidence that was sufficient to support the reparations MCS sought. *Id*. at 27-30.

On remand, the ALJ immediately issued a schedule for briefing on the remanded issues, *see* Remand Scheduling Order (Jan. 4, 2024), but before the parties began that briefing, Mediterranean filed a petition seeking judicial review of the January 2024 Order, *see* Petition, *Mediterranean v. FMC*, No. 24-1007 (D.C. Cir. filed Jan. 12, 2024), Doc. No. 2037017; Clerk's Notice (Jan. 23, 2024), Doc. No. 2037032. The petition stated that it was "filed protectively, despite the pendency of remand proceedings before the Commission, to assure that there is no question" about whether the January 2024 Order could be reviewed. Mediterranean also stated that it would seek to stay its petition until completion of the FMC No. 21-05 matter. Petition at 1-2. The FMC moved to dismiss the case for lack of jurisdiction because there had been no "final order," as is required for review under the Hobbs Act, 28 U.S.C. § 2342(3). *See* FMC's Motion to Dismiss (Feb. 28, 2024), Doc. No. 2042683. Mediterranean did not oppose the motion, but argued that if the case was not dismissed, it should be held in abeyance. Mediterranean's Response to Motion to Dismiss and Conditional Cross-Motion to Hold Case in Abeyance (Mar. 11, 2024), Doc. No. 2044450. On March 22, 2024, the court issued an order deferring the FMC's motion to dismiss and holding the case in abeyance, with the parties to file motions about further proceedings "within 30 days after resolution of the agency proceedings." Order (Mar. 22, 2024), Doc. No. 2046262. Separately, the court granted MCS's motion to intervene in the case. Order (Mar. 22, 2024), Doc. No. 2046264.

In the meantime, MCS filed its Brief on Remand and related materials in FMC No. 21-05 on January 19, 2024. MCS argued that 46 U.S.C. § 41302(d) constitutes an additional independent basis for the ALJ's default decision, and it sought $1,152,677 in reparations, based on a declaration and supporting documents related to relevant shipments. Brief on Remand. Mediterranean filed its Response Brief on Remand on February 2, 2024. Mediterranean argued that the evidence MCS had provided was so insufficient as to justify a complete denial of reparations, or at a minimum a hearing at which Mediterranean could challenge MCS's declarant and supporting evidence. Response Brief on Remand at 1-11. Mediterranean also argued that section 41302(d) did not support imposing a default in this case. *Id*. at 11-15.

D. The ALJ's Initial Decision on Remand

On February 16, 2024, after evaluating the parties' submissions, the ALJ issued the Remand Decision, Doc. 75. First, the ALJ found that the delay sanction at 46 U.S.C. § 41302(d) was an additional basis supporting the entry of default against Mediterranean. *Id*. at 6-9. The ALJ noted that section 41302(d) authorizes sanctions, including an "adverse decision," where the Commission is "unable to issue a final decision" within the period it set to do so under section 41302(c) "because of undue delay caused by a party to the proceeding." *Id*. at 7-8. The ALJ noted that not all delays are "undue," and Mediterranean had a right to vigorously defend itself. *Id*. at 8. However, she concluded that when Mediterranean failed to provide the outstanding discovery after the July 2022 order (the Second Order), which warned of the potential for a default sanction, its delay of the case became "undue." *Id*. First, the ALJ found that under the terms of the statute, section 41302(d) does apply to complaint proceedings like this one. *Id*. Next, she rejected Mediterranean's reliance on its claim that the delay sanction could not be applied where a foreign law barred discovery production. *Id*. at 9. She explained that a legitimate dispute of that nature would not create delay that was "undue," but here, even after the ALJ and the court in Switzerland had rejected the approach Mediterranean advocated, it still failed to produce the outstanding discovery, instead filing additional documents renewing its claims throughout the rest of 2022. *Id*. The ALJ found that these delays prevented the Commission from meeting its August 2023 deadline for a final decision, and that had the default not been imposed, the case might still be pending at the discovery stage, as the outstanding discovery would be needed for a merits decision. *Id*.

Turning to reparations, the ALJ undertook an extensive analysis of the evidence MCS provided to support its claims, as well as Mediterranean's objections. Remand Decision at 9-24. First, the ALJ explained the basic legal standards governing the award of reparations in the default context. *Id*. at 9-11. Complainants have the burden of proving entitlement to reparations based on their actual damages, and under analogous federal court precedent, they may do so with detailed affidavits or documentary evidence. *Id*. at 10-11.

To support its claims, the ALJ noted, MCS submitted a sworn affidavit from its logistics analyst attaching copies of the relevant service contracts between MCS and Mediterranean, the 2020 contract (May 2020-April 2021) and 2021 contract (May 2021-April 2022); a table with extensive data about replacement shipments of MCS cargo for the time frames and port pairs covered by these service contracts, but that were not carried under any service contract; and invoices, freight bills, sea waybills, and other documents supporting that data. Remand Decision at 11-13. Based on this evidence, MCS sought reparations of (1) the difference between MCS's 2020 service contract rate and the amount it actually paid for the 299 twenty-foot equivalent units (TEUs) it alleges that Mediterranean refused to carry under that contract, or $400,509; (2) the difference between MCS's 2021 service contract rate and the amount it actually paid for the 123.5 TEUs it alleges that Mediterranean refused to carry under the three months of that contract that were the "focus" of MCS's original FMC complaint (May-July 2021), or $463,936; and (3) the difference between MCS's 2021 contract rate and the amount it actually paid for the 112.25 TEUs it alleges that Mediterranean refused to carry in the final months of that 2021 contract (December 2021-April 2022), or $288,232, for total requested reparations of $1,152,677. *Id*. at 12-13.

Next, the ALJ addressed Mediterranean's claims that MCS could not recover for the third category of reparations claimed above, specifically the $288,232 for the final months of the 2021 service contract, because it failed to provide adequate notice it was seeking such damages. Remand Decision at 14-16. The ALJ noted that under Federal Rule of Civil Procedure 54(c), a "default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings." *Id*. at 15. She also noted that MCS's amended complaint did put Mediterranean on notice that the alleged violations were ongoing, and that some federal court precedent permits recovery of amounts not specified in pleadings where adequate notice is provided later, such as in connection with a motion for default judgment. *Id*. However, MCS's response to the Order to Show Cause (Third Order), where default was at issue, had sought only reparations incurred during the period of the 2020 service contract and the first three months of the 2021 service contract, which MCS at that time calculated to total $944,655. *Id*. at 14-15. Therefore, although notice was sufficient as to those earlier amounts, the ALJ concluded that MCS could not recover for any damages after that period, namely the $288,232 for the last five months of the 2021 contract. *Id*. at 15, 16.

The ALJ rejected Mediterranean's claim that it was entitled to an oral hearing to cross-examine MCS's declarant and otherwise challenge its evidentiary showing. Remand Decision at 16-17. She noted that oral hearings are not required in the default context under federal court precedent, and that the Commission generally awards reparations without such hearings even outside that context, under its Rules of Practice and Procedure. *Id*. The ALJ explained that the evidence MCS had submitted was sufficient for decision as to the reparations at issue. *Id*. at 17. Finally, the ALJ noted that she had discretion under FMC Rules to determine whether an oral hearing was needed, and that in this case Mediterranean had failed to show that one was. *Id*.

The ALJ addressed Mediterranean's numerous objections to the specific evidence MCS provided to support its reparations claims. Remand Decision at 17-23. First, the ALJ rejected Mediterranean's claim that MCS's declarant Brittany Montesano lacked the required personal knowledge. *Id*. at 18. The ALJ explained that as MCS's logistics analyst since 2016, Montesano had signed the relevant service contracts and verified MCS's FMC complaints. *Id*. Her knowledge of the relevant shipments had been established and her statements were supported by the documents attached to her declaration, even though she had been on maternity leave for three months in mid-2021. *Id*.

The ALJ also rejected Mediterranean's arguments that MCS had failed to show the differentials between its service contract rates and the spot market rates it paid for the replacement shipments reflected in its evidence were adequately supported measures of its damages. Remand Decision at 18-20. She found that Mediterranean was advocating for an excessively high standard of proof, and she rejected its apparent claims that MCS had to tie each spot shipment to a prior request that Mediterranean carry the shipment and to show that each spot shipment could not have been made any other way. *Id*. at 19-20.

In addition, the ALJ concluded that the evidence supported reparations as to most specific port pairs for which MCS sought reparations. Remand Decision at 20-21. However, the ALJ noted that the amended complaint did not allege any violations involving the port of Jakarta, and so she excluded requested reparations related to that port, resulting in a reduction of $2,738.50. *Id*.

Next, the ALJ turned to Mediterranean's arguments as to the timing of the shipments for which MCS sought reparations. Remand Decision at 21-22. She concluded that reparations were appropriate for the year of the 2020 service contract and the first three months of the 2021 service contract, as MCS had included those periods in its amended complaint and evidence supplied was sufficient to support those reparations. *Id*. With regard to shipments involving the port of Tianjin, the ALJ found that even though evidence showed MCS received its full shipping allocation from Mediterranean for

July 2021 from that port, reparations based on some spot market shipments that took place in August 2021 were appropriate because of delays caused by earlier violations. *Id*.

Finally, the ALJ reviewed the evidence as to the specific number of shipments for which MCS was entitled to reparations. Remand Decision at 22-23. She explained that MCS was entitled to the difference between its allocation of shipments under the service contracts and the shipments Mediterranean actually did carry for the time frames and port pairs at issue. *Id*. at 22. This totaled 422 twenty-foot equivalent units (TEUs), or 419.75 TEUs after removal of the Jakarta shipment. *Id*. at 22-23. The ALJ determined that certain minor discrepancies in the way TEUs were listed in MCS's evidence did not require a reduction in the overall reparations amount. *Id*.

The ALJ concluded that MCS was entitled to a total of $861,706.50 in reparations: $397,770.50 for the period of the 2020 service contract (the $400,509 sought minus $2,738.50 for the Jakarta shipment), plus $463,936 for the first three months of the 2021 service contract. Remand Decision at 23. The ALJ also awarded interest under 46 U.S.C. § 41305(a) accruing from July 31, 2021, the last date for which the amended complaint alleged violations. *Id*. at 23-24.

On March 11, 2024, Mediterranean timely filed its Exceptions to Initial Decision on Remand (Exceptions), Doc. 76. MCS did not file exceptions to any aspect of the ALJ's award. On April 2, 2024, MCS timely filed a Reply to Mediterranean's Exceptions to Initial Decision on Remand (Exceptions Reply), Doc. 77.

II. DISCUSSION

A. Standard of Review

When the Commission reviews exceptions to an ALJ's Initial Decision, it normally has "all the powers which it would have in making the initial decision." January 2024 Order at 9 (quoting 46 C.F.R. § 502.227(a)(6)). The Commission therefore generally reviews the ALJ's determinations de novo. *Id.*; *see also Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 12-02, 2015 WL 9426189, at *5 (FMC Dec. 18, 2015). In particular, when reviewing an ALJ's Initial Decision on default after a respondent has failed to appear, the FMC has adopted the ALJ's findings of fact and law if "they are well-reasoned and supported by evidence in the record." *United Logistics (LAX) Inc. – Possible Violations of Sections 10(A)(1) and 10(B)(2)(A) of the Shipping Act of 1984*, FMC Docket No. 13-01, 2014 WL 5316339, at *1 (FMC Feb. 6, 2014). Here, the ALJ's conclusion that the sanctions for undue delay described in 46 U.S.C. § 41302(d) are potentially available in private-party complaint proceedings is reviewed de novo, as a legal determination.

However, other elements of the Remand Decision under review here are more appropriately reviewed under an abuse of discretion standard. As explained in the January 2024 Order, the Commission reviews discovery orders, including orders imposing sanctions, under an abuse of discretion standard. *See* January 2024 Order at 9-10; *Rana v. Franklin*, FMC Docket No. 19-03, 2022 WL 1744905, at *4 (FMC May 25, 2022); *Kawasaki Kisen Kaisha, Ltd. v. Port Auth. of N.Y. and N.J.*, FMC Docket No. 11-12, 2014 WL 7328475, at *7-8 (FMC Nov. 20, 2014)). "In reviewing district courts' orders on discovery, the United States Courts of Appeal apply an abuse of discretion standard because a 'narrowly circumscribed' scope of review is consistent with district courts' 'considerable discretion in managing discovery' and their 'broad discretion to impose sanctions for discovery violations under [Federal] Rule [of Civil Procedure] 37.'" *Rana*, 2022 WL 1744905, at *4 (quoting *Parsi v. Daioleslam*, 778 F.3d 116, 125 (D.C. Cir. 2015) (additional citations omitted)); *see also Bonds v. District of Columbia*, 93 F.3d 801, 807 (D.C. Cir. 1996) (reviewing court should reverse discovery sanctions only if they are found to be "clearly unreasonable, arbitrary, or fanciful"). The D.C. Circuit "review[s] the district court's imposition of discovery sanctions, including a default judgment award, for abuse of discretion." *Wash. Metro. Area Transit Comm'n v. Reliable Limousine Serv.*, 776 F.3d 1, 4 (D.C. Cir. 2015). The Commission has reviewed decisions dismissing actions for failure to comply with discovery orders, *see, e.g.*, *Interpool, Ltd. v. Pac. Westbound Conf.*, 22 F.M.C. 762, 764, 19 S.R.R. 1719 (FMC May 15, 1980), available at https://www.fmc.gov/wp-content/uploads/2019/04/vol22.pdf, and in *Kawasaki*, it clarified that it would do so under an abuse of discretion standard, *see* 2014 WL 7328475, at *8.

In light of the above, the Commission concluded in the January 2024 Order that the abuse of discretion standard is appropriate for review of the ALJ's imposition of *default as a discovery sanction* under 46 C.F.R. § 502.150(b). *See* January 2024 Order at 10. Of course, default may be considered a more severe sanction than dismissal, as it determines liability and will likely lead to remedies, rather than a mere preservation of the status quo. The D.C. Circuit has described its abuse of discretion review in the default context as "more 'thorough' because the 'drastic' sanction 'deprives a party completely of its day in court.'" *Reliable Limousine*, 776 F.3d at 4 (quoting *Webb*, 146 F.3d at 971).

The same abuse of discretion standard is properly applied to review of the ALJ's imposition in the Remand Decision of *default as a sanction for undue delay* under 46 U.S.C. § 41302(d). Section 41302(d) serves a purpose comparable to that of the discovery sanctions provision at 46 C.F.R. § 502.150(b). Specifically, the delay sanction provision deters parties from obstructing the conduct of the FMC's administrative adjudication proceedings under 46 U.S.C., Chapter 413, and 46 C.F.R., Part 502, and deciding whether to impose such a sanction involves a similar exercise of ALJ discretion. MCS advocates for an abuse of discretion standard in the current situation for similar reasons. Exceptions Reply at 3-4. In any event, below we review the Remand Decision's imposition of the delay sanction at 46 U.S.C. § 41302(d) with reference to both abuse of discretion and de novo standards.

Now we turn to the standard of review applicable to the Commission's review of the ALJ's reparations determination. At least some federal agencies review ALJ decisions as to damages under an abuse of discretion standard. *See*, *e.g.*, *In the Matter of: Office of Federal Compliance Programs v. Bank of America*, Admin. Rev. Bd., U.S. Dept. of Labor, No. 13-099, 2016 WL 2892921, at *14 (DOL Adm. Rev. Bd. Apr. 21, 2016) (like a federal appellate court, review board will adopt ALJ's methodology for awarding damages if she "exercised reasonable discretion"); *In the Matter of: Larry Barnum v. J.D.C. Logistics, Inc.*, Admin. Rev. Bd., U.S. Dept. of Labor, No. 08-030, 2009 WL 564763, at *4 (DOL Adm. Rev. Bd. Feb. 27, 2009) (Board affirms ALJ's damages award because substantial evidence supported it and the ALJ did not abuse his discretion). Federal appellate courts reviewing awards of damages by district courts also generally use an abuse of discretion standard. *See Spanski Enters., Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904, 909 (D.C. Cir. 2018) (statutory damages award under Copyright Act reviewed for abuse of discretion). The basic rationale is that "[d]amage awards are 'findings of fact governed by Federal Rule of Civil Procedure 52(a), which will not be disturbed unless clearly erroneous.'" *U.S. for Use and Benefit of Am. Civil Construction, LLC v. Hirani Eng'g & Land Surveying, PC*, 26 F.4th 952, 959 (D.C. Cir. 2022) (quoting *Bucheit v. Palestine Liberation Org.*, 388 F.3d 346, 350 (D.C. Cir. 2004) (internal quotations omitted)). MCS's brief advocates for an abuse of discretion standard in this case generally, and it discusses the ALJ's reparations decision in those terms. *See*, *e.g.*, Exceptions Reply at 2-3. Mediterranean does not appear to take a position on the standard of review for the reparations award. On balance, we find that it is appropriate to review the reparations award for abuse of discretion. In any case, below we will review the award with reference to both abuse of discretion and de novo standards.

B. The ALJ correctly found that delay sanctions under 46 U.S.C. § 41302(d) are available in private-party complaint proceedings, and her finding that a default was appropriate under that provision here was permissible

The ALJ's determination in the Remand Decision that delay sanctions under 46 U.S.C. § 41302(d) are available in private-party complaint proceedings was correct. In addition, her determination that default was an appropriate remedy under section 41302(d) for Mediterranean's failure to comply with discovery orders here was within her discretion and well-supported by the record.

1. Section 41302(d) applies to private-party complaint proceedings

The ALJ correctly found that 46 U.S.C. § 41302(d) applies to private-party complaint proceedings like this one. Remand Decision at 6-8. That is evident from the plain language of the statute. Section 41302(d) provides that, where the Commission is "unable to issue a final decision because of undue delay caused by a party" to a proceeding "within the period for final decision under" section 41302(c), the Commission "may impose sanctions, including issuing a decision adverse to the delaying party." And as the ALJ explained, section 41302(c) specifically states that it applies to proceedings under sections 41302 *and* 41301, the latter of which is the "Complaints" section under which proceedings like this one arise. *See* Remand Decision at 8 (citing January 2024 Order at 25). Thus, Congress clearly intended section 41302(d) to apply to proceedings originating as "Complaints" under section 41301, as well as those that are "Investigations" under section 41302.

Mediterranean's arguments to the contrary are unpersuasive. *See* Exceptions at 13-14. It claims that Congress did not intend for section 41302(d) sanctions to apply to private-party complaint proceedings, but the only support it offers for that claim is that the original heading of what is now section 41302 was "Conduct of Investigations." *Id*. at 13. The headings of statutory sections may aid in interpretation, but they cannot limit the plain meaning of the text. *Citizens for Responsibility and Ethics in Wash. v. FEC*, 316 F.Supp.3d 349, 396 (D.D.C. 2018) (citing *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528–29 (1947) and later cases). And Mediterranean offers no response to the ALJ's careful analysis of the interplay between the subsections of section 41302, as described above, which makes clear that Congress did indeed intend that section 41302(d) apply in complaint proceedings. Mediterranean notes that extensions of final decision deadlines at the FMC are not unusual, citing a 1983 House Report describing the deadlines as "a target," and it argues that the deadlines operate only as "guidelines." *Id*. at 13. But again, these claims founder on the text of section 41302(d), which leaves no doubt that, when a party causes "undue" delay, the Commission "may impose sanctions, including issuing a decision adverse to the delaying party." Mediterranean also notes that it appears section 41302(d) has never before been applied to a reparations proceeding or as a basis for default. *Id*. at 13-14. However, the fact that section 41302(d) does not seem to have been applied in such situations before is no reason to disregard its potential application in an appropriate case today.

2. The ALJ permissibly determined that default was an appropriate section 41302(d) delay sanction in this case

The ALJ's determination that section 41302(d) provides an independent basis to support a default sanction against Mediterranean here was within her discretion, and in any case was well-supported. Remand Decision at 6-9. In reviewing the issue, the ALJ first quoted the Commission's January 2024 Order at length. *Id*. at 6-7 (quoting January 2024 Order at 25-27). In the quoted material, the Commission had noted that Mediterranean's failures to comply with discovery orders appeared to be at least the primary cause of two extensions of the final decision deadline in FMC No. 21-05, setting the date back by about a year. *Id*. In her own analysis, the ALJ stated that although Mediterranean had a right to defend itself, its delays became "undue" under section 41302(d) when it failed to provide the extensive outstanding discovery after her July 2022 order (the Second Order). *Id*. at 8. She rejected Mediterranean's argument that it could not comply because Swiss law barred the production and the issue should have been resolved using international procedures. *Id*. at 9. The ALJ noted that a legitimate dispute of that nature would not create delay that was "undue," but here, the ALJ and the court in Switzerland had rejected the approach Mediterranean advocated, yet it still failed to produce the outstanding discovery, instead continuing to file materials arguing the point. *Id*. The ALJ concluded that these undue delays prevented the Commission from meeting its August 2023 deadline for a final decision. *Id*.

Mediterranean's arguments to the contrary are unavailing. *See* Exceptions at 13-19. As an initial matter, Mediterranean's claim that the ALJ engaged in only a "cursory analysis in support of its retrospective finding" to impose the delay sanction under section 41302(d) is incorrect. *Id*. at 14. In fact, the ALJ undertook an in-depth analysis that addressed Mediterranean's arguments, and she reached her conclusion only after Mediterranean had ample opportunity to show why section 41302(d) should not apply here. *See* Remand Decision at 6-9. Mediterranean was warned repeatedly that default was a possible sanction for its failure to produce the discovery at issue, starting with the Second Order in July 2022, and again in the Third Order in September 2022. *Id*. at 8. Thus, Mediterranean's claim that the finding was "retrospective" has little force.

Mediterranean's main argument against the section 41302(d) sanction is that it cannot be applied here because Swiss law barred the production at issue, but as MCS notes, that claim has been repeatedly rejected and is unavailing. *See* Exceptions at 14-18; Exceptions Reply at 4-6. First, the ALJ's January 2023 Default

Decision correctly rejected the claim that Swiss law bars production of the discovery at issue under FMC procedures, and the Commission affirmed that conclusion. *See* January 2024 Order at 14-16, 21-22; Second Order at 2-3 (discussing cases rejecting the claim that the provision of Swiss law on which Mediterranean relies bars the production of information where, as here, there is no risk of criminal sanctions). As the Commission already noted, Mediterranean has failed to identify any specific information or categories of documents that Swiss law supposedly bars it from providing, or even to show that any responsive information is located in Switzerland and otherwise unavailable. January 2024 Order at 20-21. And even if Mediterranean believed it had identified such information, that would not justify its complete failure to comply with the ALJ's discovery orders. Its remedy in that event would be either to comply and pursue the issue on later review by the Commission, or if it felt it was genuinely at risk, to seek to appeal the rulings immediately. Instead, it continued to re-assert its rejected claims, obstructing the adjudication and causing significant delay. Indeed, Mediterranean continues to rely on these rejected claims here, including its lengthy arguments that the Swiss court was wrong to reject the Hague Evidence Convention request and that production really would subject it to criminal liability. But its argument that the ALJ's Remand Decision wrongly failed to discuss the arguments and precedent on which it relies for those points is misplaced; the ALJ had no obligation to discuss authority on claims that were previously rejected. *See* Exceptions at 15-18.

Mediterranean's claim that application of a section 41302(d) default sanction here would create tension with 46 U.S.C. § 41108(c)(2) is also incorrect. *See* Exceptions at 17, 18. First, the January 2024 Order already rejected Mediterranean's claim that section 41108(c)(2) precludes default here, explaining that even if the claim had not been waived by Mediterranean's failure to raise it earlier, Mediterranean has failed to show it would bar a default here. *See* January 2024 Order at 23-24. In particular, although part of section 41108(c)(2) is phrased in mandatory terms, directing the agency to notify the Secretary of State when a carrier "alleges" that foreign law bars production, the Commission noted that "[g]iven the burdens that implementation of the provision would impose on both the U.S. and foreign governments, and the potential effects on FMC discovery, it is reasonable to interpret the statute to require a more specific and developed showing that the documents sought actually are located in a foreign country, not available in the United States, and cannot be produced because of foreign laws." *Id*. at 24. Mediterranean has failed to make such a showing. *Id*. Moreover, its renewed claims about MCS's prior position on section 41108(c)(2) must fail because that position would not bind the ALJ or the Commission. *See id*. And as the ALJ noted, a default sanction here creates no tension with section 41108(c)(2) because legitimate discovery disputes that lead to consultation under that section would not cause delays that were "undue." Remand Decision at 9. Certainly, after the Second Order, there was no legitimate discovery dispute before the ALJ.

In addition, though there was no need earlier to explore all the infirmities in Mediterranean's argument, Mediterranean has failed to show that section 41108(c)(2) even applies outside the context of the potentially severe tariff-suspension and vessel-clearance revocation penalties available under section 41108(c)(1), neither of which is involved in this case. The remedies currently available under section 41108(b) where a tariff has been suspended for a failure to supply information ordered to be produced include civil penalties of up to $146,092 *per shipment*. *See* 46 U.S.C. § 40102(22) ("shipment" means all "cargo carried under the terms of a single bill of lading"); 46 C.F.R. § 506.4 (inflation adjustments). In addition, penalties imposed under section 41108 must be submitted for expedited Presidential review before they become effective. 46 U.S.C. § 41108(e). The potential for penalties of that magnitude may well call for diplomatic resolution under section 41108(c)(2). The default and reparations imposed on Mediterranean in this case are clearly distinguishable.

And even if section 41108(c)(2) were interpreted to require that the FMC notify the Secretary of State based merely on

Mediterranean's allegation about Swiss law, it would frustrate the overall purpose of the Shipping Act to permit Mediterranean to rely on the agency's failure to do that to refuse to produce discovery where the carrier utterly failed to show that the Swiss statute it relied on would actually prevent it from providing the discovery at issue. Section 41108(c)(2) is designed to aid the Commission in obtaining evidence, not to provide carriers with a way to evade discovery obligations with demonstrably insufficient claims about foreign law. Thus, any failure to meet a requirement to notify the Secretary of State here would be at most harmless error.

Finally, Mediterranean's claims that it was not responsible enough for the delays here to justify a default sanction are unpersuasive. *See* Exceptions at 18-19. The ALJ emphasized Mediterranean's right to "vigorously defend" itself, and she carefully assessed the progress of FMC No. 21-05, determining that the delay was not "undue" until Mediterranean failed to comply with the Second Order issued in July 2022 — after the First Order granting MCS's motion to compel in December 2021, after the Swiss court rejected the Hague Evidence Convention request, and after the Second Order rejected Mediterranean's arguments that Swiss law prevented it from producing the outstanding information. Remand Decision at 8-9. MCS argues that the delay caused by Mediterranean actually became "undue" before July 2022, starting with the "discovery misconduct" that led to the original 2021 motion to compel. Exceptions Reply at 5. There is a strong basis to find that some of the pre-July 2022 delay was "undue." Mediterranean never complied with the First Order from December 2021, and it never established that Swiss law barred any, much less all, of the discovery ordered to be produced then. But in any case, rather than providing the outstanding discovery after the Second or Third Orders, Mediterranean persisted in its arguments in additional filings through the end of 2022. That led to the ALJ's January 2023 Default Decision, followed by exceptions briefing and the Commission's consideration of the difficult non-merits issues that Mediterranean's conduct has forced the agency to confront since then. In these circumstances, the agency's February 2023 and August 2023 final decision deadlines could not be met, as the Commission discussed earlier. *See* Remand Decision at 6-7.

In sum, it was not an abuse of discretion for the ALJ to conclude that the undue delay Mediterranean caused by failing to provide discovery in accord with her orders merited a default sanction under 46 U.S.C. § 41302(d), as that conduct was, at a minimum, the primary reason the agency could not meet its August 2023 final decision deadline. And in any event, the ALJ's determination was well-reasoned and well-supported by the record.

C. The reparations award was within the ALJ's discretion, and it was well-supported by a sworn declaration and extensive documentary evidence

As explained in section I.D above, the ALJ's reparations award was based on a detailed analysis of the relevant submissions, and it entailed substantial reductions (totaling about 25%) of the amount MCS requested. Thus, Mediterranean's assertion that the ALJ "effectively rubber-stamped" the requested award is plainly incorrect. Exceptions at 25. On the contrary, the award was within the ALJ's discretion, and in any case her analysis was well-reasoned and well-supported by a declaration from MCS's logistics analyst and extensive documentation. In particular, as explained below, the ALJ permissibly determined the scope and amount of reparations at issue, while rejecting Mediterranean's arguments that MCS's evidence was inadequate and that Mediterranean was entitled to an evidentiary hearing.

1. The ALJ permissibly determined the scope and the amount of claimed reparations

The ALJ took considerable care in evaluating the scope of the reparations MCS claimed and what would be recoverable, and the manner in which she did so was reasonable. *See* Remand Decision at 12-24. Indeed, even the Exceptions present little objection to how she made these determinations, focusing instead on whether MCS had established a sufficient link between the claimed reparations and Mediterranean's conduct as an evidentiary matter, as discussed in the sections below. Before addressing those objections, however, we will review the basic universe of damages at issue, about which there seems to be little if any remaining dispute.

Toward the start of her analysis, the ALJ analyzed the extent to which the specific reparations MCS claimed were consistent with its previous positions and whether Mediterranean had received sufficient notice of the claims. Remand Decision at 14-16. As explained in section I.D above, MCS claimed reparations of \$400,509 for the period of the 2020 service contract, \$463,936 for the first three months of the 2021 service contract (May-July 2021), and \$288,232 for the final five months of that contract (December 2021-April 2022). Mediterranean argued that MCS could not recover reparations for the final months of the 2021 service contract, because it had failed to provide adequate notice. *Id*. The ALJ noted that under Federal Rule of Civil Procedure 54(c), damages following a default cannot exceed what is demanded in the pleadings, and that even though recovery of amounts not specified in pleadings may be permitted where adequate notice is provided in briefing as to a default judgment, here MCS's response to the Order to Show Cause (Third Order) had sought only reparations caused by conduct during the first two periods above. *Id*. at 14-15. The ALJ concluded that MCS could not recover any damages for conduct after those periods, namely the \$288,232 for the final five months of the 2021 contract. *Id*. at 15, 16. This determination was well-supported, and MCS filed no exception to it. It is upheld.

The ALJ also addressed whether the port pairs as to which MCS sought reparations were within the scope of the service contracts at issue and the permitted time periods above. Remand Decision at 20-21. As explained in section I.D above, because the amended complaint did not allege any violations involving the port of Jakarta, the ALJ excluded the requested reparations related to that port, in the amount of $2,738.50. *Id*. This determination was well-supported, and MCS filed no exception to it, so it is affirmed.

In addition, the ALJ evaluated MCS's use of the differentials between its service contract rates and the spot market rates it paid for the shipments reflected in its evidence as a measure of its damages. Remand Decision at 18-20. She concluded that using such rate differentials was an appropriate way to measure damages in this context, and that MCS had provided sufficient evidence to link Mediterranean's failure to carry shipments to the spot market shipments involved. *Id*. at 19-20. The ALJ's discussion indicated that she understood Mediterranean to be disputing both of these major points—the use of rate differentials and MCS's specific evidence. But in its Exceptions, Mediterranean disputes only the latter point. Mediterranean states that if MCS had provided adequate evidence linking its spot shipments to unjustified Mediterranean conduct and showing that it could not have otherwise mitigated its harm, "then the difference between the contract rates and the spot rates paid might be a reasonable basis for calculating reparations owed." Exceptions at 22. Thus, there appears to be no dispute that the use of such rate differentials is a permissible method here, and the ALJ's determination on that point is affirmed.

The ALJ also addressed the overall time frame and the number of shipments for which MCS sought reparations, concluding that these were supported by the evidence MCS supplied, subject to the limitations discussed above. Remand Decision at 21-23. Thus, the ALJ determined that reparations were appropriate for the year of the 2020 service contract and the first three months of the 2021 service contract. *Id*. at 21-22. The ALJ's allowance of reparations for specific shipments involving the port of Tianjin was reasonable, and Mediterranean does not appear to renew its specific objection to that determination here. *Id*. In addition, the ALJ's conclusion that MCS was entitled to reparations for shipments reflecting the difference between its full allocation of shipments under the service contracts and the shipments Mediterranean actually did carry for the time frames and port pairs at issue, minus the Jakarta shipment, was reasonable. *Id*. at 22. This totaled 419.75 TEUs and $861,706.50 in reparations. *Id*. at 22-23. Mediterranean does not appear to object to the specific manner in which the ALJ made these calculations. The calculations are well-supported and are upheld.

Finally, the ALJ awarded interest under 46 U.S.C. § 41305(a) accruing from July 31, 2021, the last date for which the amended complaint alleged violations. Remand Decision at 23-24. That was a conservative choice, in light of recent precedent the ALJ identified which could have supported use of an earlier date, specifically one at the mid-point of relevant shipments. *Id*. Mediterranean has not specifically challenged the award of interest, and neither party has challenged the ALJ's choice of the date. The ALJ's interest determination was reasonable and is affirmed.

In sum, the ALJ's above determinations as to the overall time frame, shipments to be included, and the calculation of reparation amounts due were permissible and are upheld.

2. <u>The ALJ permissibly determined that MCS had established a sufficient evidentiary link between its claimed damages and Mediterranean's conduct</u>

Mediterranean's main challenge to the ALJ's award of reparations is that MCS failed to show a sufficient link between Mediterranean's alleged violations and the specific damages MCS claims. Exceptions at 19-25. As part of this evidentiary challenge, Mediterranean argues that the declarant MCS offered to support the documentation of its claimed injuries lacked sufficient personal knowledge to provide that support, and that MCS failed to show it had made sufficient efforts to mitigate its damages. These claims are substantial and merit careful consideration. But on balance we affirm the ALJ's decisions as to the evidence MCS provided, because those decisions were within the ALJ's discretion and in any case well-supported by the record. *See* Remand Decision at 17-23.

a. MCS sufficiently established the knowledge of its declarant

The ALJ's determination that the declarant MCS provided to support its evidentiary showing had the knowledge required to do so was permissible. Remand Decision at 18. The ALJ noted that declarant Brittany Montesano had been MCS's logistics analyst since 2016, had signed the two service contracts at issue, and had verified MCS's FMC complaints, concluding that Montesano had demonstrated sufficient knowledge of the relevant shipments and other activities, which were confirmed by the voluminous documentation attached to her declaration. *Id.*; *see* Declaration of Brittany Montesano, Doc. 72 (Jan. 19, 2024), at 2-3, Exhs. 1-5.

Mediterranean's challenge to Montesano's personal knowledge is unpersuasive. Mediterranean concedes that "[n]o one is arguing Ms. Montesano is a complete stranger to the litigation," but it claims that she lacks the required knowledge because she "was on leave for the key period in 2021 for which Complainant is seeking reparations." Exceptions at 24. The ALJ acknowledged evidence indicating that Montesano had been on maternity leave for three months, from May 9 to August 9, 2021, but the ALJ concluded that the overall record in the case established that Montesano had sufficient knowledge, "including from review of corporate records, of the basis for the reparations claim." Remand Decision at 18. The declaration itself states that it is based in part on "information received from others." Montesano Decl. at 4.

As an initial matter, the above maternity leave dates indicate that Montesano was absent from MCS's day-to-day operations for less than three of the 15 months for which reparations were awarded (May 2020-July 2021), or less than 20% of the total time in question. Mediterranean does not appear to challenge the basis for Montesano's knowledge for the remainder of the 15 months. Mediterranean is correct that May-July 2021 were important months, as they are the basis for a slim majority of the reparations the ALJ awarded. Still, Montesano's leave did not begin until more than a week into that May-July 2021 period. And $397,770.50 of the total of $861,706.50 awarded, or about 46%, did stem from the preceding 2020 service contract period.

In any event, in the context of the record in this case, Montesano can permissibly rely on company records in testifying as to the relevant information for the short time gap at issue. Under Commission rules, evidence must be reliable and otherwise admissible "in accordance with the Administrative Procedure Act." 46 C.F.R. § 502.204(a). The Commission has "long recognized the liberal standards of admissibility of evidence in administrative proceedings and the need for considerable relaxation of the rules of evidence followed by the federal courts in proceedings before the Commission." Rules of Practice and Procedure; Presentation of Evidence in Commission Proceedings, FMC Docket No. 16-08, 81 Fed. Reg. 93831 (Dec. 22, 2016). With regard to declarations in particular, a "corporate representative can provide a declaration based on personal knowledge even if that personal knowledge is based on a review of the corporation's business records and if the declarant's position within the corporation makes him competent to testify on the matters set forth in the declaration." *United States, et al. v. Dish Network, L.L.C.*, 75 F.Supp.3d 942, 963 (C.D. Ill. 2014). Indeed, "[s]uch a declarant may rely on business records to testify as to matters that occurred before his tenure at the corporation." *Id*.

Here, it is undisputed that Montesano served as MCS's lone logistics analyst for years before and after the time gap, and that she was deeply involved in the factual events at issue, rendering her well-qualified to testify on the matters at issue. Remand Decision at 18. And Mediterranean has provided no reason to doubt that any of her specific statements are correct. It is true that Montesano's declaration in this case would have benefited from a specific statement about her review of company records, beyond the more general "information received from others" statement noted above. On the whole, though, in light of Montesano's longtime position at MCS, her unique competence in the matters at issue here, and the extensive documentation she attaches, the declaration is sufficiently reliable to support the reparations award under the relevant standards.

b. MCS showed an adequate link between the violations and its claimed damages

Mediterranean argues forcefully that MCS has failed to establish a sufficient evidentiary link between the carrier's conduct and the shipper's injury, and in particular between Mediterranean's refusals to carry shipments and MCS's replacement shipments on the spot market during the relevant period. Exceptions at 19-23. The ALJ considered these claims but ultimately concluded that MCS had met its evidentiary burden. Remand Decision at 18-20. Although Mediterranean is correct that the evidence here does not include specific links between each of MCS's requests to Mediterranean and each of MCS's replacement shipments, on the whole the detailed declaration and extensive supporting documentation sufficiently establish MCS's injury.

As the ALJ noted, 46 U.S.C. § 41305(b) states that the Commission "shall direct the payment of reparations to the complainant for actual injury caused by a violation." Remand Decision at 10. It is the complainant's burden to show actual damages resulting from such violations. *Id*. at 11. "That does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained." *MAVL Capital Inc. v. Marine Transp. Logistics, Inc.*, Docket No. 16-16, 2022 WL 2209421, at *3 (FMC June 10, 2022). Moreover, as noted above, under Commission rules evidence must be admissible "in accordance with the Administrative Procedure Act," 46 C.F.R. § 502.204(a), which entails "liberal standards of admissibility [and] considerable relaxation of the rules of evidence followed by the federal courts." 81 Fed. Reg. 93831 (Dec. 22, 2016).

MCS's evidence as to reparations meets the above standards. As the ALJ noted, with liability already established by the default decision, MCS has supported its longtime injury claims with "a declaration, the service contracts, a table of shipments made under spot rates, and over 700 pages of supporting documents such as freight invoices." Remand Decision at 19. Montesano's sworn declaration states that MCS intended to use the full number of TEUs of cargo space provided for in the two service contracts at issue; that prior to and during the terms of the contracts MCS instructed its booking agent to book space under the contracts; that during this time the MCS agent "consistently and diligently attempted to book space" under the contracts through Mediterranean's booking agents; that MCS "complained directly to Mediterranean on many occasions" during the terms of the contracts "regarding Mediterranean's failure to provide contracted space"; that MCS would have used the full number of TEUs for which it had contracted had Mediterranean made that space available; and that because Mediterranean did not make the space available, MCS "had to seek carriage from other sources, at higher rates, in order to meet its ocean shipping needs." Montesano Decl. at 2-3. The declaration authenticates the exhibits, including the detailed table of replacement shipments and the documentation of those shipments. *Id*. at 1-4; Exhibits 4-5. Except to the very limited extent discussed below, Mediterranean does not seem to dispute the accuracy of any of these statements or documents.

What Mediterranean does argue is that MCS had to show that each of these spot market shipments was the result of a Mediterranean refusal to carry that specific shipment. Exceptions at 20; *see id*. at 19-23. But the ALJ correctly found that Mediterranean had not shown that that extremely demanding standard of proof was required in this context. Remand Decision at 20. Mediterranean claims that 46 U.S.C. § 41305(b) and relevant Commission regulations require the use of its standard. Exceptions at 19-20. But that is not the case. Section 41305(b) says only that a complainant must show "actual injury caused by a violation." At one point Mediterranean misquotes 46 C.F.R. § 502.252 as requiring that reparations be the "proximate result of violations of the statute" — in fact, that language comes from a 2003 FMC decision, which was itself quoting a 1950 Federal Maritime Board case, as Mediterranean itself notes elsewhere in its brief. Exceptions at 19-21. But in any event, a general "proximate result" standard likewise does not require the adoption of Mediterranean's demanding standard here.

On the contrary, MCS persuasively argues that such a standard would be impractical given the complex and fluid nature of the type of ocean shipping arrangements involved here. Exceptions Reply at 12-13. It is unreasonable to expect documentation on either end of these arrangements to consistently reflect such a link as to hundreds of containers over a 15-month period. For example, it is not clear why documentation of a particular shipment would bother to, or even be able to, note, "This shipment A is to replace a shipment B that MCS tried to make with Mediterranean on date X." MCS also argues that it would need more discovery to make such a showing, and that Mediterranean is responsible for the premature end of discovery, which is persuasive at least as to materials not within MCS's own custody or control. *Id*. at 13-15. MCS has provided sworn statements evidencing the shipper's persistent efforts to book the cargo space for which it had contracted, Mediterranean's failure to provide that space, and MCS's need to make the well-documented alternative arrangements. That is sufficient under the liberal standards of evidence that apply here.

The causal link between Mediterranean's conduct and MCS's damages is particularly evident because, when default has been entered and liability determined, as in this case, the factual allegations in the complaint are deemed to be admitted. *See Crabtree v. Overcash Pipeline LLC*, Civ. No. 20-1506, 2021 WL 6753416, at *2 (D.D.C. June 7, 2021); *SNH Med. Office Properties Trust v. Healthy Eateries, L.L.C.*, 325 F.R.D. 514, 518 (D.D.C. 2018); Exceptions Reply at 7. That means that, although it is still necessary to make an independent determination as to the amount of reparations, it has been established by MCS's Amended Complaint (verified by Montesano) that Mediterranean's unlawful failure to meet its obligations to MCS as to the time periods and port pairs at issue caused MCS to need to seek carriage from other sources and to have to pay higher rates for that carriage. *See* Am. Compl. (Doc. 38) at 7-9, 14-17, 23-24 (Feb. 4, 2022).

Mediterranean does make two more specific objections to MCS's showing, but they are too limited and vague to undermine that showing. Mediterranean argues that (1) evidence obtained in discovery shows "there were no communications for weeks at a time" between MCS and Mediterranean during the May-July 2021 period, and (2) Mediterranean "did not receive any booking requests for the Port of Qingdao, for example, from May 2021 to July 8, 2021 or any indication of issues with Complainant attempting to make bookings during that period." Exceptions at 23. The first claim is simply that there were no communications between the parties for some undefined period of weeks within the May-July 2021 period, with no indication whether that includes booking agents. The statement is not inconsistent with MCS having made sufficient attempts to book cargo space for the three-month period and with Mediterranean having failed to provide that space. Mediterranean's second objection appears to apply to only one of the two ports at issue in the 2021 service contract (Qingdao and Tianjin), and to apply to a time period that is more than three weeks short of the full three-month period at issue. Again, Mediterranean's claim is not inconsistent with MCS or its booking agents having made requests that were not met for the full relevant period. Also, Mediterranean's failure to provide requested space as to Qingdao and Tianjin did not begin with the May-July 2021 period, but in the preceding 2020 service contract period. MCS is not required to show continuous requests for space or complaints where a carrier has been failing to provide adequate space for some time. And factual statements in MCS's complaint, now deemed admitted, detail specific interactions showing MCS's unsuccessful efforts to obtain sufficient space from Mediterranean in July 2021. *See* Am. Compl. at 14-17.

c. Mediterranean has not shown that MCS failed to mitigate its damages

Mediterranean also argues that MCS has failed to show sufficient efforts to mitigate its damages, and in particular failed to show that it tried to find more affordable cargo space than the spot market bookings it ended up with, but this argument misses the mark. *See* Exceptions at 22-23. It is true that MCS has provided no detail beyond the statements in the Montesano declaration and the complaint that MCS was forced to seek carriage elsewhere at higher rates, and the ALJ does not seem to have addressed the mitigation issue directly. But it is Mediterranean's burden to show that MCS failed to meet a duty to mitigate, and it has not met that burden.

"Failure to mitigate damages is an affirmative defense, on which the party opposing the award of damages bears the burden of proof." *Adenariwo v. FMC*, 808 F.3d 74, 79 (D.C. Cir. 2015). "Mitigation requires a party to take reasonable steps after it has been injured to prevent further damage from occurring." *Id*. at 80. Finding substitute performances, as MCS did here, is a classic example. *See id*.

Mediterranean has failed to meet its burden to show MCS did not mitigate damages under these standards. Instead, Mediterranean tries to shift the burden to MCS to show that it acted reasonably, suggesting that MCS had other service contracts it might have used to ship its containers. Exceptions at 22-23. But MCS has documented exactly what it did to mitigate damages when, in the challenging 2020-2021 time period, it "had to seek carriage from other sources, at higher rates, in order to meet its ocean shipping needs." Montesano Decl. at 3; *see id.* Exhs. 4-5. MCS might have offered more detail about its mitigation efforts, but it clearly did not stand idle and increase its damages by shipping nothing. Mediterranean fails to challenge the specific spot rates MCS has documented as unreasonable or to provide any other reason to doubt MCS acted reasonably to ship at the lowest rates it could consistent with its needs. Mediterranean also fails to suggest any reason MCS would accept unreasonably high rates, which would obviously increase its own costs, if it could avoid them. Indeed, that could be a difficult claim for Mediterranean to make here. The complaint includes allegations, now deemed admitted, that some of the spot market purchases MCS made resulted in MCS's containers being "carried on [Mediterranean]'s own ships or pursuant to [Mediterranean]'s own bills of lading." Am. Compl. at 10. MCS's chart of replacement bookings indicates that this did in fact occur as to at least seven containers in the May-July 2021 period, resulting in payments totaling $39,803 in excess of the rates at which MCS had contracted with Mediterranean for such shipments. *See* Montesano Decl. Exh. 4 (public version).

3. The ALJ did not abuse her discretion in declining Mediterranean's request for an evidentiary hearing

The ALJ permissibly declined Mediterranean's request for an evidentiary hearing to cross-examine MCS's declarant. Remand Decision at 16-17. Mediterranean now argues at some length that it was entitled to such a hearing, Exceptions at 23-25, but that is incorrect. Such hearings may be held in a proper case, but there is no support for the idea that they are mandatory in a situation like the current one.

In the Remand Decision, the ALJ carefully considered Mediterranean's hearing request, but she provided ample reasoning in support of her exercise of discretion not to grant it. First, the Commission's rules make clear that, in adjudicating private party complaints, "[t]he presiding officer will determine whether an oral hearing is necessary." 46 C.F.R. §§ 502.62(a)(5), 502.62(b)(3); *see* Remand Decision at 17. With regard to evidence of damages on default in particular, the ALJ correctly noted that federal courts have the discretion to hold such hearings under Federal Rule of Civil Procedure 55(b)(2), but they are not required as long as there is a basis for the damages sought. *See* Remand Decision at 16-17 (citing *Boland v. Providence Constr. Corp.*, 304 F.R.D. 31, 35-36 (D.D.C.

2014), in turn quoting cases including *Transatlantic Mar. Claims Agency, Inc. v. Ace Shipping Corp., Div. of Ace Young Inc.*, 109 F.3d 105, 111 (2d Cir. 1997)). The ALJ further explained that "[i]n Commission proceedings, reparations are typically awarded without an oral hearing," on the basis of documentary evidence. *Id*. at 17. The ALJ described the extensive documentary evidence that MCS supplied with the Montesano Declaration to support its reparations request, noted that Mediterranean had had an opportunity depose key MCS witnesses in discovery, and concluded that an oral hearing at this point would unnecessarily create further delay in the resolution of the proceeding. *Id*.

Mediterranean cites a number of cases to support its claim to be "entitled at the very least to a hearing" on the reparations, Exceptions at 23-25, but those cases do not support that claim. Mediterranean makes no reference to FMC procedure or adjudications, or to any administrative agency authority, and none of its cases show that an ALJ is required to hold an evidentiary hearing in a context like this one. Mediterranean particularly faults the ALJ's reliance on the *Transatlantic* case, arguing that the court of appeals there reversed the trial court and that the cases it relied on are distinguishable from this one. Exceptions at 23-24. In fact, the *Transatlantic* court did remand that case in part for the development of further evidence as to damages — in a situation where, in stark contrast to the current state of this FMC proceeding, the district court had "simply accepted at face value Transatlantic's statement in its complaint that it 'has sustained damages as nearly as can now be estimated in the amount of $45,976.83.'" 109 F.3d at 111. But even then, the appeals court did not *require* the lower court to hold a hearing. *Id*. And contrary to Mediterranean's claims, the cases on which *Transatlantic* relied, whose elements included affidavits, documentary evidence, and long experience with the matter by the decision-maker, are in fact quite similar to this case, which includes a declaration supported by a detailed chart of bookings and more than 700 pages of documentation, and which, at the time of the Remand Decision, had been pending for more than two and a half years. *See* Docket, FMC No. 21-05.

D. Mediterranean's request for oral argument is denied

Mediterranean requests oral argument pursuant to 46 C.F.R. § 502.241. *See* Exceptions at 1. The request is denied under section 502.241(b).

III. CONCLUSION

The Commission hereby:

(1) **DENIES** Respondent Mediterranean's March 11, 2024 Exceptions; and

(2) **AFFIRMS** the ALJ's February 16, 2024 Initial Decision on Remand.

By the Commission.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

NETCYCLE TRADING CORP., *REVOCATION OF OCEAN TRANSPORTATION INTERMEDIARY LICENSE NO. 021597NF*

DOCKET NO. 24-15

Served: July 18, 2024

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION REVOKING OCEAN TRANSPORTATION LICENSE[1]

[Notice Not to Review served 8/20/2024, decision administratively final]

I. INTRODUCTION

A. Summary

The Bureau of Certification and Licensing ("BCL") and the Office of Enforcement ("OE") within the Bureau of Enforcement, Investigations, and Compliance ("BEIC") at the Federal Maritime Commission ("FMC" or "Commission") contend that Respondent Netcycle Trading Corp. ("Netcycle") should have its ocean transportation intermediary ("OTI") license revoked. Netcycle requested a hearing on the proposed revocation of its license.

Respondent Netcycle is a Florida corporation, licensed by the Commission as an ocean transportation intermediary on May 13, 2008. In the Form FMC-18 submitted by Netcycle when it applied for an OTI license ("OTI license application"), Netcycle listed Nadia E. Ledesma as its President/Secretary and qualifying individual ("QI"), and the Commission approved Ms. Ledesma as its QI. BEIC 46.

As explained more fully below, BEIC alleges that Ms. Ledesma was indicted and convicted of a criminal offense, which she failed to report to the Commission. As a result, BCL notified Netcycle on March 8, 2024, that it intended to revoke Netcycle's OTI license because it had determined that Netcycle had violated 46 C.F.R. § 515.16(a)(1) of the Commission's regulations by violating the Shipping Act, or any other statute or Commission order or regulation; 46 C.F.R. § 515.16(a)(4), by not being qualified to render intermediary services; and 46 C.F.R. § 515.20(e), by failing to report material changes to the Commission. As discussed below in greater detail, the evidence supports a finding that Netcycle's OTI license should be revoked.

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.708(c). Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.708(c).

B. Procedural History

On March 21, 2024, the Secretary issued a Notice of Hearing Request and Assignment, stating that on March 8, 2024, BCL had notified Netcycle by letter that the Commission intended to revoke its OTI license and that on March 19, 2024, Netcycle had requested a hearing on the proposed revocation pursuant to the Commission's Rules at 46 C.F.R. § 515.17 and 46 C.F.R. Part 502, at Subpart X of the Commission's Rules of Practice and Procedure. In addition, the Secretary assigned this proceeding to the Office of Administrative Law Judges for adjudication, pursuant to Commission Rule 702(a). 46 C.F.R. § 502.702(a).

On March 22, 2024, an Order Designating Administrative Law Judge and a Notice and Initial Order ("Initial Order") were issued notifying BEIC of Netcycle's hearing request and instructing BEIC to file a copy of the notice given to Netcycle and BCL's materials supporting the notice, by April 16, 2024, as well as serve the same documents on Netcycle pursuant to 46 C.F.R. § 502.702(b). The initial order also stated that BEIC "may file a brief with legal arguments, proposed findings of fact, or additional information." Initial Order at 1.

On April 16, 2024, BEIC filed the Notice of Revocation issued to Netcycle by BCL and an appendix of materials supporting the Notice ("BEIC Submission"). BEIC indicated that it respectfully declined the opportunity to file a brief and that it would submit its reply within 20 days of Netcycle's response. BEIC Submission at 2.

Later on April 16, 2024, a Notice of Right to Respond and to Reply was issued, notifying Netcycle that it should respond in support of its license by May 16, 2024; that its "written response must include all information and argument that it wants the presiding officer to consider, including a brief with legal arguments, proposed findings of fact, and an appendix with supporting documents;" and that "[f]ailure to respond may result in a default decision upholding the license revocation." Notice of Right to Respond and to Reply at 1. BEIC was advised that it could file a reply to Netcycle's response within twenty days of Netcycle's filing. *Id.*

No response was filed by Netcycle by May 16, 2024. On May 21, 2024, the Office of Administrative Law Judges emailed the Respondent to determine if it intended to file any response and later that afternoon, its counsel indicated that Respondent intended to respond.

On May 31, 2024, Netcycle filed a motion for acceptance of late filing with its proposed response ("Opposition"). On June 5, 2024, BEIC filed an opposition to Respondent's motion. On June 12, 2024, an order was issued granting Netcycle's motion to accept late filing and requiring BEIC to file its reply brief and appendix by July 2, 2024. The Opposition included a one-page attachment without any Bates number ("Opposition, attachment").

On June 27, 2024, BEIC submitted a reply to Netcycle's opposition ("Reply") and an additional exhibit: Ms. Ledesma's factual proffer supporting her guilty plea.

Pursuant to Subpart X, Rule 708, this initial decision is due within forty days of BEIC's Reply, or by August 6, 2024. 46 C.F.R. § 502.708(a).

C. Argument of the Parties

Netcycle asserts in its hearing request that it had a well-maintained reputation and clear record since 2008 and is a small family business that has supported many families. Hearing Request at 1. Netcycle President Nadia Ledesma alleges that an ex-employee used the business for unlawful purposes and that "as principal officer of corporation I assumed the responsibility" and that she has handed over the position of president to her stepson, Carlos Ledesma. Hearing Request at 1.

BEIC asserts in its initial submission:

> BCL issued a Notice of Intent to Revoke the ocean transportation intermediary (OTI) license of Netcycle due to (1) the criminal guilty plea by Netcycle's listed President, Secretary and Qualifying Individual (QI) in the U.S. District Court for the Southern District of Florida and (2) Netcycle's failure to report material changes to the Commission, including any criminal indictment or conviction of a licensee, QI, or officer under 46 C.F.R. § 515.20(e). Beyond the failure to report the criminal charges, the nature of the charges and guilty plea—conspiracy to export stolen vessel parts and smuggle goods from the United States in violation of 18 U.S.C. § 371—led BCL to conclude that Netcycle was no longer qualified to provide ocean transportation intermediary services within the meaning of 46 U.S.C. § 40903 and 46 C.F.R. § 515.16(a)(1) and (4).

BEIC Submission at 1-2. BEIC submitted an appendix of exhibits, including BCL's notice of intent to revoke, indictment of Nadia Ledesma, Department of Justice press release, plea agreement, judgment, and Netcycle's Form 18 OTI application. BEIC 3-55.

Netcycle, in its Opposition, does not dispute "that Netcycle's listed President, Secretary and Qualifying Individual (QI) Ms. Nadia Ledesma, was indicted as alleged" and also does not dispute "that Ms. Ledesma failed to report the matter to the FMC under a mistaken belief that it was unnecessary." Opposition at 2. Rather, Netcycle contends that "license revocation is not an automatic penalty" and argues that Ms. Ledesma should be allowed the "opportunity to fully divest ownership, resign her position as QI and for Netcycle to quickly file an FMC-18 designating Mr. Carlos Ledesma Jr. as replacement QI." Opposition at 3.

BEIC contends in its Reply that Netcycle's "license should be revoked due to the felony criminal conviction related [to] the business of serving as an OTI, failures to notify the Bureau of Certification and Licensing (BCL) of material changes, and a lack of the necessary character to render OTI services" and that "revocation is clearly warranted by the Shipping Act of 1984 (Shipping Act), Federal Maritime Commission (FMC or Commission) regulations, and established legal precedent." Reply at 1.

II. LEGAL AND FACTUAL FINDINGS

A. Controlling Legal Authority

The Shipping Act grants authority to revoke an OTI's license under certain conditions:

> The Federal Maritime Commission, after notice and opportunity for a hearing, shall suspend or revoke an ocean transportation intermediary's license if the Commission finds that the ocean transportation intermediary –
>
> (1) is not qualified to provide intermediary services; or
>
> (2) willfully failed to comply with a provision of this part or with an order or regulation of the Commission.

46 U.S.C. § 40903(a).

The Commission's regulations also address when a license may be revoked or suspended, stating:

> A license may be revoked or suspended for any of the following reasons:
>
> (1) Violation of any provision of the Act, or any other statute or Commission order or regulation related to carrying on the business of an ocean transportation intermediary;
>
> (2) Failure to respond to any lawful order or inquiry by the Commission;
>
> (3) Making a materially false or misleading statement to the Commission in connection with an application for a license or an amendment to an existing license;
>
> (4) A Commission determination that the licensee is not qualified to render intermediary services; or
>
> (5) Failure to honor the licensee's financial obligations to the Commission.

46 C.F.R. § 515.16(a). Reasons 1 and 4 are alleged here.

Rule 515.20's provisions regarding changes in organization state:

> (e) **Other changes.** Other changes in material fact of a licensee shall be reported within thirty (30) days of such changes, in writing by mail or email (bcl@fmc.gov) to the Director, Bureau of Certification and Licensing, Federal Maritime Commission, Washington, DC 20573. Material changes include, but are not limited to: Changes in business address; any criminal indictment or conviction of a licensee, QI, or officer; any voluntary or involuntary bankruptcy filed by or naming a licensee, QI, or officer; changes of five (5) percent or more of the common equity ownership or voting securities of the OTI; or, the addition or reduction of one or more partners of a licensed partnership, one or more members or managers of a Limited Liability Company, or one or more branch offices. No fee shall be charged for reporting such changes.

46 C.F.R. § 515.20(e).

B. Burden of Proof

Under the Administrative Procedure Act ("APA"), an Administrative Law Judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981).

This initial decision addresses only material issues of fact and law. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

C. Findings of Fact

1. Netcycle submitted an FMC-18 application for a license as an OTI on or about April 28, 2008. BEIC 5, 41-55.

2. Netcycle's OTI application stated that Netcycle was incorporated in Florida on January 27, 2006. BEIC 44.

3. Netcycle's OTI application listed Nadia E. Ledesma as the President/Secretary, one hundred percent owner, and Qualifying Individual. BEIC 46, 53.

4. Netcycle's OTI application listed Fernando Rincon as the Vice President. BEIC 53.

5. Netcycle's OTI application answered "No" to the question of whether the "applicant or any of the applicant's partners, officers, directors, or stockholders [have] ever . . . been ARRESTED, CHARGED, CONVICTED OF, OR FORFEITED COLLATERAL for any FELONY, MISDEMEANOR, OR OTHER VIOLATION?" excluding minor traffic violations or any incident prior to the person's 21st birthday. BEIC 45.

6. Netcycle's OTI license was not included in the record. Official notice is taken that FMC's OTI list, available on its website, shows organization and license number 021597 for Netcycle Trading Corp., located in Miami, FL, with Nadia Ledesma listed as QI and President/Secretary. https://www2.fmc.gov/oti (last visited July 5, 2024).

7. It appears that payment was received and the license granted on May 13, 2008. BEIC 5, 42.

8. On June 21, 2022, an indictment in the United States District Court for the Southern District of Florida, case number 22-20269-CR-SCOLA/Goodman, lists four Defendants, including Nadia Esperanza Ledesma. BEIC 8.

9. On March 10, 2023, Nadia Esperanza Ledesma signed a factual proffer for Defendant's change of plea, which was also signed by her attorney and the Assistant United States Attorney. BEIC 62.

10. From April 2015 to 2018, Ms. Nadia Ledesma willfully participated in a criminal conspiracy to export stolen outboard motors. BEIC 57.

11. Ms. Ledesma's husband and former co-owner and Netcycle warehouse manager, Carlos Ledesma, was also charged in the conspiracy, as well as others. BEIC 57-58.

12. Evidence seized pursuant to a search warrant executed at Netcycle shows that Carlos and Nadia Ledesma used Netcycle to export nearly 600 stolen outboard engines to Mexico. BEIC 59.

13. Netcycle's email, office phones, employees, warehouse, and office spaces were used in furtherance of the conspiracy. BEIC 60-61.

14. Netcycle records indicate that the company charged $480,197.68 for exporting the stolen engines from 2015 to 2018 and that most of the payments were in cash. BEIC 61.

15. Nadia Ledesma filled out documents that were fabrications and she submitted electronic export information based on the false bill of sale with a fabricated value of the engines. BEIC 62.

16. Ms. Ledesma received at least $48,064.79 as proceeds of the offense. BEIC 61.

17. A plea agreement dated March 10, 2023, states that Nadia Esperanza Ledesma agrees to plead guilty to count 1 of the indictment, which charges the defendant with conspiring with others to export boat engines and parts that were stolen. BEIC 25.

18. Judgment in case number 1:22-CR-20269RNS(2), dated May 23, 2023, states that defendant Nadia Esperanza Ledesma pleaded guilty to count 1 of the indictment, 18 U.S.C. § 371 - Conspiracy to export stolen vessel parts and to smuggle goods from the United States and that counts 2 through 10 are dismissed. BEIC 34.

19. Defendant Nadia Esperanza Ledesma was sentenced to imprisonment for 18 months, starting May 15, 2025, followed by one year of supervised release. BEIC 35-38.

20. Defendant Nadia Esperanza Ledesma was ordered to pay joint and several restitution with co-defendants of $420,668.47. BEIC 39-40.

21. On March 8, 2024, BCL sent a letter to Netcycle stating that the revocation of its OTI license 021597NF will become effective March 29, 2024, unless Netcycle requests a hearing. BEIC 4-6.

III. DISCUSSION

An OTI's license is subject to revocation for willfully failing to comply with a provision of the Shipping Act or any other statute, a Commission order or regulation, or based on a determination by the Commission that the OTI is not qualified to provide intermediary services. 46 U.S.C. § 40903(a). In addition, an OTI's license is subject to revocation for a violation of any provision of the Shipping Act or any statute, a Commission order or regulation related to carrying on the business of an ocean transportation intermediary, or based on a Commission determination that the licensee is not qualified to render intermediary services. 46 C.F.R §§ 515.16(a)(1), (4).

The arguments in Netcycle's request for hearing are consistent with the record that Netcycle was established in 2006 and received an OTI license in 2008. Hearing Request at 1. While Ms. Ledesma blames the illegal activity on an ex-employee, she acknowledges that "as principal officer of corporation I assumed the responsibility in my fault although this meant in personal legal consequences and loss my position as president of the company" and further states that she "handed over the position of president" to Carlos Ledesma, Jr. Hearing Request at 1. However, Netcycle later states that its "QI and former President, Nadia Ledesma has been in the process of determining how best to respond on behalf of Netcycle in this matter including whether to retain counsel," so she is still actively involved. Motion to Accept Late Filing at 2.

Netcycle's Opposition contends:

> Netcycle does not seek to dispute that Netcycle's listed President, Secretary and Qualifying Individual (QI) Ms. Nadia Ledesma, was indicted as alleged by the BOEIC. Further, there is no dispute that as Netcycle's President, Ms. Ledesma took personal responsibility for the issues that occurred in her business and, in order to resolve the matter expeditiously, agreed to plead guilty to a single count. Ms. Ledesma thereafter resigned her position as President with Mr. Carlos Ledesma Jr., her stepson, took over as President of Netcycle while Ms. Ledesma took a position as Director to assist Mr. Ledesma Jr. and ensure Netcycle maintained a QI. See Exhibit A. There is also no dispute that Ms. Ledesma failed to report the matter to the FMC under a mistaken belief that it was unnecessary. As discussed below, however, the circumstances of this matter do not warrant the extreme sanction of license revocation along with the significant harm to the community and employees that such a revocation would cause.

Opposition at 2. Netcycle relies on a Florida Secretary of State filing of an amended annual report "for the purpose of changing its registered office or registered agent, or both" showing Carlos Ledesma Jr as the registered agent and "PD" while Nadia Ledesma is listed as "D." Opposition, attachment.

BEIC contends that Netcycle "minimizes both the level of wrongdoing committed by Ms. Ledesma and the depth of the involvement of Netcycle in that criminal misconduct;" Netcycle does not contest the basis for the revocation; Ms. Ledesma's conduct can be imputed to Netcycle; and revocation is the appropriate sanction "given Ms. Ledesma's continued role with the company post-indictment and conviction and Netcycle's intimate involvement with her criminal conduct in this case." Reply at 2, 7-15.

Both parties rely on *Washington Movers,* where the Commission affirmed the revocation of an OTI license after the QI was convicted of unlawful export of defense articles and smuggling of goods. *In Re: Revocation of Ocean Transportation Intermediary License No. 017843 – Washington Movers, Inc.,* 1 F.M.C. 2d 5, 5-6 (FMC March 16, 2018). In that case, the QI's wife "was unaware of her husband's plans to ship weapons," and after the QI's arrest, "she used life insurance money, her children's tuition money, proceeds from selling gold, and loans from family" to pay carriers to release shipments to Washington Movers' clients. *Id.* at 6-7. The QI, however, remained involved with the company after his arrest. *Id.* at 7. The Commission found that "the unchallenged facts support imputing liability to Washington Movers" as the illegal acts were "within the scope of his employment;" Washington Movers failed to notify the Commission of criminal proceedings; and the QI's criminal conduct rendered the company "unqualified to render OTI services." *Washington Movers,* 1 F.M.C. 2d at 13-18. In deciding to revoke Washington Movers' license, the Commission considered the nature and extent of its conduct giving rise to suspension or revocation, its good faith and likelihood of complying with Commission regulations in the future, and the character and association of the proposed new QI. *Id.* at 20-21.

Similar to *Washington Movers*, here, the QI's criminal conviction, QI's continued involvement with the company, and nature and extent of the criminal conduct support the appropriateness of Netcycle's license revocation. The evidence shows that from April 2015 to 2018, Ms. Nadia Ledesma willfully participated in a criminal conspiracy with her husband and former co-owner and Netcycle warehouse manager, Carlos Ledesma, and others to export stolen outboard motors. BEIC 57-58. Evidence seized pursuant to a search warrant executed at Netcycle shows that Carlos and Nadia Ledesma used Netcycle to export nearly 600 stolen outboard engines to Mexico. BEIC 59. Netcycle emails, office phones, employees, warehouse, and office spaces were used in furtherance of the conspiracy. BEIC 60-61. Netcycle records indicate that the company charged $480,197.68 for exporting the stolen engines from 2015 to 2018 and that most of the payments were in cash. BEIC 61. Ms. Ledesma received at least $48,064.79 as proceeds of the offense. BEIC 61. Nadia Ledesma filled out documents that were fabrications and she submitted electronic export information based on the false bill of sale with a fabricated value of the engines. BEIC 62.

A plea agreement dated March 10, 2023, states that Nadia Esperanza Ledesma agrees to plead guilty to count 1 of the indictment, which charges her with conspiring with others to export boat engines and parts that were stolen. BEIC 25. Judgment in case number 1:22-CR-20269RNS(2), dated May 23, 2023, states that defendant Nadia Esperanza Ledesma pleaded guilty to count 1 of the indictment, 18 U.S.C. § 371 - Conspiracy to export stolen vessel parts and to smuggle goods from the United States and that counts 2 through 10 are dismissed. BEIC 34. Ms. Ledesma was sentenced to imprisonment for 18 months, starting May 15, 2025, followed by one year of supervised release, and ordered to pay joint and several restitution with co-defendants of $420,668.47. BEIC 35-40.

The record supports finding that Netcycle violated 46 C.F.R. § 515.16(a)(1) of the Commission's regulations by violating the Shipping Act, or any other statute or Commission order or regulation because Netcycle's QI was indicted and convicted of violating 18 U.S.C. § 371, conspiracy to export stolen vessel parts and to smuggle goods from the United States. BEIC 34. Netcycle's QI was acting within the scope of her employment while committing the illegal acts, which spanned three years and utilized Netcycle's corporate resources. Therefore, it is appropriate to impute the QI's actions to the corporation. Thus, the record supports a finding that Netcycle violated the Shipping Act or any other statute related to carrying on the business of an ocean transportation intermediary.

The record also supports finding that Netcycle violated 46 C.F.R. § 515.16(a)(4), by not being qualified to render intermediary services due to the conviction of its QI. "An ocean transportation intermediary is fully responsible for the acts and omissions of any of its employees and agents that are performed in connection with the conduct of the ocean transportation intermediary's business." 46 C.F.R. § 515.4(b)(3). While Netcycle seeks, in its arguments in this proceeding, to minimize the QI's involvement in the illegal activity, her factual proffer is more detailed and credible, showing significant participation in the extensive illegal conduct. Therefore, BEIC has established that Netcycle's QI lacks the necessary character to render OTI services.

Additionally, the record supports finding that Netcycle violated 46 C.F.R. § 515.20(e), by failing to report material changes to the Commission within thirty days. Pursuant to this rule, material changes include "any criminal indictment or conviction of a licensee, QI, or officer." 46 C.F.R. § 515.20(e). The evidence includes a letter from the BCL Acting Director stating that "[a]t no time did you inform the Commission of your criminal indictment or subsequent conviction." BEIC 5. While this statement is not under oath, it is reliable as a business record. Moreover, the record does not contradict the statement. Therefore, the evidence supports a finding that Netcycle failed to report the criminal indictment or conviction to the Commission.

Accordingly, the record supports a finding that Netcycle and its QI, Nadia E. Ledesma, failed to report to the Commission changes in material facts, contrary to 46 C.F.R. § 515.20(e) of the Commission's regulations; violated the Shipping Act, or any other statute related to carrying on the business of an ocean transportation intermediary, contrary to the Commission's regulations at 46 C.F.R. § 515.16(a)(1); and lack the necessary character to render OTI services contrary to the Commission's regulations at 515.16(a)(4). The remaining issue is the appropriate penalty.

Netcycle asserts that "license revocation is not an automatic penalty for a violation nor is it the only potential remedial action that the Commission can take in response to a violation," citing the initial decision in *Stallion Cargo*. Opposition at 2-3 (citing *Stallion Cargo, Inc.-Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 2001 WL 379928, at *17 (ALJ Mar. 15, 2001) ("*Stallion Cargo (ALJ)*") aff'd in part and vacated in part 2001 WL 35725562 (FMC Oct. 18, 2001) ("*Stallion Cargo (FMC)*")). Netcycle is correct that license revocation is not an automatic or the only penalty.

In *Stallion Cargo*, the respondent violated the Shipping Act by "misdescribing cargoes tendered to vessel-operating common carriers on 15 occasions and by failing to charge its applicable tariff rates on 152 occasions." *Stallion Cargo (FMC),* 2001 WL 35725562, at *2. The Administrative Law Judge had found that license revocation was unwarranted, however, the Commission found that "Respondent does not possess the necessary character to render OTI services. We believe that license revocation is an appropriate sanction in this instance." *Id.* at *22. The Commission stated that this was "a harsh sanction, resulting in an NVOCC being put out of business;" however, the Commission also stated that the "shipping community should be protected from those who choose not to comply with the Shipping Act's licensing requirements." *Id.* at *23.

In deciding to revoke Washington Movers' license, the Commission considered the nature and extent of its conduct giving rise to suspension or revocation, its good faith and likelihood of complying with Commission regulations in the future, and the character and association of the proposed new QI. *Washington Movers,* 1 F.M.C. 2d at 20-21. Here, the nature and extent of the conduct is significant, including the export of nearly 600 stolen outboard engines over the course of three years by multiple members of Netcycle. It does not appear that Netcycle made any efforts to comply with Commission regulations after the guilty plea and even after this proceeding was filed, has minimized its conduct and failed to follow Commission rules, so that the good faith and likelihood of complying with Commission regulations is low. The record does not include any information about the character and association of the proposed new QI, so that element is neutral – not weighing for or against revocation. However, given the findings on the first two factors, revocation is the appropriate remedy and is consistent with the penalties imposed on Stallion Cargo and Washington Movers.

Accordingly, the evidence supports a finding that Netcycle failed to report a material change; that Netcycle does not have a qualified QI; and that Netcycle violated the Shipping Act, or any other statute related to carrying on the business of an ocean transportation intermediary. Accordingly, pursuant to 46 U.S.C § 40903(a) of the Shipping Act and 46 C.F.R §§ 515.16(a)(1), (4), and 515.20(e) of the Commission's regulations, Netcycle's OTI license is revoked.

IV. ORDER

Upon consideration of the evidence and arguments in the record, and for the reasons stated above, it is hereby

ORDERED that Netcycle's ocean transportation license No. 021597 be **REVOKED**. It is

FURTHER ORDERED that Netcycle cease and desist any and all ocean transportation intermediary activities.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Statement of the Commission

On the Potential Use of an Investigatory Process to Support Determinations Under 46 U.S.C. § 41307(b)

Docket No. 24-25

Issued July 30, 2024

After careful consideration, the Federal Maritime Commission (Commission or FMC) has determined that it is appropriate to issue a policy statement explaining the agency's potential future use of its administrative investigation process, under 46 U.S.C. §§ 41302-04 and applicable regulations, to enhance its determinations regarding filed agreements that may present the anticompetitive features described in 46 U.S.C. § 41307(b).

I. Background

Title 46 U.S.C. § 41307(b) provides that the Commission can seek injunctive relief from a federal court where an agreement among ocean common carriers, marine terminal operators, or marine terminal operators and ocean carriers has been filed with the FMC pursuant to Chapter 403 of the Shipping Act of 1984. If the FMC "determines that the agreement is likely, by a reduction in competition, to produce [1] an unreasonable reduction in transportation service or [2] an unreasonable increase in transportation cost or [3] to substantially lessen competition in the purchasing of certain covered services," the Commission may, after notice to the filer, ask the U.S. District Court for the District of Columbia to enjoin the agreement.[1] Such a suit may be filed any time after the filing or effective date of the agreement, but it is the only remedy available to the FMC with regard to an agreement that it determines is likely to have such an effect.[2] The district court may issue "a temporary restraining order or a preliminary injunction," and "a permanent injunction after a showing that the agreement is likely to have the effect described in paragraph (1)."[3] The Commission has the burden of proof in such an action.[4]

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1 46 U.S.C. § 41307(b)(1). We emphasize that for the agency to pursue an injunction, the statute requires a determination that it is likely that a "reduction in competition" will produce at least one of the effects described in section 41307(b)(1). The process explained in this policy statement is intended to assist the agency in making that determination. *Cf.* 15 U.S.C. §§ 1, 18.

2 *Id.*

3 46 U.S.C. § 41307(b)(2).

4 46 U.S.C. § 41307(b)(3).

The core elements of section 41307(b) were part of the Shipping Act of 1984.[5] The Conference Report on the original 1984 language discussed the substantive elements in section 41307(b), in particular that subsection's "compromise general standard," which permits the enjoining of certain anticompetitive agreements even if they do not violate any specific prohibitions in the Shipping Act.[6] Significant additional commentary on that standard appeared in a 1997 Senate committee report regarding the proposed revision to the statute that became the Ocean Shipping Reform Act of 1998.[7] That Senate report also encouraged the agency to seek greater participation by interested parties and hold hearings prior to filing section 41307(b) lawsuits.[8] The committee "encourage[d] the agency to allow shippers or others to contribute to the process of determining whether an injunction should be sought."[9] It noted that at the time of the report, "notices of agreement filings [were] published in the Federal Register and comments of interested parties are solicited," but the FMC "could encourage even more participation by shippers and others potentially detrimentally affected by agreement authority by issuing notices of inquiry or conducting hearings on new agreement filings or existing agreements, the objective being to more fully apprise the agency of the likely or actual impact of the agreement prior to it seeking an injunction."[10]

In 2008, the Commission filed a section 41307(b) suit against the Ports of Los Angeles and Long Beach.[11] In the *City of Los Angeles* case, the Commission sought a preliminary injunction on the grounds that an agreement between the two marine terminal operators to potentially coordinate their Clean Truck Programs (CTPs) was likely, by reducing competition, to unreasonably increase costs and decrease services in violation of section 41307(b).[12]

The dispute in *City of Los Angeles* stemmed from an agreement, originally filed with the FMC in 2006, under which the ports later developed CTPs in order to reduce air pollution.[13] The FMC sought further information from the ports in May 2008, the ports filed an amended agreement in August 2008, and the FMC again sought further information in September and October 2008.[14] The ports began implementing the programs on October 1, 2008.[15] On October 29, the Commission determined that the agreement violated section 41307(b), and it filed suit on

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5 *See* Pub. L. 98-237, § 6(g)-(h), Mar. 20, 1984, 98 Stat. 72, 73.

6 *See* H.R. Conf. Rep. 98-600 (1984).

7 *See* S. Rep. 105-61 (1997) at 14-16.

8 *Id*. at 17.

9 *Id*.

10 *Id*.

11 *See Fed. Mar. Comm'n v. City of Los Angeles*, 607 F. Supp. 2d 192 (D.D.C. 2009).

12 *Id*. at 192-93.

13 *See* 607 F. Supp. 2d at 195.

14 *Id*.; Complaint at 9, *City of Los Angeles*, Civ. No. 08-1895 (D.D.C. Oct. 31, 2008), ECF No. 1.

15 607 F. Supp. 2d at 196.

October 31, requesting a preliminary injunction on November 17.[16] The Commission alleged that certain elements of the CTPs, in particular the Port of Los Angeles requirement that all licensed motor carriers (LMCs) serving it eventually use only employee truck drivers rather than independent owner-operators, as well certain differences between the two ports in related exemptions and incentives, would result in a less competitive market in which surviving LMCs would be able to raise prices and offer inferior services.[17] In support, the FMC relied mainly on analysis in a declaration by an economist from the agency's Bureau of Trade Analysis, as well as information submitted by the ports in the agreement review process, declarations from trucking industry representatives and others, academic works, and public comments.[18]

In April 2009, the *City of Los Angeles* court denied the preliminary injunction. First, the Court rejected the FMC's argument for a more relaxed preliminary injunction standard under section 41307(b) and found that the traditional four-part equitable test applies.[19] In applying that test to the agreement, the court found that the FMC had failed to show a likelihood of success or irreparable harm.[20] Finally, the balance of equities and the public interest weighed against a preliminary injunction, the court found, in light of the environmental and safety interests served by the CTPs.[21] In discussing the balance of equities and public interest, the court stated that "it is important to note that the CTPs represent the judgment of the cities' elected and appointed officials based on multi-year deliberative processes that involved innumerable public meetings and the receipt and review of comments from a wide range of stakeholders."[22] The FMC later dismissed the case, noting that later events had obviated the need to pursue it further.[23]

II. Policy

In light of the above, the Commission deems it appropriate to explain its potential future use of its administrative investigation process, under 46 U.S.C. §§ 41302-04 and applicable regulations, to enhance determinations regarding filed agreements that may present the anticompetitive features described in 46 U.S.C. § 41307(b). In an appropriate case, such an administrative process can aid in the agency's competition analysis and enable it to present a more comprehensive, well-supported determination in any later section 41307(b) court proceeding.

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16 *Id*.

17 *Id*.

18 *Id*.; Complaint at 9-10, 24-26; FMC's Motion for Preliminary Injunction at 23-44, *City of Los Angeles*, Civ. No. 08-1895 (D.D.C. Nov. 17, 2008), ECF No. 3-1.

19 607 F. Supp. 2d at 196-99.

20 *Id*. at 200-03.

21 *Id*. at 203-04.

22 *Id*. at 203.

23 *See* Motion to Dismiss at 1-2, *City of Los Angeles*, Civ. No. 08-1895 (D.D.C. June 16, 2009), ECF No. 59; Stipulation of Dismissal (D.D.C. July 24, 2009), ECF No. 63.

In undertaking such a proceeding, the agency would initiate an investigation under the authority in 46 U.S.C. § 41302(a) to investigate any agreement "that it believes may be in violation of this part." Agreements that are inconsistent with section 41307(b) are Shipping Act violations, as explained in the legislative history discussed above. An investigation can be started through the general authority the Commission has under 46 C.F.R. § 502.91 to open a proceeding through an order to show cause. In addition, 46 C.F.R. § 502.282 authorizes the Commission to initiate nonadjudicatory investigations through an order of investigation issued under 46 C.F.R. § 502.283. Subsection 502.282 provides that an investigation may be opened if the FMC determines that information would be "helpful in the determination of its policies or the carrying out of its duties, including whether to institute formal proceedings directed toward determining whether any of the laws which the Commission administers have been violated."

Once an investigation is opened, the Commission has authority to gather evidence from interested parties, subpoena witnesses and documents, and hold hearings under 46 U.S.C., Chapter 413, and 46 C.F.R., Subpart R. Title 46 U.S.C. § 41303(a)(1) authorizes the Commission to subpoena witnesses and evidence in such investigations. In particular, 46 C.F.R. § 502.286 authorizes the agency to issue orders or subpoenas directing persons to testify or provide documentary evidence related to such investigations, and section 502.287 provides that the Commission may order testimony to be taken by deposition. Section 502.288 states that the Commission may order a person to file a report or written answers to specific questions relating to any matter under investigation. Title 46 U.S.C. § 41304(a) provides that the Commission shall provide an opportunity for a hearing before issuing an order relating to a violation. In addition, 46 C.F.R. § 502.285 authorizes the agency to conduct investigational hearings in the course of any investigation to hear the testimony of witnesses and receive documents and other data.

At the end of such an investigatory process, the FMC would evaluate the evidence. If appropriate, the agency could reach a "determination" within the meaning of section 41307(b) that an agreement is likely to have anticompetitive effects and issue a written report. That report would then be "competent evidence in a court of the United States" under 46 U.S.C. § 41302(e), and it could be submitted to the district court in a section 41307(b) action to help meet the Commission's burden of proof under 46 U.S.C. § 41307(b)(3). Such a report would also serve as strong evidence in support of the agency's determination in the matter. On the other hand, at the end of the investigation the Commission may also determine that, based on the available evidence, an agreement does not appear likely to have anticompetitive effects under section 41307(b), subject to later reconsideration should circumstances change.

It is important to note that the report described above would be consistent with the provision in section 41307(b) that the Commission's "sole remedy" is to seek an injunction, because the report would not include civil penalties, a cease-and-desist order, or any punitive measure. Rather, the report would be an agency "determination," after the investigation described above, that the agreement under review is likely to have anticompetitive effects, along with an explanation of the agency's reasoning and evidence in support of that determination.

It is also important to note that the section 41307(b) investigatory process described above is distinct from the agreement review and potential judicial-review processes described in 46 U.S.C. §§ 40304(d) and 41307(c) in connection with requests for additional information.

Finally, although this policy statement explains aspects of the Commission's procedures and practices relevant to 46 U.S.C. § 41307(b), it does not create binding rights or obligations, does not affect the rights or obligations of private parties, and does not limit the discretion of the Commission or its staff in any way. In particular, the discussion of administrative procedures in this policy statement does not create any obligation by the Commission to use any such procedures in any future matter. Future agency decisions and practices will continue to require discretion and judgment in accord with specific circumstances and the applicable law.

By the Commission.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

NETCYCLE TRADING CORP., *REVOCATION OF OCEAN TRANSPORTATION INTERMEDIARY LICENSE NO. 021597NF*	**DOCKET NO. 24-15**

Served: August 20, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Chief Administrative Law Judge's July 18, 2024, Initial Decision Revoking Ocean Transportation License has expired. Accordingly, this decision has become administratively final.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

OJ COMMERCE, LLC, *Complainant*, v. HAMBURG SÜDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO. KG AND HAMBURG SUD NORTH AMERICA, INC., *Respondents.*	Docket No. 21-11

Served: August 27, 2024

BY THE COMMISSION: Daniel B. MAFFEI, Chairman; Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, and Max M. VEKICH, Commissioners.

Order Affirming Initial Decision

[petition for reconsideration filed by Complainant 9/26/2024, decision pending]

This case is before the Commission ("FMC") on Exceptions to an Initial Decision (Initial Decision") of the Administrative Law Judge ("ALJ") dated June 7, 2023. The Initial Decision ordered Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft ("HSDG") to pay OJ Commerce, LLC ("OJC") a total of $9,843,766.40 in reparations due to HSDG's knowing and willful violations of the Shipping Act's prohibitions on refusing to deal and retaliation. The Initial Decision dismissed any pending motions and ordered the proceeding discontinued.

As to liability, we deny the Exceptions and affirm the ALJ's Decision. The ALJ correctly found that HSDG refused to deal with OJC and retaliated against OJC. As to damages, we modify the ALJ's damages calculations to reflect more accurately the harm suffered by OJC, but we affirm the ALJ's decision to double the damages award given the knowing and willful nature of HSDG's violations.

I. BACKGROUND

A. Factual Background

1. Parties

OJC is a limited liability company organized with a principal place of business in Miramar, Florida that sells "dropship products" from domestic inventory of hundreds of brands. Initial Decision (I.D.) at 5.[1] OJC also has a direct import program where OJC buys household goods, including a wide variety of furniture and office products globally for sale in the United States. OJC's imports come from Asia and Brazil and are delivered to California or Kentucky.

HSDG was previously a corporation operating as a Vessel Operating Common Carrier ("VOCC") with a principal place of business in Hamburg, Germany until it merged with its former parent company, Maersk A/S on November 1, 2021. I.D. at 5. Hamburg Sud North America, INC ("HSNA") is a corporation with a principal place of business in Morristown, New Jersey. HSNA was a wholly-owned subsidiary of HSDG that acted as the United States general agent of HSDG until November 1, 2021, when it became a

[1] The Commission adopts the ALJ's findings of fact, except as specifically described below, and supplements them as noted herein with additional evidence from the record or evidence pursuant to 46 C.F.R. § 502.226(a). I.D. at 5-22.

wholly-owned, indirect subsidiary of Maersk A/S. On January 1, 2022, HSNA was merged into Maersk Agencies USA, Inc., the United States subsidiary and general agent of Maersk A/S.[2]

2. Relationship

OJC and HSDG entered into a service contract in June 2020 for the carriage of goods by sea from foreign countries to the United States and for delivery to warehouse facilities within the United States. I.D. at 6. The service contract signed between OJC and HSDG "c/o" HSNA was numbered AECC0000291 and was effective June 23, 2020, to May 31, 2021. I.D. at 6 ("2020-2021 Service Contract"). In the 2020-2021 Service Contract, OJC agreed to tender, and HSDG agreed to transport, a minimum volume/quantity commitment of 400 twenty-foot equivalent units ("TEUs"), equal to 200 forty-foot equivalent units ("FFEs"), from Asia to California at specified rates. The 2020-2021 Service Contract included a liquidated damages clause that only provided liquidated damages if the carrier failed to provide space to meet 90 percent of the minimum quantity commitment ("MQC") and capped those damages at $250 per TEU.

HSDG initially internally allocated OJC 8 TEU per week, but on August 3, 2020, OJC was informed by email that "Space Protection" was increased to 10 TEU per week. I.D. at 7. The record suggests that OJC received insufficient space based on HSDG emails. I.D. at 7. But HSDG emails indicate that there was no formal documentation of an obligation to carry additional cargo per week. I.D. at 8. Throughout the 2020-2021 service contract, OJC and OJC President Jacob Weiss repeatedly asked for more space per week. *See, e.g.*, I.D. at 9.

[2] The ALJ denied all claims against HSNA because it found HSNA not to be a common carrier, instead HSNA was acting as a disclosed agent on behalf of HSDG. I.D. at 37. Neither side challenged this conclusion, and no evidence suggests it should be reviewed. As such, the ALJ and this memorandum impute HSNA and HSNA employee actions to HSDG. Given this, references to HSDG sometimes encompass HSNA or HSNA employee conduct.

On October 16, 2020, OJC sent a demand letter to HSDG notifying it of breach of the 2020-2021 Service Contract and demanding that HSDG honor the terms of the agreement, including minimum TEU quantities. I.D. at 7; Complainant's Appendix ("CX") at 159-160 ("October 16 Demand Letter"). The October 16 Demand Letter was a formal letter from a law firm representing OJC that requested HSDG maintain all records relating to the dispute in anticipation of litigation. *Id*. HSNA Risk Management employee Michael Gast sent an email on October 21, 2020, following a conversation within HSDG in which he stated, among other things, "I understand space is limited and other customers are paying a premium for space presently but any additional profit gained from those premiums is going to quickly go out the window if this matter goes to trial… This is a very bad case for us which we will likely lose… At present based on the emails I have seen I do not have confidence in our ability to establish that we are doing our part under these terms…but again we must please take into account that our losses could easily exceed US$100,000 between our lawyer fees and any final judgment which may be awarded to them by a court." I.D. at 8.

OJC began negotiations towards a 2021-2022 service contract ("2021-2022 Service Contract") as early as January 2021. I.D. at 10. HSNA Cargo Flow Specialist Kevin Li testified that the majority of contracts would be negotiated and entered in the first quarter of the year, through April, or possibly May. I.D. at 10. HSNA Senior Vice President Juergen Pump stated that customers in 2021 started to negotiate contracts as early as January and February in light of market conditions and OJC's renewal not being concluded by April was "very very late in the game." Respondent's Appendix ("RX") at 992. Negotiations on a renewal continued through March and April of 2021. I.D. at 11. The record also shows that OJC continued to struggle with booking space with HSDG through March and April. I.D. at 11.

Internal HSDG emails reflect a conversation between HSNA Cargo Flow Specialist Mr. Li, HSNA Manager East Coast Sales Gonzalo Maldonado, and HSNA Account Executive Andrea Casanova about renewing OJC's contract for another year. I.D. at 13. Mr. Li requested an MQC for OJC's account and Ms. Casanova reached out to Mr. Weiss for him to commit to an MQC. Mr. Weiss declares that "OJC and Maersk [HSDG] agreed to the 4200-4700 MQC for 2021-2022, and [Ms.] Casanova worked on getting the new contract drafted." CX at 468. However, Ms. Casanova declares that this is "false" and that OJC and HSDG never agreed on key contract terms, like shipping rates, volume, and trade lanes. RX at 1138-39.

On April 28, 2021, at 10:27 AM, a law firm representing OJC emailed a second demand letter ("April 28 Demand Letter") to HSDG notifying HSDG of breach of the 2020-2021 Service Contract and asserting that failure to cure the described breach of the service agreement may result in the "filing of a petition to the Federal Maritime Commission to seek relief." I.D. at 13. This is the first time OJC notified HSDG of an intention to complain to the Commission. OJC specifically stated, "[f]ailure to cure the breach by May 3, 2021, may result in legal action against you and your affiliates, as well as the filing of a petition to the Federal Maritime Commission to seek relief." I.D. at 13-14. Soon thereafter Ms. Casanova created a contract renewal in HSDG's computer system doubling the MQC to 400 FFE as a way to potentially offset the anticipated 2020-2021 Service Contract deficit and "showing an interest in handling more of OJC's volume." I.D. at 14. Ms. Casanova used the rates of the 2020-2021 Service Contract because those were the rates in the system. *Id.* On April 29, 2021, Ms. Casanova sent an internal HSDG email, which the ALJ presumed attached OJC's April 28 Demand Letter, stating: "I have spoken with the customer and… he does not want to end the relationship with us… [h]e is open to any solution that can offset this deficit. I want to ask if it is possible to Increase MQC by 200 FFE giving a total of $400 [sic] FFE, that will not only cover the deficit by [sic] also show our interest to participate more of their volume, of course, if we truly can satisfy this volume. This is not a short term account and the customer has been constant in his volumes and is willing to commit to much more of the current MQC." I.D. at 14-15.

Later, on April 29, 2021, at 2:04 PM, Mr. Li emailed Mr. Pump, "[s]orry to trouble you but I need your executive decision on this account… I was completing [sic] unaware of the legal action they put against us… they are threatening us on liquidated damage… Meanwhile, they are proposing a renewal contract with 400 FFE MQC but all rates remain the same from last year contract. In my opinion this is pathetic and unacceptable, it will be a risk to continue work with this account especially considering our space situation this coming year. I can work with APAROM to ensure they will get the remaining 18 FFE before end of May." I.D. at 15. Mr. Pump responded the same day, "Fully agree. We should not engage in any renewal discussions with customer in light of the potential litigation, I would also not provide them with space under the existing contract. The shortfall will be compensated as per contract terms." Mr. Li communicated this "executive decision" to other HSDG employees on April 29, 2021, stating that HSDG should not engage in renewal discussions and should reject the proposed agreement. I.D. at 15-16. Mr. Li also stated, "we should also consider not provide them space under existing contract. The shortfall will be compensated as per contract terms[.]" I.D. at 16.

Mr. Gast, the risk manager, followed up with his own email to HSDG employees internally on April 29, 2021, opining that, "The first time this occurred I stressed the financial impact such a lawsuit could carry and I have done so again. It appears our local sales colleagues had tried to address the capacity issue with origin but were advised that no additional space would be granted for this customer… Should such a lawsuit occur I can easily imagine the cost would easily wipe out any profits gained from the commercial relationship due to potential breach of contract judgments against us and the cost of our own legal representation. At this point I do not know what more could be done from my side other than to wait for May 31 to see how bad the shortfall is[.]" I.D. at 17-18.

Another HSDG employee requested authorization to grant OJC the space in May to meet the MQC. I.D. at 16. Subsequent messages between HSDG employees on May 4, 2021, indicate that employees in Asia identified 12 FFE on a specific ship, confirmed the space, and told the local booking desk to release the space to OJC. I.D. at 16. Another email states HSDG had found an additional 6 FFE and the total 18 FFE should fulfill the MQC of 200 FFE. *Id.* HSDG employees congratulated each other on their efforts to fulfill the contractual obligations and reported they had informed OJC of the space on May 5, 2021. *Id.* Two screenshots of the OJC customer dashboard tell a conflicting story. On April 29, Ms. Casanova attached a screenshot of OJC's customer dashboard that reflected 11 FFE being carried by HSDG in April 2021 and projected 18 FFE would be carried in May 2021. CX at 215-16. But on May 7, 2021, an email from Ms. Casanova included a screenshot of the same OJC customer dashboard reflecting HSDG transporting only 9 FFE for OJC in April, and May is no longer listed. RX at 726. June 2021 is listed but shows 0 FFE scheduled to move. Ms. Casanova appears to have informed Mr. Weiss by phone that HSDG would not renew the service contract, as she followed up with an email stating, "[a]s per our conversation, we are not able to renew the contract at this time." She then blamed this on "the lack of space and equipment in Asia and the shortage of truck power in the US that we and the entire industry are facing." I.D. at 17. OJC tried to negotiate a contract with a more limited scope, but HSDG refused. *Id.*

The 2020-2021 Service Contract expired on May 31, 2021, with HSDG shipping 185 FFE for OJC, and no renewal contract was concluded because it was "not approved by Upper Management." I.D. at 18. Ms. Casanova noted that OJC was "claiming" the 15 FFE deficit. I.D. at 19. The ALJ concluded that the 15 FFE shortfall was not a result of space being unavailable, rather the containers were not shipped "due to potential litigation." I.D. at 19.

Finding of Fact 76, which HSDG challenges, reads, "After April 29, 2021, Hamburg entered into service contracts with other shippers for a significantly higher amount of space than OJC was requesting." I.D. at 19. The ALJ cited to a declaration of Mr. Weiss stating Maersk entered into service contracts with the prefix NOAC for 25,402 TEUs after April 29, 2021. CX at 469. The ALJ also cited to a list of agreements and MQCs produced by HSDG, but that list does not include the dates the agreements were signed or identify the trade lane or lanes that are covered by each agreement. CX at 259-84. However, Mr. Weiss's declaration does state that OJC demanded HSDG identify, "for each Service Contract, the date it was entered into, total FFEs or TEUs, the shipping lines included, and the shipping prices." CX at 469. HSDG refused to produce the requested information, instead producing only the limited information the ALJ cited. CX at 469.

3. Reparations

i. Expert Reports

Both parties submitted expert reports. OJC submitted the first expert report by Mr. Berning on September 2, 2022, after the ALJ's scheduled deadline for disclosure of initial expert reports on August 5, 2022. Mr. Berning then submitted a supplemental report on October 17, 2022. HSDG submitted one expert report by the August 5, 2022, deadline. Respondent HSDG's Exceptions to Initial Decision ("HSDG Exceptions") at 23. Mr. Zayas's report was submitted on August 5, 2022, but he also submitted a supplemental declaration on December 8, 2022. I.D. at 45. The ALJ decided that it was preferable to resolve the case on the merits and declined to exclude any of the expert reports because they were late. I.D. at 45.

HSDG's expert, Mr. Zayas, concluded that OJC had provided insufficient information to conclude it sustained any loss due to HSDG's conduct. RX at 1183. Mr. Zayas did not have access to Mr. Berning's first report, but he evaluated OJC's damages based on a version of OJC's final spreadsheet. RX at 1183. Mr. Zayas identified issues with OJC's damages claims and challenged assumptions that he stated undermine OJC's data. RX at 1184.

Mr. Zayas supplemented his initial report on December 8, 2022, the day HSDG filed its final brief, with a "declaration" that is longer than his expert report. RX at 1144-73. Mr. Zayas reviewed both of Mr. Berning's reports and the updated spreadsheet OJC provided on September 2, 2022. Mr. Zayas declared that these documents did not change his opinions and he continued to assert that OJC had not provided enough information to evaluate or sustain the damages claims. RX at 1149.

Mr. Berning's initial expert report assumed that HSDG was liable to OJC on one or more legal claims and that OJC's damages were proximately caused by HSDG. CX at 418. Mr. Berning used the data provided to him to calculate three different valuations of damages, namely lost profits, shipping rate differentials, and market value of lost revenue. CX at 418. When evaluating OJC's lost profit damages claim, Mr. Berning noted that OJC captured all of its costs and all of the costs of third parties used to sell the product. CX at 423. Mr. Berning acknowledged Mr. Zayas's statement that OJC's gross profit calculation does not capture all the costs associated with the sale of a product but then concluded, based on an understanding of how OJC operated, that OJC had captured the vast majority, if not all, of the costs relating to the sale of products. CX at 423. Mr. Berning supplemented his report but the additions are not relevant to this decision as they dealt with damages measured by shipping rate differentials and neither party advocates for the usage of this measure. CX at 462.

ii. Profits Per Container

The ALJ accepted OJC's calculations of average revenue per container, $60,250.30, and average profit per container, $22,892.48. I.D. at 48. The ALJ noted that OJC calculated those numbers for the period from June 1, 2020, to July 16, 2022. For revenue per container, OJC used actual products shipped and the selling price of those products. I.D. at 48. OJC calculated profits per container by using the same information about actual products shipped and selling price and deducting "all the costs" such as the purchase cost of the good, sales commissions, marketing, fulfillment center costs, and shipping costs.[3] I.D. at 48. Mr. Berning evaluated OJC's costs in light of OJC's organizational structure and noted, "the way they operated is almost as... a virtual company. So their costs, overhead and stuff are very limited because they outsource pretty much everything." I.D. at 48. OJC also provided a spreadsheet identifying spot market shipping rates from 2020 through 2022. OJC Exhibit 104 – CONFIDENTIAL WCI Data for OJcommerce ("OJC Ex. 104"). Mr. Pump testified that service contract rates doubled from 2019 to 2021 and spot rates tripled if not more. I.D. at 19.

iii. Container Volume

Mr. Pump testified that HSDG's biggest challenge for 2021-2022 was capacity, as almost all customers asked for more capacity and HSDG could not "get a firm handle" on capacity for 2021-2022. I.D. at 19-20. Further, he stated, there was the challenge of figuring out which customers should get more capacity and where that capacity comes from. I.D. at 20. After HSDG cut off contract renewal negotiations, OJC could not obtain a shipping contract from any other carrier. I.D. at 20. Mr. Weiss declared that he "tried to do so with no avail" and OJC was forced to obtain what limited space it could on the spot market at elevated rates. I.D. at 59. The ALJ concluded that OJC was often unable to secure shipments and in most cases was forced to forgo making shipments because spot rates became too expensive to justify the cost of container freight. I.D. at 20. OJC shipped 143 containers in 2021-2022 on the spot market or through freight forwarders. I.D. at 20.

The evidence shows that OJC told HSDG it planned to move 70 percent of its projected 2021-2022 volume of 4,200 to 4,700 FFE to Kentucky, with the remaining 30 percent going to California. I.D. at 12. Mr. Weiss declared that Ms. Casanova agreed to finalize an

[3] As will be discussed later, it appears that OJC's data does not base these calculations on actual shipping costs, but instead on an estimated rate.

agreement to transport 4,200 to 4,700 FFE for 2021-2022. CX at 468. Mr. Weiss also stated that OJC had a contract with Maersk for shipments from Brazil. CX at 469. But Ms. Casanova declared that OJC had no such contract and OJC had previously tried to secure a service contract with HSDG delivery to Kentucky multiple times without success. RX at 1141. It appears OJC tried to include the Kentucky business in the service contract prior to signing the 2020-2021 Service Contract. I.D. at 20. Then during the contract, Ms. Casanova or Mr. Weiss asked to revisit the Kentucky business in July 2020, October 2020, January 2021, and April 2021. I.D. at 10, 12, 21. HSDG came closest to considering a service contract with delivery to Kentucky in April 2021, but Ms. Casanova ultimately indicated on April 28, 2021, that HSDG was unwilling to bid on the Kentucky route. RX at 812 (Ms. Casanova stating to Mr. Weiss, "Please consider this a commitment for the place of delivery City of Industry CA only."); RX at 1137. HSDG did transport cargo to Kentucky for OJC, but only through the spot market. RX at 1142 (Ms. Casanova stating it is false that OJC had a service contract for Brazil to United States shipments and those were instead shipped on a case-by-case basis pursuant to short-term rate quotations).

iv. Double Damages

The ALJ awarded double damages based on the knowing and willful violation of the Commission's prohibition on retaliation, the maximum allowable amount. I.D. at 64; *see also* 46 U.S.C. § 41305(c). Mr. Pump testified that he did not receive or review copies of OJC's notice of intention to file a case with the Commission, but emails indicate OJC was mentioned in a call with Mr. Pump, Mr. Li referenced OJC's "legal action" against HSDG, and Mr. Pump emailed Mr. Li that OJC should be cut off from renewal negotiations and space under the existing service contract due to "potential litigation." I.D. at 15. Mr. Pump testified he made his "executive decision" to cut off OJC based on the emails he received from Mr. Li and his conversation with Mr. Li. I.D. at 22. Further, Mr. Pump testified that he knew a customer complaining to the Commission could not be a reason not to negotiate and that this was part of

HSDG's compliance training. *Id.* Mr. Pump also testified that it was clearly understood in the organization a customer threat to complain to the Commission is not to factor into a decision of whether or not to negotiate a service contract. *Id.*

When considering the knowledge of HSDG, the ALJ also highlighted Mr. Gast's multiple emails explaining to HSDG employees how HSDG was failing to meet its contractual commitments. I.D. at 62. The ALJ noted that Mr. Gast's emails do not suggest that OJC's claims were not well-founded and noted that Mr. Gast hoped the lure of a contract renewal would dissuade OJC from filing suit. *Id.* Based on this, the ALJ concluded that OJC clearly explained why HSDG violated the service contract and Shipping Act, but instead of resolving this dispute, HSDG committed additional violations. I.D. at 63. HSDG knew OJC would seek compensation, but still decided to "disengage." Though HSDG employees suggested how HSDG could meet the minimum requirements of the 2020-2021 Service Contract and offered to give the space to OJC, HSDG still did not provide the space to OJC and refused to engage in renewal discussions. I.D. at 63. From this record, the ALJ concluded double damages are appropriate because of HSDG's knowing and willful violation of the Shipping Act. I.D. at 64.

B. Procedural History

OJC initiated this case with a Complaint dated December 13, 2021, alleging that HSDG and HSNA are vessel-operating common carriers and that they violated 46 U.S.C. §§ 41104(a)(3) and (10) in connection with service contract AECC0000291 and unsuccessful negotiations towards a renewal for a service contract covering June 2021 to May 2022. Verified Complaint; I.D. at 6; 46 U.S.C. § 41104(a)(3), 41104(a)(10) (2021). On February 8, 2022, the ALJ issued an Order granting OJC's request to amend the Complaint and denying HSDG's Motions to Dismiss and for Summary Judgment as moot because OJC amended the Complaint. Order on Motion to Amend Complaint and Motion to Dismiss, February 18, 2022 ("First

MTD Order"). The ALJ included in that order dicta advising that the Commission has a duty to determine whether an entity has violated the Shipping Act, even when allegations may also constitute breach of contract claims. First MTD Order at 4.

In a June 29, 2022, Order, the ALJ approved the parties' request for a modification to the scheduling order but shortened their requested extension of time. Order on Respondents' Motion to Compel and Revised Schedule, June 29, 2022 ("MTC Order"). The new schedule called for disclosure of initial export reports on August 5, 2022, the last day for serving discovery requests on August 30, 2022, the last day to disclose rebuttal expert reports on September 2, 2021, and the close of all discovery on September 16, 2022. MTC Order at 4. The ALJ did not compel HSDG to respond to OJC's request for production about which shippers were offered service contracts and which were not, as the burden outweighed the potential benefit, but did compel HSDG to produce other information about service contracts, such as sailings from the cities at issue, total cargo capacity and unbooked cargo capacity, and documents showing pricing for shipping or determining prices for service contracts and the spot market. MTC Order at 2-4.

On August 31, 2022, the ALJ issued an Order addressing multiple motions. Order on Respondents' Motion to Partially Dismiss and for a Protective Order and Complainant's Motion for Expedited Relief, August 31, 2022 ("Second MTD Order"). The ALJ dismissed OJC's claims under 46 U.S.C. §§ 41102(a)(5), 41102(b), and 41104(a)(9), but denied the rest of HSDG's motion to dismiss. Second MTD at 12. The ALJ also ordered HSDG to comply with the previous Order on Respondents' Motion to Compel and threatened sanctions for HSDG's continued unwillingness to produce information. Second MTD at 9. The ALJ also removed some of HSDG's confidential designations and rejected HSDG's labeling of certain documents "Attorney Work Product." Second MTD at 8-10. Finally, the ALJ directed HSDG to produce management level employees who would have knowledge of HSDG pricing decisions for deposition. Second MTD at 12.

On September 30, 2022, the ALJ denied all of HSDG's motions to compel, but granted OJC's motion to extend the close of discovery so any depositions agreed to, but not conducted, could be completed. Order on Respondents' Motion to Compel and Complainant's Motions for Extension of Time and for Clarification, September 30, 2022 ("Second MTC") at 5-6. The ALJ chose not to strike OJC's expert report even though it was not timely submitted. Second MTC at 5.

On June 7, 2023, the ALJ issued the Initial Decision. Both HSDG and OJC filed exceptions on June 29, 2023, and responses on July 21, 2023.

II. <u>DISCUSSION</u>

A. Standard of Review

Normally, when the Commission reviews exceptions to an ALJ's Initial Decision, it has "all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). The Commission therefore generally reviews the ALJ's findings de novo. *Id.*; *see also Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 12-02, 2015 WL 94261, at *5 (FMC Dec. 18, 2015). Under the Administrative Procedure Act, the complainant has the burden of proving its allegations by a preponderance of the evidence, meaning that it must persuade the Commission that the allegations are more probable than not. 5 U.S.C. § 556(d); 46 C.F.R. § 502.203; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 WL 9966245, at *14 (FMC Dec. 17, 2014). However, the Commission reviews discovery orders, including orders imposing sanctions, under an abuse of discretion standard. *See Rana v. Franklin*, FMC Docket No. 19-03, 2022 WL 1744905, at *4 (FMC May 25, 2022).

B. Liability

1. Jurisdiction

The Commission affirms the ALJ's determination that it has jurisdiction over OJC's Shipping Act claims. HSDG argues that treating OJC's claims as Shipping Act claims instead of breach of contract claims renders 46 U.S.C. § 40502(f) a nullity since "virtually every breach now becomes actionable under the Shipping Act[.]" HSDG Exceptions at 12. But the Commission's test is "whether a complainant's allegations are inherently a breach of contract claim, or whether they also involve elements peculiar to the Shipping Act." *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1635, 1645 (2000).[4] The Commission has a duty to consider Shipping Act claims because they are distinct from breach of contract claims and entail a different analysis. *MCS Industries, Inc., v. MSC Mediterranean Shipping Company S.A.*, Docket No. 21-05, 2024 WL 95383, at *7 (FMC Jan. 3, 2024). Here, OJC sought remedies for HSDG's violations of Shipping Act prohibitions against retaliation and refusing to deal, so the Commission has jurisdiction.

The ALJ found that OJC sent HSDG a notice of intention to file a case with the Commission, which led HSDG to refuse any further requests for space under the MQC and abruptly break off negotiations towards an expanded service contract for the next year. I.D. at 19. The remedies OJC seeks are not for HSDG's failure to meet its contractual commitments; it seeks redress for Shipping Act violations, namely HSDG's actions after OJC notified HSDG of an

[4] Though HSDG relies on *Cargo One* to support its argument that the Commission should narrowly interpret its power to review service contracts given the language of 46 U.S.C. § 40502(f), that decision actually revised the Commission's interpretation in the other direction. *Cargo One* "articulat[ed] a more precise and less expansive view of which causes of action seeking reparations are precluded by [§ 40502(f)]" than previously articulated in the *Vinmar* case. *Cargo One*, 28 S.R.R. at 1644.

intention to bring a complaint to the Commission. I.D. at 27.[5] OJC provided concrete evidence of HSDG refusing to provide available space and terminating ongoing discussions about a contract renewal and expansion due to OJC's notice of intention to file a case with the Commission. There is clear evidence of violations of the Shipping Act and the presence of a service contract does not alter the Commission's duty to resolve OJC's claims.

HSDG's argument that the ALJ erred by not making OJC rebut the presumption that its claims are simply breach of contract claims is not persuasive. First, OJC brought no contract law claims to the Commission. Though any contract law claims OJC brought would share facts with OJC's Shipping Act claims, OJC does not seek breach of contract remedies and seeks only remedies for Shipping Act violations. Moreover, OJC did unearth evidence of Shipping Act violations by HSDG that are distinct from HSDG's failure to meet its contractual commitments.

Second, HSDG's claim that the Commission has articulated a presumption that a claim is no more than a breach of contract claim when it involves an underlying service contract is inaccurate. HSDG does not cite to case law supporting the existence of this presumption. The Commission did state in the *Cargo One* decision that allegations essentially comprising contract law claims should be dismissed unless the complainant successfully rebuts "the presumption" that the claims are no more than simple breach of contract claims. *Cargo One*, 28 S.R.R. at 1645. But in the next sentence, the Commission stated that the Commission would likely presume a case is correctly before the Commission where the alleged violation raises issues beyond contractual obligations.[6]

[5] The Commission notes that some of HSDG's Shipping Act violations appear to have predated April 29, 2021, and continued after that date, as HSDG refunded OJC for demurrage charges as early as February 5, 2021 and as late as July 14, 2021. *See* Verified Amended Complaint at 10-12; I.D. at 1.

[6] "We find that as a general matter, allegations essentially comprising contract law claims should be dismissed unless the party alleging the violation successfully

Here, OJC did not allege breach of contract claims and instead alleged violations of the Shipping Act. Accordingly, HSDG's argument that the ALJ failed to address a presumption that does not exist and in any case would have been easily overcome by the evidence OJC proffered is not persuasive.

Based on this record, the Commission has jurisdiction to consider OJC's claims.

2. Refusal to Deal

The ALJ correctly determined that HSDG had refused to deal with OJC in violation of 46 U.S.C. § 41104(a)(10) because the evidence established that after OJC sent HSDG notice of an intention to file a case with the Commission, HSDG refused to provide OJC any more space pursuant to the 2020-2021 Service Contract and refused to negotiate a renewal. 46 U.S.C. § 41104(a)(10) (2021). HSDG's argument that it did not engage in a refusal to deal is unpersuasive. There are two parts to the Commission's analysis of a refusal to deal claim. *See Orolugbagbe v. A.T.I., U.S.A., Inc.*, Informal Docket No. 1943(I), at *31 (FMC Oct. 22, 2015). The Commission first considers whether the entity has refused to deal or negotiate, also described as "shutting out" a counterparty. *New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans*, Docket No. 00-11, 29 S.R.R. 1066, 1070, 2002 WL 33836158 (FMC June 28, 2002), *aff'd sub nom. New Orleans Stevedoring Co. v. FMC*, 80 Fed. Appx. 681 (D.C. Cir. 2003). Then the Commission considers whether that refusal has been unreasonable. *Canaveral Port Authority - Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate,* Docket No. 02-02, 29 S.R.R. 1436, 2003 WL 723336, at *16 (FMC Feb. 24, 2003). Refusal to deal cases are factually driven and

rebuts the presumption that the claim is no more than a simple contract breach claim. In contrast, where the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support such a claim, that the matter is appropriately before the agency." *Cargo One,* 28 S.R.R. at 1645.

determined on a case-by-case basis. *Canaveral Port Authority*, 2003 WL 723336, at *18.

i. Whether HSDG "Refused"

a. 2020-2021 Service Contract

The ALJ correctly concluded that HSDG refused to provide the required space under the 2020-2021 Service Contract because of OJC's notice of intention to file a case with the Commission and not because space was unavailable. I.D. at 28-30. The record shows HSDG employees offering to find space to fulfill the MQC and finding that space, but HSDG undisputedly not meeting the MQC. I.D. at 30. HSDG argues that it did not "shut out" OJC as required for a claim of refusal to deal. HSDG first argues that internal emails show that HSDG was attempting to find space for OJC after OJC's April 28 Demand Letter and after the "executive decision" to cut off OJC. HSDG Exceptions at 13. But the internal emails are more complicated. The emails show HSDG employees securing space for OJC that would meet the MQC and celebrating meeting the MQC, but ultimately HSDG shipped only 185 of the 200 required containers after Mr. Pump's "executive decision." I.D. at 16, 19.

HSDG argues that it shipped containers for OJC after the April 28 Demand Letter, so it did not "refuse" to deal, but OJC's CEO explained that a few of the 66 containers shipped by Maersk after April 29, 2021, were already scheduled prior to that date and the rest were shipped by freight forwarder or using spot quotes. Complainant's Appendix - Supplement ("SCX") at 509-10. This is consistent with contemporaneous internal HSDG evidence that it had shipped 182 FFE for OJC by April 29, 2021, and only 185 FFE by May 31, 2021. I.D. at 15, 19. Neither side disputes the fact that

HSDG shipped only 185 FFE during the 2020-2021 Service Contract. [7]

The Commission affirms the ALJ's conclusion that the shortfall of 15 FFE was not a result of space being unavailable but was because of "potential litigation." I.D. at 19. Emails from HSDG employees indicate that sufficient space was available during this period to meet the MQC and that space was saved for OJC. I.D. at 16. Emails from Mr. Pump and Mr. Li reflect an "executive decision" that OJC was to be cut off from space on the existing service contract. I.D. at 15-16. An internal HSDG dashboard showing its relationship with OJC reflects no previous months where OJC was completely cut off. RX at 726. This evidence shows that HSDG had not previously completely failed to ship any of OJC's cargo during a month, space was available during the April 29, 2021, to May 31, 2021, period, and HSDG executives directed that OJC be cut off from using the service contract on April 29, 2021. HSDG's argument that it did not "cut off" OJC is unpersuasive.

b. Service Contract for 2021-2022

The Commission affirms the ALJ's conclusion that HSDG shut out OJC by refusing to finalize negotiations towards a 2021-2022 Service Contract. The record shows HSDG proceeding towards a renewal of OJC's service contract, and then abruptly ceasing all renewal efforts and refusing to enter even a pared-down service contract with OJC. HSDG argues that it did not shut out OJC by refusing to enter into a service contract for 2021-2022 primarily because the ALJ erred in finding HSDG "shut out" OJC when there

[7] Neither side provides a convincing explanation for 16 Bills of Lading ("BOLs") dated after April 28, 2021, that include the OJC-HSDG service contract number or exactly how they relate to the MQC, though this question is ultimately inconsequential to the outcome. RX at 2-56. Though neither side, nor the ALJ, provided adequate explanation, no one disputed that HSDG missed the MQC by 15 FFE.

is evidence HSDG shipped containers for OJC on the spot market. HSDG Exceptions at 12. But HSDG cites no support for the argument that spot market shipments can preclude finding a respondent refused to deal with respect to a service contract.

The Commission concurs with the ALJ that these are qualitatively different products and that finding a refusal to deal does not require finding a carrier shut out a shipper from both types of products. The ALJ rejected HSDG's evidence that it continued to work with OJC after the expiration of the 2020-2021 service contract, because "offering higher spot market rates does not ameliorate the problems caused by not having a predictable, year-long service contract." I.D. at 31.

Though the issue of whether refusing to negotiate a service contract but continuing to ship containers at spot rates qualifies as a refusal to deal is a novel issue for the Commission, the record supports the ALJ's conclusion. Because OJC worked on an as-needed basis with a 60–90-day lead time to produce products, it had to secure future transport before producing products; otherwise, its products would be stuck at ports or abroad with nowhere to store them. SCX at 510. Using the spot market does not allow this planning, as prices may fluctuate to an extent that products are not profitable to ship, and space may simply not be available. OJC Ex. 104; I.D. at 59. Given the supply chain dislocation that spanned 2020 to 2022, OJC's fears it could not find a carrier to ship a container were well-founded. *See* I.D. at 20 (Mr. Pump stating, "who do we give more capacity to where, where does it come from" when discussing the space allocation challenges during the April 2021 service contract renewal period); Peter Tirschwell, *Container Capacity Shortfall Drives Contract Fulfillment Conflict,* Journal of Commerce (Aug. 5, 2021) https://www.joc.com/article/container-capacity-shortfall-drives-contract-fulfillment-conflict_20210805.html ("sailings have been canceled because the ships are anchored off North American ports awaiting berth, making then unavailable for scheduled weekly departures from Asia ports"). Spot rates on a route from Shanghai to Los Angeles grew from around $2,000 at the start of the 2020-2021 Service Contract, to $5,742 by its end, and within four months spiked to over $12,400. OJC Ex. 104. Over the course of 2020-2021, OJC shipped 542 containers pursuant to three service contracts with three different carriers, but without a service contract, it shipped only 143 FFE in 2021-2022 despite projecting significantly higher volume during this period. Complainant's Exceptions to the Initial Decision ("OJC Exceptions") at 24; I.D. at 20.

The Commission affirms the ALJ's conclusion that intermittent spot rate shipping is not equivalent to or the same as the guarantees provided by a service contract and the ALJ's determination that HSDG shut out OJC by refusing to negotiate a 2021-2022 service contract.

ii. Whether the Refusal was Unreasonable

The Commission affirms the ALJ's conclusion that HSDG's refusal to deal with OJC was unreasonable. HSDG never gave "good faith consideration to [OJC]'s proposal or efforts at negotiation" as described in *Orolugbagbe* and *Maher*. *Orolugbagbe* Docket 1943(I), at *32*, citing Maher,* 2014 WL 9966245, at *6. Nor are HSDG's actions similar to those of the port in *New Orleans Stevedoring*, where there were documented concerns about the Complainant's desired use of a physical space interfering with planned construction. *New Orleans Stevedoring,* 2002 WL 33836158, at *1-2. Instead, HSDG's actions are similar to those of the Canaveral Port Authority, which offered a range of explanations after the fact, but none that justified the refusal to even hold a hearing to evaluate the Complainant's application. *Canaveral Port Authority,* 2003 WL 723336, at *16-18. Here, HSDG refused to even consider a renewal after OJC's April 28 Demand Letter when OJC tried to negotiate a pared-down service contract.

The record supports the ALJ's conclusion that HSDG's actions were unreasonable. As early as the October 16 Demand

Letter, HSDG employees knew and admitted they were not meeting their contractual commitments. I.D. at 8. Before and after the April 28 Demand Letter, HSDG employees knew they were failing to meet their contractual commitments and sought additional space guarantees for OJC in the next service contract to make up for their failures. I.D. at 11-14. OJC issued reasonable legal notices based on these failures, and HSDG responded by cutting off access to the existing service contract and refusing to renew or expand the relationship. I.D. at 13-17. HSDG seemed to know this response was unreasonable because it offered pretextual excuses for the refusal. I.D. at 30. When OJC received the refusal and attempted to salvage even a pared-down service contract, HSDG continued to refuse. I.D. at 17. HSDG Executive Mr. Pump admitted during depositions that he knew retaliating against a counterparty after a threat to file litigation or a complaint with the Commission was prohibited. I.D. at 22.

HSDG's explanations for its refusal offered after the fact are inconsistent with the evidence showing the real reason HSDG disengaged, namely Mr. Pump's executive decision after OJC's notice of intention to file a case with the Commission. HSDG argues that its failure to perform was due to legitimate transportation factors posed by supply chain congestion. The evidence supports HSDG's claim that it was impacted by supply chain congestion and, as the ALJ noted, supply chain congestion could be a transportation factor that reasonably justifies failing to perform under a service contract or refusing to negotiate a renewal. But "[*i*]*n this particular case*" the evidence does not support a conclusion that any transportation factors were the reason HSDG declined "*this particular service contract*." I.D. at 33 (emphasis in original). Prior to April 28, 2021, HSDG was actively negotiating a service contract with OJC, and after Mr. Pump's April 29, 2021, executive decision HSDG refused to negotiate further. HSDG does not point to any abrupt changes in transportation factors, such as sudden supply chain congestion around April 29, 2021, that would explain the stark shift from expanding the relationship with OJC to ending it. It was the “executive decision” by Mr. Pump communicated to Mr. Li that resulted in HSDG’s refusal. *Id.*

HSDG’s argument that a carrier may refuse to deal when faced with what appears to be a baseless claim by a counterparty is not persuasive because this argument is inconsistent with this record. I.D. at 34. HSDG disagrees with the ALJ’s conclusion that this argument does not apply but now points to no errors in her analysis. Instead, HSDG argues that shutting out OJC was a reasonable exercise of business discretion given what it characterizes as OJC’s baseless threats to sue for a breach of contract and the contract’s liquidated damages clause.[8] HSDG Exceptions at 14. But this argument is not supported by these facts, as the evidence shows OJC’s notice of intention to file a case with the Commission was well supported. I.D. at 34. OJC was seeking transportation it was entitled to under the service contract, it objected to demurrage fees HSDG ultimately refunded, and it raised legitimate complaints about HSDG’s actions that ultimately led to a judgment against HSDG for Shipping Act violations. *Id.* HSDG’s own risk manager confirmed that HSDG was not meeting its contractual commitments and would likely face substantial damages. CX at 161, 229. These facts do not lead to the conclusion that OJC was making baseless or frivolous claims or that HSDG was justified in refusing further dealings. I.D. at 34.

Further, the case HSDG relies upon to support its argument that HSDG can refuse service to counterparties that demand it meets

[8] HSDG may have been justified in cutting off OJC from further business if there was no basis for a claim against HSDG. I.D. at 34. But in contrast to *Cornell v. Princess Cruise Lines, Ltd.*, HSDG was indisputably failing to meet contractual commitments. Docket No. 13-02, 2014 WL 5316340, at *8 (FMC Aug. 28, 2014). Further, OJC’s complaint alleged HSDG charged demurrage that violated 46 U.S.C. § 41102(c) and HSDG ultimately refunded that demurrage, suggesting OJC had non-frivolous Shipping Act claims prior to its April 28, 2021, Demand Letter. HSDG’s argument that OJC’s notice of intention to file a case with the Commission was frivolous because HSDG had yet to violate the Shipping Act by retaliating, meaning the Commission lacked jurisdiction, ignores the Commission’s jurisdiction to resolve OJC’s 46 U.S.C. § 41102(c) claims.

its contractual obligations cannot be read as expansively as HSDG desires; otherwise the Commission's prohibitions against retaliation would cease to exist. In *Cornell v. FMC*, the complainant brought not one, but two unsuccessful lawsuits stemming from carriage on the respondent's passenger vessel. *Cornell v. FMC*, 634 Fed. Appx. 795 (D.C. Cir. 2015). The Commission noted in the *Cornell* case that the nature of passenger vessel operators means they cannot be expected to resolve all customer complaints, such as high ticket prices or bad food, to the customer's satisfaction or face claims of refusal to deal. *Cornell v. Princess Cruise Lines, Ltd.*, Docket No. 13-02, 2014 WL 5316340, at *8 (FMC Aug. 28, 2014). The Commission's decision in no way suggested a carrier could cut off a shipper from contractually obligated space because that shipper intended to complain to the Commission. The Shipping Act prohibits a carrier from retaliating against a shipper for filing a complaint or for any other reason by refusing otherwise available cargo space accommodations or resorting to other discriminatory measures. *See* 46 U.S.C. § 41104(3) (2021). But HSDG's interpretation of the *Cornell* case would allow a carrier to refuse otherwise available cargo space accommodations because a shipper has sued them or a related entity, filed a complaint against the carrier, or simply notified a carrier it was failing to meet its legal obligations pursuant to a contract. The Commission declines to adopt HSDG's expansive view of the *Cornell* case and concludes that the situation facing the passenger vessel operator in that case is distinguishable from the situation of HSDG here.

For the reasons discussed above, the Commission affirms the conclusion of the ALJ that HSDG's refusal was unreasonable.

3. Retaliation

The Commission affirms the ALJ's conclusion that HSDG retaliated against OJC in violation of 46 U.S.C. § 41104(a)(3) by refusing further space under the 2020-2021 Service Contract and refusing to renew the contract for the 2021-2022 term after OJC's protected notice of intention to file a case with the Commission. 46

U.S.C. § 41104(a)(3) (2021). HSDG argues that neither its non-performance of the existing service contract nor its refusal to enter into a new service contract amounts to retaliation. Even if HSDG did retaliate, HSDG argues, OJC's private notice of intention to file a case with the Commission is not a protected activity. The Commission does not find HSDG's arguments persuasive.

i. HSDG Engaged in Prohibited Conduct by Shutting Out OJC

The Commission rejects HSDG's argument that it did not retaliate against OJC either during the term of the existing service contract or during negotiations towards a renewal. HSDG Exceptions at 15-18.[9] HSDG argues that the ALJ improperly conflated 46 U.S.C. § 41104(a)(3)'s reference to "cargo space accommodation" with a service contract,[10] and that it was erroneously based on an incorrect interpretation of the evidence. 46 U.S.C. § 41104(a)(3) (2021). HSDG argues that the ALJ erred by concluding that it refused to provide cargo space accommodations when available because the record clearly shows it provided OJC space through the spot market. But the ALJ's decision is well supported and HSDG's exceptions are unpersuasive.

[9] HSDG uses much of the same evidence to argue it did not refuse cargo space accommodations as it used to argue it did not refuse to deal. For the reasons discussed above, those arguments are not persuasive.

[10] HSDG also argues that "to the extent" that the Initial Decision relied on the Commission's Refusal to Deal NPRM to suggest a decision to decline a service contract must be based on transportation factors, it is wrong. HSDG Exceptions at 21. HSDG is correct that the ALJ overstated the Commission's consideration of transportation factors. The ALJ stated a carrier's decisions on granting or denying cargo space "must" be based on legitimate transportation factors or legitimate business decisions. I.D. at 39. The NPRM notes that the Commission has previously found reasonable decisions based on transportation factors or legitimate business decisions, but it does not say that decisions "must" be based on these factors as the ALJ suggested. NPRM at 57677. But it is not HSDG's failure to base its refusal or retaliation on transportation or business factors that underpins the ALJ's determination, so the confusion is irrelevant to the ultimate outcome.

HSDG first argues that the ALJ improperly conflated offering space with negotiating a service contract, but it offers no support for that claim.[11] HSDG does not cite precedent explaining why providing "cargo space accommodations" cannot include the signing of service contracts and why refusing a service contract does not mean refusing "cargo space accommodations" when available. HSDG Exceptions at 16-17. The Commission's definition of a "Service Contract" includes commitments to provide "a defined service level, such as assured space…" 46 U.S.C. 40102(21). The Commission concludes that refusing to sign a service contract that guarantees cargo space and rates is a form of refusing cargo space accommodations.

HSDG then argues that it cannot be forced to contract with OJC and its offer to carry cargo on a non-contract basis shows it did not refuse to provide "cargo space accommodations." HSDG Exceptions at 16-17. But OJC does not argue, and the Commission does not find, that HSDG must sign a service contract with any party that requests one. Instead, HSDG simply must refrain from refusing to negotiate or sign a service contract for one of the reasons prohibited by the Shipping Act. I.D. at 34. The contemporaneous evidence supports the conclusion that HSDG refused to sign a new service contract with OJC for prohibited reasons, not for any of the reasons now offered.

Relevant precedent considering whether refusing to sign a service contract but continuing to ship containers through the spot market qualifies as a refusal to provide cargo space accommodations is rare. 46 U.S.C. § 41104(a)(3) (2021). HSDG does not analyze this distinction in detail. Instead, HSDG points out that it does not have to sign a service contract with every counterparty, it just must avoid shutting out a customer, and that it did offer spot market space. HSDG Exceptions at 12. HSDG then leaps to the conclusion that it

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[11] HSDG notably does not extend this argument to the final four weeks of the 2020-2021 Service Contract, essentially admitting it refused space for this period.

did not refuse space, but service contracts and non-contractual cargo space are different.

The Commission's definition makes clear that a service contract is a reciprocal commitment between shipper and carrier that ensures the carrier receives a minimum volume of cargo and the shipper receives commitments to assured space or rates. 46 U.S.C. § 40102(23). In contrast, spot market rates can, and did, fluctuate wildly over a one-year period. OJC Ex. 104. A carrier has no obligation to accept cargo pursuant to the spot market. And when a shipper may need guaranteed space the most, for instance during periods of peak demand or supply chain congestion, the spot market offers neither certainty the cargo will ship nor certainty the price will be palatable. As OJC's Mr. Weiss explained, service contracts provide certainty for a company trying to create business plans for the next year by locking in rates for shipping and regular space for containers. SCX at 510. Further, the ALJ found that providing higher spot market rates does not ameliorate the problems caused by not having a predictable, year-long service contract. I.D. at 31. HSDG offers no persuasive argument or evidence from the record rebutting that conclusion, only evidence that it did provide spot market space. HSDG Exceptions at 12-13. Finally, HSDG's choice to cut off OJC from a service contract but not spot rates shows that HSDG viewed those as different products that provide different services. Accordingly, HSDG's argument that it did not refuse to provide cargo space accommodations is not persuasive.

HSDG also takes issue with the ALJ's citations. HSDG is correct that *Ceres Marine Terminals v. Maryland Port Administration* is not a refusal to deal or retaliation case and instead involves unreasonable preference or prejudice. Docket 94-01, 29 S.R.R. 356, 370 (FMC Aug. 15, 2001); HSDG Exceptions at 21. But the ALJ only cited *Ceres* because it is cited in the Commission's Notice of Proposed Rulemaking for a rule addressing the prohibition on refusing to deal, not for any legal principle whose application here would be undermined by the specific focus of the *Ceres* case. I.D. at 39; *see also* Notice of Proposed Rulemaking, Definition of

Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier, Docket No. 22-25, 87 Fed. Reg. 57674 (Sept. 21, 2022). Given this, the citation to the *Ceres* case in no way calls into question the ALJ's decision.

Finally, HSDG's argument that the ALJ's conclusion that HSDG had space available is inconsistent with the evidence and is not persuasive. HSDG points out that Finding of Fact ("FOF") 76 is based partially on a list of HSDG service contracts that do not include the date the contract was entered into or information besides the MQC and the effective date. HSDG Exceptions at 17-18. The ALJ used the phrase "entered into" when describing the list of service contracts, even though the list does not appear to show when the parties concluded negotiations towards each contract, just the date the contract started. I.D. at 19. OJC, however, asked for information on when the contracts were entered into, the shipping lane, and the contract prices. CX at 255 (HSDG objecting to the request and stating it will only produce a list of service contracts "concluded" after April 28, 2021, and the MQC), 469. OJC complained about HSDG's refusal to produce relevant information about blank sailings, service contract rates, and pricing strategy for the spot market and service contracts. Complainant's Brief ("OJC Brief") at 26-33. The failure of the record to include what HSDG sees as key missing information, namely the date HSDG "entered into" service contracts with counterparties, is solely due to HSDG's unwillingness to provide that information. HSDG now argues that the failure of the record to include this single data point renders any conclusion HSDG had space available to offer OJC unsupportable. But if HSDG wanted that conclusion to flow naturally from the record, it had more than ample opportunity to produce the missing information.[12] It did not.

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[12] Further evidence that might prove HSDG had insufficient space is unavailable either because HSDG withheld testimony from knowledgeable executives or because of HSDG's intervening violations of the Shipping Act, specifically refusing to conclude negotiations towards a 2021-2022 Service Contract for prohibited reasons.

Moreover, there is sufficient evidence in the record to conclude that HSDG had space available to offer OJC. The record shows that at no point prior to August 29, 2021, did HSDG suggest to OJC that it would be unable to renew the 2020-2021 Service Contract due to space constraints, no internal HSDG communications suggest it was considering rejecting a contract renewal due to space concerns, internal HSDG communications from April 29, 2021, show it had enough available space to consider renewing and even doubling OJC's MQC to appease OJC, and HSDG's spreadsheet of service contracts shows that around the time it broke off negotiations with OJC, it was allocating space in magnitudes far exceeding the 400 FFE it was considered granting OJC. I.D. at 39. After HSDG cut off negotiations, OJC calculated that HSDG entered into service contracts with MQCs for 25,402 TEUs on one specific trade lane.[13] CX at 283, 469. [redacted] This evidence shows HSDG dealing in quantities of space vastly exceeding the 400 FFE Ms. Casanova provisionally allocated to OJC. *See also* RX at 985 (Mr. Pump testifying that 500 FFE would be a small customer for the transpacific trade).[14]

[13] OJC cites the NOAC trade lane. CX at 469. As HSDG points out, it is not clear which trade lanes are represented by which abbreviations. But, again, the reason this information is not available is because HSDG refused to provide it.

[14] Mr. Pump's testimony proves difficult to parse. Mr. Pump testified that generally carriers schedule year-long service contracts to all begin on May 1. RX at 988. He testified that carriers will enter "out of season" contracts during the year, but will end "out of season" contracts on April 30 so that the carrier can evaluate demand for the following year. Next Mr. Pump testified that most carriers sell all their space by April or May at the latest, meaning they have no contract space to sell throughout the rest of the year. RX at 988. But OJC's 2020-2021 Service Contract started in June of 2020, indicating HSDG had not sold all

HSDG's argument that it did not have enough cargo space available to support a finding that it had retaliated by refusing "cargo space accommodations" is not persuasive for all the reasons listed above. HSDG may be right that technically the ALJ erred by stating the evidence shows HSDG "entered into" contracts after April 28, 2021, instead of more clearly articulating that those contracts had an effective date after April 28, 2021. But this is only a technicality that is outweighed by the evidence showing HSDG had cargo space accommodations available. The Commission affirms the ALJ's well-supported findings that HSDG retaliated against OJC by denying cargo space accommodation when available.

ii. OJC Engaged in Protected Activity

The Commission affirms the ALJ's finding that OJC's notice of intention to file a case with the Commission is protected by the Commission's prohibition on retaliation "for any other reason." *See* 46 U.S.C. § 41104(a)(3) (2021). It is a novel legal issue whether the Commission's prohibition on retaliation extends to a notice of intention to file a case with the Commission, but such a protection is consistent with statutory language and the Commission's guidance. HSDG argues that the ALJ erred in finding a notice of intention to file a case with the Commission constitutes retaliation. First, HSDG argues that the Commission's Statement on Retaliation does not state that a "mere threat of legal action constitutes, 'for any other reason.'" HSDG Exceptions at 19; *see also* Federal Maritime Commission: Statement on Retaliation, Docket 21-15 (Dec. 2021)

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of its contract space by May of 2020, and ended at the end of May 2021, indicating HSDG did not require OJC's contract to end when Mr. Pump testified it should have ended. None of the discussions between OJC and HSDG during April 2021 indicated an expectation that OJC's contract end early, or that any new contract begin before the end of the previous contract. Further, the list of contracts provided by HSDG includes many contracts, representing thousands of FFE, that either do not start May 1 or do not end April 30. *See* CX at 259-84. Because it is contradicted by substantial evidence, the Commission does not place great weight on Mr. Pump's testimony that carriers had no service contract space to sell by the end of April or at the latest May.

("Statement on Retaliation"). Then HSDG argues that the implications of including notification of intention to complain to the Commission within the definition for this phrase would be sweeping and unworkable. Finally, HSDG disagrees with the ALJ's conclusion that protecting the ability of consumers to share notification of an intent to complain to the Commission would avoid Shipping Act violations. The Commission finds HSDG's arguments that the ALJ erred unpersuasive.

a. The ALJ Correctly Interpreted the Commission's Guidance on Retaliation

The Commission affirms the ALJ's interpretation of the Commission's guidance. The central focus of the ALJ's analysis and HSDG's exceptions is on whether the statutory phrase, "for any other reason," includes the claimed conduct in this case. Subsection 41104(a)(3) of Title 46 prohibited a common carrier from retaliating against a shipper "because the shipper has patronized another carrier, or has filed a complaint with the commission, or for any other reason." 46 U.S.C. § 41104(a)(3) (2021). The Commission provided guidance on how it would interpret the phrase "for any other reason" in the Statement on Retaliation. *See* Policy Statements on Representative Complaints, Attorney Fees, and Retaliation, Docket 21-15, 87 Fed. Reg. 13292 (Mar. 9, 2022).

HSDG's arguments that the ALJ erred are unpersuasive. HSDG first argues that the Commission's Statement on Retaliation does not state that a "mere threat of legal action" constitutes "for any other reason." HSDG Exceptions at 19. Such a threat does nothing to air a grievance to the Commission and HSDG argues that the ALJ erred by finding such a threat protected. HSDG Exceptions at 19. HSDG is correct that the Commission's Statement on Retaliation did not specifically prohibit retaliation against notices of an intention to file a case with the Commission. But the Statement also did not try to address every possible scenario, instead advising the Commission "will interpret… the anti-retaliation provision…

broadly to effectuate Congress's intent that shippers feel free to air their grievances to the Commission, and to address new shipping practices and new forms of retaliation." Statement on Retaliation at 1. And if a shipper is protected in filing a complaint with the Commission — one of only two situations that Congress deemed important enough to explicitly describe — it is reasonable to protect a shipper for stating that it intends to file such a complaint, a more limited but closely related action that would serve the same goals. The ALJ's inclusion of notices of intention to file a complaint with the Commission is not a misinterpretation of the Commission's guidance.

b. HSDG's Argument that the ALJ Established an Unworkable Precedent is Unpersuasive

The Commission disagrees with HSDG's predictions of the implications of the ALJ's decision. HSDG Exceptions at 20. HSDG argues that all a shipper would need to do to obtain a service contract from a carrier is threaten litigation during negotiations, and a carrier would be forced to sign a contract or face an adverse decision for retaliation. HSDG extrapolates that the Commission would be forced to evaluate many complaints of failed negotiations to determine whether each refusal was reasonable. Moreover, HSDG argues that cases will be filed where the Commission clearly lacks jurisdiction given that it clearly lacks jurisdiction in this case. Finally, HSDG argues that OJC's threats were governed by the arbitration clause in the service contract, so since this threatened action would never come before the Commission, it is not the type of threat the prohibition on retaliation was intended to protect. HSDG Exceptions at 21.

HSDG's speculation is not well-grounded. The ALJ's decision does not vastly expand the types of retaliation claims the Commission will consider, it only clarified that the category includes formal notices of an intention to file a case with the Commission, like OJC's notice. Most carriers and shippers want to maintain a business relationship, so notices of an intention to file a case with the Commission will be rare, and rarer still will be the type of abrupt disengagement HSDG pursued here.[15] Further, the Commission affirms the ALJ's decision was appropriate for the facts of this case, which included two formal notices of an intention to pursue legal action. Offhand bluster or idle threats are of a different class. Shippers may feel more emboldened to bring cases where a notice of an intention to file a case with the Commission led to retaliation, but these cases are not prohibited now. Merely publicly reinforcing that the Commission will consider cases like this one, which it could always consider, does not radically alter the Commission's jurisdiction.

Second, OJC's notices of an intention to pursue legal action were not baseless, as HSDG alleged, and they are due protection against retaliation. HSDG Exceptions at 20-21. As the ALJ found, OJC sought cargo space it was due under the contract, objected to demurrage fees HSDG ultimately refunded, and otherwise raised legitimate concerns, so OJC's notices of intention to file pursue legal action were not spurious. I.D. at 34. Further, the Commission strongly disagrees with HSDG's suggestion that it should be free to retaliate against notices it considers invalid. The Commission allowed a passenger vessel operator to discriminate against a customer who had already lost a case against a related entity in court in the *Cornell* case and referenced the unique characteristics of passenger vessel carriage that underpinned that decision. Docket No. 13-02, 2014 WL 5316340, at *8. In contrast, HSDG now asserts it can retaliate not just before a court or the Commission decides on the merits of a claim, but before the claim is even filed. HSDG argues that it made a decision that OJC's claims were meritless and reasonably decided to cut off OJC from available cargo space accommodations. The logical outcome of HSDG's argument is that HSDG's decision about whether OJC's claims had merit, made solely by one inherently biased party, would control the

[15] Further, carriers are aware of the prohibition on retaliation, as Mr. Pump testified and indicated HSDG's compliance training reinforces. I.D. at 22.

Commission's later decision made after full production of evidence and briefing by both parties. If HSDG decided there was an error in OJC's notice, the Commission must now conclude that HSDG was reasonable in cutting off OJC from available space. This would usurp the Commission's jurisdiction to decide Shipping Act claims and transfer that to carriers. The Commission is not persuaded by HSDG's reasoning.

Further, HSDG does not point to contemporaneous evidence that suggests it thought OJC's claims were meritless at the time. OJC's claims had sufficient merit to prompt two warnings from HSDG's risk manager[16] and internal emails show HSDG knew OJC was not receiving the required space. HSDG tried to make up for its failures by proposing an increase in the space allocated to OJC. If such clearly meritorious claims do not warrant protection from retaliation, it is not clear from HSDG's arguments when a carrier would be prohibited from retaliating. The Commission's Statement on Retaliation makes clear that shippers serve a greater good by filing private party complaints with the Commission, and for this to occur shippers must be free to do so without fear of retaliation. HSDG's proposal would have the opposite effect, allowing subjective carrier judgments to support retaliation and chilling shipper openness to discussing potential complaints with carriers. The Commission disagrees with HSDG's interpretation.

Third, the ALJ did not err by suggesting that protecting a notice of intention to file a complaint would deter Shipping Act violations. HSDG argues that OJC's notice did not raise any Shipping Act claims and the law does not require a carrier to identify any potential violation or explain it to the shipper. HSDG Exceptions at 21. First, though HSDG is right the law does not require it to identify and explain its own Shipping Act violations to shippers, it does require HSDG to not commit willful Shipping Act

[16] HSDG's Mr. Gast twice informed HSDG that OJC's claims had merit and OJC was likely to recover far more than the liquidated damages in the service contract. I.D. at 8, 17.

violations as HSDG did here. Second, HSDG does not explain why the ALJ was wrong in concluding that protecting notices of an intention to file a case with the Commission will deter Shipping Act violations. The ALJ explained that ideally the parties can discuss potential Shipping Act violations and resolve them before they become litigation. I.D. at 42. HSDG fails to offer a persuasive argument why that is not true.

Moreover, a notice of intention to file a case with the Commission does not mean a complaint is valid and the carrier can always ensure that their conduct does not violate the Shipping Act. Instead, as the ALJ explained, it starts a conversation that can avoid complaints to the Commission. In this case, OJC clearly wanted to continue the relationship despite sending a notice of intent to complain to the Commission, and Ms. Casanova seemed to share the desire to continue the relationship, as she provisionally increased OJC's MQC for the next year. Had HSDG not violated the Shipping Act by cutting off OJC, the record suggests OJC's notice could have crystalized HSDG's failures and spurred the parties to overcome them through an ongoing relationship. The Commission disagrees with HSDG that the ALJ erred by suggesting that protecting notices of an intent to complain to the Commission would deter Shipping Act violations.

The policy implications of the ALJ's decision are also consistent with the Commission's previous guidance. Private threats of legal action are different from some of the types of public airing of grievances listed by the Commission in the Statement on Retaliation, such as commenting on a rulemaking or participating in investigation or enforcement activities. HSDG Exceptions at 19. But the Commission's Statement on Retaliation also highlighted using the Commission's Consumer Affairs and Dispute Resolution Services ("CADRS"), which provides non-public procedures directed at a specific counterparty. OJC's two formal demand letters served essentially the same purpose as enlisting CADRS, by putting HSDG on notice of OJC's claims and providing an opportunity to resolve them before more formal litigation. In both scenarios, a carrier can freely ignore the warnings provided, whether of a notice of intent to file a case with the Commission or CADRS proceeding, if it is confident it has not violated the Shipping Act. A carrier is not forced to sign a service contract with a shipper once it engages in negotiations, contrary to HSDG's fears, if it has reasonable grounds for rejecting an agreement.

In contrast, failing to protect shipper notices of an intention to file a case with the Commission from carrier retaliation might cause shippers to hide disagreements from carriers until they are filed. Notifying a carrier of potential claims could cause the carrier to immediately disengage from all contact because the carrier knows it can retaliate freely up until a complaint is filed. This is inconsistent with the Commission's Statement on Retaliation and the purpose of the retaliation provisions first conceived in the Alexander Report. Report of the Committee on the Merchant Marine and Fisheries on Steamship Agreements and Affiliations in the American and Foreign Domestic Trade Under H. Res. 587 (1914) ("Alexander Report"). The Alexander Report predated the 1916 Shipping Act and laid the groundwork for the Commission's prohibition on retaliation because shippers were willing to provide confidential information to the Commission, but "very few were willing (fearing retaliation) to testify openly." Alexander Report at 5. Carriers, through monopolist power, "so completely dominate the shippers" that the shippers "can not afford, for fear of retaliation" to address grievances in the open or antagonize the carriers. Alexander Report at 306. The 1916 Shipping Act accepted the recommendation of the Alexander Report to prohibit retaliation, and the final language of the prohibition closely approximates the prohibition at issue here. 46 U.S.C. § 41104(a)(3) (2021). The Commission's instant decision is consistent with the Commission's long history of prioritizing protecting shippers given the imbalance of power between shippers and carriers.

Based on this record, the Commission affirms the ALJ's finding that HSDG retaliated against OJC in violation of 46 U.S.C. § 41104(a)(3). 46 U.S.C. § 41104(a)(3) (2021).

C. Reparations

The Commission affirms the majority of the ALJ's analysis but modifies specific findings for the reasons discussed below. The award of double reparations to OJC is well supported by the evidence that HSDG's violations of the Shipping Act were knowing and willful. The ALJ calculated damages based on OJC's lost profits calculation, but that calculation is an inaccurate reflection of OJC's average profits for the periods in question. The ALJ also concluded that the parties would have negotiated a renewal of the service contract for the 2021-2022 year with the same MQC of 200 FFE. But there is substantial evidence supporting a conclusion that the parties would have doubled this MQC when renewing the service contract and the Commission concludes 400 FFE is an accurate estimate of an MQC for the 2021-2022 Service Contract.

1. Award of Damages

i. Sufficiency of Evidence

The Commission affirms the ALJ decision to award damages. HSDG argues that no award is appropriate because the evidence of OJC's damages is too speculative. HSDG relies on *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, where the Commission denied an award because the damages were inherently speculative, but the ALJ correctly rejected HSDG's argument, concluding the evidence in this case is "vastly" different. Docket No. 88-15, 25 S.R.R. 1213, 1230 (FMC Oct. 19, 1990); I.D. at 50; HSDG Exceptions at 28. HSDG now argues, as it did before the ALJ, that *California Shipping* was about the lack of "underlying documentation" to support the Complainant's damages and claims the ALJ was wrong that the "underlying data" there differed from OJC's data here. HSDG Exceptions at 28; I.D. at 50. To HSDG, the *California Shipping* case turned on a lack of the underlying documentation to support a claim that was entirely the work of California Shipping Line's ("CSL") president and based on his estimates of the amount and types of cargo he could have generated. HSDG Exceptions at 28.

But in contrast to the instant case, the estimates the president provided in that case were based on "his experience in the industry, his knowledge of [CSL]'s operations and customer base" and his knowledge of the market. I.D. at 50. The estimates included damages for potential customers, including many that were not strictly CSL's, and there was no convincing evidence that CSL would have had a sufficient customer base to satisfy the volume required by each contract. I.D. at 50; *California Shipping* 1990 WL 427266, at *12. Further, CSL admitted a "good portion" of the cargo would have been supplied by its agents, even though the decision states such conduct was not permitted under the law at the time. I.D. at 50; *California Shipping* 1990 WL 427266, at *11. Much of CSL's information was "'subjective' in nature." *California Shipping* 1990 WL 427266, at *11.

In contrast, OJC supplied objective data in the form of a spreadsheet reflecting actual shipments. OJC Ex. 101. The estimates of how many containers it could have shipped in the 2021-2022 service contract year are necessarily somewhat uncertain, but they are informed by OJC's actual previous year shipments. The Commission affirms the ALJ's finding that the underlying data in *California Shipping* is "vastly" different than the data in this case. I.D. at 50.

HSDG points to other Commission cases for the proposition that sufficient documentation is necessary to establish damages. But none of the cases HSDG cites state that the type of evidence OJC offers is insufficient. The type of evidence provided in *Consolo v. Flota Mercante Grancolombia,* 6 F.M.B. 262 (1961), certainly would have helped prove OJC's claims, but HSDG cites no language saying alternative evidence is unacceptable. HSDG Exceptions at 29. In *Muzorori v. Canada States Africa Lines Inc.*, the ALJ refused to award damages where the charges such as hotel stays, meals, and wages, were unsupported by any documentation, but in no way suggested some sort of internal documentation would be insufficient. No. 1949(F), 2015 WL 9582593, at *11 (FMC Dec. 23, 2015). HSDG's characterization of the disallowed damages in the *Adair* case is misleading at best. *Adair v. Pennnordic Lines, Inc.,* No. 1695(F), 1991 WL 383091, at *24 (FMC Sept. 24, 1991). The ALJ disallowed a claim for interest as interest would be computed later based on the total award, a claim for "loss of use" of a vehicle that Mr. Adair admitted was purely subjective, and a filing fee the Commission was not allowed to consider. *Id*. at FN 11.[17] HSDG's arguments that OJC's evidence is insufficient under Commission precedent are unpersuasive.

OJC's damages documentation is not accompanied by the level of support HSDG desires, but the ALJ correctly determined that OJC submitted sufficient documentation to support its lost profit calculations. Detailed information about the data points HSDG seeks is present in OJC's spreadsheet and, as OJC explained, it is an e-commerce company so many of the paper records that HSDG says are necessary for corroboration do not exist. SCX at 500; I.D. at 48; RX at 1082-83. Importantly, OJC does not need to provide absolute precision, it merely needs evidence sufficient to reasonably infer the actual loss. *MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, Docket No. 16-16, 2022 WL 2209421, at *3 (FMC June 10, 2022). The Second MTC and the Initial Decision both found that HSDG had not identified specific problems with the detailed information provided in the spreadsheet, and this remains true. I.D. at 48. OJC's spreadsheet contains at the "Sales" tab much of the information HSDG says is missing from the record. OJC Ex. 101. The spreadsheet includes tens of thousands of specific order numbers, with order types (e.g., Amazon, Walmart, website), order dates, item identification, and sales price. The specificity of the order number, order date, order type, and item identification provides strong evidence that OJC's spreadsheet reflects actual identifiable orders for specific products OJC ended up importing, not imports that failed to sell. Further, Mr. Weiss declared that

[17] Further, these decisions by the ALJ are not binding on the Commission.

OJC's data was based on actual products shipped and the selling price of each product. CX at 470-71. Similarly, HSDG looks for shipping records to confirm the number of containers OJC shipped and their contents, but OJC provides an entire tab dedicated to container contents broken down by item identification with corresponding stock-keeping-unit ("SKU") numbers and item descriptions. A final tab provides a wealth of information about the shipment of those containers, like carrier, origin and destination, shipping rate, date shipped, date received, and waybill. HSDG and Maersk combine for 238 of these shipments and would have plenty of their own information on these shipments with which to challenge any inaccuracy in OJC's data.

Further, HSDG's desired specificity of corroborating documentation is not necessary according to Commission rules and precedent. The Commission clarified in a 2016 Final Rule that standards of evidence in administrative proceedings are more liberal and relaxed than those applied by courts. *See* Rules of Practice and Procedure; Presentation of Evidence in Commission Proceedings, Docket No. 16-08, 81 Fed. Reg. 93831-32 (Dec. 22, 2016). In that rule, the Commission cited to a recent case where the ALJ had excluded evidence that the Commission deemed admissible when identifying the need to clarify the Commission's evidentiary standards. Currently, the Commission's regulations permit considering "all evidence which is relevant, material, reliable, and probative, and not unduly repetition or cumulative." 46 C.F.R. § 502.204. The evidence rejected in the cases cited by HSDG was much more speculative than the evidence provided by OJC.

Neither side challenges the provenance or foundation of the spreadsheet, but the Commission finds sufficient support in the record to establish the reliability of this evidence under Commission regulations. *See* 46 C.F.R. § 502.204. The ALJ referred to the spreadsheet OJC "provided" but did not explain further. I.D. at 49. Mr. Weiss's first declaration identified the spreadsheet as reflecting relevant data the company assembled and this provides a reasonable form of authentication in this context. CX at 475.[18] As noted above, the Commission has recently emphasized the flexibility to use lower standards for considering evidence in Commission proceedings than those required by federal courts. Rules of Practice and Procedure, 81 Fed. Reg. at 93831-32. Given the great detail of the data OJC provided, the lack of specific challenge to any of the 238 data points representing HSDG and Maersk shipments, the lack of challenge by HSDG to who created the spreadsheet or its data, Mr. Weiss's declaration that the copy of the spreadsheet submitted is "true and correct," Mr. Weiss's statement that OJC created the spreadsheet, and Mr. Berning's statement that the data comes directly from OJC's computers, the Commission finds sufficient support in the record to conclude it is relevant, reliable, and probative. 46 C.F.R. § 502.204.

HSDG points out that OJC's damages calculations changed over the course of discovery and argues that OJC's data is unreliable. But HSDG has access to both sets of data on which OJC's two different profit per container calculations were based and it has identified no specific data changes that were erroneous or unreasonable. HSDG Exceptions at 30; RX at 1123. Given the thousands of data points contained in each spreadsheet, HSDG had ample opportunity to identify and question specific data points that changed between the two spreadsheets and caused OJC's calculations of profits to shift. OJC's spreadsheet describes exactly how OJC calculated profits, including the costs it subtracted such as shipping, fulfillment, commissions/marketing, discounts, and sales price. HSDG deposed both Mr. Weiss and Mr. Berning, with sufficient opportunity to challenge the changes to damage calculations. HSDG had yet another opportunity to pinpoint specific

[18] Elsewhere in the declaration Mr. Weiss states "OJC compiled" or "OJC computed," but given the size of the company and Mr. Weiss's role as CEO, it seems likely he was involved in creating the spreadsheet. CX at 470-1. Mr. Berning testified that he looked at "the Excel spreadsheets which have the company data… that comes directly from the company's accounting and other systems." I.D. at 48; RX at 1082-83. Mr. Weiss's deposition transcript reflects his deep knowledge of the data and calculations.

errors with OJC's data and calculations before the Commission. Instead of identifying specific errors, HSDG asserts, "OJC's surface-level damages analysis almost certainly inflated lost profits by failing to exclude variable costs that OJC would not have incurred." HSDG Exceptions at 32. But as Mr. Berning explained, OJC operates as a virtual company outsourcing "pretty much everything" so its costs, like overhead, are minimal. RX at 1082-83; I.D. at 48. HSDG's general assertions that OJC's calculations must be wrong without evidence of error are unpersuasive. [19]

OJC argued and the ALJ found that the change in OJC's damages claims reflect the involvement of Mr. Berning. OJC Reply to HSDG's Exceptions ("OJC Reply") at 22; I.D. at 45. However, it is not clear that Mr. Berning was involved in the preparation of the documents that led to a change in the damages calculations. There were multiple versions of OJC's spreadsheet and Mr. Berning testified that he only had access to the final spreadsheet, not any of the previous versions. RX at 1064. Though OJC and the ALJ appear to have been wrong to suggest Mr. Berning's involvement led to the changes, it is ultimately harmless error. As noted above, HSDG fails to highlight errors in OJC's data or specific miscalculations made by the ALJ, and OJC's thousands of data points provide more than sufficient evidence to reasonably calculate OJC's actual loss. *MAVL,* 2022 WL 2209421, at *3.

ii. Experts

HSDG also challenges the ALJ's reliance on OJC's expert and the ALJ's alleged failure to consider HSDG's expert. HSDG Exceptions at 23, 26-29. HSDG's complaint that the ALJ did not consider HSDG's expert is not persuasive, as the ALJ specifically cited the HSDG expert reports written by Mr. Zayas and stated that his reports would be "given the weight they are due." I.D. at 44-45.

[19] It appears the first spreadsheet may have been created as early as May 2022, before the end of the proposed 2021-2022 Service Contract term. The final OJC spreadsheet included data on profits running through July 2022.

HSDG places much importance on the ALJ's failure to make refer to Mr. Zayas's report as much as the ALJ referenced OJC's expert, Mr. Berning. HSDG Exceptions at 23. But the ALJ did consider many of the arguments made in Mr. Zayas's reports because HSDG argued them. Mr. Zayas lists numerous "Unreasonable Assumptions" OJC made and the ALJ addressed them simply without referencing Mr. Zayas's report. *See* I.D. at 55-56 (refuting paragraphs 55-56 of Mr. Zayas's report at RX at 1164); I.D. at 53-54 (addressing paragraphs 57-58 of Mr. Zayas's report); Second MTC at 4 and I.D. at 45-46 (addressing paragraphs 59-60 of Mr. Zayas's report); I.D. at 59-60 (addressing paragraphs 76-78 of Mr. Zayas's report). The ALJ referenced Mr. Zayas's critiques but attributed them to HSDG, and then stated that they would be addressed while calculating OJC's damages. I.D. at 45-46. The ALJ might have more precisely cited Mr. Zayas's work, but the ALJ did not fail to consider his report as HSDG argues, and the ALJ's conclusions as to Mr. Zayas's points were reasonably explained. *Crocus Invs., LLC v. Fed. Mar. Comm'n*, No. 21-1199, 2022 WL 3012275, at *2 (D.C. Cir. July 29, 2022) (noting agency action must be reasonable and reasonably explained).

As for OJC's expert, Mr. Berning, the Commission disagrees with HSDG's criticism of his expertise and report. The ALJ already correctly addressed and dismissed criticisms of Mr. Berning's qualifications and HSDG offers no persuasive reason to disturb the ALJ's finding. I.D. at 44. Mr. Berning has certifications in accounting, financial forensics, and valuation analysis, as well as education in accounting and economics. I.D. at 44. Mr. Berning's resume shows he has the experience, training, and education to assist the trier of fact, which is sufficient to qualify Mr. Berning as an expert, even if he does not possess the highest possible education or most relevant possible experience. I.D. at 44; *see also Robinson v. D.C.*, 75 F. Supp. 3d 190, 197 (D.D.C. 2014). HSDG's challenges to Mr. Berning's expertise are not persuasive.

The challenges to Mr. Berning's report misunderstand the utility of that report. Mr. Berning's report is not useful for validating or auditing the underlying data OJC provided, and neither Mr. Berning's testimony nor his report professes to do this. CX at 415, RX at 1029. The ALJ's treatment of Mr. Berning's report and testimony was consistent with this. The ALJ used Mr. Berning's expertise to help decide which method to use to value OJC's damages but then conducted her own calculations based on OJC's data.[20] HSDG failed to produce evidence of errors in the methodology of Mr. Berning's report or his testimony, and to the extent that HSDG challenges Mr. Berning's reliance on OJC's data, that argument is unpersuasive. Neither OJC nor HSDG ended up challenging the ALJ's reliance on Mr. Berning's expertise to help decide lost profits were the appropriate valuation method to calculate damages.

The Commission does not find HSDG's argument that Mr. Berning's methodology was flawed and the ALJ erred by citing his report persuasive. HSDG Exceptions at 26-29. HSDG identifies no errors in Mr. Berning's math and instead contends his calculations are inadequate because they "matched exactly" or "blind[ly] accept[ed]" or were "based entirely" on those done by OJC. HSDG Exceptions at 27-28. But as discussed above, Mr. Berning's report is useful for determining how best to calculate the damage OJC suffered, not to audit OJC's data. And as the ALJ explained, the fact that OJC tendered damage estimate data does not disqualify that data, and the source of the calculations is to be taken into account when evaluating the opinions. I.D. at 44-45. HSDG does not persuasively highlight the error in how Mr. Berning calculated the monetary damages OJC suffered due to HSDG's Shipping Act violations and the Commission does not find that the ALJ erred by relying on his report.

2. Double Reparations

[20] As will be discussed below, there are questions about OJC's data, but those are not relevant to Mr. Berning's methodology.

The Commission affirms the ALJ's finding that double reparations were appropriate in this case due to HSDG's knowing and willful violation of the Shipping Act. I.D. at 64. At the time of these violations, the Shipping Act's prohibition on retaliation was[21] subject to double reparations under 46 U.S.C. § 41305(c). *See* 46 U.S.C. § 41305(c) (2021). There is a lack of direct precedent on specific factors the Commission will consider when awarding additional damages, but double damages available in an enforcement proceeding for enhanced civil penalties are an apt guide. I.D. at 61. The ALJ's use of a "knowing and willful" standard, also the standard for enhanced civil penalties, is well supported and consistent with the recommendations in Fact Finding 29. A knowing and willful violation requires showing the violator acted with "reckless disregard or plain indifference to the Shipping Act, or purposeful or obstinate behavior akin to gross negligence." *Rose Int'l Inc. v. Overseas Moving Network Int'l*, Docket No. 96-05, 29 S.R.R. 119, 2001 WL 865708, at *47 (FMC June 1, 2001). For determining the appropriateness of civil penalties, the Commission takes into account factors including "the nature, circumstances, extent, and gravity of the violation committed," as well as the violator's "degree of culpability," "history of prior offenses," and "ability to pay." 46 C.F.R. § 502.603(b). The conclusion that HSDG acted knowingly and willfully is well supported by evidence of Mr. Gast's repeated warnings that HSDG was in breach of the 2020-2021 Service Contract, HSDG's purposeful refusal to allocate available space to OJC to meet the 2020-2021 Service Contract MQC, and Mr. Pump's testimony that he knew that retaliating against OJC for sending a notice of intention to file a case with the Commission was prohibited and it was clearly understood at HSDG that such a notice was not to factor into decisions about a service contract. I.D. at 63.

HSDG argues that it did provide services to OJC after negotiations on a renewal broke down by providing OJC space

[21] This is no longer true after OSRA 2022 moved the Commission's anti-retaliation statute from section 41104 to 41102.

through the spot market. HSDG Exceptions at 40. But HSDG purposefully failed to meet contractual requirements and wrongfully rejected a continued business relationship in retaliation for a notice of intention to file a case with the Commission. Further, as discussed above, service contracts and spot market shipments are not the same, and HSDG clearly wrongfully refused to negotiate a service contract. Finally, the ALJ did consider the fact that HSDG shipped cargo for OJC after April 28, 2021, but simply did not find it relevant to the question of whether HSDG knowingly and willfully violated the Commission's authorities. I.D. at 19, 63-64. Therefore, HSDG's argument that the ALJ erred by failing to consider HSDG's shipments for OJC after April 28, 2021, is not persuasive.

HSDG also argues both the Initial Decision and the August 2022 Second MTD Order incorrectly held that Mr. Gast's first email is not protected work product. HSDG Exceptions at 39; Second MTD Order at 9-10. The ALJ did imprecisely describe the work product doctrine, as it does not require the work product to be prepared by an attorney as the ALJ stated in the Second MTD Order, but this was at most harmless error. Work product protection applies to documents prepared "in anticipation of litigation" by or for a "party or for his representative." *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 74 (S.D.N.Y. 2010). "[D]ocuments prepared in the ordinary course of business or that would have been prepared absent the prospect of litigation, do not receive work product protection." *Id.* at 74. The purpose behind the broader scope of protection is to allow attorneys to rely on non-attorneys to help prepare for litigation or trial. But in this case, HSDG did not assert that any of those copied on Mr. Gast's first email were attorneys or that it had asked Mr. Gast to prepare the document in preparation for litigation, and it appears to be the type of document Mr. Gast prepared in the ordinary course of business, as he sent a similar email after the April 28 Demand Letter. HSDG Exceptions at 39, I.D. at 17; *United States v. Nobles*, 422 U.S. 225, 238–39 (1975). Since the ALJ's ultimate conclusion that the work product doctrine does not apply to Mr. Gast's emails was correct, and the Commission reviews ALJ discovery orders under the more deferential abuse of discretion standard, HSDG's argument is unpersuasive. *See Rana,* 2022 WL 1744905, at 4.

Finally, HSDG cites to the Commission's regulations governing civil penalties and suggests the ALJ erred by failing to consider the factors outlined there. HSDG Exceptions at 41. But the ALJ did analogize the award of double damages to the Commission's civil penalties authority, just by using the statute and not the regulation as HSDG suggests. I.D. at 62. Further, the factors listed in 46 C.F.R. § 502.603(b) such as HSDG's culpability, the nature and circumstances of the violation, and HSDG's ability to pay do support awarding double damages, as explained above. HSDG argues that this case poses novel issues, but the ALJ thoroughly documented how Mr. Gast warned HSDG that "[t]his is a very bad case…which we will likely lose" in October 2020; HSDG employees suggested how to meet the MQC but HSDG chose not to; Ms. Casanova used pretextual reasons to refuse to enter a service contract with OJC; and Mr. Pump testified he knew, and it was widely known in his organization, that he could not retaliate against a shipper that sent a notice of an intention to file a case with the Commission. I.D. at 62-63. Turning to other relevant factors, while HSDG suggests that it cannot pay because it no longer exists, in reality, it simply was absorbed into Maersk and, as OJC points out, Maersk's head of United States litigation signed HSDG's exceptions. HSDG Exceptions at 42. HSDG recorded $61.8 billion in revenue in 2021 and $81.5 billion in 2022, ample evidence it has the ability to pay this award. OJC Exceptions at 4.

Lastly, HSDG's argument that supply chain disruptions reduce its culpability is at odds with the evidence of HSDG employees finding sufficient space to meet the MQC and evidence that HSDG had sufficient space to accommodate a renewal with OJC. I.D. at 13-14, 16-17. Based on this record, HSDG's argument that the ALJ erred by awarding additional damages is not persuasive.

3. Profit Per Container

The ALJ adopted OJC's calculations of lost profits, since they were based on data reflecting actual profits per container made during the relevant period. I.D. at 56. While HSDG argues that the ALJ erred in adopting OJC's profits per container, HSDG's reasons are not persuasive. That is not to say that OJC's profit calculation is without error, but that will be discussed further below and is not related to the purported errors HSDG highlights. For the reasons below, the Commission modifies the ALJ's award to more accurately reflect the actual loss suffered by OJC.

i. HSDG's Arguments

HSDG's challenges to OJC's calculations do not persuasively identify errors in the damages calculations or the ALJ's decision. Many were previously addressed in this decision or by the ALJ's findings and do not require repeating. HSDG argues that OJC failed to differentiate between "fixed and variable" costs when calculating damages, and therefore inflated the damages by not excluding variable costs. HSDG Exceptions at 32. HSDG also argues that OJC's expert and the ALJ ignored inconsistent information that projected far less revenue than OJC's data reflects. HSDG Exceptions at 33. Both arguments are unpersuasive.

First, HSDG continues to make general reference to errors by the ALJ or in OJC's data, such as a failure to differentiate between fixed and variable costs, without grounding the arguments in actual numbers. Next, HSDG seems confused about the distinction between fixed and variable costs. HSDG argues, variable costs "are saved costs that do <u>not factor</u> into a lost profit calculation because OJC would not incur them." HSDG Exceptions at 32 (emphasis added). Then HSDG argues that OJC's damages analysis "almost certainly inflated lost profits by failing to <u>exclude</u> variable costs that OJC would not have incurred." *Id*. (emphasis added). But HSDG's own expert was concerned that OJC's profit calculations "may not have <u>included</u> all variable costs." RX at 1156 (emphasis added). Regardless, HSDG does not identify which of the costs OJC included, such as outbound shipping, fulfillment, discounts, or marketing, should not have been included but were, or which costs OJC should have included but did not. HSDG's citation to the *Rose* case highlights the information OJC did provide. *Rose Int'l Inc*, 2001 WL 865708, at *77. There, Rose simply subtracted a payable from a corresponding receivable and used that to calculate profit. *Id*. In contrast, OJC has subtracted costs such as fulfillment, shipping, marketing, and discounts. OJC Ex. 101. OJC's expert explained that OJC captured all costs, "including the purchase cost, sales commissions, fulfillment center costs, shipping costs and any other direct costs associated with the product." CX at 423. OJC used third parties for many tasks, reducing other costs to the point that a significant increase in sales in 2021 would only nominally increase its fixed costs. I.D. at 48. As Mr. Berning testified, "the way [OJC] operated is almost as… a virtual company. So their costs, overhead and stuff, are very limited because they outsource pretty much everything." RX at 1082. HSDG's general assertions that OJC's calculations must be wrong without evidence of error are unpersuasive and do not undermine the ALJ's conclusion that OJC's evidence is sufficient to reasonably infer the actual loss sustained. I.D. at 51.[22]

Second, HSDG raises Mr. Berning's and the ALJ's failure to address two reports in the record created by consultants, BTIG and Nomura, when OJC was considering selling itself. HSDG Exceptions at 33. The flaw in HSDG's argument is that it tries to use projections to dispute actual data. OJC's damages data is based on actual shipments and profits from 2020 through 2022. OJC Ex. 101. The Nomura and BTIG reports were based on data and projections provided to them by OJC. These reports were produced in September 2020 and October 2020 respectively, so the data OJC provided predated those reports. OJC Exhibits 109, 110. Neither report took into account the spike in demand OJC saw for its

[22] Even if OJC's data fails to include nominal costs that should reduce OJC's average profits, the Commission below takes a conservative approach to calculating OJC's damages that would more than accommodate these nominal costs.

products starting in late 2020 and early 2021. CX at 471. As HSDG itself argued, OJC's profits for the 2021-2022 service contract period exceeded those for the 2020-2021 Service Contract. HSDG Exceptions at 38. Further, Mr. Berning did address the BTIG and Nomura valuations in his report, and he calculated one measure of damages based on the reports. CX at 430-32. He did not address discrepancies in profits between OJC's actual profits and the consultants' projections, but the failure to question actual data based on outdated projections does not undermine the ALJ's conclusions.

ii. Calculations

OJC's spreadsheet of calculations does contain multiple unreasonable assumptions incorporated into OJC's profit per container calculation, though neither HSDG nor the ALJ identified them. When OJC calculates its average profit per container, it does so based on unsupported assumptions, first that HSDG is responsible for any costs OJC paid to other carriers above the rate of the 2020-2021 Service Contract rates and second that HSDG would have renewed the contract at the 2020-2021 Service Contract rates. First, OJC's assumption that it should be reimbursed for rates it paid carriers aside from HSDG that exceeded HSDG's rates during the 2020-2021 Service Contract is not supported by argument or evidence. Second, HSDG has argued it would never have renewed the contract at 2020-2021 Service Contract rates for another year given the market in May 2021. I.D. at 55-6; HSDG Exceptions at 24. The ALJ rejected this argument against OJC's calculation by pointing out that OJC provides data through 2022 and reasoning that OJC's averages thus include actual shipping costs for 2021-2022, including elevated spot rates. I.D. at 55-6. But OJC's calculations do not calculate its profits using the actual shipping costs it paid during the 2020-2021 Service Contract or the proposed 2021-2022 Service Contract. OJC does not calculate its profits based on what it actually paid to ship containers, but instead a number "HS Est Rate" which seems to be pegged to the shipping rate of OJC's service contract with HSDG. OJC Ex. 101. OJC does this for both the period of the 2020-2021 Service Contract and the proposed

2021-2022 Service Contract, even though the actual shipping rates it paid to ship containers are available for both periods.

For the 2020-2021 period, this is clearly unsupported as damages should represent the actual loss OJC sustained due to HSDG's actions. The only harm OJC suffered during this period due to HSDG was HSDG's failure to meet the MQC, not the fact that OJC got better shipping rates from HSDG than from other carriers. I.D. at 51. HSDG did not have an obligation to ship more containers than the 200 FFE MQC of the 2020-2021 Service Contract and the ALJ correctly rejected OJC's arguments that HSDG had some obligation to make weekly shipments for OJC. I.D. at 51-52. Basing the profit calculations on the lowest price OJC could have paid during this period instead of the price it actually did pay incorrectly inflated OJC's damages. For the proposed 2021-2022 Service contract, there is no evidence that HSDG was willing to renew for the 2020-2021 shipping rates, the contract did not contain an automatic renewal provision, HSDG's expert report states that marketplace dynamics at the beginning of 2021 would have dictated higher rates for the new contract, and the spot rates supplied by OJC show rates at least doubled over the course of 2020-2021. RX at 1150, 1163; OJC Ex. 104. Based on this record, OJC's decision to calculate profits using the "HS Est Rate" for both the 2020-2021 Service Contract and the proposed 2021-2022 Service Contract is not reasonable.

OJC's data also includes other unsupported decisions. OJC calculates an average profit per container based on containers shipped across a two-year period, even though there are two distinct damage periods. The Commission can easily calculate an average profit figure for containers shipped during the 2020-2021 Service Contract term and a different average for containers carried during the 2021-2022 Service Contract term. Splitting these averages out separately is more accurate given the significant fluctuations in shipping costs and OJC's profits per container. Further, OJC includes in its calculations 53 containers shipped before the 2020-2021 Service Contract started and 51 containers shipped after the date the proposed year-long 2021-2022 Service Contract would have expired. Finally, OJC's calculations include shipments from Brazil and to Kentucky in its profit averages even though the ALJ expressly rejected OJC's arguments that shipments originating from Brazil or destined for Kentucky should be included in damages. I.D. at 54-55.

The Commission chooses to adjust the calculations in OJC's spreadsheet itself instead of remanding the case for essentially the same work to be completed. OJC and the ALJ calculated average profits for containers shipped between June 1, 2020, and July 12, 2022. Ex 101. It is certainly one way to calculate the damage to OJC by averaging profits over a longer period. But the more precise method of evaluating OJC's loss is to calculate two sets of damages. The first is based on the period of the 2020-2021 Service Contract, specifically from the June 23, 2020, effective date until the May 31, 2021, expiration. I.D. at 6. This number is used to calculate damages for the 15 FFE shortfall of the 2020-2021 Service Contract. The second period of damages runs during the proposed term of the 2021-2022 Service Contract, specifically from June 1, 2021, until May 31, 2022.[23] This average is used to calculate damages for the proposed 2021-2022 Service Contract. This excludes from consideration shipments made outside the relevant dates that OJC still included in the spreadsheet, such as those made before June 23, 2020, and after May 31, 2022.

Next, the Commission finds the appropriate shipping costs to deduct from OJC's profits measure are most accurately calculated using the actual prices OJC paid to ship. For the 2020-2021 Service Contract, using the actual shipping rates OJC actually paid is a simple change that clearly more accurately represents the harm OJC suffered due to HSDG's actions. As for the proposed 2021-2022 Service Contract, OJC unreasonably assumed its shipping rates

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[23] Though it is not completely confirmed by the record when the proposed contract was to end, partially because negotiations were never completed, Ms. Casanova suggested the end date would be May 31, 2022. I.D. at 14.

would remain the same as the prior year. The Commission considered using the spot rate price for the week when OJC sent the April 28 Demand Letter and HSDG retaliated against it as a reasonable rate the parties would have negotiated, or the week following, or the week when OJC's contract expired. OJC Ex. 104. But HSDG may have negotiated a higher service contract rate than that of the spot market to protect itself against shipping rates jumping, which rates ended up doing. Or OJC may have been able to negotiate a discount given HSDG's failure to meet the commitments of the previous contract. There are also other potential data points that could be used to benchmark OJC's shipping costs for the 2021-2022 Service Contract, but none of them as accurately represent OJC's costs to ship as the actual costs OJC paid to ship containers. For the proposed 2021-2022 Service Contract the actual shipping costs OJC paid likely overestimate the rates OJC would have paid, but it is the most supportable data point in the record.

Finally, the Commission decides to exclude shipments from Brazil and those sent to Kentucky when calculating OJC's profits but includes shipments to CRISOSA and GLM. The ALJ was correct to exclude consideration of OJC's volume shipped on the Brazil and Kentucky routes from potential damages. I.D. at 54. But OJC's spreadsheet includes many entries for shipments from Brazil or destined for Kentucky that impacted the calculation of damages. The Commission excludes those shipments when recalculating damages to approximate more closely the profits OJC would have earned through the 2021-2022 Service Contract with HSDG for shipments from Asia to the West Coast. The Commission does not exclude shipments to "CRISOSA" or "GLM" as those appear to be shipments OJC sent from Asia to Mexico to be sold in the United States when it lost access to a service contract serving "LA/LB" and at a time when container shipments to the Los Angeles area were facing a traffic jam. RX at 1000; Greg Miller, *Zero Ships Waiting Off Southern California for First Time Since 2020*, Freightwaves, (Nov. 23, 2022) https://www.freightwaves.com/news/zero-ships-waiting-off-southern-california-59-off-other-ports. The purpose of the damages analysis is to reasonably infer actual loss. HSDG's wrongful Shipping Act violations prevent the Commission from calculating damages based on actual shipments carried by HSDG during the 2021-2022 period. To prevent HSDG from profiting from its wrongdoing, the Commission must use just and reasonable estimates from the relevant data. *California Shipping*, 1990 WL 427266, at *23. Transpacific shipments from Asia to Mexico provide relevant and reasonable estimates of OJC profits on furniture shipments originating in Asia and shipping to the West Coast for sale in the United States.

Based on this analysis, the Commission has recalculated a more accurate approximation of OJC's profits per container. For the shortfall under the 2020-2021 Service Contract, OJC's average profit per container for OJC shipments is $20,737.24. For the period of the proposed 2021-2022 Service Contract, the most accurate measure of OJC's average profit per container is $18,983.01, which removes shipments outside the relevant time frame and shipments to Kentucky or from Brazil, and adjusts OJC's shipping costs to reflect actual shipping rates it paid.

4. Volume

While OJC argues the ALJ wholly underestimates OJC's potential 2021-2022 volume and HSDG argues even 200 FFE is too high and unsupported by the record, the record supports a finding in between. The ALJ chose 200 FFE because "[i]t is reasonably certain that OJC would have shipped at least that same 200 FFE in 2021-2022, given OJC's actual performance in 2020-2021, OJC's constant requests for even higher volumes throughout 2020-2021, OJC's internal projection of and request for a significantly higher 2021-2022 volume, and the increased demand for consumer goods that even Hamburg recognized." I.D. at 53. As the ALJ pointed out, HSDG was interested in contracting with OJC for at least the same volume for the next year. I.D. at 53. But the ALJ then rejected a higher number because "it is not clear whether or not [HSDG] could handle a higher volume." I.D. at 54.

However, the Commission finds 400 FFE is an appropriate estimate of the MQC for the 2021-2022 Service Contract. There is no question OJC would have accepted an MQC higher than 200 FFE, the only question is whether they would have accepted anything as low as 200 FFE, given that they were trying to consolidate all their volume with HSDG and had shipped 542 containers the year before. OJC Exceptions at 24. As for HSDG, Mr. Li's emails acknowledge OJC's 200 FFE MQC for the 2020-2021 Service Contract and do not reflect any hesitance to renew at similar levels. I.D. at 13. When Ms. Casanova created a template in HSDG's system, she chose 400 FFE. I.D. at 14. She emailed this proposed MQC internally twice, without any negative responses. I.D. at 14. The next relevant actions taken by HSDG were to violate the Shipping Act. "[W]here a wrongdoer has by its own actions prevented the precise computation of damages… the wrongdoer must bear the risk of the uncertainty and that damages can be shown by just and reasonable estimates based on relevant data." *California Shipping*, 1990 WL 427266, at *23 (*citing Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65 (1946)); OJC Exceptions at 26-27.

The 143 containers OJC did ship across 2021-2022 do raise questions. HSDG argued that number shows that there was insufficient customer demand for OJC to ship 200 containers in 2021-2022, let alone greater numbers. HSDG Exceptions at 35. But as HSDG later notes, OJC's shipments during the 2021-2022 period have higher profits than those of the 2020-2021 period even with higher shipping rates on the spot market, suggesting demand was not waning. HSDG Exceptions at 38. Moreover, OJC projected demand for 4,700 containers during the 2021-2022 Service Contract. This number suggests they would have easily eclipsed the 542 FFE shipped the previous year, which was only constrained by OJC's ability to obtain space as evidenced by OJC's repeated requests for additional space during the 2020-2021 Service Contract. The Commission finds based on this record that the fact that OJC only shipped 143 containers throughout the 2021-2022 period is more due to OJC's inability to secure predictable and affordable space with carriers and less a reflection of declining demand. CSX at 510-12.[24]

The ALJ addressed a different argument about the 143 containers OJC shipped, namely that any award should be reduced by the number of containers OJC was actually able to ship. I.D. at 56. But as the ALJ noted, OJC tried to secure as much space as possible during the 2020-2021 Service Contract to keep up with surging demand for its products. I.D. at 56. The ALJ concluded that the 143 containers represented spot market shipments OJC would have made in addition to any made pursuant to a service contract. I.D. at 56. OJC was anchoring projections around 4,700 FFE for the 2021-2022 Service Contract, shipped 542 FFE the year prior, was looking to consolidate all of its volume with HSDG, and was experiencing a surge in demand. I.D. at 10, 12, 56; OJC Exceptions at 14. The Commission concludes that OJC would have shipped at least as many containers as the prior year given the chance.

Certainly, as Mr. Pump testified, space was an issue for HSDG, and allocating it between customers was a challenge. HSDG's inability to fulfill the MQC of the 2020-2021 Service Contract does not portend well for HSDG's ability to fulfill a renewal. But the evidence shows that HSDG could have fulfilled this the MQC and chose not to. Moreover, Ms. Casanova mentioned OJC's desire to increase the MQC for the 2021-2022 Service Contract and plan to ship up to 4,700 FFE. Mr. Li's response suggests he was skeptical that OJC could meet a higher MQC given his belief that OJC had failed to meet the 2020-2021 Service Contract MQC, but it seems he did not realize that HSDG had failed

[24] As described above, OJC's business model required a 60-to-90-day lead time to produce products and certainty that they would be able to ship the products from Asia. SCX at 510. OJC operated as essentially a virtual company, and not having access to a predictable, year-long service contract negatively affected OJC's ability to schedule production and therefore ship goods. I.D. at 48; RX at 1082-83.

to provide sufficient space.[25] In any case, Mr. Li was open to a renewal, and Mr. Li then asked for a new MQC based on the existing 200 FFE MQC. I.D. at 12-13. Before HSDG's Shipping Act violations cut off negotiations and after OJC sent the April 28 Demand Letter, Ms. Casanova mentioned OJC was looking for a solution to offset the 2020-2021 Service Contract deficit; referenced HSDG's desire to renew the 2020-2021 Service Contract; proposed increasing the MQC to 400 FFE; and stated that OJC was not a short-term account, was constant in shipping volume, and was willing to commit much more volume.[26] I.D. at 14-15. Further, evidence produced by HSDG shows service contracts with much higher MQCs starting after April 28, 2021, and Mr. Weiss testified that Ms. Casanova was attempting to woo a larger share of OJC's volume throughout the renewal process. I.D. at 10. Based on this evidence, the Commission concludes that a reasonable estimate of an MQC both parties would have accepted would be 400 FFE and that number can be used to calculate OJC's actual loss. *MAVL Capital*, 2022 WL 2209421, at *3 (finding actual damages does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained).

OJC argues that this number is too low. While OJC's arguments are comprehensive, they lack contemporaneous support in the record. OJC offers no contemporaneous evidence that HSDG seriously considered an MQC of 4,700 FFE. OJC Exceptions at 13. Agreeing on an MQC would have required both OJC and HSDG to make binding commitments to reach that level of space. HSDG refused OJC's attempts to secure more space during the 2020-2021 Service Contract and Mr. Pump testified that space constraints were the biggest challenge HSDG faced. When Ms. Casanova raised the

[25] "They signed 200 FFE last year for City of Industry, CA and almost fulfilled that this year. Based on that what would be the MQC target for next year with and without KY business?" I.D. at 13.

[26] Ms. Casanova's email actually says, "willing to commit to much more of the current MQC." But given the context of the email where she describes proposing a higher MQC, it seems she is referring to OJC committing much more volume to HSDG.

4,700 FFE number in an internal email, it was essentially ignored, and Mr. Li referenced OJC's 2020-2021 Service Contract 200 FFE MQC that OJC "almost fulfilled." When Ms. Casanova seemed to be scrambling to appease OJC in the wake of the April 28 Demand Letter, she chose 400 FFE as an MQC. She chose 400 FFE as a way "of offsetting the anticipated deficit," but only "if we can truly satisfy this volume." I.D. at 14-15. Even trying to appease OJC, no evidence suggests HSDG was willing to commit to transporting more than 23 times the 2020-2021 Service Contract MQC. Ms. Casanova declared she did not have the power to agree to "such a substantial increase of the [MQC]."[27] RX at 1139.

Further, nothing at the time suggests OJC was willing to commit to such a significant increase and pay penalties if it did not ship that much cargo. If OJC agreed to an MQC with HSDG of 4,700 FFE with the same liquidated damages as the 2020-2021 Service Contract, it could face over $1,000,000 in liquidated damages if OJC shipped the same number of containers as the year before. I.D. at 7 ($250 liquidated damages clause). OJC projected 4,700 FFE[28] but was reticent to offer an MQC when engaging in renewal negotiations, instead waiting for HSDG to propose an MQC. I.D. at 12-13.

OJC argues that HSDG was offering a 400 FFE bridge service contract and agreed to an MQC of 4,700 FFE. OJC Exceptions at 13. But only Mr. Weiss's later declaration supports this, and Ms. Casanova claims that Mr. Weiss's statement was false. RX at 1139. No contemporaneous evidence confirms that HSDG

[27] Ms. Casanova's declaration that she did not have power to agree to "such a substantial" increase suggests she did have the power to agree to something less substantial, such as the doubling of the MQC she proposed internally.

[28] HSDG internal emails relate that OJC told HSDG that it shipped, "3500x40HC in 2020," despite stating to the Commission that it shipped only 542 FFE in the 2020-2021 service contract year across three carriers. I.D. at 12, OJC Exceptions at 14. In Mr. Weiss's declaration, he clarified that OJC had the "demand" during the 2020-2021 Service Contract to ship 3500 High Cube FFEs if HSDG provided the space.

agreed to either the bridge contract or a 4,700 FFE MQC, and Ms. Casanova's email of April 28, 2021, requesting OJC commit to an MQC suggests that there was no agreement. I.D. at 13. OJC is right that some uncertainty is due to HSDG wrongfully cutting off negotiations, but even before HSDG's actions, there is no evidence that either side seriously considered 4,700 FFE for an MQC. OJC argues that its continued requests for more space during the 2020-2021 Service Contract show the 4,700 FFE MQC was reasonable, but HSDG's continued rejection of these requests suggests the opposite; HSDG was unlikely to commit to 23 times as much space for OJC the following year.

The ALJ correctly found that it was not reasonably certain the new contract would have included shipments to Kentucky. OJC argues that it could have shipped all 4,700 containers to California if needed because it had a warehouse to accommodate extra cargo. But in February 2021 OJC asked HSDG to reroute shipments because its warehouse had run out of space, which is not consistent with the capability to handle 23 times as much volume four months later. I.D. at 10. HSDG did not express to OJC that it wanted to ship to Kentucky and though some employees wanted to revisit this business, others responded that it had a negative impact on profit. I.D. at 21. Ms. Casanova internally proposed revisiting OJC's request for shipments to Kentucky in January 2021 and again when discussions about a renewal began in earnest. I.D. at 13. While Mr. Li asked OJC to propose an MQC for a contract including the Kentucky route, he also stated "suggest to maintain focus on local destination only," presumably excluding inland ports. I.D. at 13. Further, in an April 28, 2021, email Ms. Casanova stated, "[p]lease consider this commitment for the place of delivery City of Industry CA only," suggesting HSDG was declining to bid on shipping to Kentucky. RX at 812.

OJC's last argument for a 4,700 FFE MQC conflates shipping to a port with shipping to an inland port. Mr. Pump testified that shipments to Savannah or Charleston were more desirable than shipments to New York only because New York has a surplus of export containers and Savannah and Charleston need containers for exports. CX at 92. But OJC did not propose to move containers to those ports, it needed them moved inland to Kentucky by rail. I.D. at 12, 21 (*citing* CX at 242-43). Given this record, OJC's argument that the ALJ erred in excluding the Kentucky shipments from the damages calculation is not persuasive.

In the alternative, OJC argues 1,410 FFE is the appropriate number to use for calculating damages. OJC Exceptions at 22. But again, there is no evidence that HSDG ever entertained such a substantial increase in volume committed to OJC and HSDG rejected OJC's requests to add space during the existing contract. HSDG doubled OJC's allocation in a draft contract, but even that had yet to be approved by management and is nowhere near 1,410 FFE.

Finally, OJC argues in the alternative for 542 FFE as the appropriate number to calculate damages, because OJC shipped that many containers during the 2020-2021 Service Contract across the three carriers and it was consolidating all of its volume with HSDG. Failing this, OJC argues that 400 FFE is the very least the ALJ should have used to calculate damages because that was "the initial MQC of the bridge contract drafted by [HSDG]." OJC Exceptions at 24. As explained above, the Commission concludes that 400 FFE is the right measure of volume to calculate OJC's damages and when this 400 FFE is added to the 143 containers OJC actually shipped during the 2021-2022 period, the result is very close to the 542 FFE OJC shipped in 2020-2021. As noted above, there is no contemporaneous evidence that HSDG ever entertained a MQC above 400 FFE for the 2021-2022 Service Contract.

HSDG argues the opposite, that there is insufficient evidence to support the conclusion that OJC could ship 200 FFE or that HSDG would have committed 200 FFE of space to OJC. As discussed above, there is sufficient evidence that OJC was actively seeking extra space during the 2020-2021 Service Contract, was seeking more space for the proposed 2021-2022 Service Contract, had projected a significant growth in demand during that period, and did actually earn more from shipments during this period.[29] Further, HSDG showed a willingness to renew the 2020-2021 Service Contract, proposed internally a new MQC of 400 FFE, allocated space to other shippers in magnitudes far exceeding what Ms. Casanova proposed for OJC, and did not finalize negotiations because it committed a Shipping Act violation. Based on this record, there is sufficient evidence to conclude that OJC could have shipped more than 200 FFE and HSDG would have committed more than 200 FFE to OJC. *California Shipping*, 1990 WL 427266, at *23.

The Commission concludes that it can be shown by just and reasonable estimates based on the record that OJC and HSDG would have agreed to a service contract with an MQC of 400 FFE. Thus, the Commission uses this figure when calculating OJC's damages.

5. Mitigation of Damages

The Commission affirms the ALJ's finding that there was nothing further OJC could have reasonably done to mitigate its losses. The requirement to mitigate damages prevents a party from recovering damages for losses it could have reasonably avoided without undue risk or burden, and the ALJ correctly found there were no losses OJC reasonably could have avoided. *See Rose Int'l Inc. v. Overseas Moving Network Int'l*, Docket No. 96-05, 29 S.R.R. 119, 2001 WL 865708, at *77-78 (FMC June 1, 2001). "Failure to mitigate damages is an affirmative defense, on which the party opposing the award of damages bears the burden of proof." *Adenariwo v. FMC*, 808 F.3d 74, 79 (D.C. Cir. 2015). HSDG argues that there is no evidence beyond a statement by Mr. Weiss that it attempted to obtain a service contract with a different carrier or otherwise mitigate damages. HSDG Exceptions at 37. Further, HSDG argues that OJC's evidence shows it earned over $7,000 per

[29] The only reason the profits per container awarded as damages are higher for the 2020-2021 Service Contract is because OJC was forced to pay elevated spot rates to ship during the 2021-2022 period, which would not have occurred if HSDG concluded negotiations towards a renewal contract.

container in 2021-2022 and it should have been able to ship many more containers profitably. But the evidence shows that OJC's business required certainty when shipping products to the United States, that OJC was unable to negotiate a service contract with another carrier, that it did make some shipments on the spot market, and that HSDG's management testified that the period when HSDG discontinued negotiations with OJC was already "very very late in the game" for negotiating service contracts. CSX at 510-12; I.D. at 61; RX at 992. The ALJ found Mr. Weiss's testimony that he attempted to negotiate with other carriers credible and consistent with testimony by Mr. Li that the majority of contracts are negotiated through April or possibly May. I.D. at 60. HSDG submitted no evidence showing space offered to OJC that it rejected or otherwise contradicting OJC's evidence of its attempts at mitigation. Based on this record, HSDG has not carried its burden and its argument is not persuasive.

6. Discovery Sanctions

The ALJ correctly concluded sanctions against HSDG were not required, as the information OJC sought and HSDG refused to supply was not necessary to resolve the proceeding. I.D. at 63; OJC Exceptions at 28-29. The record suggests that HSDG failed to make witnesses and evidence available to OJC, even after orders from the ALJ. OJC Exceptions at 28-29. Some of this information dealt with space availability which would have relevance to HSDG's argument that it lacked space OJC sought. While it seems that HSDG did not meet all of its discovery obligations, the Commission's conclusion is that additional evidence would not have materially impacted the outcome of this case.[30] The Commission rejects OJC's request for

[30] OJC was able to establish a reasonable measure of profits-per-container and there is sufficient evidence to establish a reasonable projection of the 2021-2022 Service Contract MQC. OJC does not persuasively explain why testimony from HSDG executives further removed from negotiations with OJC or evidence of blank sailings would have permitted it to prove a higher MQC. As will be discussed above there was evidence of OJC's hesitance to commit to an MQC for

sanctions, as the ALJ did, because sufficient evidence exists to resolve this case and the missing information would not impact the final determination.

7. Final Calculations

Pursuant to the discussion above, the Commission must recalculate the damages award. For the 2020-2021 Service Contract, the average profits per container OJC earned was $20,737.24. OJC missed the MQC by 15 FFE so the profits per container are multiplied by that number to give a measure of the total harm done to OJC by HSDG's actions during this period of $311,058.60, plus interest of $34,538.02. Because it is appropriate to double this damage award based on HSDG's knowing and willful violations, the total award for the 2020-2021 Service Contract period is $691,193.24.

For the period of the proposed 2021-2022 Service Contract, the average profits per container OJC would have earned based on just and reasonable estimates is $18,983.01. The record supports the conclusion that OJC and HSDG would have agreed to an MQC of 400 FFE for this period, so the measure of the total harm done to OJC by HSDG's actions is $7,593,204, plus interest of $843,102.45. When doubled due to HSDG's knowing and willful violations, the total award for the proposed 2021-2022 Service Contract is $16,872,612.90. Combined, the total award for the two periods is $17,563,806.14.

III. CONCLUSION

For the reasons discussed in this order, the Commission denies the Exceptions filed by HSDG in their entirety. The

2021-2022, and further, more data on HSDG's available space does not prove HSDG would have allocated the space to OJC. There is no evidence HSDG ever considered an MQC as high as the 4,700 FFE OJC projects, and general evidence about HSDG's availability of space would not provide sufficient certainty.

Commission also denies OJC's Exceptions except with respect to the calculation of damages. The Commission modifies the damages award consistent with the findings above and the Commission's best judgment of the appropriate measure of damages. The Commission awards OJC reparations for the 2020-2021 Service Contract of $691,193.24 and $16,872,612.90 for the proposed 2021-2022 Service Contract, for a total award of $17,563,806.14.

The Commission hereby:

(1) **DENIES** Respondent Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft's June 29, 2023 Exceptions;

(2) **DENIES** Complainant OJ Commerce, LLC's June 29, 2023 Exceptions as to liability;

(3) **AFFIRMS** the ALJ's June 7, 2023 Initial Decision as to liability;

(4) **ORDERS** HSDG to pay OJC reparations in the amount of $17,563,806.14. This amount includes interest on the reparations award running from April 29, 2021.[31]

By the Commission.

David Eng
Secretary

[31] The ALJ chose to award interest based on this date and neither party challenged this decision. The Commission also finds it to be a reasonable date from which to calculate interest based on the facts of this case.

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

COLOR BRANDS, LLC, *Complainant* v. AAF LOGISTICS, INC., *Respondent*.	**DOCKET NO. 22-18**

Served: August 27, 2024

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION ON REMAND[1]

[Notice Not to Review served 9/27/2024, decision administratively final]

I. INTRODUCTION

On August 11, 2022, Color Brands, LLC ("Color Brands") filed a complaint alleging that AAF Logistics, LLC ("AAF") violated the Shipping Act of 1984 ("Shipping Act") by charging for insurance that it did not obtain for maritime shipments and engaging in improper practices concerning damaged cargo claims. On August 30, 2022, the Federal Maritime Commission ("Commission") issued a Notice of Filing of Complaint and Assignment.

AAF did not respond to the complaint as required by Commission Rule 62(b)(1). 46 C.F.R. § 502.62(b)(1). In addition, AAF did not respond to the initial order, order to show cause, motion for default, or order to respond to the motion for default and AAF terminated the attorney it originally hired to represent it. On January 27, 2023, an Initial Decision on Default ("I.D.") was issued, which granted Color Brands' motion for default against AAF and awarded $322,624.17, plus interest from December 17, 2021, as reparations. I.D. at 4-5.

On January 18, 2024, the Commission issued an Order Affirming Initial Decision in Part and Remanding in Part ("Remand Order"), affirming the default against AAF, vacating the reparations amount and date of injury, and remanding for further proceedings. Remand Order at 5-6. The Commission remanded only two narrow issues: the amount of reparations and the date of injury. Remand Order at 3-5.

On January 22, 2024, the parties were ordered to file briefs with supporting evidence addressing the two issues remanded. On March 15, 2024, Complainant Color Brands filed its

[1] This decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

remand brief ("Brief") and a declaration under oath ("Decl.") with nine exhibits, including a chart listing details of all shipments for which Color Brands seeks reparations in exhibit 1.

On March 22, 2024, an order requesting clarification and extending deadlines was issued, requiring Color Brands to submit a supplemental declaration with additional exhibits, including a revised chart adding a column listing the port of departure for all shipments, to determine which shipments utilized a United States port. The clarification order also extended the date for AAF to respond to Color Brand's remand filings to May 13, 2024.

On April 10, 2024, Color Brands submitted a supplemental declaration under oath (Supp. Decl.") with two additional exhibits, including a supplemental chart in exhibit 10. AAF has not made any filings since the Commission's remand order.

For the reasons below, the evidence submitted is sufficient to award reparations of $291,564.58, plus interest, to Color Brands for three dates of injury. Reparations are awarded for both insurance premiums and cargo damage.

II. ANALYSIS AND CONCLUSIONS OF LAW

The Commission remanded for a determination of the amount of reparations and for a determination of the date of injury. Remand Order 3-5. The reparations amount will be discussed prior to addressing the date of injury.

A. Reparations

1. Relevant Law

The Shipping Act requires that the "Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation" of the Act. 46 U.S.C. § 41305(b). Pursuant to Commission Rule 65(b), "[w]hen a party is found to be in default, the Commission or the presiding officer may issue a decision on default upon consideration of the record, including the complaint or Order of Investigation and Hearing." 46 C.F.R. § 502.65(b). Pursuant to Commission Rule 65(c), the "presiding officer may require additional information or clarification when needed to issue a decision on default, including a determination of the amount of reparations or civil penalties where applicable." 46 C.F.R. § 502.65(c).

Commission Rules provide additional guidance regarding proof for an award of reparations.

> If many shipments or points of origin or destination are involved in a proceeding in which reparation is sought (See § 502.63), the Commission will determine in its decision the issues as to violations, injury to complainant, and right to reparation. If complainant is found entitled to reparation, the parties thereafter will be given an opportunity to agree or make proof respecting the shipments and pecuniary amount of reparation due before the order of the Commission awarding reparation is entered. In such cases, freight bills and other exhibits bearing on the details of all shipments, and the amount of reparation on each, need not be

> produced at the original hearing unless called for or needed to develop other pertinent facts.

46 C.F.R. § 502.251 (Proof on award of reparation).

> Complainants have the burden of proving entitlement to reparations.
>
> As the Federal Maritime Board explained long ago: "(a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation."

James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist., 30 S.R.R. 8, 13, 2003 WL 22067203, *8 (FMC Aug. 26, 2003) (quoting *Waterman v. Stockholms Rederiaktiebolag Svea*, 3 F.M.B. 248, 249 (1950)).

Reparations will only be awarded based on actual damages. *Tractors & Farm Equipment Ltd. v. Cosmos Shipping Co.,* Docket No. 81-57, 26 S.R.R. 788, 798 (ALJ Nov. 23, 1992), admin. final, Dec. 31, 1992. Actual damages means "compensation for the actual loss or injuries sustained by reason of the wrongdoing." *Cal. Shipping Line, Inc. v. Yangming Marine Transport Corp.*, Docket No. 88-15, 25 S.R.R. 1213, 1230, 1990 WL 427466, at *23 (FMC Oct. 19, 1990). "That does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained." *MAVL Capital Inc. v. Marine Transport Logistics, Inc.,* Docket No. 16-16, 2022 WL 2209421, at *3 (FMC June 10, 2022).

Federal courts may rely on detailed affidavits or documentary evidence to determine damages in the case of default.

> A defaulting defendant is deemed to admit every well-pleaded allegation in the complaint. *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 63 (2d Cir.1971), *rev'd on other grounds*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973). Although the default establishes a defendant's liability, the court is required to make an independent determination of the sum to be awarded unless the amount of damages is certain. *Adkins v. Teseo*, 180 F.Supp.2d 15, 17 (D.D.C.2001); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1364 n. 27 (11th Cir.1997); *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 814 (2d Cir.1975). Moving for a default judgment, the plaintiff must prove its entitlement to the requested damages. *Oberstar v. FDIC*, 987 F.2d 494, 505 n. 9 (8th Cir.1993). In ruling on such a motion, the court may rely on detailed affidavits or documentary evidence to determine the appropriate sum for the default judgment. *United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir.1979). When the damages cannot be calculated with relative simplicity, however, the court may order an evidentiary hearing. *Cablevision Sys. New York City Corp. v. Lokshin*, 980 F.Supp. 107, 111-12 (E.D.N.Y.1997). Finally, the movant is entitled to all reasonable inferences from the evidence offered. *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981).

Flynn v. Mastro Masonry Contractors, 237 F. Supp. 2d 66, 69 (D.D.C. 2002); *see also GAG Enterprises, Inc. v. Rayford*, 312 F.R.D. 230, 234 (D.D.C. 2015) (citations omitted).

Commission Rules provide guidance regarding how the Commission calculates interest in complaint proceedings.

> Except as to applications for refund or waiver of freight charges under § 502.251 and claims which are settled by agreement of the parties, and absent fraud or misconduct of a party, interest granted on awards of reparation in complaint proceedings instituted under the Shipping Act of 1984 will accrue from the date of injury to the date specified in the Commission order awarding reparation. Compounding will be daily from the date of injury to the date specified in the Commission order awarding reparation. Normally, the date specified within which payment must be made will be fifteen (15) days subsequent to the date of service of the Commission order. Interest shall be computed on the basis of the average monthly secondary market rate on six-month U.S. Treasury bills commencing with the rate for the month that the injury occurred and concluding with the latest available monthly U.S. Treasury bill rate at the date of the Commission order awarding reparation. The monthly secondary market rates on six-month U.S. Treasury bills for the reparation period will be summed up and divided by the number of months for which interest rates are available in the reparation period to determine the average interest rate applicable during the period.

46 C.F.R. § 502.253 (Interest in reparations proceeding).

2. Analysis

Color Brands seeks reparations for cargo insurance premiums and cargo damage or loss, relying on the declaration and supplemental declaration of its CEO Daniel Lutz, as well as eleven exhibits. Brief at 1-2. Color Brands also requests and calculates prejudgment interest. Decl. ¶¶ 20, 28. AAF has continued to not respond to this proceeding.

Because the end date for the interest determination is the date of the Commission's order awarding reparations, the determination of the amount of interest is premature at this point. That amount will be calculated by the Commission in its final order. *See, e.g. Muhammad Rana v. Michelle Franklin*, 2 F.M.C.2d 70, 101, 2020 WL 13512909, at *29 (ALJ May 12, 2020) (*aff'd* 2022 WL 1744905 (FMC May 25, 2022) (with interest calculated)); *Shipco Transport Inc. v. Saturn Air Sea* Cargo, Docket No. 95-07, 1995 WL 348131 at *1, 4 (ALJ June 2, 1995).

The amount of reparations for the insurance premiums will be addressed prior to determining the amount for cargo damage and loss. Then, the date of injury will be determined.

a. Insurance Premiums

Color Brands asserts that it paid insurance premiums on 1,221 shipments with values totaling $36,104,153.77 and the insurance payment reimbursement claim totals $115,533.29. Brief 2-3; Supp. Decl. ¶ 4; Exhibit 10. Color Brands acknowledges that of the 1,221 shipments, AAF provided proof of insurance for three, reducing Color Brands' insurance premium damages by $649, to $114,884.29, covering 1,218 shipments. Brief at 3; Decl. ¶¶ 13-14; Supp. Decl. ¶ 6.

In Color Brands' supplemental declaration, they argue that "the FMC has jurisdiction over all the insurance premium claim shipments against AAF, a U.S. licensed NVOCC who collected the premiums in the U.S., charged a U.S. shipper." Supp. Decl. ¶ 12. However, the Shipping Act defines a common carrier as a person that "uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country." 46 U.S.C. § 40102(7). An NVOCC is defined as a "common carrier" that "(A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(17); *see also* 46 C.F.R. § 515.2(k). Thus, only the shipments that arrive or depart from a United States port are regulated. *CMI Distribution, Inc. v. Service By Air, Inc.*, Docket No. 17-05, 2019 WL 4734318 at *11 (ALJ May 24, 2019) *aff'd in part, rev'd in part,* 2021 WL 3367603 (FMC July 26, 2021). Therefore, the claims based on shipments that did not utilize United States ports are excluded from the reparations calculation.

After being ordered to supplement the information in exhibit 1, Color Brands submitted exhibit 10, which includes the information in exhibit 1 and adds the port of loading for each shipment, AAF's place of receipt, and identifies fourteen shipments that did not use a United States port. Exhibit 10; Supp. Decl. ¶¶ 7-9. Color Brands also provides bills of ladings for four of the fourteen shipments that did not use a United States port. Exhibit 11; Supp. Decl. ¶ 11.

The evidence shows that Color Brands paid AAF $115,533.29 in cargo insurance premiums from August 30, 2019, to August 30, 2022, on 1,221 shipments. Decl. ¶ 3. These shipments are all within the three-year limitations period for reparations claims. Of this amount, AAF obtained insurance for three shipments, reducing the damages by $649. Decl. ¶ 13; Supp. Decl. ¶ 6. In addition, fourteen shipments did not utilize a port in the United States, which equates to insurance premiums of $1,754.57. Supp. Decl. ¶¶ 9, 13. If these amounts are subtracted, Color brands calculates the reparations due as $113,129.72. Supp. Decl. ¶ 13. The detailed evidence is credible and supports the amount claimed.

Therefore, the evidence shows that Color Brands paid $115,533.29 in cargo insurance. Subtracting the three containers for which AAF obtained insurance ($649) and the fourteen containers that were shipped from Canada ($1,754.57), the amount of reparations due to Color Brands from AAF for cargo insurance that was paid for but not purchased is $113,129.72.

b. Cargo Damage and Loss

Regarding reparations for cargo damage and loss, Color Brands asserts that there were fifteen shipments with cargo damage and seeks $189,929.10 for the damage to those containers. Brief at 5; Decl. ¶¶ 21-23.

Color Brands submits a detailed chart showing for each shipment: the order number, bill of lading number, vessel name, booking number, container number, origin, destination, submission date, claim number, claim amount, shipping date, and delivery date. Decl. ¶ 22; Exhibit 6. Color Brands also provides detailed support for three of these damage claims, including bills of lading, photographs of the damage, loss and damage claim forms, and memos regarding the losses. Exhibits 7-9; Decl. ¶¶ 24-26. One of the damaged shipments did not utilize a United States port and the claim for that shipment is $11,494.24. Exhibit 6.

The evidence submitted is credible and supports Color Brand's cargo damage and loss claim of $189,929.10. However, reparations cannot be awarded for the one shipment originating in Canada, so $11,494.24 is subtracted from the claim. Therefore, the evidence supports reparations of $178,434.86 for fourteen cargo damage and loss claims.

B. Date of Injury

A complaint seeking reparations must be filed within three years after the claim accrues. 46 C.F.R. § 502.62(a)(4)(iii); *see also* 46 U.S.C. §§ 41301(a), 41305(b). The initial complaint in this proceeding was filed on August 11, 2022, and the Notice of Filing was served on August 30, 2022. Color Brands alleges violations spanning from August 30, 2019, to August 30, 2022. Decl. ¶ 3; Exhibit 1.

The Shipping Act permits reparations for actual injury and defines "actual injury" to include "the loss of interest at commercial rates compounded from the date of injury." 46 U.S.C. § 41305(a). The Commission stated that "with respect to multiple shipments, the ALJ should be able to determine the reasonable date or dates of injury," concluding that:

> [I]t would not appear to be unreasonable to determine that the mid-point date of the period of all eligible shipments was the date of injury for the claim, because such a date may award Color Brands approximately the same amount of interest as being calculated using each shipment date, by evening out the earlier and later dates of injury.

Remand Order at 5. The reparations amount "can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences." *Tractors & Farm*, 26 S.R.R. at 798-99.

The Commission remanded, finding the ALJ should be able to determine a reasonable date of injury and that Color Brands should be able to provide the relevant information to do so. Remand Order at 5 (citing 46 C.F.R. § 502.251). The Commission indicates that a mid-point calculation of all shipment dates would be reasonable for the date of injury concerning Color Brands' insurance premiums and that the dates of injury concerning cargo damages should be the date on which the cargo was damaged. *Id.*

For the insurance premium claim of $113,129.72, Color Brands requests interest accruing from the midway point of the three-year period from August 30, 2019, to August 30, 2022, which it identifies as March 2, 2021. Brief at 4. However, the chart in exhibit 10 shows that insurance premiums were paid from August 30, 2019, to February 18, 2022, a period of 903 days. The mid-point of that timeframe is November 23, 2020, a date which better matches the facts presented. Therefore, Color Brands' declarations and exhibits, which are appropriately considered in calculating reparations in a case in which default judgment is entered, establish actual injury of $113,129.72 with a date of injury, and interest running from, November 23, 2020.

For the cargo loss and damage claim of $178,434.86, Color Brands requests interest accruing from the midway point of the delivery dates from September 1, 2021, to March 12, 2022, which it identifies as November 20, 2021. Brief at 5. Color Brands' chart of damage and loss claims includes detailed information, including three dates: a submission date, departure date, and arrival date. Exhibit 6. It is not entirely clear what the submission date is and it is noted that one submission date is before the delivery date, for bill of lading NEWMEL108028. Exhibit 6. Therefore, the delivery date is found to be the most reliable date for determining the date of the damage or loss. Reviewing the dates and amounts of the claims, it is possible to group these claims into two time periods.

There were nine damage and loss claims totaling $86,690.24 from September 1, 2021, to October 16, 2021. These claims are close in time and will be grouped together, with a mid-point of September 23, 2021. Similarly, the five claims totaling $91,744.62, from December 4, 2021, to March 12, 2022, will be grouped together, with a mid-point of January 22, 2022. Color Brands' declarations and exhibits establish actual injury of $86,690.24 with a date of injury, and interest running from, September 23, 2021, plus actual injury of $91,744.62 with a date of injury, and interest running from, January 22, 2022.

III. ORDER

Upon consideration of the record, the arguments of the parties, the findings and conclusions set forth above, in the Initial Decision, and in the Commission Order, and the default determination, it is hereby

ORDERED that AAF Logistics pay Color Brands reparations in the amount of:

- $113,129.72 for insurance claims with interest running from November 23, 2020, plus
- $86,690.24 for cargo loss and damage with interest running from September 23, 2021, plus
- $91,744.62 for cargo loss and damage with interest running from January 22, 2022,

for a total reparations amount of $291,564.58.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

M.E. DEY & CO., INC., *Complainant* v. HAPAG-LLOYD AG AND HAPAG-LLOYD (AMERICA) LLC, *Respondents and Third-Party Complainants* v. CSX TRANSPORTATION, INC., *Third-Party Respondent*.	**DOCKET NO. 22-35**

Served: August 27, 2024

ORDER OF: Alex M. CHINTELLA, *Administrative Law Judge*.

INITIAL DECISION APPROVING CONFIDENTIAL SETTLEMENT AGREEMENT[1]

[Notice of Commission Determination to Review served 9/26/2024, final decision pending]

On June 17, 2024, Complainant M.E. Dey & Co., Inc. ("Dey") and Respondents Hapag-Lloyd AG and Hapag-Lloyd (America) LLC ("Hapag") filed a joint motion seeking approval of a confidential settlement agreement and dismissal with prejudice ("Settlement Motion") with a copy of the confidential settlement agreement.

Using language borrowed in part from the Administrative Procedure Act, Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b); *see* 5 U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and

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

valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy….The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims….The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A Am. Jur. 2d *Compromise and Settlement* § 3 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, Docket No. 88-2, 1988 WL 340657 at *7 (FMC 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, Docket No. 07-01, 2009 WL 971291, at *2 (FMC, Apr. 1, 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

On June 14, 2024, the Commission decided to review the Administrative Law Judge's May 17, 2024, Order Granting Third-Party Respondent CSXT's Motion to Dismiss the Third-Party Complaint and Resetting Briefing Schedule ("Dismissal Order"). *See* 46 C.F.R. § 502.227. However, shortly after the Commission's decision to review the Dismissal Order, Dey and Hapag filed the Settlement Motion on June 17, 2024. In the Settlement Motion, Dey and Hapag state their mutual desire to discontinue this proceeding in its entirety upon approval of the confidential settlement agreement. Settlement Motion at 4.

On June 28, 2024, CSXT filed Third-Party Respondent's Request for Status Conference on Complainant and Third-Party Complainants' Joint Motion for Approval of Confidential Settlement ("Request for Status Conference"), wherein they requested a conference with me "to discuss procedural questions pertaining to the [Settlement Motion] filed by Dey and Hapag. Request for Status Conference at 1. On July 2, 2024, in my Order on Third-Party Respondent's Request for Status Conference ("Order on Status Conference"), I denied CSXT's request for a status conference and allowed them to file a response to the Settlement Motion. Order on Status Conference at 2.

On July 11, 2024, CSXT filed Third-Party Respondent's Opposition to Complainant and Third-Party Complainants' Joint Motion for Approval of Confidential Settlement ("Opposition"), arguing that action on the settlement would be procedurally inconsistent under 46 C.F.R. §502.227(a)(5), which holds an initial decision under review "inoperative until the Commission determines the matter;" and that approval of the settlement and request for dismissal would not resolve all issues on the docket, allegedly using up judicial resources and prejudicing the rights of CSXT. Opposition at 2, 5, 7, 9; citing, e.g., *Banfi Products Corp., et al. – Possible Violations of Section 16, Initial Paragraph, Shipping Act, 1916 and Section 10(A)(1) of the Shipping Act of 1984,* Docket No. 87-14, 1993 WL 435699 at *1-2 (ALJ Sept. 14, 1993); and *APM Terminals North America, Inc. v. PANYNJ*, FMC Docket No. 07-01, 2009 WL 971291 at *3 (FMC April 1, 2009).

Upon the FMC deciding to review an initial decision, such decision becomes inoperative until the Commission determines the matter. 46 C.F.R. § 502.227(a)(5). CSXT cites *Banfi*, contrasting it with the case at hand, stating:

> Unlike the reasoning in *Banfi Products* finding that '[c]learly, settlement of this proceeding serves the public interest by saving public and private time and funds, and by bringing to immediate conclusion a case which may well have been in trial or on appeal for several more years,' here the proceeding would not end, based on Dey and Hapag's own allegations and arguments, and thus the ALJ would be presented with deciding the same issues that Dey and Hapag purportedly seek to settle.

Opposition to Settlement at 8. (citing *Banfi,* WL 435699 at *2).

CSXT does not adequately explain how approval of the Settlement Motion would prejudice them or "impair CSXT's right to file exceptions to the Commission and/or subsequent standing to pursue further review." Opposition to Settlement at 3, 9-10. In federal district courts, third-party actions routinely continue after the primary parties settle. *See, e.g., Kennedy v. Lankenau Hosp. Jefferson Health Sys.*, 1999 WL 782527 (E.D. Pa. 1999) (court retained jurisdiction over a third-party complaint for indemnification after the main negligence action was dismissed following settlement); *General Star Indem. Co. v. Oakwood Bldg. & Development Co.*, 2009 WL 151526 (D. Colo. 2009) (court retained ancillary jurisdiction over the third-party claims and such jurisdiction was not lost upon the settlement of the central claims; court has discretion to retain or dismiss third-party claims after the settlement of the central claims).

Commission practice is consistent with that of the district courts. For example, in *APM Terminals North America v. Port Authority of N.Y. and N.J.*, the Commission rejected third-party Maher Terminals, LLC's argument that approval of a settlement agreement between the primary parties would prejudice Maher, noting that Maher's countercomplaint against the Port Authority could continue. Docket No. 07-01, 31 S.R.R. 623, 626 (FMC April 1, 2009) (denying Maher's exceptions to the initial decision approving settlement and consolidating Maher's countercomplaint into a related case). Once the settlement between Dey and Hapag is approved, the Commission may approve that initial decision and continue its review of the order dismissing Hapag's third-party claim against CSXT, which may be remanded for further proceedings regardless of whether the claims between Dey and Hapag are still part of the case. The Commission may stay approval of the Dey/Hapag settlement pending the outcome of its review of the third-party dismissal or may reject the settlement and remand for further proceedings. Regardless, CSXT does not explain how the above outcomes prejudice CSXT's rights with respect to Hapag's claims. Nor does CSXT explain how placing all issues in the case before the Commission would involve greater use of resources than staying the settlement between the primary parties while the third-party claim is before the Commission.

Having dealt with the procedural questions, the issue is whether the settlement is "fairly made and not in contravention of some law or public policy." *Old Ben Coal*, 18 S.R.R. at 1092. The settling parties state:

> In this action, the parties, both sophisticated corporate entities, arrived at the Confidential Settlement Agreement through arm's length negotiations and support this motion and the relief that it seeks. The Confidential Settlement Agreement does not contravene any law or public policy and is neither unjust nor discriminatory. It does not contemplate any adverse effects on any third parties or the shipping public. Instead, the Confidential Settlement Agreement is a fair and reasonable resolution of the dispute between the parties and reflects their desire to resolve their issues without the need for costly and uncertain litigation. For these reasons, the Parties respectfully request that the Confidential Settlement Agreement be approved and, on that basis, the complaint in this matter be dismissed with prejudice.

Settlement Motion at 3.

Based on the representations in the Settlement Motion, the parties have established that the settlement agreement, dated June 17, 2024, does not appear to violate any law or policy, or contain other defects which might make it unapprovable. The parties are represented by counsel and have engaged in arms-length settlement discussions. The proceeding would require potentially expensive briefing. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation.

Confidentiality

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); see also 46 C.F.R. § 502.141(j). "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, Docket No. 00-04, 2000 WL 1920488, at *3 (ALJ Dec. 14, 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991).

The confidential settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

Upon consideration of the motion and opposition, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the joint motion to approve the settlement agreement between Complainant M.E. Dey & Co., Inc., and Respondents Hapag-Lloyd AG and Hapag-Lloyd (America) LLC be **GRANTED**; it is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**; and it is

FURTHER ORDERED that Complainant M.E. Dey & Co., Inc.'s complaint against Respondents Hapag-Lloyd AG and Hapag-Lloyd (America) LLC is hereby **DISMISSED WITH PREJUDICE**.

Alex M. Chintella
Administrative Law Judge

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

SeaFair USA LLC, *Complainant*

v. **DOCKET NO. 22-34**

Sterling Container Line Ltd. and Atlantic Forwarding Ltd., *Respondents*.

Served: August 28, 2024

ORDER OF: Alex M. CHINTELLA, *Administrative Law Judge*.

Order Denying Respondents' Petition for Attorney Fees[1]
[Notice Not to Review served 9/30/2024, order administratively final]

I. INTRODUCTION

A. Overview

On May 16, 2024, the Commission issued a notice not to review, thereby making the initial decision in this proceeding administratively final. *See* 46 C.F.R. § 502.227(a)(3). Then, on June 14, 2024, Respondents Sterling Container Line Ltd. ("Sterling") and Atlantic Forwarding Ltd. ("Atlantic") filed a petition for attorney fees ("Fee Petition") and a motion for confidential treatment of the Petition exhibits.

Complainant SeaFair USA LLC acted as a "destination agent" for Respondents, managing document turnover, providing destination services, and collecting charges relating to steamship lines, associated terminals, and logistics companies. Initial Decision at 4-5. Respondent Sterling is a foreign Non-Vessel-Operating Common Carrier (NVOCC) based in Hong Kong; Respondent Atlantic is an ocean transportation intermediary based in Basel, Switzerland. *Id.* at 4.

The core dispute in this proceeding concerned SeaFair's claim that Respondents failed to pay document-turnover fees and outstanding destination charges, in violation of the Shipping Act. Complaint at 1. Respondents denied these allegations and argued that SeaFair's inability to collect destination charges was due to its "disorganized billing and collection processes." Opposition Brief of Respondents at 3. I found that "the parties' dispute arises out of an alleged breach of their agreement, and the evidence does not support a Shipping Act violation" under any of the theories SeaFair advanced. Initial Decision at 19.

[1] This order will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service of this order. 46 C.F.R. § 502.254(h).

B. Procedural History

On December 15, 2022, the Commission issued a notice of filing of complaint and assignment in this proceeding. Respondents filed an answer with defenses to the complaint on December 26, 2022. A scheduling order was issued on January 18, 2023, commencing discovery. Complainant's motion to compel was dismissed as moot on June 26, 2023, and the discovery period closed. Then, Complainant filed a combined motion to amend its complaint and an extension to the scheduling order. The motion to amend was denied on July 6, 2023, and the briefing schedule was revised.

Complainant filed its opening brief with proposed findings of fact and appendix on July 28, 2023. Respondent filed its opposition brief, proposed findings of fact, appendix, and responses to Complainant's findings of fact on August 28, 2023. On September 12, 2023, SeaFair filed its reply brief and responses to Respondents' proposed findings of fact. Respondents then filed a motion for leave to file sur-reply and to supplement the record on September 22, 2023. On October 4, 2023, the case was reassigned to the undersigned. Leave to grant a sur-reply was granted on October 10, 2023. Then, on October 20, 2023, Respondents filed their sur-reply with an attached appendix. The initial decision was issued on April 15, 2024. The Commission issued a Notice Not to Review the Initial Decision on May 16, 2024.

After Respondents filed their Fee Petition, SeaFair moved for an enlargement of time to respond. I granted the motion, and SeaFair served its Reply to Respondents' Petition for Attorney Fees ("Reply") on July 11, 2024. On August 1, 2024, in the course of reviewing the Fee Petition and Reply, I noticed that the Reply did not appear on the docket and had apparently not been emailed to the Office of the Secretary for filing (although it had been served on Respondents' counsel with a courtesy copy provided to me). I instructed SeaFair's counsel by email to correct the omission with an appropriate motion, and on August 2, 2024, SeaFair moved to strike the Fee Petition or, in the alternative, for leave to file its Reply out of time. The motion to strike argues that Respondents also did not email their Petition to the Secretary (although they concede that it was served), and therefore it should be stricken. Respondents consented to the motion for leave to file out of time but opposed the motion to strike. SeaFair then sought leave to file a reply to the opposition to the motion to strike, which Respondents opposed.

My aim in instructing SeaFair to file with the Secretary was to ensure the public record is complete. Claim-processing rules such as 46 C.F.R. § 502.254 are not jurisdictional, and regardless of whether Respondents inadvertently omitted to file the Petition or SeaFair inadvertently omitted to file the Reply with the Secretary, all parties and the undersigned were served with both documents such that there is no prejudice to any party or other basis to support a motion to strike. The motion to strike is therefore DENIED, the motion for leave to file out of time is GRANTED, and the motion for leave to file a reply to the opposition to the motion to strike is DENIED.

II. Discussion

A. Burden of Proof

The successful party in a private party complaint proceeding under 46 U.S.C. § 41301 may petition for an award of attorney fees after the decision becomes administratively final. 46

U.S.C. § 41305(e); 46 C.F.R. § 502.254(a). The burden is on the applicant to prove that it is eligible and entitled to attorney fees. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (explaining that "the fee applicant bears the burden of establishing entitlement to an award…."). The petition must include evidence to support the reasonableness of the rates claimed and specific documentation of hours worked at each identifiable stage of the proceeding. 46 C.F.R. § 502.254(d); *see Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984) ("[C]ourts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates."). Here, Respondent filed the petition and have the burden of proof. The standard of proof is preponderance of the evidence. *Logfret, Inc. v. Kirsha, B.V.,* FMC Docket No. 18-10, 2 F.MC.2d 110, 113 (F.M.C. June 22, 2020). An appeal of an award of attorney fees is governed by the procedures in 46 C.F.R. § 502.227. 46 C.F.R. § 502.254(h).

B. Arguments of the Parties

The Fee Petition alleges SeaFair "forced multiple Respondents to expend significant time and money in the defense of objectively unreasonable and frivolous claims." Petition at 2. As SeaFair did not terminate its claims, despite "ample opportunity," Respondents incurred significant expenses. *Id.* Respondents characterize SeaFair's complaint as a "common law contract dispute in the vein of vague Shipping Act violation allegations." *Id.* The Fee Petition asserts the following arguments: that SeaFair falsely described the nature of its damages, failed to cite any Commission precedent in its briefings, produced "voluminous billing records involving various non-parties … including conflicting calculations and unsubstantiated evolving totals," attempted to amend its Complaint after the close of discovery, supplemented its Opening Brief with "substantial new alleged evidence and theories" that required "extensive review time," and failed to "mediate or withdraw its claims with Respondents." *Id.* at 2-3. Respondents believe that an award of attorney fees would serve a "critical deterrence function" that would support taking Commission proceedings seriously and diligently. *Id.* A potential award would not chill future Shipping Act violation claims, but discourage "unsubstantiated filings, baseless mischaracterizations of facts, and blind hope that the FMC will issue orders outside of its statutory purview." *Id.* at 4.

SeaFair contends that its allegations were not objectively unreasonable or frivolous, but that the Commission encourages bringing unusual or unique claims that involve potential violations of the Shipping Act. Reply at 4. As the presiding officer did not make a finding of frivolousness during the initial decision, such a finding should not be made now. *Id.* In explaining the basis for its complaint, SeaFair "merely wanted to pursue every avenue possible to legally protect its business interests, and it reasonably believed that Respondents' actions constituted violations of the Shipping Act." *Id.* at 5. SeaFair points out that Respondents "could have ended the proceeding at an earlier point by settling the accounts with MSC or by paying SeaFair so it could settle with MSC." *Id.* Furthermore, awarding attorney fees in the instant case would discourage future claims of Shipping Act violations arising in "novel situations not yet addressed in Commission case law." *Id.* at 9.

C. Eligibility for Attorney Fees

The Commission conducts a two-step inquiry in determining whether to award fees. First, the Commission considers whether a petitioner is eligible for fees, that is, whether it is a "prevailing party." If the answer is yes, the Commission considers whether it should award fees to the petitioner. *Logfret*, 2 F.M.C.2d at 113. A party is the prevailing party if there has been a "material alteration of the legal relationship to the parties in a manner which Congress sought to promote in the fee statute." Final Rule: Organization and Functions; Rules of Practice and Procedure; Attorney Fees, 81 Fed. Reg. 10508, 10512 (Mar. 1, 2016) (citing *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.,* 489 U.S. 782, 792-93 (1989)). A respondent is the prevailing party "when the complainant's challenge is rebuffed 'irrespective of the precise reason for the court's decision.'" *Baltic Auto Shipping, Inc. v. Hitrinov*, Docket No. 14-16, 2017 WL 4924883 at *9 (FMC Oct. 25, 2017) (citing *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 431 (2016)). A complainant is generally the prevailing party if the presiding officer awards damages, an injunction, or "at least some relief on the merits." Final Rule, 81 Fed. Reg. at 10512 (quoting *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)).

In the instant proceeding, SeaFair's Complaint was denied because a violation of the Shipping Act was not established. A material alteration of the legal relationship of the parties transpired because Respondents successfully rebuffed SeaFair's claims. Complainant does not raise an argument that Respondents are not the prevailing party. Thus, as Respondents are the prevailing party, they are eligible for attorney fees. However, to be awarded attorney fees, Respondents must also be found to be *entitled* to attorney fees. *Logfret*, 2 F.M.C.2d at 113.

D. Entitlement to Attorney Fees

To determine entitlement to attorney fees, the Commission's primary consideration is "whether such an award is consistent with the purposes of the Shipping Act." Final Rule, 81 Fed. Reg. at 10515. There is not a general presumption for or against awarding attorney fees, and "parties should be encouraged to litigate meritorious claims and defenses." *Id.* The Commission considers the factors recommended in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994) as a helpful guide in deciding entitlement. *See Edaf Antillas, Inc. v. Crowley Caribbean Logistics, Inc.*, Docket No. 14-04, 2016 WL 5110081 at *5 (FMC Sept. 14, 2016). These factors include "frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Fogerty*, 510 U.S. at 534 n.19 (citing *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 156 (1986)). The Commission may consider additional factors depending on the issues raised in a specific case. *Statement of the Comm'n on Attorney Fees*, Docket No. 21-14, 3 F.M.C.2d 195, 198 n.22 (FMC Dec. 28, 2021).

In *Edaf,* the Commission reasoned that because the complainant failed to prosecute its claim by becoming increasingly unresponsive, awarding attorney fees would further the purposes of the Shipping Act:

> Complainant failed to substantiate the legal and factual components of its case, knowingly disregarded the ALJ's orders on numerous occasions, abandoned its claim, forced multiple [r]espondents to expend significant resources of both time and money in their defense, and perhaps most egregiously, failed to terminate the claim when it could have limited the expenses of the [r]espondents.
>
> 2016 WL 5110081 at *5.

In this case, Respondents acknowledge that "simply because a claim was unsuccessful does not necessarily mean it was objectively unreasonable or frivolous." Fee Petition at 6. Nevertheless, Respondents argue that they are entitled to attorney fees because SeaFair's "consistent mischaracterization of purported damages was objectively unreasonable and frivolous." *Id.* SeaFair's attempt to amend its Complaint by adding detail surrounding its purported damages when it later "omitted, abandoned, and amended its entire theory of damages" constitutes objective unreasonableness. *Id.* at 8. Because "SeaFair knew or should have known its claims regarding damages were blatantly false and patently devoid of a factual basis…" and it "egregiously failed to substantiate the factual elements of its allegations in the Complaint," Respondents are entitled to attorney fees. *Id.* at 8-9.

Complainant cites to *MSRF, Inc. v. HMM Co. Ltd.*, Docket No. 22-20, 2024 WL 1741928 at *6 (ALJ Apr. 15, 2024) to argue that the failure to prove a Shipping Act violation is not tantamount to a frivolous or unreasonable claim. Complainant is correct that the Commission does not grant attorney fees when the complainant's claim is only found to be unpersuasive. *See Baltic Auto*, 2017 WL 4924883 at *12 ("[E]ven if we agreed that deterring frivolous claims was consistent with the purposes of the Shipping Act, an award would not be warranted in this case."); *see also Logfret*, 2 F.M.C.2d at 114 ("The mere fact that a respondent has prevailed does not render a complainant's claim objectively unreasonable, otherwise prevailing respondents would be per se entitled to attorney fees, an approach the Commission has rejected."). While the Commission in *Logfret* found the complainant's allegations unconvincing, "they were not so patently devoid of merit so as to weigh in favor of awarding fees." *Id.* That is the case here. SeaFair's claim that Respondents were required to indemnify SeaFair against unpaid per diem charges that it advanced as Respondents' destination agent was novel – but it was rationally related to the practices employed and rates charged by Respondents in their capacity as ocean transportation intermediaries. That the evidence presented did not ultimately support a finding that Respondents violated the Shipping Act does not render the claims so lacking in legal or factual bases to necessitate an award of attorney fees.

Respondents' next argument is that SeaFair's complaint and briefs were "patently devoid of legal and factual bases to support allegations of Shipping Act violations, and were improperly motivated." Petition at 9. Respondents assert that SeaFair's claim can "be readily characterized as a fishing expedition seeking relief outside of the purview of the FMC's jurisdiction" because the dispute turned out to be a breach of contract claim, and not a Shipping Act violation. *Id.* Respondents contend that SeaFair's inability to cite a Commission case directly related to indemnification for unpaid per idem charges advanced by a destination agent is evidence that SeaFair "improperly attempted to disguise its unconvincing breach of contract claims and misguided requests for indemnification under the cloak of the Shipping Act." *Id.*

Respondents argue that, with respect to its § 41102(a) claim, SeaFair's brief "simply restated the statute, and provided a three sentence characterization of the relationship between the Respondents and non-party MSC on certain bills of lading," and "did not address the three required elements for proving such a claim, how those elements must be established, nor how either of the Respondents in any way could be shown to have engaged in violative behavior." *Id.* Respondents raise similar arguments as to SeaFair's § 41104(a) and § 41102(c) claims, focusing on SeaFair's apparent inability to connect its allegations to the elements of the above Shipping Act statutes. Because I decided that SeaFair's allegations were ultimately breach of contract claims for which the Commission could not provide a remedy, Respondents take this as further evidence of SeaFair's "legally deficient attempts to shoehorn its unsubstantiated breach of contract claims and request for indemnification under the guises of Shipping Act violations…." *Id.* at 11-12.

SeaFair replies by pointing out that the absence of similar Commission case law does not render its claim improperly motivated or factually deficient. Reply at 4. It acknowledges that it is "unaware of Commission case law that addresses Shipping Act claims arising from circumstances similar to those in the instant matter." *Id.* Be that as it may, disputes that involve developing areas of case law or scenarios that do not have precisely analogous precedent do not weigh in favor awarding attorney fees. *See Logfret*, 2 F.M.C.2d at 115 ("As the ALJ pointed out, there is little Commission case law discussing that scenario. Consequently, one cannot characterize the argument as *clearly* without merit."). The most cursory review of its cases shows that the Commission routinely addresses arguments regarding the applicability of the Shipping Act to complex and novel factual scenarios – that SeaFair's arguments were novel does not by itself make them improperly motivated or so obviously deficient so as to warrant an award of attorney fees.

Respondents' next argument is that "SeaFair's motivations in this case were questionable at best, particularly given the evolving presentation of key facts and legal theories regarding the Respondents' liability…" Fee Petition at 13. Respondents fault SeaFair for continuing to litigate its claims without citing Commission case law precedent regarding reparations and seeking reparation payments for uncollected destination charges. *Id.* Specifically, Respondents allege that SeaFair "did not have a good faith intent to protect a valid interest in pursuing these Shipping Act allegations, but rather sought to financially damage a former business partner as a last gasp attempt to relieve itself from its own failures to perform its destination agent obligations between 2021 and 2022." *Id.* at 14.

SeaFair denies these allegations, pointing out that "Respondents do not present any evidentiary support for their accusations of SeaFair's alleged improper motivation." Reply at 5. Further, SeaFair states that its motivation was to protect its "important economic interests" and it was not "SeaFair's objective in filing the Complaint to financially damage Respondents." *Id.*

First, as to SeaFair's alleged "failures to perform," I noted in the Initial Decision that Respondents did not "tie the customer complaints [about SeaFair] to specific disputed charges that are at issue in this proceeding," and presented evidence that was "insufficiently precise for me to be able to determine that the complaints about SeaFair's practices are relevant." Initial Decision at 18. So to the extent Respondents' argument is premised on SeaFair's alleged "attempt to relieve itself from its own failures," that argument is as factually unsupported now as it was the last time they made it.

Second, even if SeaFair had failed to perform adequately, Respondents have not tied that failure to perform to any facts that would demonstrate an improper motive in this case. Improper motivation is evident when a party advances an unreasonable legal theory in order to achieve a secondary gain. *Logfret*, 2 F.M.C.2d at 116. Respondents must present more than an allegation that SeaFair's motivations were "questionable" to be awarded fees. As explained above, there is nothing objectively unreasonable about SeaFair's claims. I pointed out in the initial decision that SeaFair may very well have a valid claim against Respondents: "SeaFair may be correct that Respondents' failure to collect from their shippers or pay MSC's outstanding charges is a violation of the terms and conditions Respondents agreed to," but that this was essentially a breach of contract claim for which the Commission could not provide relief under the Shipping Act. Where the theory is not objectively unreasonable, and where there is no specific evidence of a secondary motive other than recovery of the unpaid document-turnover fees and destination charges, Respondents cannot establish improper motivation.

Respondents' final argument is that SeaFair's conduct greatly increased Respondents' costs because of the need to respond to new evidence and motions throughout the proceeding. Fee Petition at 14. Respondents argue that they should be "compensated for the extensive resources, time, and effort put into defending against SeaFair's objectively unreasonable and frivolous claims" and that "SeaFair simply failed to terminate its improper claims when it could have limited the expense of the Respondents (and itself).” *Id.* at 15. The specific actions that purportedly increased Respondents’ costs were SeaFair’s motion to compel, motion to amend the complaint, as well as “new evidence, arguments, and theories, as well as voluminous billing records” in SeaFair’s opening brief and additional evidence in SeaFair’s reply brief that necessitated a sur-reply. *Id*. at 14-15. SeaFair counters by stating that Respondents could have themselves ended the proceeding by settling and that its claims were “meritorious and based on plausible interpretations of the law and genuine arguments.” Reply at 7.

Absent egregious circumstances, it is hard to conclude that a single motion to compel and a single motion to amend amount to unreasonable multiplication of litigation costs. Nor do I find anything improper in the evidence submitted with SeaFair’s opening brief. Given the nature of claims filed with the Commission, appendices are often voluminous, and SeaFair’s submission was not out of proportion to the claims at issue. With respect to the sur-reply, SeaFair argued at the time that the additional information included in its reply brief was directly responsive to Respondents’ arguments in their opposition brief, and I agreed that this “may be the case,” while nevertheless allowing Respondents to file a sur-reply since the evidence attached to the reply was not previously part of the record. See Order on Respondent’s Motion for Leave to File Sur-Reply (Oct. 10, 2023) at 2.

E. Confidentiality

Respondents filed a Motion for Confidential Treatment of Petition on June 14, 2024. Respondents argue that the “billing narratives associated with the time entries in the Respondents’ invoices [are] subject to attorney-client privilege and/or work product doctrine.” Confidentiality Motion at 1-2. Public and redacted versions of the exhibits were filed. Complainant argues that the public exhibit versions do not contain any description of the work performed, which makes it difficult to challenge the reasonableness of the fees charged. Reply at 9. The question of whether the rates charged are reasonable does not need to be reached considering the Respondents have not established an entitlement to fees. This confidentiality motion will be granted since such information is appropriate for confidential treatment. *See* 46 C.F.R. § 502.5.

III. ORDER

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

ORDERED that Complainant’s Motion to Strike Respondents’ Petition for Attorney Fees or, in the Alternative, for Leave to File Reply to Respondents’ Petition for Attorney Fees Out of Time is **GRANTED IN PART** to the extent the Reply is deemed filed and is otherwise **DENIED**; it is further

ORDERED that Complainant’s Motion for Leave to File Reply to Respondents’ Response in Opposition to Complainant’s Motion to Strike is **DENIED**; it is further

ORDERED that Respondents’ Petition for Attorney Fees is **DENIED;** it is further

ORDERED that Respondents' Motion for Confidential Treatment of Petition is **GRANTED**.

Alex M. Chintella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of the Administrative Law Judges

GENESIS RESOURCE ENTERPRISE INC., *Claimant* v. MAERSK LINE, LIMITED, *Respondent*.	**DOCKET NO. 2014(I)**

Served: September 4, 2024

BEFORE: Theresa Dike, *Small Claims Officer*.

ORDER APPROVING SETTLEMENT AND DISMISSING PROCEEDING

[Notice of Commission Determination to Review served 9/27/2024, final decision served 12/4/2024]

On July 29, 2024, the Secretary of the Federal Maritime Commission issued a Notice of Filing of Small Claims Complaint and Assignment ("Notice"), stating that Claimant Genesis Resource Enterprises Inc. ("Genesis") had filed an informal complaint against Respondent Maersk Line, Limited ("Maersk"). Genesis alleges that Maersk violated 46 U.S.C. § 41102(c) of the Shipping Act in connection with certain charges Genesis alleges were caused by the actions of Maersk. The Secretary informed Maersk that it was required to file a response to the complaint by August 23, 2024, and indicate whether it consents to the adjudication of the Claim under the informal procedures provided at Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.301-305).

On August 12, 2024, Claimant submitted a Motion to Dismiss ("Motion") and a copy of a settlement and release ("Settlement") signed by both parties, requesting that its complaint against Maersk be dismissed with prejudice pursuant to 46 C.F.R. § 502.72(a)(3), based on the parties' settlement of their dispute.

The Commission's Rule 72(a)(3) provides:

> [A]n action may be dismissed at the complainant's request only by order of the presiding officer, on terms the presiding officer considers proper. If the motion is based on a settlement by the parties, the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable. Unless the order states otherwise, a dismissal under this paragraph is without prejudice.

46 C.F.R. § 502.72(a)(3). Although Rule 72, governing dismissal of Commission proceedings, is not applicable to Subpart S proceedings, the undersigned used the rule as guidance for ruling on Claimant's request to dismiss the Claim.

The Commission's regulations allow settlements by litigating parties; however, the Commission requires that settlement agreements be submitted "for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." *Maher Terminals v. The Port Authority of N.Y. & N.J.*, 34 S.R.R. 322, 325 (FMC 2016). In reviewing settlement agreements, the Commission is guided by its "strong and consistent policy of encouraging settlements and engaging in every presumption which favors a finding that they are fair, correct, and valid." *Maher Terminals*, 34 S.R.R. at 326 (quoting *APM Terminals North America, Inc. v. Port Authority of N.Y. & N.J.,* 31 S.R.R. 623, 626 (FMC 2009)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1092 (ALJ 1978). However, if a "proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defect which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Id.* at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from the vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988).

The parties state in their settlement that their "Agreement has been negotiated between the parties, both of whom are represented by counsel," and that the "Agreement is made strictly as a customer accommodation and as a compromise of disputed claims . . . to avoid the expense and business distraction of continued dispute and/or litigation." Settlement at 1. A review of the settlement agreement, which is executed by both parties, shows no indicia of fraud, duress, undue influence, or mistake, and appears to reflect an arm's-length resolution between the parties. The terms appear to be fair, reasonable, and adequate. Accordingly, the settlement agreement is approved, and this proceeding dismissed with prejudice, as requested.

Although the parties did not explicitly request confidentiality, the words: "Classification: Confidential" are printed on the Settlement and its terms provide that:

> [n]either Maersk nor Claimant nor any of their respective Related Parties will, at any time or in any manner, either directly or indirectly, disclose, divulge, communicate or otherwise reveal or allow to be revealed to any person the terms, substance, or content of any communications, whether written or oral, concerning the negotiation, terms, execution or implementation of this Agreement or related to the Claimed Charges except to the extent required by applicable law, in which case the disclosing party shall first give written notice to the other party unless prohibited by applicable law.

Settlement at 1. It is thus presumed that the parties are seeking confidentiality for their agreement. "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (internal citations omitted); *Marine Dynamics v. R.T.M Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *International Association of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991). The parties' request to keep the terms of their settlement agreement confidential is reasonable and thus granted.

Upon consideration of the proposed settlement, Claimant's motion to dismiss, and for the reasons stated above, it is hereby

ORDERED that the settlement agreement be **APPROVED**. It is

FURTHER ORDERED that the request for confidentiality be **GRANTED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.

Theresa Dike
Small Claims Officer

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

TPG PRESSURE, INC., *Complainant* v. OMNI LOGISTICS LLC AND EPIC FREIGHT SOLUTIONS LLC, *Respondents*.	**DOCKET NO. 22-31**

Served: September 12, 2024

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION[1]
[exceptions filed by Complainant and Respondents 10/4/2024, final decision pending]

I. INTRODUCTION

A. Overview

This proceeding began on November 29, 2022, when the Federal Maritime Commission ("Commission" or "FMC") issued a notice of filing of complaint and assignment indicating that Complainant TPG Pressure, Inc. ("TPG") had filed a complaint against Respondent Omni Logistics LLC ("Omni"). An amended complaint subsequently named both Omni and Epic Freight Solutions LLC ("Epic") as Respondents, corrected Complainant's name, and added new claims. The amended complaint alleges that Respondents violated the Shipping Act of 1984 ("Shipping Act"), sections 41102(c), 41104(a)(14), and 41104(a)(15). Amended Complaint at 8-14. After filing two unsuccessful motions to dismiss, Respondents filed their answer and affirmative defenses to the first amended verified complaint on May 2, 2023 ("Answer").

TPG imports goods that are delivered to its customers for construction projects and used Epic as its non-vessel operating common carrier ("NVOCC"), a type of ocean transportation intermediary. In April 2021, Epic was acquired by Omni and became a wholly owned subsidiary. After a two-year period, Epic was consolidated into Omni. TPG alleges that both Epic and Omni are responsible for improper invoices and billing issues and that Respondents improperly invoiced TPG for demurrage and detention, storage, and chassis use for hundreds of containers. Respondents contend that Epic was the sole NVOCC for these shipments, the charges were proper, and TPG has not paid many of the invoices at issue.

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

The evidence shows that TPG and Epic worked well together prior to the 2021-2022 timeframe. The timing of the problems coincided with the acquisition of Epic by Omni and also with unprecedented congestion in the shipping industry related to COVID. The result was an increase in demurrage charges imposed by third parties, which Respondents frequently passed on to TPG with a markup or "admin fee." TPG required significant documentation, which Respondents struggled to provide timely. Respondents also threatened not to release certain containers until payments were made for other containers that had been delivered. TPG delayed or refused to provide payment for some invoices with disputed demurrage, including failing to provide payment for freight or other undisputed charges.

As explained more fully below, the evidence shows that Respondent Epic violated section 41102(c) and, after June 16, 2022, when the Ocean Shipping Reform Act ("OSRA") was enacted, section 41104(a)(14), by imposing improper markups on demurrage charges and for coercive collection practices. However, the evidence does not establish that Respondent Omni was the common carrier that handled TPG's shipments and it is therefore dismissed. In addition, TPG has not established other alleged violations of sections 41102(c) and 41104(a)(14), for example, that all the demurrage charges were improper, or a violation of section 41104(a)(15) invoice requirements, to the extent that Epic was an NVOCC passing through charges imposed by other entities.

The focus of this proceeding is on the alleged practices of the NVOCC Respondents. The Shipping Act, however, does not permit shippers to withhold payment to NVOCCs without cause. Disputes over certain charges, for example demurrage, do not justify nonpayment of freight or other non-disputed charges. When shippers improperly delay or withhold payments to NVOCCs, financial pressures can occur; however, the remedies available to the NVOCCs under the Shipping Act do not include adding charges or markups that are not disclosed in the NVOCC's tariff or refusing to release other shipments.

In its amended complaint, TPG sought reparations in excess of $1,222,123. Amended Complaint at 14. TPG reduced its damages claim to $844,712.63 in its brief and to $584,837.29 in its reply. Brief at 30-31; Reply at 40; Sur-reply Response at 4, 7-8. As explained below, TPG has only established improper charges of $107,384.20, calculated by adding $86,722.10 for improper markups and $20,662.10 for coercive collection practices. However, because the improper charges are less than the amount TPG refused to pay Respondents, no reparations are ordered.

B. Procedural History

On October 28, 2022, the complaint was received by the Commission. On November 29, 2022, the Commission issued a notice of filing of complaint and assignment. On January 24, 2023, Omni filed a motion to dismiss the complaint. On February 9, 2023, TPG filed a response and a motion to amend the complaint to add Epic. On February 24, 2023, an order was issued allowing the amended complaint and denying the motion to dismiss as moot. On March 24, 2023, Omni and Epic filed a partial motion to dismiss the amended complaint. On April 25, 2023, an order was issued denying the second motion to dismiss. On May 2, 2023, Omni and Epic filed an answer and affirmative defenses.

On May 12, 2023, a scheduling order was issued and the parties began discovery. On August 2, 2023, October 18, 2023, and January 16, 2024, in response to requests from the parties, orders were issued revising the schedule of briefing and other deadlines. On November 3, 2023, and December 14, 2023, orders were issued on motions to compel.

On February 22, 2024, TPG filed a motion to accept the late filing, its brief ("Brief"), proposed findings of fact, Exhibit A analysis of documents supporting invoice charges, Basiri declaration, appendix in seven volumes, and motion for confidential treatment. On March 1, 2024, an order was served granting Complainant's motion to accept its initial filings, which were one week late, and extending the subsequent deadlines.

On March 25, 2024, Respondents filed their opposition brief ("Opposition"), responses to TPG's proposed findings of fact as Exhibit A, proposed findings of fact as Exhibit B, and an appendix including two excel spreadsheets.

On April 9, 2024, TPG filed its reply brief ("Reply"), responses to Respondents' proposed findings of fact, a reply in support of its proposed findings of fact, Comprés and Burd declarations, a revised damages chart, and a revised shipment chart.

On April 30, 2024, Respondents filed a motion requesting leave to file a sur-reply with the proposed sur-reply ("Sur-reply") attached and requested leave to submit supplemental documents. On May 15, 2024, an order to supplement the record was issued, denying without prejudice TPG's motion for confidential treatment and granting Respondents' request to file a sur-reply and supplemental documents. On May 20, 2024, TPG filed a petition for reconsideration of the sur-reply portion of the order.

On May 30, 2024, the parties filed a renewed motion for confidential treatment of certain specific documents ("Joint Confidential Treatment Motion") and Respondents submitted their supplemental exhibits. On June 10, 2024, an order was issued granting the petition for reconsideration, granting leave to Respondents to file the sur-reply and supplemental exhibits, and granting leave to TPG to file a response to the sur-reply and supplemental exhibits. On July 3, 2024, TPG filed a response to the sur-reply ("Sur-reply Response").

On July 26, 2024, in response to emailed requests from this office on July 12 and 19, 2024, TPG filed corrected exhibits properly marking confidential material, specifically in volumes IV and V of its appendix, and confirming that the other volumes could be made public.

C. Arguments of the Parties

TPG asserts that: the Commission has jurisdiction because Epic and Omni acted as NVOCCs; Epic and Omni violated Shipping Act section 41102(c) because they failed to observe just and reasonable billing practices; Epic's and Omni's actions and billing practices violated the OSRA Shipping Act sections 41104(a)(14), (15); and TPG properly substantiated its damages. Brief at 3-31; Reply at 8-40. In its sur-reply response, TPG asserts that TPG's damages theory remains consistent and Respondents have failed to rebut it; Respondents' supplemental evidence does not establish that they adhered to just and reasonable practices; and Respondents improperly invoiced TPG $584,837.29. Sur-reply Response at 5-8.

Respondents contend that: TPG has the burden of proof for each of its claims and must prove its damages with reasonable certainty; Respondents did not violate section 41102(c) because Respondents' practices were reasonable and in accordance with industry standards; and Respondents are not liable under OSRA-22 because they merely passed through charges from ocean common carriers and Respondents are not otherwise responsible for the charges. Opposition at 3-35. In their sur-reply, Respondents contend that TPG submitted new evidence and raised new arguments about certain evidence that TPG did not raise in its opening brief; TPG quietly advances a new theory as to its damages that was not set forth in its opening brief; and TPG continues to claim damages for amounts that Respondents charged but which TPG has not paid. Sur-reply at 3-8.

D. Evidence

Under the Administrative Procedure Act, an administrative law judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 98-102 (1981). This initial decision is based on the pleadings, exhibits, briefs, proposed findings of fact, and replies thereto filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations in the complaint or defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent that individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

Specific findings of fact are covered next, in part two, prior to the analysis and conclusions of law in part three, and the order in part four.

II. FINDINGS OF FACT ("FOF")

A. Relevant Entities

1. TPG

1. TPG is a corporation organized under the laws of the State of Texas with a principal place of business at 1003 Macarthur Blvd, Grand Prairie, TX 75050. TPG's Basiri Decl. ¶ 2.

2. Bezad Basiri is the General Manager-FRP Products of TPG. TPG's Basiri Decl. ¶ 1.

3. TPG is a supplier and installation contractor of concrete, steel, fiberglass, and polymer pipes and structures used for drainage, sanitary, pressure, and trenchless applications. Products used by TPG are imported from outside the United States, including from such countries as Turkey, Colombia, and others. TPG's Basiri Decl. ¶ 3.

2. Epic

4. Epic was and is a limited liability company organized under the laws of the State of Wyoming, with a mailing address at 3200 Olympus Blvd., Suite 300, Dallas, Texas 75019. CApp 10997.

5. Epic was started in 2011 by John Moran, CEO; Robert Reis, COO; and Yohanse Manzanarez, Executive Vice President of Sales. CApp 10213; CApp 10294.

6. Epic was a licensed NVOCC, with license number 027656NF, from on or about June 14, 2019, until March 10, 2023. Epic Freight Solutions LLC FMC Tariff No. 001 ("Epic's Tariff"), CApp 10749-893; CApp 10997; Answer ¶¶ 5, 16.

7. Epic's tariff was published and available to the public for a fee. Response to TPG Proposed Finding of Fact ("Resp/TPG PFF") ¶ 5; CApp 10749-893.

8. Epic was also licensed as an ocean freight forwarder at all relevant times. Resp/TPG PFF ¶ 6.

9. The logo on the top left of Epic's website includes a vessel among other forms of transportation. Resp/TPG PFF ¶ 7; *see e.g.*, CApp 10518.

10. Epic's email signatures contained language stating:

> Congestion in all the major ports (air and ocean) in North America has caused delays, diminished capacity, additional fees, surcharges including the standard per diem, demurrage, chassis, chassis splits, pre-pulls and weekend pickups/deliveries, and storage. As always Epic Freight Solutions will be very transparent throughout the entire process. We will communicate and address the situations as they arise. We will stand by our quote however cannot be responsible for the aforementioned accessorials as they simply cannot be anticipated. We appreciate your support during this latest wave of congestion as the world begins to open up businesses, that all call on North American ports.

CApp 10557.

11. Epic's terms and conditions provided that the customer shall "be jointly and severally liable to [Epic] for payment of all freight, demurrage, detention and charges." RApp 356 (Section 12(e)).

12. Epic's terms and conditions further grant Epic "a general and continuing lien . . . on any property of the customer . . . coming into Epic's actual or constructive possession . . . as to any unpaid charges." RApp 356 (Section 13(a)).

13. Epic's tariff states that Epic "shall have a lien on any and all property (and documents relating thereto of Merchant in its actual or constructive possession, custody or control or en route, for all claims for charges, expenses or advances incurred by Carrier in

connection with this shipment, or any previous shipment, of Merchant, or both, which lien shall survive delivery." CApp 10842-43 (Item 23).

14. Epic's tariff provides that "Tolls, Wharfage, Cost of Landing, and all other expenses beyond the port or terminal area are for account of the Owner, Shipper or Consignee of the cargo and all such expenses levied in the first instance against the Carrier will be billed in an equal amount to the Owner, Shipper, or Consignee of the Cargo." CApp 10786.

15. Epic's tariff provides that "at shipper's request, carrier will arrange for inland transportation as shipper's agent. All associated costs will be for the account of the cargo." CApp 10786.

16. Epic's tariff provides that: "Carrier does not own or lease equipment. When equipment is provided to shippers and/or consignees by Vessel Operating Common Carriers (VOCC), the VOCC, either directly or via the carrier, provisions as published by the VOCC in its FMC tariff, including detention charges, will be for the account of the cargo." CApp 10861.

17. Epic's tariff provides that: "Carrier does not operate terminals at origin or destination. Except as otherwise provided in tariff rate items, all shipments will be subject to the origin and destination terminal charges assessed by the underlying ocean carrier, including demurrage charges, whose vessel will be clearly identified on bills of lading." CApp 10863.

18. At the time Epic was retained to ship TPG's cargo subject to this action, Epic maintained a public website where it advertised its shipping and freight services as "all in," "door-to-door," and "door-to-port" for "international shipping needs." CApp 10518-20.

3. Omni

19. Omni was and is a limited liability company organized under the laws of the State of Delaware with its current mailing address at 3200 Olympus Blvd., Suite 300, Dallas, Texas 75019. Resp/TPG PFF ¶ 10; CApp 10997.

20. Omni was licensed as an NVOCC with license No. 18469 from at least June 14, 2019, until at least the date of the Notice of Filing of this action on November 29, 2022. Resp/TPG PFF ¶ 11; CApp 10720-48; CApp 10997.

21. Omni is also licensed as an ocean freight forwarder. Resp/TPG PFF ¶ 13; CApp 10513.

22. Omni's tariff was published and available to the public for a fee. Resp/TPG PFF ¶ 12; CApp 10720-48.

23. Omni maintained a public website where it advertised its shipping and freight services as "Door-to-Port / Port-to-Door Services," including "ocean freight" and "overseas shipping" for international shipping needs. CApp 10512-17.

24. Omni's website stated, in part:

> **Ocean freight experience you can trust.**
>
> Omni has the kind of ocean freight experience that you expect from a leader. We are an experienced ***Non Vessel Operating Common Carrier (NVOCC)*** for all major international carriers. Through our global network of experienced professionals and discounted contract pricing, we provide an integrated solution of ***ocean freight services***. As an ocean freight forwarder, Omni assigns cargo, arranges pickup and delivery locations and streamlines document management to guarantee the uninterrupted flow of goods.
>
> **Ocean freight transportation that does it all.**
>
> We offer a multitude of ocean freight transportation options, all designed and customized to fit your company's needs.
>
> - Full Container Load Service (FCL)
> - Less than Container Load Service (LCL)
> - Multimodal Solutions
> - Discounted Pricing Structures
> - Fragile and / or Oversized Equipment Moves
> - Specialized Container Services (e.g., Flat Rack, OOG, etc.)
> - Project Cargo (Oversized/Non-Containerized)
> - Customized Consolidation Programs
> - Dangerous Goods Transportation
> - **Door-to-Port / Port-to-Door Services**

CApp 10512-13 (bold in original).

25. Omni published its terms and conditions on its website on its own behalf and on behalf of its subsidiaries. CApp 10522-39 (Omni's BusinessTerms, ¶ 1 Definitions (B) "'Company' shall mean Omni Logistics, LLC, its subsidiaries, affiliates, related companies, agents and/or representatives").

4. TPG's Relationship with Epic

26. TPG began working with Epic around 2015 or 2016. Resp/TPG PFF ¶ 19; CApp 10220.

27. Epic arranged for ocean transportation services, drayage, domestic motor carrier services, and customs clearance services for TPG. TPG Response to Respondents' PFF ("TPG Resp/RPFF") ¶ 1.

28. TPG would email Epic requesting a quote for a particular construction project, specifying the estimated number of containers, origin, and destination, and Epic would respond with the freight cost, pre pull cost, chassis cost and minimum days, handling fee, ISF charge, customs clearance charge, and wait time rate, as well as the terms (for example, door to door). TPG's Basiri Decl. ¶ 9; *see also, e.g.*, CApp 10122-200.

29. TPG requested supporting information about each charge; it was "a very detailed and at times complicated account," requiring proof of delivery, in gate and out gate tickets, demurrage receipts, and customs entry summary. CApp 10687; CApp 10306-07; CApp 10669.

30. The information TPG required needed to be input manually. CApp 10689 ("every part of this account and all tasks are manual making it easy for mistakes to occur and tasks become very time consuming.").

31. TPG's General Manager, Mr. Basiri, wanted "enough supportive documents and a story or explanation to tell me why this -- these charges were assessed." CApp 10404.

> Tell me the story of what happened. Did your truck driver have an accident? Did he get sick? Did he get arrested for something? You know, what happened? Why did -- why did we have seven days of charge? And they -- they would always say something like, we -- we can't get appointment to take it back or there's congestion. There's shortage of chassises [sic]. I mean, there – there's some broad generic response. I never received any proper response.

CApp 10405.

32. Mr. Manzanarez testified about Thompson Pipe (TPG) that he had "not had a customer before or since that has required the – the documentation that Thompson Pipe has required" and stated in a January 6, 2022, email that "Historically, we have had a great partnership with Thompson Pipe. They require several pieces of documentation on delivery. This is needed for audit purchases. Unfortunately, we, our team, has not managed this process well this year." CApp 10222.

33. Epic would provide a written quote via email and most quotes provided by Epic included language indicating that all shipments were subject to Epic's Terms and Conditions. *See, e.g.*, CApp 10186; *but see* CApp 10143.

34. Epic's services to TPG were generally provided on a door-to-door basis. CApp 10301; *see also*, *e.g.*, CApp 10122-200; TPG's Basiri Decl. ¶ 14.

35. Respondents paid third-party service providers—including NVOCCs, VOCCs, customs house brokers, motor carriers, and railroads—out of pocket for the transportation of TPG's freight from abroad—generally, Colombia or Turkey—to a port within the United States or Canada and, ultimately, a final destination in the United States at TPG's customers' job sites. CApp 10319; CApp 10323.

36. Respondents received invoices for ocean freight from their international agents and prepaid such agents for ocean freight on TPG's behalf. CApp 10323.

37. Once Respondents took control of the cargo, TPG did not have control of its cargo or the way in which it was going to be transported; Respondents handled everything, and the charges assessed by third parties, including steamship lines, were passed to TPG. CApp 10299; CApp 10319.

38. Epic was listed as consignee, notify party, or entity to contact for delivery on draft bills of lading and on arrival notices. CApp 10300-01.

39. TPG was listed as both consignee and notify party on some arrival notices, and Epic's Colombian agent was listed as shipper on some arrival notices. *See* RApp 141; RApp 280-285. Omni was identified as a "destination agent" on some bills of lading later in the parties' relationship. *See, e.g.*, CApp 1451; CApp 1460.

40. Respondents received compensation only from TPG, not from carriers or other parties. CApp 10980-95; CApp 10904-18.

41. On April 13, 2022, in trying to sort out the delivery order for a container, Omni sent an email stating that "Epic is the broker." RApp 321; *see also* RApp 327 ("Epic Freight Solutions had the clearance release on 9/2[/2021].").

42. Throughout the entirety of TPG's relationship with Respondents, all shipments arrived at their final destinations. CApp 10397.

5. Epic's Relationship with Omni

43. On April 2, 2021, Omni purchased Epic and Epic became Omni's wholly owned subsidiary. CApp 10212; CApp 10895-903; Answer ¶ 14 (admitted); CApp 10996-11007.

44. Epic's Terms and Conditions continued to be incorporated into Epic's quotes to TPG after April 2, 2021. *See, e.g.* CApp 10142; CApp 10158; CApp 10170.

45. Under the April 2, 2021, operating agreement, Epic remained a separate business entity. CApp 10895-10903; CApp 10218; RApp 75-76.

46. As part of the Epic acquisition, all Epic Partners were subject to an earn-out provision where a certain gross profit component had to be met by the end of April 2023. The consequence of not meeting this target would be no cash payout, potential job jeopardy, and "not fulfilling our obligation." CApp 10217.

47. The earn-out agreement included a requirement that Epic "had to operate as an entity without additional resources, and hit those earn-out numbers." CApp 10218.

48. The earn-out agreement impacted compensation; however, the acquisition would have continued if the earn-out goal was not reached. CApp 10217.

49. Some key Epic employees, including David Ikemoto, John Moran, and Yohanse Manzanarez, became Omni employees as of April 2021. CApp 10213-14; CApp 10217; CApp 10292; CApp 10169-10171.

50. In general, there were no changes in the decision-making hierarchy at Epic pre- and post-acquisition. CApp 10218.

51. There "was no co-mingling for support on the account with issues from anybody at Legacy OMNI," rather the Epic and former Epic employees would resolve issues in their accounts. CApp 10326.

52. There is no evidence of any overlap in the clients served by Epic and Omni. "Epic had its own clients and Omni had its own clients." CApp 10218.

53. Before "the transition and merger, Epic had used an outside firm to do accounting and collections. And as part of the transition and the merger, that firm was let go, and Epic started to rely on Omni's accounting and collection team." CApp 10217-18; CApp 10306.

54. Respondents assert that in early 2022, Omni began providing back-office accounting support to Epic. CApp 10320. However, the record includes invoices requesting that payment be remitted to Omni as early as December 11, 2020. CApp 1.

55. At about the time of the acquisition, Epic's invoices started listing payment directions to Omni. TPG's Basiri Decl. ¶ 7.

56. By at least June 16, 2021, Epic's emails contained a footer noting Epic was partnering with Omni "[a]s a wholly owned subsidiary." *See, e.g.*, CApp 11017.

57. Some emailed quotes to TPG were signed by former Epic employees who listed Omni in their signature block and as part of their email address. However, the shipping quote in the text of the email states: "All shipments are subject to Epic Freight's Terms and Conditions" and "Epic Freight Solutions liability is not responsible for consequential damages." *See, e.g.*, CApp 10169-70.

58. Hapag-Lloyd invoices were addressed to Epic until approximately May of 2022. *See, e.g.*, CApp 3934-39; CApp 3943; CApp 3954; CApp 4673; *but see* CApp 3385-90, CApp 4534 (Omni (May 12, 2022)).

59. Around June or July of 2022, Epic employees moved into the Omni facility and began meeting the Omni team. CApp 10316-17.

60. Until April 2023, "[Epic's] structure internally and [its] responsibilities" did not change; "everything was business as usual, and [we] still continued to operate" as Epic. CApp 10218.

61. Epic's employees are now "fully blended with the Legacy Omni team." CApp 10326.

B. Charges and Payments

62. Respondent's rate quotes to TPG typically stated that "All shipments are subject to Epic Freight's Terms and Conditions" and included:

- Freight cost: variable
- Pre Pull: $125

- Chassis: $45/day - 2 Day Min
- Handling: $45
- ISF: $35
- Customs Clearance: $105
- Wait time: $95/hr (1 hr free)

See, e.g.: CApp 10126-29; RApp 262.

63. Respondents were required to pay demurrage to ocean carriers and terminals using programs such as PayCargo or CargoSprint via credit card. TPG Resp/RPFF ¶ 96; CApp 10307; CApp 10319; RApp 175.

64. On February 1, 2021, TPG emailed Respondents, stating:

> I reviewed and approved most of invoices that were sitting on my desk. Sorry for processing these late. As you know Jenelle was working with David to get proper back up for all extra chassis and demurrage fees.
>
> While they seem to be excessive and not a TPG issue, given current condition of the ports, I've approved them for payment. ACH will be processed tomorrow.
>
> In future, please make sure you notify us of any additional charges prior to incurring and provide options for us, so we can make an informed decision together as a team.
>
> I also noticed some per diem charges on some of the invoices (see attached). Some are marked up 10% admin fee. We've never had to pay per diem and I don't believe your proposal and T&Cs specify potential per diem charges. . . . I'm holding these for further review. Or if you remove these charges, I can process them all.

CApp 11008 (paragraphs combined).

65. On November 3, 2021, Respondents sent an email with TPG copied stating that "As you know the congestion at the terminal is crazy high right now. But we are doing our best to navigate and get these containers to you." RApp 269.

66. Mr. Manzanarez testified that "COVID was not easy for anybody in transportation," explaining:

> So during this time, there was unprecedented congestion at every major port in -- in America. . . . 140 ships waiting out in the -- the port of Los Angeles. We had 37 miles of backup of railroads in the Chicago area. The entire system was stressed and broken, and there was no communication coming from a majority of our partners in getting -- gathering this information. It became awful hard to get documentation from partners and providers when they were struggling to fulfill their own obligations in transportation. It -- I know you are implying that -- that COVID is a -- is an easy scapegoat. It was -- it was the

> world I operated in, and it was extremely stressful and very challenging to conduct business in that environment. This specific example that you were talking about, not being able to receive invoices, a lot of it alluded to the -- the -- the documentation that we were unable to receive from our partners and compile the information to give him the invoices necessary.

CApp 10232-33.

67. Mr. Manzanarez further testified that: "we're in a tremendous and unprecedented environment with . . . the global shipping" and the "charges and invoicing that happened during COVID were unusual and challenging to -- to manage, and that was the -- that was the challenge. Getting that information from organizations who did not, A, break it down like that, B, were significantly understaffed." CApp 10224-25.

68. On January 26, 2022, Respondents internally discussed raising rates to cover costs, noting that handling is pure profit and that pre-pull and chassis charges cover most of their charges. RApp 261-62.

69. On January 26, 2022, Mr. Manzanarez sent an email to others at Omni stating "I spoke to Bezad. I told him that we would be charging 5% on pass through costs moving forward." RApp 261.

70. On March 15, 2022, TPG emailed Mr. Manzanarez, in part stating that "Why is there a 5% Admin charge on Chassis charges? You [and] I discussed starting to add 5% admin fee for pass through charges. Chassis charges were always a fixed rate." RApp 225.

71. On April 5, 2022, Epic created a "standard operating procedures" ("SOP") document for TPG's shipments. CApp 11015; CApp 10317. The SOP specifically mentioned a 5% administrative fee for pass-through costs, which was implemented in January 2022. CApp 11015; RApp 2-3; RApp15-16; RApp 263; RApp 225.

72. On April 13, 2022, TPG and Respondents received an email from a booking agent in Germany stating that:

> Also, one of the main problems here is, that there was (and still is) a heavy trucker shortage in the USA which can lead to heavy delays in delivery. You probably know from the media, that there were times in which a lot of ships had to wait in front of US ports for several days or even weeks to be unloaded and that containers accumulated in US ports due to lack of capacities, which also lead to a worldwide container shortage. Unfortunately, the carriers do not accept responsibility for any costs emerging from that, such as demurrage and storage. These costs are on account of the cargo (i.e. shipper or consignee).

RApp 320.

73. On May 19, 2022, Respondents told TPG that "Please note that we get hit with an admin fee when we pay the carrier/terminal, it is a minimal amount but when you mix that with

our 5% processing fee, it will lead to the backup demurrage invoice not matching exactly dollar for dollar what our invoice reflects." RApp 175.

74. The credit card receipts typically show critical information, including the container number, steamship line, vessel, voyage, discharge date, FTE date, and payment information. *See, e.g.*, CApp 2565-66.

75. Respondents also provided TPG with proofs of delivery, which "confirm that the actual freight was delivered and signed off by [TPG's customers'] job site." CApp 10306.

76. For the ship canal project, TPG's customer refused to take delivery of five containers for five months leading to substantial storage and chassis charges; however, Respondents successfully negotiated to waive $232,500 in detention charges. RApp 234.

77. Respondents assert that TPG presently owes Respondents $390,336.80. RApp 3 ¶ 21.

C. Coercive Collection Communications

78. On May 17, 2022, Bill Heathcock, Omni's Vice President of North American Operations, emailed TPG, subject "Omni Logistics/TPG Receivables," stating:

> Mr. Basiri, from this point until we conclude our relationship with TPG I will be taking over communications on behalf of Omni Logistics.
>
> A summary in general terms of our present situation:
>
> - Open A/R due Omni is approx. $835K (attached)
> - Delivered freight that has been delivered as instructed and that is actively being invoiced is $845K, invoices will be completed by this Friday May 20th
> - Freight that is "on the water" or otherwise in transit is approx. $480K (this figure could change dramatically depending on TPG)
>
> Approx total above is almost $2.2M of which $1.7 Million has been delivered
>
> No additional freight for TPG will be delivered until Omni receives the $1.7 Million owed for freight handled and delivered, so any additional charges incurred due to delays in your remittance to Omni to conclude our relationship will be TPG's responsibility.
>
> After the $1.7M is received, we will deliver the remaining 81 containers or so as they arrive on a "cash" basis paid and received in advance.
>
> Suggest wire transfers to expedite the process, and can provide the necessary information if your Accounting department does not possess this already.

CApp 10705; CApp 10227.

79. On May 18, 2022, TPG responded to Respondents, stating:

> If it is Omni's position to hold TPG's freight hostage - TPG will immediately re-produce the products being shipped and have them delivered by another party to replace ALL pipe that you have indicated "no additional freight for TPG will be delivered until Omni receives the $1.7 Million".
>
> TPG highly recommends that Omni retracts its position and provide TPG, immediately, an abundance of assurance that it will deliver the balance of freight due from Omni as soon as possible. Omni's position of holding TPG's freight hostage will only compound the problems Omni has already created with TPG and its clients. While it is unfortunate that Omni has taken an unnecessarily aggressive and defensive tone because TPG questioned Omni's efforts with regard to our account, TPG remains hopeful to an amicable settlement of our differences. To that end TPG requests a meeting with you and TPG executives at our Grand Prairie offices. As time is of the essence, we are available anytime tomorrow May 19th, 2022.
>
> Resolution to matter must be clear by 3:00pm CST tomorrow, otherwise TPG will consider Omni's failure to abide by its obligations to be made in bad faith and TPG will hold Omni accountable for any ***<u>and all</u>*** extended costs and damages, such as, re-manufacturing the product, additional shipping cost (by 3rd party), liquidated damages, etc. that TPG becomes subject to as result of Omni's inaction.
>
> ***<u>TPG is hopeful to resolve matter before it Escalades [sic] any further.</u>***
>
> Please let us know your availability and who will attend.

CApp 10704.

80. Respondents emailed TPG on May 18, 2022, stating:

> It's a simple issue to remedy, pay what you owe us, we are not a bank, we are a transportation company, and you have far exceeded any reasonable credit limits.
>
> Attached is an updated A/R statement which is now up to $1,068,707 and climbing, attached is also an update on current status of active and delivered containers and remittance/wire instructions.
>
> We wish no other end than to collect monies due and conclude existing transactions - the end result is entirely in your hands, pay us what you owe us for services rendered, and all will flow smoothly.
>
> I have 30 minutes for a call... it will not change our stance, every day you delay payment is incurring more unnecessary charges which Omni will not pay.

CApp 10703-4.

81. On May 19, 2022, TPG emailed Respondents stating:

> Thank you for taking my call. I'm hopeful we can resolve this by tomorrow. TPG's first payment in the amount owed of $228,536.76, can be made as early as tomorrow. This will bring our account current. We have missed the deadline for any wire transfer today. All other invoices for the services performed would be paid in accordance with our course of dealing of 30 days. Your accounting department can work with my team to ensure we have agreed dates for when payment will be due.
>
> All payments shall be contingent on Omni providing written assurances that it will continue processing our shipments and deliver the cargo without delay or disruption by Omni, and that Omni abides by its assurances to perform. We understand that congestion may affect deliveries to and from the port and our expectation is that Omni will act reasonably and efficiently when performing its obligations.
>
> Please note we are still missing required documentation for some of the invoices (see attached list) and in reviewing our records, we do not show receipt of invoice LGB1545214-00. Please forward those documents to me for review and approval. If those documents have been previously emailed, please send me copies of those prior emails so that I may make any correction on my side to ensure such lapses are corrected.
>
> Feel free to reach out to me, if you have any questions.

CApp 10701; *see also* CApp 10227-28.

82. During this timeframe, three containers had arrived but had not yet been delivered by Respondents. The bill of lading for the three withheld containers is BGA0324110. CApp 6611.

83. APM Terminals charged $4,700 in demurrage for each of these three containers, paid through May 10, 2022. CApp 6611.

84. The first container, CMAU4830227, was picked up by Mecca Trucking on May 10, 2022, delivered on May 27, 2022, and the empty container returned on June 1, 2022. CApp 3559-61; RApp 181.

85. For the first container CMAU4830227, Respondents billed TPG $1,265 in chassis fees, $4,947.36 in demurrage charges, and $765 in storage for total invoice charges of $6,977.36. CApp 3557.

86. The second container, CMAU4265316, was picked up by Mecca Trucking and delivered on May 27, 2022. CApp 6427; CApp 6611.

87. For the second container CMAU4265316, Respondents billed TPG $1,265 in chassis fees for 23 days, $4,947.37 in demurrage charges, and $765 in yard storage for 17 days for total invoice charges of $6,977.37. CApp 6427.

88. The third container, DRYU9980059, was picked up by Mecca Trucking on May 10, 2022, and delivered on May 27, 2022. CApp 3554; CApp 6611; RApp 179-81.

89. For the third container DRYU9980059, Respondents billed TPG $1,265 in chassis fees, $4,947.37 in demurrage charges, and $765 in storage for total invoice charges of $6,977.37. RApp 179.

90. The total amount invoiced by Respondents to TPG for these three withheld containers was $20,932.10. CApp 3557; CApp 6427; RApp 179.

D. Improper Markups Chart

91. Respondents submitted an excel shipment chart and damages chart with their initial brief and then a revised shipment chart and revised damages chart with their reply brief with the same Bates numbers. CApp 11020 (shipment); CApp 11019 (damages).

92. "Demurrage claims for shipments to Nova Scotia, Canada with further transport to Chicago, IL by rail are excluded from the computation" in the revised damages chart. TPG Reply, Burd Declaration ¶ 6; TPG Resp/RPFF ¶¶ 59-64.

93. In its revised damages chart, TPG also removed claims for damages due to the ship canal project, where the customer refused to take delivery of five containers for five months. TPG Reply, Burd Declaration ¶ 6; TPG Resp/RPFF ¶¶ 65-88.

94. TPG's revised damages chart, demurrage sheet shows that for invoice 7217739 00, TPG was invoiced $59,789.47 for 18 containers, while the receipts show APM Terminals charged $56,800. CApp 11019; CApp 6424-26. The markup is the difference of $2,989.47.

95. Different invoices may refer to the same container. For example, invoices 7203111 00 and 7203111 01, both of which are included in TPG's revised damages chart, both pertain to container HLBU3359426 and show that the demurrage charge of $682.50 was refunded in full. CApp 4172; CApp 5008. When the record shows that there was no improper markup by Respondents, as here, the container and invoices are not included in the improper markups chart.

96. Even when credit card fees were shown on credit card receipts, Respondents often invoiced TPG a higher amount. For example, for container BEAU6227719, the Maher Terminals receipt shows $5,008 paid plus a "Credit Card Processing Fee" of $199.82 for a total of $5,207.82; however, Respondents invoiced TPG $5,468.21 in demurrage for this container. CApp 8294; CApp 7469. The markup is the invoiced amount of $5,468.21 minus the demurrage paid of $5,207.82, which equals a markup of $260.39.

97. Similarly, for container CSNU6785143, the Maher Terminals receipt shows $858 plus a $34.23 "Credit Card Processing Fee" for a total of $892.23 plus Mecca Trucking demurrage charge of $382.68 plus $30 "Admin Fee" for a total of $412.68; however, Respondents invoiced TPG demurrage of $1,650.84 plus demurrage of $412.68. CApp 8011, 9109, 9965, 9968. Therefore, the markup is the invoiced amount of $2,063.52 minus the demurrage paid of $1,304.91, which equals a markup of $758.61.

98. The improper markups chart below shows the (A) container number, (B) demurrage invoiced by Respondents to TPG, (C) demurrage paid by Respondents to third parties, (D) markup, (E) TPG invoice number, and (F) citations to the evidence.

99. The markup is calculated by taking the demurrage invoiced by Respondents to TPG minus the demurrage paid by Respondents to third parties (columns B – C = D). The amounts in column D are then added to calculate the improper markup of $86,722.10.

100. Only invoices listed in TPG's revised damages chart were considered in compiling the improper markups chart as those were the charges for which TPG requested reparations. CApp 11019 (revised).

101. For the twenty-one containers where there was no evidence cited to by either party reliably showing the amount paid by Respondents for the relevant container, the markup is calculated as the total amount invoiced to TPG. *See, e.g.*, CApp 6003-4 (container CMAU7895089).

102. The improper markups chart identifies and calculates the improper markups that were established by the evidence submitted and cited by the parties:

Container Number	*Demurrage Invoiced to TPG*	*Demurrage Paid by Respondents*	*Markup*	*TPG Invoice Number*	*Cite*
TCNU6161224	$325.50	$0.00	$325.50	7203093 00	CApp 4650
HLXU6589482	$546.00	$390.00	$156.00	7203102 00	CApp 4159; RApp 382
UASU1052116	$546.00	$520.00	$26.00	7203104 00	CApp 4162; RApp 390
HLBU1567415	$546.00	$520.00	$26.00	7203105 00	CApp 5552; RApp 393
UETU5817572	$1,060.50	$1,010.00	$50.50	7203107 00	CApp 5555; RApp 398
HLBU2073818	$955.50	$0.00	$955.50	7203113 00	CApp 4653
TEMU7560743	$672.00	$640.00	$32.00	7203114 01	CApp 3491; CApp 3498
TGHU8918221	$672.00	$640.00	$32.00	7203115 01	CApp 3499; CApp 3498
TCLU8216822	$682.50	$650.00	$32.50	7203118 00	CApp 5775; RApp 425
FFAU3390796	$2,063.62	$1,985.00	$78.62	7203132 00, 7203132 01	CApp 3725; CApp 9955; CApp 3727; CApp 3732; CApp 9963
CSNU6785143	$2,063.52	$1,304.91	$758.61	7203133 00, 7203133 01	CApp 8011; CApp 9109; CApp 9965; CApp 9968
CSLU6309509	$1,650.94	$858.00	$792.94	7203134 00	CApp 7710; CApp 5032

TRHU5455660	$1,650.94	$1,572.32	$78.62	7203135 00	CApp 3887; RApp 439; RApp 440
TRHU7261535	$1,650.94	$1,572.32	$78.62	7203138 00	CApp 4053; CApp 4055; CApp 4056
BEAU5769741	$1,963.00	$858.00	$1,105.00	7203139 00	CApp 5561; CApp 5032
BEAU5787909	$2,090.24	$1,572.32	$517.92	7203140 00	CApp 5562-63; RApp 460-1
TGBU8721729	$1,650.94	$858.00	$792.94	7203141 00	CApp 5565; CApp 5032
FSCU7267786	$1,616.00	$858.00	$758.00	7203219 00	CApp 5568; CApp 5032
TRHU5347856	$5,468.21	$0.00	$5,468.21	7203220 00	CApp 5812
BEAU6227719	$5,468.21	$5,207.82	$260.39	7203222 00	CApp 7469; CApp 8294
OOCU8978862	$5,468.21	$5,207.82	$260.39	7203224 00	CApp 5814; CApp 5823
TCNU5013500	$5,468.21	$5,207.82	$260.39	7203225 00	CApp 3895; CApp 3899
TRHU7270917	$5,468.21	$0.00	$5,468.21	7203227 00	CApp 4210
BEAU5766085	$5,468.17	$5,207.82	$260.35	7203228 00	CApp 3900; CApp 3902
CSNU6601457	$5,468.21	$0.00	$5,468.21	7203229 00	CApp 5827
DFSU7463187	$5,467.35	$5,207.82	$259.53	7203230 00	CApp 5034; CApp 5042
CSNU7886415	$5,468.21	$5,207.82	$260.39	7203231 00	CApp 4663; CApp 4665
TGBU4774090	$5,468.21	$5,207.82	$260.39	7203232 00	CApp 6942; CApp 7962
GCXU5367877	$4,331.25	$4,125.00	$206.25	7203243 00, 7203243 01	CApp 5149; CApp 4998; CApp 3905
CMAU6927875	$4,567.50	$4,125.00	$442.50	7203244 00	CApp 5043; CApp 3905
CMAU6828996	$4,567.50	$4,350.00	$217.50	7203245 00	CApp 3295; CApp 4761
SEKU5605343	$4,961.25	$4,800.00	$161.25	7203246 00	CApp 3296; CApp 4761
BEAU6100339	$4,567.50	$4,350.00	$217.50	7203247 00	CApp 3293; CApp 5160
BEAU6256110	$4,567.50	$4,350.00	$217.50	7203248 00	CApp 3300; CApp 4761
TRHU7860451	$5,276.25	$5,025.00	$251.25	7203249 00	CApp 3917; CApp 4761
FFAU4263522	$4,331.25	$4,125.00	$206.25	7203250 00	CApp 3298; CApp 4761
CAAU5027430	$5,040.00	$4,800.00	$240.00	7203254 00	CApp 3297; CApp 4761
TRHU8260718	$5,276.25	$5,025.00	$251.25	7203255 00	CApp 4760; CApp 5115
BSIU8068597	$5,040.00	$4,800.00	$240.00	7203256 00	CApp 5050; CApp 3905
HLXU8270405	$2,916.38	$2,810.00	$106.38	7203381 00	CApp 5055; CApp 3934; CApp 3937; CApp 3943
UACU5373513	$2,194.50	$2,090.00	$104.50	7203384 00	CApp 3932; CApp 3934; CApp 3937; CApp 3943
UACU5985566	$871.50	$830.00	$41.50	7203385 00	CApp 4672; CApp 4477
UACU5522849	$3,202.50	$2,270.00	$932.50	7203386 00	CApp 3949; CApp 3934; CApp 3937; CApp 3943
TCLU5095476	$409.50	$390.00	$19.50	7203389 00	CApp 3967; CApp 3943
AMFU8822403	$1,627.50	$1,550.00	$77.50	7203393 00	CApp 5165; CApp 4477
HLBU1290315	$1,161.50	$1,010.00	$151.50	7203394 00	CApp 4677; CApp 4477-80
BMOU4426700	$1,816.50	$1,730.00	$86.50	7203395 00	CApp 4816; CApp 4477-78
DFSU7048925	$304.50	$160.00	$144.50	7203397 00	CApp 4827-28; CApp 4829
HLBU3326715	$546.00	$520.00	$26.00	7203398 00	CApp 4469; CApp 4470

FCIU7469643	$871.50	$830.00	$41.50	7203399 00	CApp 4476; CApp 4678
Not on invoice	$1,097.25	$0.00	$1,097.25	7203601 00	CApp 5792
ONEU0280464	$420.00	$0.00	$420.00	7203603 00	CApp 5178
APHU7297242	$315.00	$300.00	$15.00	7204002 00	CApp 5123; CApp 5130-31
TRHU8556187	$2,100.00	$2,000.00	$100.00	7204003 00	CApp 6040; CApp 4842-43
BEAU6082512	$2,402.90	$2,000.00	$402.90	7204004 00	CApp 4395; CApp 4842-43
TLLU7764959	$2,402.40	$2,000.00	$402.40	7204005 00	CApp 4400; CApp 4842
BEAU4118961	$2,100.00	$2,000.00	$100.00	7204006 00	CApp 4838; CApp 4842-43
BMOU6071003	$2,100.00	$2,000.00	$100.00	7204007 00	CApp 4844; CApp 4842-43
SEGU4745156	$2,100.00	$2,000.00	$100.00	7204012 00	CApp 4183; CApp 4842-43
TGBU6810452	$2,100.00	$2,000.00	$100.00	7204015 00	CApp 4848; CApp 4842-43
BHCU5024009	$2,100.00	$2,000.00	$100.00	7204018 00	CApp 4853; CApp 4842-43
CSNU7421969	$535.00	$500.00	$35.00	7204071 01	CApp 4235; CApp 4266
CSNU8495694	$660.00	$625.00	$35.00	7204072 01	CApp 4241; CApp 4266
FFAU3560491	$535.00	$500.00	$35.00	7204076 01	CApp 3830; CApp 4266
FSCU8591660	$660.00	$625.00	$35.00	7204077 01	CApp 4247; CApp 4266
CSNU6030131	$660.00	$625.00	$35.00	7204078 01	CApp 4252; CApp 4266
TRHU4378071	$410.00	$375.00	$35.00	7204082 01	CApp 4256; CApp 4266
OOCU8283736	$660.00	$625.00	$35.00	7204083 01	CApp 4261; CApp 4266
TRHU4446031	$410.00	$375.00	$35.00	7204084 01	CApp 3835; CApp 4266
BSIU9546094	$305.55	$300.00	$5.55	7204088 00	CApp 4219; CApp 5130-31
FFAU3996905	$105.00	$100.00	$5.00	7204089 00	CApp 8286; CApp 5131
TLLU5008280	$326.55	$100.00	$226.55	7204179 00	CApp 4223; CApp 5131
APHU7024227	$210.00	$200.00	$10.00	7204181 00	CApp 5199; CApp 5130
CSNU6521876	$525.00	$500.00	$25.00	7204903 00	CApp 4864; CApp 4870
Not on invoice	$735.00	$0.00	$735.00	7204907 01	CApp 4871
TGHU6652106	$735.00	$700.00	$35.00	7204910 00	CApp 4879; CApp 4870
OOLU 9209663	$525.00	$500.00	$25.00	7204911 00	CApp 4885; RApp 698; RApp 695-96
TGBU4912199	$2,633.65	$2,508.24	$125.41	7204937 00	CApp 4893; CApp 4899
CMAU5640427	$105.00	$0.00	$105.00	7205135 00	CApp 4231
TCNU5037055	$105.00	$100.00	$5.00	7205142 00	CApp 5138; CApp 5142
TLLU4292191	$105.00	$100.00	$5.00	7205685 00	CApp 5069; CApp 5131
TCNU3505291	$15,504.91	$14,766.58	$738.33	7205689 00	CApp 3507; CApp 3510
TCNU3605984	$655.14	$623.94	$31.20	7209510 00	CApp 4120; RApp 761
CSNU6248057	$105.00	$100.00	$5.00	7209832 00	CApp 3700; RApp 769
CMAU5798794	$656.78	$623.94	$32.84	7210043 00	CApp 3848; CApp 8921
CMAU7461396	$1,263.15	$1,200.00	$63.15	7210609 00	CApp 3853; CApp 3854
TRHU5885300	$1,282.98	$0.00	$1,282.98	7210826 01, 7210830 01	CApp 3514; CApp 3517
CMAU4728405	$1,196.63	$200.00	$996.63	7210839 00, 7210839 01	CApp 7282; CApp 3519; CApp 7284
Not on invoice	$524.04	$0.00	$524.04	7210840 01	CApp 3522

CMAU5880372	$420.00	$400.00	$20.00	7210843 00	CApp 4507-09
Not on invoice	$524.04	$0.00	$524.04	7210843 01	CApp 3524
Not on invoice	$758.94	$0.00	$758.94	7210850 01	CApp 3527
SEGU5315988	$210.00	$200.00	$10.00	7210852 00	CApp 5429; CApp 5433
CMAU6647560	$655.14	$623.94	$31.20	7210929 00	CApp 8965-66; CApp 5441
CMAU7631764	$655.14	$623.94	$31.20	7210930 00	CApp 3718; CApp 3721
TCNU6497230	$11,137.33	$10,606.98	$530.35	7210935 00	CApp 4513; CApp 4517-18
CMAU4503435	$11,137.33	$10,606.98	$530.35	7210937 00	CApp 8866; CApp 4527-28
TCLU5749812	$157.50	$150.00	$7.50	7210950 00	CApp 7254; RApp 914
Not on invoice	$610.53	$0.00	$610.53	7210958 00	CApp 6177
TCNU582639	$315.00	$300.00	$15.00	7211369 00	CApp 4564; RApp 1044
BEAU4020933	$2,105.26	$2,000.00	$105.26	7211527 00	CApp 3630; CApp 3400
FCIU9205681	$1,578.94	$1,500.00	$78.94	7211584 00	CApp 3634; CApp 3640
TCNU7501313	$1,263.15	$1,200.00	$63.15	7211743 00	CApp 3859; CApp 3854
Not on invoice	$1,263.15	$0.00	$1,263.15	7211745 00	CApp 3863
SEKU5488632	$656.78	$623.94	$32.84	7211789 00	CApp 3651; CApp 9398
CSNU7465653	$5,469.26	$5,207.82	$261.44	7212031 00	CApp 5447; RApp 988
SEKU6018865	$1,747.03	$1,663.84	$83.19	7212040 00	CApp 3372; CApp 3376
CAIU9216570	$3,800.00	$500.00	$3,300.00	7212049 00, 7212049 01	CApp 3653; CApp 3530; CApp 3435
APHU6774762	$2,526.32	$100.00	$2,426.32	7212057 00, 7212057 01	CApp 3536; CApp 3438-39
TCLU6596256	$948.69	$500.00	$448.69	7212063 00, 7212063 01, 7212063 02	CApp 3442; CApp 3434; CApp 3540; RApp 360
BEAU4117604	$3,684.21	$1,500.00	$2,184.21	7212064 00	CApp 3446; CApp 3447-38
TCLU8158650	$2,747.36	$500.00	$2,247.36	7212067 00, 7212067 01	CApp 3451; CApp 3544; CApp 3435
SEGU5340147	$525.00	$500.00	$25.00	7212068 00	CApp 3455; CApp 5848
CMAU6430003	$2,526.32	$2,400.00	$126.32	7212114 00	CApp 6604; CApp 6607-08
BEAU4103914	$656.78	$623.94	$32.84	7212624 00	CApp 3460; CApp 8681
CMAU6332100	$656.78	$623.94	$32.84	7212625 00	CApp 3463; CApp 3465
BMOU6093070	$656.78	$623.94	$32.84	7212627 00	CApp 3467; CApp 3469
TEMU7577725	$656.78	$623.94	$32.84	7212628 00	CApp 3471; CApp 9641
SEGU6306260	$656.78	$623.94	$32.84	7212629 00	CApp 3474; CApp 9390
SEGU4496290	$656.78	$623.94	$32.84	7212632 00	CApp 3476; CApp 9360
SEKU5586198	$3,283.90	$623.94	$2,659.96	7212635 00, 7212647 00	CApp 3478-79; CApp 3485
TLLU5002105	$2,627.12	$2,495.76	$131.36	7212640 00	CApp 3481; CApp 9785-86
TCHU2242903	$2,627.12	$0.00	$2,627.12	7212644 00	CApp 9489
CMAU6861700	$2,627.12	$2,495.76	$131.36	7212654 00	CApp 8980; CApp 8988-89
TCNU8192311	$2,627.12	$2,495.76	$131.36	7212655 00	CApp 3489; CApp 9603-04
TEMU6969125	$2,627.12	$2,495.76	$131.36	7212656 00	CApp 4430; CApp 9629-30

TCLU8955592	$3,065.00	$2,911.72	$153.28	7212657 00	CApp 4432; CApp 4434-35
FSCU8375511	$3,064.96	$2,911.72	$153.24	7212658 00	CApp 4438; CApp 9256-57
TCNU8169899	$2,526.32	$2,400.00	$126.32	7212662 00	CApp 7106; CApp 6527; CApp 6529
TCLU1861085	$4,947.36	$4,700.00	$247.36	7212663 00	CApp 4444; CApp 6611
CMAU4238265	$4,947.37	$4,700.00	$247.37	7212664 00	CApp 4588; CApp 6611
TEMU6102561	$4,947.36	$4,700.00	$247.36	7212665 00	CApp 6609; CApp 6611
CMAU7150347	$4,842.11	$4,600.00	$242.11	7212667 00	CApp 4453-54; CApp 4456
TEMU7613592	$4,842.11	$500.00	$4,342.11	7212668 00	RApp 525-26
Not on invoice	$4,947.36	$0.00	$4,947.36	7212669 00	RApp 527; RApp 177
APHU7033790	$4,315.79	$4,100.00	$215.79	7212671 00	CApp 4459-60
TRHU4770122	$4,947.36	$4,700.00	$247.36	7212672 00	CApp 4461; CApp 6611-12
TEMU6316590	$4,947.36	$4,700.00	$247.36	7212673 00	CApp 4464; CApp 6611
TCNU3223317	$4,947.36	$4,700.00	$247.36	7212674 00	CApp 3975; CApp 6611
CMAU4596926	$4,315.79	$4,100.00	$215.79	7212677 00	CApp 3977; CApp 3978
TGBU6325272	$4,842.11	$4,600.00	$242.11	7212678 00	CApp 3978; CApp 3979-81
CMAU6902780	$5,473.68	$5,200.00	$273.68	7212679 00	CApp 3982; CApp 3978; CApp 3980
CMAU7464815	$5,473.68	$5,200.00	$273.68	7212680 00	CApp 3985; CApp 3978; CApp 3980
TCLU8537817	$5,473.68	$5,200.00	$273.68	7212681 00	CApp 3988; CApp 6527; CApp 6529
BMOU5417391	$5,473.68	$5,200.00	$273.68	7212682 00	CApp 3992; CApp 6527; CApp 6529
TRHU8963665	$5,473.68	$5,200.00	$273.68	7212683 00	CApp 6613; CApp 6527-29
APHU7275264	$5,473.68	$5,200.00	$273.68	7212684 00	CApp 5851; CApp 6527; CApp 6529
TCNU6993707	$2,631.58	$2,000.00	$631.58	7212690 00	CApp 8260; CApp 6620; CApp 3400
CMAU8486552	$631.57	$300.00	$331.57	7212692 00, 7212692 01	CApp 3995; CApp 5855; CApp 3431
BMOU5867969	$2,105.26	$2,000.00	$105.26	7212693 00	CApp 8267; CApp 3400
AXIU1665326	$2,105.26	$2,000.00	$105.26	7212694 00	CApp 6623; CApp 3400
TCNU4365430	$2,631.58	$2,500.00	$131.58	7212695 00	CApp 4618; CApp 6527; CApp 6529
TLLU4227724	$2,105.26	$2,000.00	$105.26	7212697 00	CApp 6626; CApp 6607
CMAU4651387	$5,473.68	$5,200.00	$273.68	7212749 00	CApp 4005; CApp 6527; CApp 6529
CMAU5833869	$315.78	$300.00	$15.78	7212830 00	CApp 4008; CApp 3431
CMAU4489234	$2,105.26	$2,000.00	$105.26	7212836 00	CApp 4015; CApp 3400
CAIU7906426	$2,105.26	$2,000.00	$105.26	7212837 00	CApp 8276; RApp617
TGHU9661689	$2,105.26	$2,000.00	$105.26	7212838 00	CApp 6629; CApp 3400
DFSU6656920	$2,105.26	$2,000.00	$105.26	7212839 00	CApp 4021; CApp 3400

CMAU4408530	$2,631.58	$2,500.00	$131.58	7212840 00	CApp 6632; CApp 6607; CApp 6634
TCNU7371858	$2,631.58	$2,000.00	$631.58	7212841 00	CApp 8268; CApp 6607
CMAU5635776	$1,578.94	$1,500.00	$78.94	7212842 00	CApp 4025; CApp 4026
TCLU1527289	$1,578.94	$1,500.00	$78.94	7212843 00	CApp 4027; RApp 371
CAIU9243831	$1,578.94	$0.00	$1,578.94	7212844 00	CApp 5693
UETU5542161	$1,578.95	$1,500.00	$78.95	7212845 00	CApp 5698; RApp 1046
CMAU7115388	$1,578.94	$1,500.00	$78.94	7212846 00	CApp 5702; CApp 5872
CMAU7895089	$1,578.94	$0.00	$1,578.94	7212847 00	CApp 5706
TGHU6870509	$2,105.26	$2,000.00	$105.26	7212848 00	CApp 5711; CApp 5103-04
TGBU4927060	$1,578.94	$1,500.00	$78.94	7212850 00	CApp 5716; CApp 5107
SEGU6200704	$2,105.26	$2,000.00	$105.26	7212851 00	CApp 5719; CApp 4701-02
TCKU6322710	$2,105.26	$2,000.00	$105.26	7212852 00	CApp 5723; CApp 4706-07
Not on invoice	$2,105.26	$0.00	$2,105.26	7212854 00	CApp 5728; RApp 364
TCLU8884626	$2,105.26	$2,000.00	$105.26	7212855 00	CApp 5733; CApp 4716-17
TLLU7705160	$2,631.58	$2,500.00	$131.58	7212856 00	CApp 5738; CApp 4721-22; CApp 4724
TCNU5272331	$2,105.26	$2,000.00	$105.26	7212857 00	CApp 5744-45; CApp 4728
CMAU6309497	$842.10	$0.00	$842.10	7212862 00	CApp 6434
TGHU6332761	$1,222.15	$1,185.49	$36.66	7214688 00	CApp 6125; CApp 6130
SEGU4425091	$1,222.17	$1,185.49	$36.68	7214766 00	CApp 3247-48
SEGU6189441	$1,222.15	$1,185.49	$36.66	7214775 00	CApp 3281; CApp 3292
TGBU9314306	$1,222.15	$1,185.49	$36.66	7214777 00	CApp 6046; CApp 8416
TEMU7620550	$1,222.15	$1,185.49	$36.66	7214781 00	CApp 6962; CApp 6050
CMAU6459012	$1,634.89	$1,585.85	$49.04	7214935 00	CApp 3261-62
TLLU7774582	$1,634.89	$1,585.85	$49.04	7214937 00	CApp 3270; RApp 1028
TCNU1568393	$1,634.89	$1,585.85	$49.04	7214939 00	CApp 6148; CApp 6152
CAIU8833520	$1,634.89	$1,585.85	$49.04	7214940 00	CApp 6167; RApp 1030
CAIU7116458	$2,047.63	$1,986.21	$61.42	7214941 00	CApp 6056-7; RApp 1041-2
TGHU6326748	$306.00	$296.37	$9.63	7214943 00	CApp 6537-38
TGBU4315697	$1,248.42	$1,185.48	$62.94	7214944 00	CApp 6543; CApp 6548-49
TLLU7533902	$1,248.00	$1,185.48	$62.52	7214946 00	CApp 6550; CApp 6555; CApp 6566
CMAU7571238	$312.00	$296.37	$15.63	7214948 00	CApp 6556; CApp 6566
APHU6446676	$312.00	$296.37	$15.63	7214949 00	CApp 6561; CApp 6566
TCNU5045580	$1,248.42	$1,185.48	$62.94	7214951 00	CApp 6567; CApp 6572-73
CRSU9351044	$1,248.42	$1,185.48	$62.94	7214952 00	CApp 6153; CApp 6158-59
CRSU9308921	$1,248.00	$1,185.49	$62.51	7214953 00	CApp 6574; CApp 6579
18 Containers[2]	$59,789.47	$56,800.00	$2,989.47	7217739 00	CApp 6424-26
TOTAL MARKUP			**$86,722.10**		

[2] Fourteen of the eighteen containers are listed by individual container number in the chart as well; however, those earlier entries reflect a separate time period of demurrage charges.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

The Shipping Act provides that a "person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Docket No. 02-04, 2006 WL 2007808, at *11-12 (FMC May 10, 2006); *see also Cargo One, Inc. v. COSCO Container Lines Co.*, Docket No. 99-24, 2000 WL 1648961, at *15 (FMC Oct. 31, 2000).

2. Burden of Proof

To prevail in a proceeding to enforce the Shipping Act, a complainant bears the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.203; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, Docket No. 08-03, 2014 WL 9966245, at *14 (FMC Dec. 17, 2014). Under the preponderance standard, a complainant must show that their allegations are more probable than not. *Crocus Investments, LLC v. Marine Transport Logistics, Inc.*, Docket No. 15-04, 2021 WL 3732849, at *3 (FMC Aug. 18, 2021) (Order Affirming Initial Decision on Remand). It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, Docket No. 93-15, 26 S.R.R. 1173, 1180 (ALJ Dec. 9, 1993), adopted in relevant part, 1994 WL 279898 (FMC June 13, 1994).

3. Admissibility of Charts and Supplemental Exhibits

With its opening brief, TPG submitted two excel spreadsheets labeled as a shipment chart (Vol. VII, CApp 110120) and a damages chart (Vol. VI, CApp 11019). Respondents object to the charts, arguing that they are unauthenticated and inadmissible and that TPG offered no foundation for the charts. Opposition at 2, 2 n.1. TPG argues in reply that the charts are admissible under Federal Rule of Evidence 611(a) regarding presentation of evidence or Rule 1006 as a summary of evidence. Reply at 14 n.1; 39-40. TPG submits declarations from its attorneys regarding creation of the charts, and revised versions of the charts with the same Bates numbers. Comprés and Burd Declarations; CApp 110120 (revised); CApp 11019 (revised). Respondents argue that the charts should be afforded no more weight than argument of counsel and object that TPG's opening brief stated that the *shipment* chart listed its damages while TPG's reply states that the *damages* chart lists its damages. Sur-reply at 3-6.

Charts summarizing evidence may be admitted pursuant to Federal Rule of Evidence 611(a) or pursuant to Rule 1006. Under Rule 611(a), demonstrative evidence is admissible where it will assist in better understanding the case. *United States v. Palazzo*, 2010 WL 1141644, at *8 n.5 (5th Cir. Mar. 23, 2010). Courts are split regarding whether such demonstrative evidence should be admitted. Admissibility of Summaries or Charts of Writings, Recordings, or Photographs Under Rule 1006 of Federal Rules of Evidence, 198 A.L.R. Fed. 427 (2004).

Rule 1006 allows the admission of charts into evidence instead of voluminous records that would otherwise be admissible. *United States v. Janati*, 374 F.3d 263, 273 (4th Cir. 2004). The rule states that the "contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place." Fed. R. Evid. 1006.

Charts "admitted under Rule 1006 are explicitly intended to reflect the contents of the documents they summarize and typically are substitutes in evidence for the voluminous originals," whereas Rule 611(a) demonstrative charts "most typically are used as 'pedagogical devices' to 'clarify and simplify complex testimony or other information and evidence or to assist counsel in the presentation of argument to the court or jury.'" *United States v. Milkiewicz*, 470 F.3d 390, 397-398 (1st Cir. 2006) (citations omitted). Thus, while charts under Rule 1006 are admitted as evidence themselves, charts under Rule 611(a) are "instead merely a summary of evidence *already admitted*." *U.S. v. Palazzo*, 2010 WL 1141644, at *8 n.5 (emphasis in original).

The shipment and damages charts and the revised versions are admitted under Federal Rule 611(a) to assist in reviewing the claims, and not as independent evidence of underlying claims under Rule 1006. Although courts do not always admit Rule 611(a) demonstrative evidence, considering the relatively liberal standard for admitting evidence in administrative litigation, they will be admitted. As explained in more detail below, the revised damages chart is helpful in identifying the specific invoices for which TPG seeks reparations, while the shipment charts are helpful in ascertaining the container number and evidence citations corresponding to the relevant invoices. Of note, TPG could have better presented its damages request by organizing alleged damages by container number, or at least by indicating the container number corresponding to each invoice in their request for reparations. The improper markups chart, the last finding of fact, does not rely upon the revised damages chart itself; rather, it was developed by reviewing TPG's revised damages chart and comparing that to the evidence in the record, noting the specific evidence supporting each markup calculated.

TPG also objects to the 689 pages of supplemental exhibits filed by Respondents. Sur-reply Response at 6-7. It is not clear whether these documents had been provided to TPG prior to this litigation; however, even if not, that is not a reason to exclude them. In the past, the Commission has allowed evidence of charges to be submitted after a remand. It is more efficient to admit these documents at this stage. Therefore, the request to strike Respondents' supplemental exhibits is denied.

It is unfortunate that TPG could not identify its damages during discovery and that its damages request changed from $1,222,123 to $584,837.29 from its amended complaint to its reply. This was in part due to Respondents' delays in providing the relevant receipts and discovery. Earlier identification of damages could have saved both parties' resources in litigating the proceeding and improved the likelihood of a settlement.

4. Joint Renewed Motion for Confidential Treatment

On February 22, 2024, TPG filed a motion for confidential treatment. On May 15, 2024, an order to supplement the record was issued, denying without prejudice TPG's motion for confidential treatment and permitting the parties to file a narrowed request. On May 30, 2024, the parties filed a joint renewed motion seeking confidential treatment of only a few select documents included in TPG's Appendix, volumes IV and V. Joint Confidential Treatment Motion at 1.

The parties state that "their request is narrowly tailored to seek confidential treatment only of documents that contain confidential, commercially sensitive information relating to Respondents' business and the terms of Omni's acquisition of Epic, disclosure of which could cause Respondents' competitive harm and violate Respondents' obligations to third parties." *Id.* The parties provide a chart with the Bates numbers of the documents for which protection is sought along with the basis for the confidentiality request.

Commission Rule 5 authorizes confidential treatment for confidential commercial information. The joint request for confidential treatment significantly limited the amount of information for which confidential treatment is sought. Confidential treatment is sought for confidential terms of Omni's acquisition of Epic and non-public information about the corporate structure and ownership of Omni and Epic. For depositions, protection is properly sought only for specific lines and not entire pages. Joint Confidential Treatment Motion at 2.

As narrowed, the requests are reasonable. Further, this decision is readable without the need for quotations from material designated as confidential. Accordingly, it is hereby ordered that the joint renewed motion requesting confidentiality be **GRANTED**.

B. Shipping Act Definitions

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including common carriers.

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

46 U.S.C. § 40102(7). The statutory definitions are echoed in the Commission's regulations:

> *Common carrier* means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:
>
> (1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and
>
> (2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . . .

46 C.F.R. § 515.2(e).

The Shipping Act also provides that the term "ocean transportation intermediary" means "an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(20). The term non-vessel-operating common carrier is then defined as a common carrier that "(A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(17).

The Commission promulgated regulations providing examples of NVOCC services performed by OTIs.

> (k) ***Non-vessel-operating common carrier services*** refers to the provision of transportation by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:
>
> (1) Purchasing transportation services from a common carrier and offering such services for resale to other persons;
>
> (2) Payment of port-to-port or multimodal transportation charges;
>
> (3) Entering into affreightment agreements with underlying shippers;
>
> (4) Issuing bills of lading or other shipping documents;
>
> (5) Assisting with clearing shipments in accordance with U.S. government regulations;
>
> (6) Arranging for inland transportation and paying for inland freight charges on through transportation movements;
>
> (7) Paying lawful compensation to ocean freight forwarders;
>
> (8) Coordinating the movement of shipments between origin or destination and vessel;
>
> (9) Leasing containers;
>
> (10) Entering into arrangements with origin or destination agents;
>
> (11) Collecting freight monies from shippers and paying common carriers as a shipper on NVOCC's own behalf.

46 C.F.R. § 515.2(k).

On June 16, 2022, the Ocean Shipping Reform Act of 2022 ("OSRA 2022") was enacted. OSRA 2022 revised parts of the Shipping Act. Those sections, and the OSRA 2022 changes, are addressed below. The Shipping Act sections at issue here include: (1) section 41102(c) regarding unjust and unreasonable practices, (2) section 41104(a)(14) regarding charges inconsistent with section 41102(c), and (3) section 41104(a)(15) regarding demurrage or detention charges.

C. Discussion

1. Sections 41102(c) and 41104(a)(14): Unjust and Unreasonable Practices

a. Relevant Law

Section 41102(c) of the Shipping Act, previously section 10(d)(1), states that a "common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). On December 17, 2018, after notice and comment, the Commission issued Rule 545.4, specifying the elements of a section 41102(c) claim. Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64480 (Dec. 17, 2018). Rule 545.4 states:

> 46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:
>
> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
>
> (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
>
> (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
>
> (d) The practice or regulation is unjust or unreasonable; and
>
> (e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4.

Failure of an NVOCC to "carry out [an] obligation it was paid to perform" may constitute a violation of section 41102(c). *Bimsha Int'l v. Chief Cargo Servs., Inc.*, 2013 WL 9808692, at *5 (FMC Sept. 4, 2013), *aff'd sub nom. Chief Cargo Servs. v. FMC*, 586 Fed. Appx. 730 (2nd Cir. 2014). As an example, the Commission noted an NVOCC was held to have violated section 10(d)(1) "when it refused to release the cargo at destination port unless additional money was paid, and instructed its agent to place the shipment on hold." *Bimsha Int'l*, 2013 WL 9808692, at *5 (citing to *Brewer v. Maralan*, Docket No. 99-19, 29 S.R.R. 6, 9 (FMC Jan. 3, 2001)); *see also Corpco Int'l Inc. v. Straightway, Inc.*, Docket No. 97-05, 28 S.R.R. 296, 300, 1998 WL 940257, at *7 (FMC June 8, 1998) (affirming "the ALJ's conclusion that Straightway violated section 10(d)(1) of the Act by forcing its customer to pay additional transshipment costs to obtain the negotiable bill of lading necessary to effect the delivery of certain cargo."). The Commission similarly affirmed that an NVOCC had violated section 10(d)(1) "by withholding and aborting a shipment to coerce payment of debt for other shipments." *Petra Pet, Inc. v. Panda Logistics Ltd.*, Docket No. 11-14, 2013 WL 9808694, at *6 (FMC Oct. 31, 2013).

The Commission has also provided specific guidance on factors to consider in determining whether demurrage and detention charges violate section 41102(c) in the Demurrage and Detention Rule, which went into effect May 18, 2020. 85 Fed. Reg. 29638 (May 18, 2020). Commission Rule 545.5 provides in pertinent part:

> (a) *Purpose.* The purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and § 545.4(d) in the context of demurrage and detention.
>
> (b) *Applicability and scope.* This rule applies to practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, the terms demurrage and detention encompass any charges, including "per diem," assessed by ocean common carriers, marine terminal operators, or ocean transportation intermediaries ("regulated entities") related to the use of marine terminal space (*e.g.*, land) or shipping containers, not including freight charges.
>
> (c) *Incentive principle*—(1) *General.* In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.

46 C.F.R. § 545.5.

TPG also alleges that some invoices violate OSRA 2022, section 41104(a)(14), which states that:

> (a) IN GENERAL.-A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not- . . .
>
>> (14) assess any party for a charge that is inconsistent or does not comply with all applicable provisions and regulations, including subsection (c) of section 41102 or part 545 of title 46, Code of Federal Regulations (or successor regulations).

46 U.S.C. § 41104(a). This requires that charges assessed after June 16, 2022, comply with section 41102(c) and Commission Rules in 545, including 545.4 and 545.5. Therefore, the section 41104(a)(14) allegations will be addressed in conjunction with the alleged 41102(c) violations.

b. Parties' Arguments

TPG asserts that Respondents: both acted as an NVOCC with respect to Complainant; acts occurred on a normal, customary, and continuous basis; acts related to or were connected with receiving, handling, storing, or delivering TPG's property; acts were unjust and unreasonable; and practices are the proximate cause of the claimed loss. Brief 16-27.

Respondents contend that: Epic was the Respondent that performed the services at issue in this dispute; the provisions of Epic's tariff and Epic's terms and conditions apply to TPG's shipments and obligate TPG to pay additional charges above the amount of freight charges; Respondents' alleged "markups" were not unjust or unreasonable because Respondents informed TPG of the "markups" and TPG agreed to pay them; Respondents did not unreasonably withhold or fail to provide supporting documents to TPG and Respondents had no obligation to communicate demurrage charges in any particular manner; TPG presents no evidence that Respondents failed to prevent or mitigate unnecessary charges; Respondents did not use coercive collection practices; TPG seeks to recover damages arising out of shipments over which the Commission lacks jurisdiction because they did not enter the United States through a United States port; and TPG fails to establish proximate cause or establish its damages with reasonable certainty. Opposition at 5-33.

In its reply, TPG further argues that: Omni cannot escape the Commission's jurisdiction because Omni was acting as a regulated entity with regard to TPG; Respondents failed to provide proof of propriety for substantial charges; Epic's tariffs and terms and conditions do not excuse Respondents' unjust and unreasonable practices; Respondents' "admin charges" were unjust and unreasonable; Respondents failed to prevent or mitigate unnecessary charges, and TPG has presented evidence to support its claim; Respondents engaged in unlawful collection practices; Respondents are liable for violations of the Shipping Act sections 41104(a)(14), (15) with respect to all invoices that are not pass-through; TPG has not included any damages for shipments that arrived outside of a United States port; and Respondents fail to rebut TPG's evidence. Reply at 8-40.

In their sur-reply, Respondents contend that TPG submitted new evidence and raised new arguments about certain evidence that TPG did not raise in its opening brief; TPG quietly advances a new theory as to its damages that was not set forth in its opening brief; and TPG continues to claim damages for amounts that Respondents charged but which TPG has not paid. Sur-reply at 3-8.

In its sur-reply response, TPG asserts that TPG's damages theory remains consistent and Respondents have failed to rebut it; Respondents' supplemental evidence does not establish that they adhered to just and reasonable practices; and Respondents improperly invoiced TPG $584,837.29. Sur-reply Response at 5-8.

c. Discussion

To succeed in a section 41102(c) claim for reparations, five elements must be shown. Each is addressed below, including whether (i) Respondents are common carriers in connection with TPG's shipments; (ii) the practices at issue relate to the receiving, handling, storing, or delivering of property; (iii) the practices are unreasonable; (iv) the practices are occurring on a normal, customary, and continuous basis; and (v) proximate cause.

i. Common Carrier

The first element requires that the respondent be an ocean common carrier, marine terminal operator, or ocean transportation intermediary. An NVOCC is a type of ocean transportation intermediary. 46 U.S.C. § 40102(20). TPG asserts that Respondents are NVOCCs and Respondents acknowledge that they were both NVOCCs. The dispute is over which Respondent provided NVOCC services to TPG for these particular shipments.

TPG asserts that both Respondents acted as non-vessel operating common carriers with respect to TPG; Respondents acted as a shipper in their relationship with the ocean common carriers; Respondents did not operate the vessels used for the ocean transportation; and Respondents performed NVOCC services set forth in 46 C.F.R. § 515.2(k). Brief at 3-16.

Respondents contend that Epic was the Respondent that performed the services at issue in this dispute, arguing that despite Omni's acquisition of Epic in April of 2021, Omni and Epic remained separate entities and Epic's operations were not fully integrated with Omni's business until April 2023; and Omni did not perform any services subject to the Commission's jurisdiction for these shipments. Opposition at 6-7.

The evidence shows, and the parties do not dispute, that both Epic and Omni were licensed ocean transportation intermediaries and NVOCCs. Answer ¶¶ 6-7, 16. Both entities maintained a tariff and held out to the general public to provide transportation by water of cargo. Answer ¶ 16; CApp 10512-20. It appears that both entities assumed responsibility for shipments and that both entities transported goods between the United States and a foreign country. CApp 10720-893. Thus, both entities meet the Shipping Act's requirements to be an NVOCC. The question is which entity handled these shipments for TPG. *See CMI Distribution, Inc. v. Service By Air, Inc.*, 3 F.M.C.2d 83, 99, 2021 WL 9204113, at *4 (FMC July 26, 2021).

Starting in about 2015, TPG began working with Epic, which arranged ocean transportation services, drayage, domestic motor carrier services, and customs clearance services. TPG Resp/RPFF ¶ 1. Effective April 2, 2021, Omni purchased Epic and Epic became Omni's wholly owned subsidiary. CApp 10996-11007. However, under the April 2, 2021, operating agreement, Epic remained a separate business entity. CApp 10895-10903; RApp 75-76. Prior to May of 2022, Hapag-Lloyd invoices were addressed to Epic. *See, e.g.*, CApp 3934-39. In June or July of 2022, Epic employees moved into the Omni facility and began meeting the Omni team. CApp 10316-17. Around April 2023, after the shipments at issue, Epic and Omni business operations were integrated. CApp 10212. Epic's employees are now "fully blended with the Legacy Omni team." CApp 10326. The parties refer to this as both an acquisition and a merger, although the issue relevant to this proceeding is whether they operated as independent entities during the 2021-22 timeframe.

"It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (citation omitted).

> Thus it is hornbook law that the exercise of the control which stock ownership gives to the stockholders ... will not create liability beyond the assets of the subsidiary. That control includes the election of directors, the making of by-laws ... and the doing of all other acts incident to the legal status of stockholders. Nor will a duplication of some or all of the directors or executive officers be fatal.

Bestfoods, 524 U.S. at 61-62 (citation and internal quotes omitted).

A wholly owned corporation is treated as a distinct juridical entity unless its corporate veil can be pierced. *Alkanani v. Aegis Def. Servs., LLC*, 976 F. Supp. 2d 1, 8-10 (D.D.C. 2013); *see also Bestfoods*, 524 U.S. at 62-63. TPG has not sought to pierce the corporate veil and the evidence does not show failure to maintain corporate records or corporate formalities; commingling or diversion of funds; use of the same office or business location; or other facts that would suggest that the corporate veil could be pierced. Similarly, there is no evidence that Epic was a mere agent or instrumentality of Omni. Rather, the evidence shows that both entities operated simultaneously during the 2021-2022 timeframe, serving different clients. CApp 10218.

As part of the Epic acquisition, all Epic partners were subject to an earn-out provision where a certain gross profit component had to be met by the end of April 2023. CApp 10217. "An earn-out is a financial technique that results in future payments to a seller contingent on the target achieving defined financial or nonfinancial objectives after completion of the deal. The seller receives the added compensation on top of the initial payments . . . if the agreed-up objectives are met." Negotiating an acquisition—Contingent purchase price: Using earn-outs in acquisitions, Corporate Acquisitions § 1:21 (2024). The consequence of not meeting this earn-out target would be no cash payout, potential job jeopardy, and "not fulfilling our obligation." CApp 10217. The earn-out agreement included a requirement that Epic "had to operate as an entity without additional resources, and hit those earn-out numbers." CApp 10218. The earn-out agreement impacted compensation; however, the acquisition would have continued if the earn-out goal was not reached. CApp 10217. There is no indication that the earn-out process undermined Epic's status as a distinct corporate entity; rather, the agreement required Epic to operate without additional resources, i.e. independently.

As explained below, the evidence shows that TPG had been Epic's client before the acquisition and primarily Epic employees, or Omni employees who were former Epic employees, continued to handle the TPG account during the earn-out period. Although there is some ambiguity, for example emails from Omni employees and emails with Omni in the signature block and email address, the totality of the evidence suggests that Epic was operating as the NVOCC for the TPG shipments and that Omni was providing accounting and collections services.

TPG had been Epic's client since at least 2016, well before the acquisition. CApp 10220. TPG would email Epic requesting a quote for a particular construction project, specifying the estimated number of containers, the origin, and the destination. Epic would respond with the freight cost, pre pull cost, chassis cost and minimum days, handling fee, ISF charge, customs clearance charge, and wait time rate, as well as the terms (for example, door to door). TPG's Basiri Decl. ¶ 9; *see also, e.g.*, CApp 10122-200. Epic would then respond with a written quote via email and most quotes provided by Epic included language stating that all shipments were subject to Epic's Terms and Conditions. *See, e.g.*, CApp 10186; *but see* CApp 10143. By at least June 16, 2021, Epic's emails contained a footer noting Epic was partnering with Omni "[a]s a wholly owned subsidiary." *See, e.g.*, CApp 11017.

The same people continued to work on the TPG account, although certain key employees, such as the Epic founders, became Omni employees as of April 2021. CApp 10213; CApp

10292. Moreover, there were not significant changes in the decision-making hierarchy at Epic pre- and post-acquisition. CApp 10218. The most glaring exception is an Omni employee, Bill Heathcock, who had not worked for Epic, who emailed TPG on May 17, 2022, threatening to withhold delivery of containers until TPG paid for other delivered containers. CApp 10705; CApp 10227. This could be seen as a collection tactic, which Omni was handling for Epic. TPG does not point to case law suggesting that employees of the parent company cannot also work for and bind a wholly owned subsidiary under these circumstances.

Some emailed quotes to TPG were signed by Omni employees and former Epic employees who listed Omni in their signature block and as part of their email address. However, the shipping quote in the text of the email generally stated: "All shipments are subject to Epic Freight's Terms and Conditions" and "Epic Freight Solutions liability is not responsible for consequential damages." *See, e.g.*, CApp 10169-10170. Moreover, the record shows that Epic retained control of the containers. For example, on April 13, 2022, in trying to sort out the delivery order for a container, Omni sent an email stating that "Epic is the broker." RApp 321; *see also* RApp 327 ("Epic Freight Solutions had the clearance release on 9/2[/2021].").

While emails from Omni and former-Epic employees, which included Omni in the email address and signature block, weigh toward finding that Omni was the NVOCC, greater weight is given to the statements that Epic's terms and conditions applied and evidence that Epic retained control over the containers. Therefore, on balance, the evidence weighs toward finding that Epic was the NVOCC for TPG's shipments and that Omni did not act as an NVOCC for TPG's shipments.

Many of the billing issues involved Omni. Respondents assert that Omni "merely performed back-office services, including the issuance of invoices for Epic's services on behalf of Epic." Opposition at 7; CApp 10320. The record includes Epic invoices requesting that payment be remitted to Omni as early as December 11, 2020. CApp 1. At about the time of the acquisition, Epic's invoices started listing payment directions to Omni. TPG's Basiri Decl. ¶ 7. Before "the transition and merger, Epic had used an outside firm to do accounting and collections. And as part of the transition and the merger, that firm was let go, and Epic started to rely on Omni's accounting and collection team." CApp 10217-18; CApp 10306. However, outsourcing accounting and collections would not make Omni the NVOCC handling these shipments, regardless of when it started, just as it did not make the prior accounting firm the NVOCC.

The evidence shows that TPG was Epic's client and that Epic held out and assumed responsibility for the TPG shipments. Although there is some ambiguity, for example emails with Omni employees, signature block, and email address, the totality of the evidence suggests that Epic was operating as the NVOCC for the TPG shipments and that Omni was providing accounting and collections services. Therefore, this first element of 41102(c) is met for Epic but not for Omni. This decision will continue to refer to Epic and Omni as Respondents. However, the order will only apply to Epic as Omni was not the NVOCC responsible for these shipments.

ii. Receiving, Handling, Storing, or Delivering of Property

TPG asserts that the practices at issue are related to or connected with the receiving, handling, storing, or delivering of property, asserting that "[a]ll of the invoices and charges at issue relate to the demurrage, detention, customs brokerage, storage, chassis, and other charges directly connected to the delivery of TPG's cargo." Brief at 16, 20-21. Respondents do not address this factor. The evidence shows that the practices at issue involve Respondents' receiving, handling, storing, and delivering of TPG's cargo and this element is not contested. The element requiring that the practice in dispute be related to or connected with the receiving, handling, storing, or delivering of property is thus demonstrated.

iii. Unjust or Unreasonable Practice

TPG asserts a variety of ways in which Respondents' billing practices were unreasonable. These arguments are organized and addressed below as issues with: (a) improper markups and charges, (b) coercive collection practices, (c) supporting documentation, and (d) information, avoidable charges, and mitigation.

(a) Improper Markups and Charges

TPG asserts that Respondents charged improper markups and other unsubstantiated charges that were not published in their tariffs, not applied consistently, and not agreed to by TPG. Brief at 22; Reply at 21-22.

Respondents contend that Epic's tariff imposes an obligation to pay demurrage, detention, and other expenses beyond the port terminal area, including inland transportation; Respondents informed TPG of the alleged markups and TPG agreed to pay them, including an administrative fee after January 2022 and credit card processing fees; and the fees were not unjust or unreasonable. Opposition at 8-11.

Common carriers are required to publish a tariff listing all rates and charges, including pass-through charges. A common carrier must "keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established." 46 U.S.C. § 40501(a)(1); *see also* 46 C.F.R. pt. 520. Moreover, common carriers are prohibited from "provid [ing] service in the liner trade that is – (A) not in accordance with the rates, charges . . . and practices contained in a tariff published or a service contract, . . . unless excepted or exempted." 46 U.S.C. § 41104(a)(2)(A). Reversing a decision that "suggest[ed] that only markups to pass-through charges need to appear in a published tariff," the Commission stated that "[a]lthough changes in pass-through charges may take effect upon publication under the Commission's tariff regulations, the pass-through charges must still appear in a tariff." *CMI Distribution,* 3 F.M.C.2d at 99, 2021 WL 9204113, at *16.

Epic's terms and conditions state that the customer shall "be jointly and severally liable to carrier for payment of all freight, demurrage, detention and charges." RApp 356 (Section 12(e)). In addition, Epic's Tariff addresses detention, demurrage, and other charges, stating:

- "Tolls, Wharfage, Cost of Landing, and all other expenses beyond the port terminal area are for account of Owner, Shipper or Consignee of the cargo and all such expenses levied in the first instance against the Carrier will be billed in an equal amount to the Owner, Shipper, or Consignee of the Cargo." CApp 10786.
- "Carrier does not operate terminals at origin or destination. Except as otherwise provided in tariff rate items, all shipments will be subject to the origin and destination terminal charges assessed by the underlying ocean carrier, including demurrage charges, whose vessel will be clearly identified on bills of lading." CApp 10863.
- "Carrier does not own or lease equipment. When equipment is provided to shippers and/or consignees by Vessel Operating Common Carriers (VOCCs), the VOCC, either directly or via the carrier, provisions as published by the VOCC in its FMC tariff, including detention charges, will be for the account of the cargo." CApp 10861.

Epic's tariff authorizes it to pass through demurrage, detention, and other charges but does not allow it to inflate or markup those charges. Respondents' quotes to TPG in the record include a variety of fees – including freight cost, pre pull, chassis, handling, ISF, customs clearance, and wait time – but do not address detention, demurrage, markups, or administrative fees. *See, e.g.*, CApp 10126-29; RApp 262. Therefore, it would be unreasonable for Epic to markup the passed-through charges or to impose an administrative fee, as those fees were not included in their tariff.

Respondents contend that the fees were finance charges or administrative fees of five percent, beginning in 2022, and were necessary because Respondents advanced hundreds of thousands of dollars to common carriers, marine terminal operators, and other third parties on TPG's behalf. Opposition at 10. The Commission will look at whether a fee was included in a tariff and how it was imposed and is not limited to the label applied to it. Here, the fee was referred to as a "processing fee" and an "administrative fee," however, it appears that the parties understood it as a fee imposed on pass-through charges such as demurrage. RApp 175; CApp 11015; RApp 225. Regardless of the name, the fee was imposed as a percentage markup on demurrage charges. And, unlike in *Bakerly*, the fee here was not included in Epic's tariff. *Bakerly, LLC v. Seafrigo USA, Inc.*, 2024 WL 95381, at *53 (ALJ Jan. 3, 2024).

Respondents contend that TPG agreed to the administrative fee. The evidence shows that on January 26, 2022, Yohanse Manzanarez reported to others working for Respondents that he told TPG they "would be charging 5% on pass through costs moving forward." RApp 261. In addition, TPG acknowledged this fee on March 15, 2022, when TPG emailed Mr. Manzanarez, in part stating that "Why is there a 5% Admin charge on Chassis charges? You [and] I discussed starting to add 5% admin fee for pass through charges. Chassis charges were always a fixed rate." RApp 225. Therefore, the record supports finding that the administrative charge was discussed for pass-through charges only. Discussion, however, is not the same as agreement. Respondents do not point to clear evidence in the record that TPG agreed to this fee.

Ocean transportation intermediaries, including NVOCCs "do not have an unbounded right to contract for whatever they want. They are limited by the prohibitions of the Shipping Act, one of which is section 41102(c)." Demurrage and Detention Rule, 85 Fed. Reg. at 29648. Charges must be reflected in a tariff and there is no evidence that Epic's tariff was updated to include these charges. Early on, TPG specifically objected to a ten percent markup admin fee, stating "I don't believe your proposal and T&Cs specify potential per diem charges." CApp 11008. Therefore, these additional fees and markups, not published in the tariff, are unreasonable. The extent of the improper markups is discussed further in section III.D.3.a below regarding reparations.

(b) Coercive Collection Practices

TPG asserts that Respondents used coercive collection practices for 81 containers that Respondents "threatened to hold hostage for ransom over the course of 14 days unless TPG paid $1.7 million" for amounts due from previous shipments and that two containers were withheld for 22 days (containers CMAU4830227 and CMAU4265316) and one container was withheld for 17 days (container DRYU9980059). Brief at 19-20; Reply at 19-20.

Respondents contend that they did not use coercive collection practices, arguing regarding reasonableness that TPG alleges a "threat" to withhold cargo but TPG acknowledges that only three, not 81, containers were allegedly withheld; the three containers were released on May 10, 2022, before the alleged threat to withhold cargo; Respondents had legitimate concerns about TPG's willingness and ability to pay; and Epic's tariff gave it a lien on property for charges on previous shipments. Opposition at 16-21.

Commission law is clear that "transportation of cargo cannot be aborted or cargo held to coerce payment of debt for other shipments." *Petra Pet, Inc. v. Panda Logistics Ltd.*, Docket No. 11-14, 2012 WL 11914703, at *22 (ALJ Aug. 14, 2012) *aff'd* 2013 WL 9808694 (FMC Oct. 31, 2013); *Bernard & Weldcraft Welding Equip. v. Supertrans Int'l,* Docket No. 02-12, 2003 WL 136313, at *14 n.14 (ALJ Jan. 8, 2003) (admin. final Feb. 12, 2003) ("[D]isputes over earlier unrelated shipments cannot be used by either a carrier or a shipper as justification for refusing to release the cargo or to pay lawful freight money."); *Tienshan v. Tianjin Hua Feng Transport*, Docket No. 08-04, 2011 WL 7144007, at *17 (ALJ Mar. 9, 2011) (admin. final April 12, 2011) ("An NVOCC that holds cargo hostage to its demands for money allegedly owed for prior shipments violates section 10(d)(1)."); *Adenariwo v. BDP Int'l,* Docket No. 1921(I), 2013 WL 12618258 (SO Mar. 7, 2013) ("*Adenariwo (SO)*"), *aff'd* 2014 WL 13110647 (FMC Feb. 20, 2014) (*Adenariwo (FMC)*), *partially aff'd on other grounds sub nom*. *Adenariwo v. FMC,* 808 F.3d 74 (D.C. Cir. 2015). Similarly, Commission case law indicates that cargo cannot be held to obtain additional fees or to collect an unreasonable debt. *Corpco Int'l Inc. v. Straightway, Inc.*, 1998 WL 940257, at *7 ("Straightway violated section 10(d)(1) of the Act by forcing its customer to pay additional transshipment costs to obtain the negotiable bill of lading necessary to effect the delivery of certain cargo."); *Total Fitness Equipment, Inc. v. Worldlink Logistics, Inc.*, Docket No. 1831(F), 1998 WL 940255 (FMC Dec. 10, 1998) (attempting to collect an unreasonable debt by refusing the release of cargo was a violation of 10(d)(1)).

In *Adenariwo*, the complainant alleged that a container was unreasonably held by Zim's agent "until payment for storage charges for a separate container shipment was made," while the respondent "pointed to the general lien clause in the terms and conditions of shipment, and said that its refusal to release the second shipment based on outstanding charges on a separate shipment was reasonable pursuant to its contractual rights." *Adenariwo (FMC)*, 2014 WL 13110647, at *1. The Settlement Officer found that the law permitted Zim "to exercise a valid maritime lien and hold a shipment based on the charges that accrued on the bill of lading covering that specific shipment," and held that Zim violated 41102(c) because the "act of holding a shipment for an unrelated shipment's charges is an unreasonable practice under the Shipping Act." *Adenariwo (SO)*, 2013 WL 12618258, at *6. The Commission affirmed, stating "while the law permits carriers to exercise valid maritime liens and hold a shipment for charges that accrue on that specific shipment's bill of lading, holding a shipment for charges unrelated to that shipment is unreasonable." *Adenariwo (FMC)*, 2014 WL 13110647, at *1. The Commission also affirmed an award of damages to Adenariwo, although the D.C. Circuit held that Adenariwo's damages ought not be reduced by mitigation. *Adenariwo v. FMC*, 808 F.3d 74, 76 (D.C. Cir. 2015).

"In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity." 46 C.F.R. § 545.5(c). Prohibiting common carriers with billing disputes from holding cargo unrelated to the dispute is consistent with the incentive principle because it will keep commerce flowing and alleviate port congestion. There are appropriate methods for resolving demurrage and detention billing disputes – but refusing to release unrelated containers and stopping the flow of the cargo is not one of them.

The evidence shows that Respondents threatened to withhold shipments due to payments owed for other containers. On May 17, 2022, Respondents emailed TPG stating:

> No additional freight for TPG will be delivered until Omni receives the $1.7 Million owed for freight handled and delivered, so any additional charges incurred due to delays in your remittance to Omni to conclude our relationship will be TPG's responsibility. After the $1.7M is received, we will deliver the remaining 81 containers or so as they arrive on a "cash" basis paid and received in advance.

CApp 10705. On May 18, 2022, Respondents reiterated their demand, stating:

> It's a simple issue to remedy, pay what you owe us, we are not a bank, we are a transportation company, and you have far exceeded any reasonable credit limits. . . . We wish no other end than to collect monies due and conclude existing transactions - the end result is entirely in your hands, pay us what you owe us for services rendered, and all will flow smoothly. I have 30 minutes for a call . . . it will not change our stance, every day you delay payment is incurring more unnecessary charges which Omni will not pay.

CApp 10703-04.

Commission case law is clear that withholding shipments due to payments owed for other containers is unreasonable. While Respondents may have had legitimate concerns about TPG's willingness and ability to pay for containers that had been delivered, that does not justify unreasonable practices. Indeed, permitting parties to leave containers in demurrage while billing disputes are negotiated could cause unreasonable backlogs at ports, negatively impact the supply chain, and increase costs for all involved.

Respondents contend that at most three containers were impacted. TPG asserts that each of the three containers incurred $1,265 in chassis fees, $765 in storage, and $4,947.36 or $4,947.37 in demurrage charges. Brief at 27. The bill of lading for the three impacted containers is BGA0324110 and all three containers were released from APM Terminals, which charged $4,700 in demurrage for each container. CApp 6611. The evidence shows that the first container, CMAU4830227, was picked up by Mecca Trucking on May 10, 2022, delivered on May 27, 2022, and the empty container returned on June 1, 2022. CApp 3559-61; RApp 181. The second container, CMAU4265316, was picked up by Mecca Trucking and delivered on May 27, 2022. CApp 8843; CApp 6427; CApp 6611. The third container, DRYU9980059, was picked up by Mecca Trucking on May 10, 2022 and delivered on May 27, 2022. CApp 3554; CApp 6611; RApp 179-81. TPG is properly focused on the date the containers were delivered.

The evidence shows that the containers were not delivered until May 27.[3] All three containers were held past the May 17th and 18th threats to withhold delivery of all freight. Respondents' emails suggest that the reason these three containers were not delivered more quickly was because they were being held to coerce payments on unrelated containers. Even if the containers were released by the terminals before the alleged threats, the delay in delivery, coupled with the emails, support a finding of coercive collection practices. Therefore, the preponderance of the evidence supports finding that these three containers were held to coerce payment for unrelated containers, which is unreasonable.

Other containers were not improperly withheld because TPG paid additional amounts, as requested. Containers that had not yet arrived at port were not improperly held because they were not in a position to be delivered. However, that TPG capitulated and paid the charges under protest does not make the threats reasonable. Moreover, the number of containers involved may impact the reparations available if the other elements are met, but that just a few containers may have been delayed does not make the practice reasonable.

Respondents contend that Epic's tariff and terms and conditions gave it a lien on TPG's property for charges from previous TPG shipments. Opposition at 20. Epic's tariff states that Epic has a lien "on any and all property . . . of [TPG] in its actual or constructive possession, custody or control or en route, for all claims for charges, expenses or advances incurred by [Epic] in connection with this shipment, or any previous shipment." CApp 10842-43. Epic's Terms and Conditions grant Epic "a general and continuing lien . . . on any property of the customer . . . coming into [Epic's] actual or constructive possession . . . as to any unpaid charges." RApp 356. Commission case law is clear, however, that the parties cannot contract in a

[3] TPG asserts that one of the containers was not released until June 1, 2022, according to an interchange receipt but it does not provide a citation to that evidence. Brief at 26 (citing RApp 180). Whether it was released on May 27th or June 1st does not change the analysis or finding.

manner that violates the Shipping Act. In *Adenariwo*, Zim's terms and conditions included a lien for "all previously unsatisfied debts whatsoever due the Carrier." *Adenariwo (SO)*, 2013 WL 12618258, at *5. This language did not shield Zim from the requirements of the Shipping Act. Similarly here, Epic's tariff and terms and conditions do not make its actions reasonable.

While Respondents' frustration with overdue billing is understandable, it does not justify withholding other containers. Therefore, Respondents acted unreasonably by threatening to hold containers and holding three containers to extract payments for other containers. The other factors and reparations for the three containers withheld are addressed below.

(c) Supporting Documentation

TPG asserts that Respondents "failed to provide TPG with complete and accurate documentation" and the "heart of this dispute are Respondents' substantial undocumented charges to TPG," arguing that Respondents failed to provide proof of the propriety of pass-through charges and the "charges are not otherwise reasonable because they are substantial." Brief at 16, 23; Reply at 13.

Respondents contend that they did not unreasonably withhold or fail to provide supporting documents to TPG and Respondents had no obligation to communicate demurrage charges in any particular manner. Opposition at 12-14.

The Commission recently discussed the *Gruenberg-Reisner* case cited by TPG.

> [T]he Commission has clarified through case law the treatment of pass-through assessorial charges for which no specific amount is fixed in either the [Negotiated Rate Agreement ("NRA")] or the rules tariff. Specifically, in *Gruenberg-Reisner* v. *Overseas Moving Specialists, Inc.*, [Docket No. 1947(I), 34 S.R.R. 613, 622-623, 2016 WL 11942284, at *10 (FMC Oct. 7, 2016)], the Commission found that an NVOCC was entitled to collect pass-through assessorial charges without any markup, which it substantiated with invoices. The NVOCC described in its rules tariff the types of charges that were not included in the rate and provided that any of those charges assessed against the cargo would be for the account of the cargo, even if the NVOCC was responsible for the collection thereof. *Id.* The Commission found that Respondent was "entitled to payment for . . . destination terminal handling charges and the additional floor fee, and . . . local port fees, customs fees, parking permit, and elevator fee because these were reasonable accessorial charges that Respondent passed through to the Claimants without any markup." *Id.* at [*9]. The Commission also stated that "assessing pass-through charges with no markup is a just and reasonable practice, in accordance with [section] 41102(c)." *Id.* at [*8].

Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements ("NSA/NRA Final Rule"), 83 Fed. Reg. 34780, 34787. In the NSA/NRA Final Rule, the Commission stated that "pass-through assessorial charges need not be fixed at the time of receipt of the first shipment, in light of the Commission's decision in *Gruenberg-Reisner*, which found it permissible for an NVOCC to collect pass-through assessorial charges that were not fixed upon receipt." *Id.* The Commission concluded that "[f]or pass-through charges and ocean carrier [general rate increases] for which the NRA or rules tariff does not include a specified amount, the NVOCC may invoice the shipper for only those charges the NVOCC actually incurs, with no markup." *Id.*

In *Gruenberg-Reisner*, the NVOCC substantiated some of its charges with invoices. The Commission found the *Gruenberg-Reisner* Respondent entitled to payment for local customs fees, parking permit fees, elevator fees, and customs inspection fees; however, the Commission remanded the issues of the fuel surcharge and terminal handling charges to determine whether Respondent reasonably assessed those charges. *Gruenberg-Reisner FMC,* 2016 WL 11942284, at *11. Although the record did not contain supporting documentation for these charges, the Commission found that invoices were "not the only indication of whether the charges were reasonable," explaining:

> The Commission has found that a carrier, under some circumstances, may recover reasonable charges it incurred without providing evidence that it incurred those charges. *C.H. Leavell & Co. v. Hellenic Lines, Ltd.,* 13 F.M.C. 76, 89 (FMC 1969). In *C.H. Leavell & Co.*, the Commission found that:
>
>> [R]espondent's showing of increased voyage distance and duration is sufficient to overcome any presumption of unreasonableness; and there is no basis for a finding that the surcharges assessed were unreasonable, in the absence of any proof of unreasonableness. On the contrary, the record supports a positive finding that the surcharges assessed for the extra services rendered to complainant's cargoes represented, in each case, a reasonable extra charge for such services.
>
> *Id.*
>
> Therefore, we remand the issue of whether Respondent's assessment of these charges was a just and reasonable practice. On remand, we recommend that the SCO request the invoices again. The invoices, however, are not the only indication of whether the charges were reasonable. *See id.* If the NVOCC is unable to produce the invoices, we recommend that the SCO look at other factors such as whether the charges were similar to those assessed by other NVOCCs.

Gruenberg-Reisner FMC, 2016 WL 11942284 at *9-10; *see also C.H. Leavell & Co.*, 13 F.M.C. at 89 ("The burden of showing that the charges were unreasonable is upon complainant, although the fact of substantial charges alone is sufficient to require the carrier the carrier to come forward with *some proof* of their propriety." (emphasis added)).

TPG argues that credit card receipts are not sufficient proof of the propriety of charges as they are not invoices from terminals or carriers. Opposition at 13. In its sur-reply response, TPG states:

> It is not TPG's contention that Respondents' charges must aways [sic] include the underlying carriers' invoices. All TPG has repeatedly asked is for Respondents to provide documentation supporting [the] propriety of their substantial charges.

> Respondents failed to do so. For example, documents that would explain why the containers were at the terminal for days Respondents did not arrange to have them picked up, resulting in excessive demurrage; or documents that would support Respondents' claims that there was congestion at the port. Respondents failed to provide any such documentation.

Sur-reply Response at 5-6.

The credit card receipts typically show critical information, including the container number, steamship line, vessel, voyage, discharge date, FTE date, and payment information. *See, e.g.*, CApp 2565-66. TPG does acknowledge that the credit card receipts show "proof that Respondents paid the charges." Reply at 13. TPG does not identify what information would be included on an invoice that is not reflected on these receipts. Moreover, even the original damages chart showed that these credit card receipts supported the majority of demurrage charges in TPG's claim. The credit card receipts are sufficient to show the amounts that Respondents paid on TPG's behalf.

Here, TPG requested supporting information about each charge; it was "a very detailed and at times complicated account," requiring proof of delivery, in gate and out gate tickets, demurrage receipts, and customs entry summary. CApp 10687; CApp 10306-07. TPG wanted the story behind each of the charges. CApp 10404.

> Tell me the story of what happened. Did your truck driver have an accident? Did he get sick? Did he get arrested for something? You know, what happened? Why did -- why did we have seven days of charge? And they -- they would always say something like, we -- we can't get appointment to take it back or there's congestion. There's shortage of chassises [sic]. I mean, there – there's some broad generic response. I never received any proper response.

CApp 10405; CApp 10390-91. TPG thus acknowledged that Respondents did provide explanations, such as lack of appointments, congestion, and chassis shortages; however, TPG did not accept these reasons.

The level of documentation that TPG (Thompson Pipe) wanted was not typical. Mr. Manzanarez testified that "I have not had a customer before or since that has required the – the documentation that Thompson Pipe has required." CApp 10220-22. Indeed, Epic employees were at times frustrated by their own inability to meet the high level of service they had previously provided. CApp 10222 ("Historically, we have had a great partnership with Thompson Pipe. They require several pieces of documentation on delivery. This is needed for audit purchases. Unfortunately, we, our team, has not managed this process well this year."). While providing this extensive documentation may have initially been a competitive advantage, then a competitive disadvantage, for Epic, TPG has not shown that it is required by the Shipping Act.

It is not clear what documents would "explain why the containers were at the terminal for days." Indeed, when TPG filed its brief, it alleged that the charges associated with the ship canal project were part of its damages claim but later acknowledged that the delays in delivering those containers were caused by its own client. TPG Reply, Burd Declaration ¶ 6 ("Storage Claims and Chassis Claims for the project entitled Ship Canal are excluded from the computation."). There is no document that is part of the typical shipping process that would indicate whether cargo was not delivered because the client was not ready for delivery or for some other reason. TPG has not provided evidence that delays in picking up containers were the fault of Respondents and such fault will not be presumed merely from the existence of demurrage charges.

It is similarly not clear what documents would show "congestion at the port" to TPG's satisfaction. The evidence shows that Respondents communicated directly with their clients about the congestion at the ports. For example, on November 3, 2021, TPG was copied on an email from Epic stating that "[a]s you know the congestion at the terminal is crazy high right now. But we are doing our best to navigate and get these containers to you." RApp 269. On April 13, 2022, TPG and Respondents received an email from a booking agent in Germany stating that "one of the main problems here is, that there was (and still is) a heavy trucker shortage in the USA which can lead to heavy delays in delivery." RApp 320. And on May 19, 2022, TPG emailed Respondents saying "[w]e understand that congestion may affect deliveries to and from the port and our expectation is that Omni will act reasonably and efficiently when performing its obligations." CApp 10701.

Mr. Manzanarez, Epic's Executive Vice President of Sales, testified that "COVID was not easy for anybody in transportation," explaining:

> So during this time, there was unprecedented congestion at every major port in -- in America. . . . 140 ships waiting out in the -- the port of Los Angeles. We had 37 miles of backup of railroads in the Chicago area. The entire system was stressed and broken, and there was no communication coming from a majority of our partners in getting -- gathering this information. It became awful hard to get documentation from partners and providers when they were struggling to fulfill their own obligations in transportation. It -- I know you are implying that -- that COVID is a -- is an easy scapegoat. It was -- it was the world I operated in, and it was extremely stressful and very challenging to conduct business in that environment. This specific example that you were talking about, not being able to receive invoices, a lot of it alluded to the -- the -- the documentation that we were unable to receive from our partners and compile the information to give him the invoices necessary.

CApp 10232-33; *see also* CApp 10224-25 ("we're in a tremendous and unprecedented environment with . . . the global shipping" and the "charges and invoicing that happened during COVID were unusual and challenging to -- to manage, and that was the -- that was the challenge. Getting that information from organizations who did not, A, break it down like that, B, were significantly understaffed.").

Indeed, Epic's email signatures contained language stating:

> Congestion in all the major ports (air and ocean) in North America has caused delays, diminished capacity, additional fees, surcharges including the standard per diem, demurrage, chassis, chassis splits, pre-pulls and weekend

> pickups/deliveries, and storage. As always Epic Freight Solutions will be very transparent throughout the entire process.
>
> We will communicate and address the situations as they arise. We will stand by our quote however cannot be responsible for the aforementioned accessorials as they simply cannot be anticipated. We appreciate your support during this latest wave of congestion as the world begins to open up businesses, that all call on North American ports.

CApp 10557.

Thus, the evidence shows that congestion impacted shipping during this time and Respondents reasonably conveyed this to TPG. During this period of unprecedented strain on shipping, unavoidable delays occurred to many shipments. Simply showing that demurrage was incurred is not sufficient to establish that the demurrage was unreasonable.

While it appears that the level of customer support declined when Omni purchased Epic, it is not clear that the service declined to a level that would constitute a violation of the Shipping Act. TPG has not shown that providing proof of delivery *and* common carrier invoices *and* proof of payment *and* each shipment's "story" are required by the Shipping Act. In fact, the Commission has held that invoices are not the only indication of whether charges were reasonable. It is unreasonable to provide no supporting documents or evidence about charges, but failing to provide all of the documentation desired by TPG is not unreasonable. It may be a reason that TPG would use to select a different provider, but that does not make it unreasonable under the Shipping Act.

The third-party invoices or credit card receipts are sufficient to show that Respondents paid demurrage charges for TPG's containers for the amounts reflected in the documents.

(d) Chassis and Storage Charges

In its brief, TPG asserts it is entitled to storage and chassis charges, stating only that the charges had "no legitimate basis" and that Respondents refused "to provide documentation to substantiate these charges." Brief at 1, 31.

Respondents contend that "[o]cean containers do not have wheels" and cannot be transported without chassis; virtually every quote Respondents provided to TPG included a per-day chassis rate (usually a two-day minimum use fee); and Respondents provided TPG with in-gate and out-gate receipts so that TPG could verify the validity of chassis charges. Opposition at 26, 26 n.12. Similarly, Respondents discuss the storage charges accumulated in the ship canal project when TPG's customer refused to accept delivery of five containers and Respondents assert:

> Storage charges are for "yard storage" in a "trucker's warehouse" or yard. Storage charges accrued in circumstances in which a container was pulled from a terminal but the receiver was not yet available or ready to accept delivery, or when an empty container could not be returned due to lack of appointments at the port or terminal.

Opposition at 27.

In its reply, TPG contends that the "record does not conclusively reflect that Respondents provided 'in-gate and out-gate receipts' and in fact, often Respondents did not provide this information" and states that it has reduced its claim for chassis fees by two days per shipment. Reply at 27. TPG also states: "None of Respondents' charges are supported with documentation for the storage fees. Again, the Ship Canal project is the sole instance that Respondents have identified is just one instance involving five invoices. The remainder of TPG's claim for storage fees stands." Reply at 38.

In its sur-reply, Respondents state that "TPG's reduction in damages for chassis and storage charges amounts to $166,455.00 but TPG does not explain the remaining $96,420.34 reduction of its claim, again leaving the Respondents' counsel and the Presiding Officer to guess why the changes have been made by TPG." Sur-reply at 2. TPG does not address these charges in its sur-reply response.

The revised damages chart, chassis sheet reduces the amount sought for chassis charges from $161,538.75 to $72,033.75 after excluding the first two days of chassis charges ($90 per invoice). CApp 11019 (revised). The revised damages chart, storage sheet reduces the amount sought for storage charges from $139,633.19 to $62,683.19 after excluding the ship canal project. CApp 11019 (revised). For these charges, the sheets in the damages chart only include an invoice number, amount of charge, and in the revised chart the reduced charge. There is no date and no citation to evidence. Moreover, TPG has not pointed to other evidence in the record supporting the argument that these charges were unreasonable. Unlike the demurrage charges where a number of emails acknowledge the markup, here, an email from TPG states "Why is there a 5% Admin charge on Chassis charges? You [and] I discussed starting to add 5% admin fee for pass through charges. Chassis charges were always a fixed rate." RApp 225. Therefore, the evidence does not demonstrate that chassis or storage charges were unreasonable.

Thus, the evidence does not support finding that chassis and storage charges were marked up or otherwise unreasonable and the record does not provide sufficient information to confirm whether or not documentation was provided for these charges. Indeed, TPG acknowledges that over half of the storage and chassis charges that they originally sought were not unreasonable. There is not sufficient evidence to support finding the remaining amounts in the revised damages chart, storage and chassis sheets, are unreasonable.

(e) Information, Avoidable Charges, and Mitigation

TPG asserts that "charges that are supported by carrier invoices are not reasonable and could have been avoided," arguing that Respondents: "failed to provide TPG with timely information concerning demurrage and detention, which are preventable charges, thereby preventing TPG from mitigating these costs;" never provided carrier's tariffs to TPG, "or any other tariff [or] information that would have helped TPG avoid or mitigate these charges;" and failed "to enact systemic controls to properly track containers and records resulted in avoidable demurrage charges." Brief at 19, 24-25, 30-31. In its reply, TPG asserts that its "principal argument is that Respondents failed to enact systemic controls to properly track records that would prevent incurring avoidable demurrage charges or even sufficient documentation for TPG (or Epic and Omni themselves for that matter) to assess the propriety of the charges after the fact." Reply at 23.

Respondents contend that TPG presents no evidence that Respondents failed to prevent or mitigate unnecessary charges but rather that the evidence demonstrates that Respondents did, in fact, regularly provide back-up documentation when it was available and made a good-faith effort to warn TPG of the potential to incur demurrage charges. Opposition at 12-16.

Respondents assert that "the only evidence in the record of 'preventable' charges were unequivocally caused by TPG and its customer in connection with the 'Ship Canal' project" where "TPG's customer refused to accept delivery of five containers for a period of over five months.'" Opposition at 14-15. TPG's reply includes a declaration from TPG's attorney that "Storage Claims and Chassis Claims for the project entitled Ship Canal are excluded from the [revised damages chart] computation." TPG Reply, Burd Declaration ¶ 6. Not only does the evidence show that the Ship Canal charges were the result of TPG's client's inability to accept the containers, but Respondents successfully negotiated a waiver of $232,500 in detention charges and TPG admits that these charges did not result from any conduct on the part of Respondents. RApp 234. Therefore, Respondents acted reasonably with regard to the ship canal project and those amounts are properly excluded from TPG's revised damages chart. Moreover, this is evidence that Respondents attempted to mitigate charges even when those charges were TPG's fault.

TPG asserts that another service provider pulled containers more quickly than Respondents and did not incur demurrage charges. Brief at 19; Reply at 23. Respondents object that TPG "never actually compared Respondents' charges to another party performing transportation on the 'same dates, same locations.'" Opposition at 16 (citing CApp 10390). But the Shipping Act prohibits conduct that is unreasonable, not conduct just because it may be less efficient.

TPG seems to think that all demurrage charges are inherently unreasonable, even where the record shows that Respondents paid the charges on TPG's behalf pursuant to their tariff. The record does show that Respondents made errors, especially as the data requested by TPG needed to be input manually. CApp 10689 ("every part of this account and all tasks are manual making it easy for mistakes to occur and tasks become very time consuming."). When errors were found, Respondents fixed them. These errors were not part of Respondents' practices and the evidence does not show that they were so pervasive as to make Respondents' billing practices unreasonable. Moreover, where the evidence did not clearly include a receipt for demurrage paid by Respondents, the improper markups chart shows the full amount of demurrage invoiced to TPG as the markup, so that this amount is accounted for in the markup section.

In addition, TPG wanted to know the demurrage charges in advance, so they could be incorporated into TPG's bids to its customers. However, the evidence shows that these charges were incurred during a period of congestion and that demurrage charges cannot always be anticipated. Similarly, the evidence does not show a practice of failing to provide timely information that would rise to the level of a Shipping Act claim.

TPG asserts that Respondents' tracking system was insufficient, but does not present convincing evidence that demurrage charges were the fault of Respondents. TPG asserts that Respondents are withholding evidence such as invoices that would show whose fault the demurrage charges are, but it is not clear what the invoices would show that is not already listed on the credit card receipts and other documentation provided. Moreover, Respondents were not the one imposing the charges; rather, they were seeking reimbursement for charges they paid on TPG's behalf.

TPG has the burden of proof and has not provided evidence that all demurrage charges were avoidable, that lack of sufficient information caused the charges, that mitigation was possible, or that other unreasonable practices of Respondents caused the charges. Therefore, the evidence does not support a finding of unreasonableness for the charges due to problems with information, that they were avoidable, lack of mitigation, or other reasons.

Accordingly, the charges that are found unreasonable are the markups of passed-through amounts and charges due to coercive collection practices.

iv. Normal, Customary, and Continuous Basis

TPG asserts that unreasonable practices lasted from January 2020 into 2022 and applied to 902 containers, and therefore occurred on a normal, customary, and continuous basis. Brief at 17. Respondents primarily allege that any coercive collection practices did not occur on a normal, customary, and continuous basis. Opposition at 17-19.

Regarding coercive collection practices, TPG asserts this does constitute a practice because it occurred on a continuous basis for several days, and under Federal Rule of Evidence 406, "'[e]vidence of a person's habit or an organization's routine practice' is admissible 'to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice.'" Reply at 24, 27 n.5 (quoting Fed. R. Evid. 406). Respondents argue that any coercive collection practices were not a normal, customary, or continuous practice and Epic's tariff gave it a lien on property for charges on previous shipments. Opposition at 16-21.

The evidence shows that Epic included the right to withhold containers to extract payment on any property in its "actual or constructive possession" for "any unpaid charges" in both its tariff and terms and conditions. CApp 10842-43; RApp 356. Thus, these coercive collection practices were part of their written policies and procedures, which is sufficient to find that they were a practice occurring on a normal, customary, and continuous basis.

Regarding the other alleged unreasonable practices, the parties do not specifically address whether they were occurring on a normal, customary, and continuous basis. For example, Respondents stated that starting in January 2022, they would start imposing a five percent administrative fee. RApp 261-62. The evidence shows that additional charges beyond the rates listed in the tariff were regularly imposed by Respondents on TPG. Improper markups chart, FOF 102. This is sufficient to establish a practice.

v. Proximate Cause

Regarding coercive collection practices, TPG states that due to coercive collection practices, it paid $228,536 around May 20, 2022, and another $417,000 around May 31, 2022, and that containers were withheld for 22 days (containers CMAU4830227 and CMAU4265316) and 17 days (container DRYU9980059). Brief at 20 (citing CPFF ¶¶ 136-137, 144). Respondents argue that any coercive collection practices caused no injury. Opposition at 16-21.

Coercive collection practices can cause demurrage to be incurred and that additional demurrage would then be proximately caused by the unreasonable practice. Regarding the three containers withheld, the evidence shows that they were detained for 17 to 22 days each. The unreasonable detention of these containers is the proximate cause of the detention, chassis, and storage charges.

The other unreasonable practice was Respondents' decision to impose markups on pass-through detention and demurrage charges. This unreasonable conduct was the proximate cause of those charges, which the parties do not dispute.

As a result, all five Section 41102(c) elements have been established for the improper markup of pass-through charges and for coercive collection practices. Other allegations do not rise to the level of a Shipping Act violation. The reparations request is discussed below, in section III.D after discussing the OSRA invoice requirements.

2. Section 41104(a)(15): OSRA Invoice Requirements

TPG asserts that Respondents' invoices violated section 41104(a)(15), which was added to the Shipping Act by OSRA 2022. Brief at 27-30. Respondents contend that they are not liable because they merely passed through charges from ocean common carriers, and Respondents are not otherwise responsible for the charges. Opposition at 33-35.

a. Relevant Law

Section 41104(a)(15) states that:

> (a) IN GENERAL.-A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not- . . .
>
> > (15) invoice any party for demurrage or detention charges unless the invoice includes information as described in subsection (d) showing that such charges comply with-
> >
> > > (A) all provisions of part 545 of title 46, Code of Federal Regulations (or successor regulations); and
> > >
> > > (B) applicable provisions and regulations, including the principles of the final rule published on May 18, 2020, entitled "Interpretive Rule on Demurrage and Detention Under the Shipping Act" (or successor rule).

46 U.S.C. § 41104(a).

The referenced Section 41104(d) states:

(d) DETENTION AND DEMURRAGE INVOICE INFORMATION.-

(1) INACCURATE INVOICE.-If the Commission determines, after an investigation in response to a submission under section 41310, that an invoice under subsection (a)(15) was inaccurate or false, penalties or refunds under section 41107 shall be applied.

(2) CONTENTS OF INVOICE.-An invoice under subsection (a)(15), unless otherwise determined by subsequent Commission rulemaking, shall include accurate information on each of the following, as well as minimum information as determined by the Commission:

(A) Date that container is made available.

(B) The port of discharge.

(C) The container number or numbers.

(D) For exported shipments, the earliest return date.

(E) The allowed free time in days.

(F) The start date of free time.

(G) The end date of free time.

(H) The applicable detention or demurrage rule on which the daily rate is based.

(I) The applicable rate or rates per the applicable rule.

(J) The total amount due.

(K) The email, telephone number, or other appropriate contact information for questions or requests for mitigation of fees.

(L) A statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage.

(M) A statement that the common carrier's performance did not cause or contribute to the underlying invoiced charges.

46 U.S.C. § 41104(d).

In addition, OSRA 2022 created a safe harbor provision, which states:

(e) SAFE HARBOR.-If a non-vessel operating common carrier passes through to the relevant shipper an invoice made by the ocean common carrier, and the Commission finds that the non-vessel operating common carrier is not otherwise responsible for the charge, then the ocean common carrier shall be subject to refunds or penalties pursuant to subsection (d)(1).

46 U.S.C. § 41104(e).

b. Parties' Arguments

TPG argues in its brief that "none of the invoices issued by Respondents after the effective date of the OSRA 2022 include all information required by the statute," amounting to $59,789.47 in improper charges. Brief at 30. TPG argues in its reply that Respondents are liable for violations of OSRA with respect to all invoices that are not passed through. Reply at 30-31.

Respondents contend that OSRA 2022 only applied to invoices issued after June 16, 2022, and only to detention and demurrage charges; and that the safe harbor provision applies as "[e]ach of the invoices issued after OSRA 2022's effective date included as an attachment proof of payments to third parties for the invoiced charges." Opposition at 33-34.

c. Analysis

Respondents assert that "TPG is not entitled to recover under OSRA 2022 for charges other than demurrage or detention, and it fails to establish any legal argument to the contrary." Opposition at 34. TPG's revised damages chart has four sheets showing: a summary, demurrage, storage, and chassis charges. The storage and chassis sheets do not include dates, making it harder to identify the charges from after June 16, 2022. This may be tacit acknowledgement that the storage and chassis charges were not impacted by OSRA 2022. Moreover, section 41104(a)(15) explicitly refers to detention and demurrage charges. TPG has not argued that this section applies to the storage and chassis charges; therefore, the focus will be on the charges listed in the revised damages chart, demurrage sheet.

TPG has not established that Respondents imposed their own demurrage charges. Rather, the evidence shows that Respondents passed-through charges from other entities, such as Maher Terminals, and that Respondents marked up those charges. Although the safe harbor provision states that it applies to invoices from ocean common carriers, the same logic would apply to invoices from marine terminal operators. While invoices for some transactions may be missing, the preponderance of the evidence suggests that this is an issue of a missing document, not that Respondents were the entity imposing the underlying demurrage charges.

As the entity that passed through charges from common carriers and terminals, Respondents could only pass through information they received from those entities. The evidence shows that those other entities often did not provide the level of detail desired by TPG, nor now required by the Shipping Act. However, NVOCCs passing through charges are not required to provide more than what they received from the underlying carrier. Therefore, TPG has not established that Respondents violated section 41104(a)(15).

D. Reparations

1. Parties' Arguments

In its brief, TPG seeks a total of total of $844,712.63[4] calculated by adding demurrage charges of $543,445.69, storage charges of $139,728.19, and chassis charges of $161,538.75. Brief at 30-31. TPG seeks damages both for unreasonable charges, including markups, and for charges caused by TPG's failure to avoid unnecessary charges. Brief at 27. TPG identifies $18,367.10 as costs caused by Respondents' improper withholding of three containers. *Id.*

Respondents assert that TPG seeks to recover damages arising out of shipments over which the Commission lacks jurisdiction because they did not enter the United States through a United States port and TPG fails to establish proximate cause or establish its damages with reasonable certainty. Opposition at 21-33. Respondents argue that TPG does not make any effort to explain how the demurrage charges it paid could have been avoided and Commission precedent requires this showing on a shipment-by-shipment basis; chassis charges were included in agreed to quotes and terms, and Respondents provided in-gate and out-gate receipts; storage charges are likewise for the account of TPG; and TPG also fails to prove its damages with reasonable certainty. Opposition at 25-33.

In its reply, TPG seeks $584,837.29 in unjustified demurrage and other ancillary charges, and argues that TPG properly substantiated its damages; Respondents are responsible for any gaps in the record; the shipment-by-shipment approach is not required; claims for chassis fees and storage fees are proper; and TPG's damages are calculated with reasonable certainty. Reply at 34-39.

In their sur-reply, Respondents contend that TPG submitted new evidence and raised new arguments about certain evidence that TPG did not raise in its opening brief; TPG quietly advances a new theory as to its damages that was not set forth in its opening brief; and TPG continues to claim damages for amounts that Respondents charged but which TPG has not paid. Sur-reply at 3-8.

In its sur-reply response, TPG asserts that TPG's damages theory remains consistent and Respondents have failed to rebut it; Respondents' supplemental evidence does not establish that they adhered to just and reasonable practices; and Respondents improperly invoiced TPG $584,837.29. Sur-reply Response at 5-8.

2. Relevant Law

The Shipping Act requires that the "Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation" of the Act. 46 U.S.C. § 41305(b). Complainants bear the burden of proving that they are entitled to reparations. *MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, Docket No. 16-16, 2022 WL 2209421, at *3 (FMC June 10, 2022). "As the Commission has explained: '(a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation

[4] The brief states $847,712.63; however, this appears to be a typographical error.

in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.'" *MAVL Capital*, 2022 WL 2209421, at *3 (citations omitted).

Reparations are awarded for actual damages. "Actual damages means 'compensation for the actual loss or injuries sustained by reason of the wrongdoing' which complainants must show to a reasonable degree of certainty." *MAVL Capital*, 2022 WL 2209421, at *3 (quoting *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, Docket No. 88-15, 1990 WL 427466, at *23 (FMC Oct. 19, 1990)). "That does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained." *MAVL Capital*, 2022 WL 2209421, at *3. "Actual injury" also includes the loss of interest compounded from the date of injury. 46 U.S.C. § 41305(a); *see also Gruenberg-Reisner FMC*, 2016 WL 11942284, at *10.

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

Tractors & Farm Equipment Ltd. v. Cosmos Shipping Co., Docket No. 81-57, 26 S.R.R. 788, 798-99 (ALJ Nov. 23, 1992) (admin. final, Dec. 31, 1992).

Demurrage and storage fees have been awarded as reparations in circumstances like the present. For example, in *Total Fitness*, the Commission awarded storage fees as damages, explaining that "holding up the cargo . . . was not an appropriate means of debt collection" and that the NVOCC's unreasonable actions were thus "the direct cause of the storage fees" complainant had to pay. 1998 WL 940255, at *12. That decision found that the storage fees:

> [A]rose from Worldlink's unreasonable decision to impose a double billing on the cargo and its refusal to release the cargo until the second billing was paid. As such, the storage fees accrued as a direct result of Worldlink's unreasonable practice. The storage fees, paid like the port fees in *Corpco* by the shipper, may therefore be awarded as damages arising as a consequence of the unreasonable practices of Worldlink described above.

Total Fitness, 1998 WL 940255, at *12. In the *Corpco* decision referenced, the "Commission ruled that the failure to pay the transshipment costs was an unreasonable practice, and that the port fees, which the shipper had paid, were attributable to the NVOCC's unreasonable practice and could therefore be awarded as damages." *Total Fitness*, 1998 WL 940255, at *12 (describing *Corpco Int'l Inc. v. Straightway, Inc.*, 28 S.R.R. 296, 299-300, 1998 WL 940257, at *6-7).

Where charges are improperly marked up, the reparations amount is "based on the difference between the demurrage charges [respondent] paid to third parties and the amounts [respondent] billed to [complainant]." *CMI Distribution,* 3 F.M.C.2d at 99, 2021 WL 9204113, at *17. The shipper's "actual injury" is "whatever it paid the NVOCC, less whatever payments were made by the NVOCC that the shipper would otherwise have had to pay." *Graniteville Co. v. Scarade, Lines,* Docket No. 16647(I), 25 S.R.R. 1330, 1331 (FMC Jan. 24, 1991). "Subtracting from the reparations the pass-through charges the NVOCC paid on the shipper's behalf also prevents the shipper from unfairly receiving a windfall." *CMI Distribution,* 3 F.M.C.2d at 100, 2021 WL 9204113, at *17.

3. Reparations Analysis

TPG submits a revised damages chart that identifies the shipments for which it seeks damages. CApp 11019 (revised). TPG also asserts that each of the three containers withheld due to coercive collection practices incurred $1,265 in chassis fees and $4,947.36 or $4947.37 in demurrage charges. Brief at 27. Respondents assert that TPG has failed to pay $390,336.80 that TPG was invoiced by Respondents. Sur-reply at 8.

TPG has not established that the amounts it was invoiced for chassis or storage were unreasonable or violated the Shipping Act, except for the charges associated with the three withheld containers. Therefore, the remainder of the damages listed on TPG's damages chart, on the chassis and storage sheets, are not improper. TPG has established that markups of the detention and demurrage charges violated the Shipping Act and were improper. Those damages are discussed below as part of the markups analysis. Next, TPG's request for damages for coercive collection practices is discussed, followed by a discussion of unpaid fees and additional amounts. Because the improper charges are less than the amount that TPG failed to pay Respondents, no reparations are ordered.

a. Markups

The calculation of improper markups is based on the difference between the demurrage charges Respondents paid to third parties and the amounts Respondents billed to TPG. Therefore, the total measure of markups is not the total amount the Respondents billed TPG, as suggested by TPG and as calculated in their damages chart. Rather, the amount Respondents paid on behalf of TPG must be subtracted.

The amount that Respondents paid to third parties is established either by credit card receipts, third-party invoices, or other payment summaries. TPG argues that "Respondents failed to provide any supporting documentation that would confirm whether charges were pass-through or originated by Respondents for at least 20 invoices." Reply at 31 (*citing* CApp 2487-2505, 2517-18, 2603). A number of these cited pages are not on TPG's revised damages chart, demurrage sheet. *See, e.g.*, CApp 2487-90, CApp 2603. Where the parties have not provided and identified evidence showing the demurrage paid by Respondents for containers, the entire demurrage cost invoiced to TPG for the relevant container is listed as a markup. This is appropriate in this case because of the numerous times that Respondents billed TPG for demurrage in excess of the payments actually made by Respondents. *See CMI Distribution,* 3 F.M.C.2d at 99, 2021 WL 9204113, at *17 (Commission identified receipts for demurrage paid by Respondent but did not criticize initial decision findings awarding full amount of demurrage charged where no evidence had been identified to support the charge (*CMI Distribution,* 2019 WL 4734318, at *18 (ALJ May 24, 2019))).

Respondents assert that TPG improperly refused to pay any charges when any small portion of an invoice could not be documented. TPG's damages charts continue with this approach. For example, the revised damages chart, demurrage sheet shows that for invoice 7217739 00, TPG was invoiced $59,789.47 for 18 containers, while the receipts show APM Terminals charges of $56,800. CApp 11019; CApp 6424-26. In reparations, TPG seeks $59,789.47, the total amount for which TPG was invoiced. However, because there are receipts for $56,800, that amount was clearly paid on TPG's behalf by Respondents and unless there is some other reason Respondents are responsible for those charges, the most TPG could obtain in actual damages is the difference, or $2,989.47. To award the full amount sought by TPG would allow it to obtain a windfall.

TPG also erred in its damages request by failing to reflect credits it received for charges. These errors were not apparent on the face of TPG's damages chart, because TPG organized its damages by invoice number, and it did not include the container number as a column within the same chart. In calculating alleged damages, container number is a vital unique identifier, and in the future parties should calculate and present similar damages requests with the container number identified. For example, invoices 7203111 00 and 7203111 01 both pertain to container HLBU3359426 and show that the demurrage charge of $682.50 was refunded in full. CApp 4172; CApp 5008. Refunded charges should not have been included in TPG's demurrage claim. In other instances, TPG listed an invoice showing a demurrage charge, but did not point to evidence in the record showing payments made by Respondents. These types of omissions would have been more readily apparent if TPG had organized its damages request by container number. TPG would obtain a windfall if reparations were ordered for amounts that were already refunded to TPG or where the evidence contains proof that payments to third parties were made by Respondents. These and other errors have, therefore, been corrected as well as possible in the improper markups chart included as the last finding of fact above.

As shown by the improper markups chart, Respondents repeatedly charged TPG more than what is supported by the proof of payments in evidence. These markups ranged from $5 to over $5000 per container and do not appear to be a consistent percentage markup. In total, Respondents overcharged TPG for demurrage by a total of $86,722.10 as shown by evidence in the record.

To support the charges invoiced to TPG above the amount paid by Respondents, Respondents argue that they "were required to pay VOCCs and MTOs by credit card, and those vendors assessed a credit card processing fee of 3% of the total amount paid." Opposition at 11, citing RPFF ¶¶ 96-97. The cited proposed fact points to deposition testimony, which says:

> And then as far as the terminal, demurrage storage, that we can provide a receipt. However, I did mention to their accounting team that it might be off by a -- a few percent, right. You -- you have to pay online and you -- you get charged, like, a credit card processing fee to do so.

CApp 10307.

For the containers included in the improper markups chart, the evidence shows that even when credit card fees were shown on credit card receipts, Respondents invoiced TPG a higher amount than shown on the receipt. For example, for container BEAU6227719, the Maher Terminals receipt shows $5,008 paid plus a "Credit Card Processing Fee" of $199.82 for a total of $5,207.82; however, Respondents invoiced TPG $5,468.21 in demurrage for this container. CApp 8294; CApp 7469. Therefore, the markup is the invoiced amount of $5,468.21 minus the demurrage paid of $5,207.82, which equals a markup of $260.39.

Similarly, for container CSNU6785143, the Maher Terminals receipt shows $858 plus a $34.23 "Credit Card Processing Fee" for a total of $892.23 plus Mecca Trucking demurrage charge of $382.68 plus $30 "Admin Fee" for a total of $412.68; however, Respondents invoiced TPG demurrage of $1,650.84 plus demurrage of $412.68. CApp 8011, 9109, 9965, 9968. Therefore, the markup is the invoiced amount of $2,063.52 minus the demurrage paid of $1,304.91, which equals a markup of $758.61.

Respondents also contend that "TPG also appears to include 'detention' charges in the 'demurrage' column in its Shipment Chart." Opposition at 34 (citing row 900). Row 900 of the original shipment chart refers to invoice 7204085 01, which is also listed as an invoice for which TPG is seeking reparations in its revised damages chart. This invoice is omitted from the improper markups chart because here Respondents charged TPG the same amount that they paid. CApp 9999; CApp 10005. Inclusion of detention in the reparations would not otherwise have been improper though. This argument thus is rejected on both a legal and factual basis.

In a small number of cases, TPG did point to invoices for drayage as opposed to demurrage, and the drayage charges were not included in the improper markups chart. CApp 8256; CApp 8257. For some of the improper markups chart entries, the proof of payment contains the word "storage;" however, the weight of the evidence demonstrates the proof of payment represents payments made for demurrage. *See, e.g.* CApp 4843; CApp 3905. Also, in a small number of instances, there is no container number listed on Respondents' invoice to TPG and the container number was not otherwise able to be determined through evidence in the record. *See, e.g.*, CApp 5792. In such cases, a markup is still calculated because matching receipts could not be found due to the lack of container number, which should have been provided by Respondents in the first instance. Likewise, documents that do not provide sufficient detail to show the amount actually paid by Respondents to third parties for the container in question have not been credited as a payment made by Respondents. *See, e.g.*, CApp 6003-4 (listing CMAU7895089 among other container numbers; however the document neither shows the value paid for this container, nor does it demonstrate that the payment was confirmed).

The last finding of fact, the improper markups chart, calculates the improper charges for which Respondents invoiced TPG, to the best that can be determined from the evidence in the proceeding. The lack of Bates numbers on the damages chart, as well as the lack of clarity in the evidence, make determining this amount challenging. However, determining reparations "does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained." *MAVL Capital*, 2022 WL 2209421, at *3.

b. Coercive Collection Practices

As discussed above, Respondents unreasonably withheld three containers as part of their coercive collection practices. The evidence shows that all three containers were released from APM Terminals, which charged $4,700 in demurrage for each container. CApp 6611. The first container, CMAU4830227, was picked up by Mecca Trucking on May 10, 2022, delivered on May 27, 2022, and the empty container returned on June 1, 2022. CApp 3559-61; RApp 181. For container CMAU4830227, Respondents billed TPG $1,265 in chassis fees, $4,947.36 in demurrage charges, and $765 in storage for total invoice charges of $6,977.36. CApp 3557.

The second container, CMAU4265316, was picked up by Mecca Trucking and delivered on May 27, 2022. CApp 6427; CApp 6611. For container CMAU4265316, Respondents billed TPG $1,265 in chassis fees, $4,947.37 in demurrage charges, and $765 in yard storage for total invoice charges of $6,977.37. CApp 6427.

The third container, DRYU9980059, was picked up by Mecca Trucking on May 10, 2022 and delivered on May 27, 2022. CApp 3554; CApp 6611; RApp 179-81. For container DRYU9980059, Respondents billed TPG $1,265 in chassis fees, $4,947.37 in demurrage charges, and $765 in storage for total invoice charges of $6,977.37. RApp 179.

Respondents invoiced TPG $20,932.10 for demurrage, storage, and chassis use for these three containers. As shown by the changes to the revised damages chart, chassis sheet, each shipment incurred $90 in chassis charges. Therefore, $90 can be subtracted from each of the three shipments.

As discussed above, these charges were caused by the coercive collection practices of Respondents. Therefore, the charges of $20,662.10 for the demurrage, storage, and additional chassis use for these containers were improper and violated the Shipping Act. These containers were removed from the improper markups chart above, so that they are not counted twice when calculating improper demurrage charges.

c. Unpaid Fees and Additional Amounts

The evidence shows that TPG was charged $86,722.10 as markups on pass-through demurrage amounts plus $20,662.10 as charges for coercive collection practices for a total of $107,384.20. The evidence does not support finding improper charges for other demurrage, detention, chassis, or storage charges.

Respondents assert that TPG has failed to pay $390,336.80 that is owed. Sur-reply at 8. TPG does not contest that amount; rather, it contends that it is not liable for these charges as they are the result of unjust and unreasonable practices and suggests that the "unlawful amount could be offset with the lawful amount due" and requests that a cease-and-desist order be issued. Sur-reply Response at 5, 8.

Under Commission case law, "'the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.'" *James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist.*, FMC Docket No. 94-32, 2003 WL 22067203, at *7-8 (FMC Aug. 26, 2003) (quoting *Waterman v. Stockholms Rederiaktiebolag*

Svea, 3 F.M.B. 248, 249 (1950)). The uncontroverted evidence shows that TPG has not paid Respondents' outstanding invoices in the amount of $390,336.80. RApp 3 ¶¶ 21, 23; RApp 5-6. Because the improper charges of $107,384.20, established by TPG, are less than the amount that TPG owes Respondents, the evidence does not show proof of pecuniary loss resulting from the unlawful act, so no reparations are ordered.

In the sur-reply, for the first time, TPG asserts that the Commission could order Respondents to pay additional amounts not exceeding twice the amount of the actual injury. This provision only became applicable to violations of section 41102(c) in OSRA 2022 and, therefore, would only apply to the few violations after June 16, 2022. However, TPG raises this argument late and has not established that such an increase in damages would be appropriate, especially here where TPG has not paid Respondents all of the amounts that were invoiced. There is no evidence that Epic would continue with practices that violate the Shipping Act; therefore, no cease and desist order is issued.

IV. ORDER

Upon consideration of the record herein, the arguments of the parties, the findings and conclusions set forth above, and the determination that Epic violated the Shipping Act, it is hereby

ORDERED that TPG's complaint against Omni be **DISMISSED**. It is

FURTHER ORDERED that TPG's complaint against Epic be **GRANTED** due to markups on pass-through invoices and coercive collection practices. It is

FURTHER ORDERED that Epic is not ordered to pay TPG reparations for improper charges of $107,384.20, as TPG has not paid those amounts to Epic. It is

FURTHER ORDERED that the joint renewed motion requesting confidentiality be **GRANTED**. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

PETITION OF THE OCEAN CARRIER EQUIPMENT MANAGEMENT ASSOCIATION, INC. FOR AN EXTENSION OF THE EFFECTIVE DATE OF THE FINAL RULE FOR DEMURRAGE AND DETENTION BILLING REQUIREMENTS	Docket No. FMC-2024-0010

Served: September 17, 2024

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*, Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, and Max VEKICH, *Commissioners*.

ORDER DENYING PETITION FOR DELAY OF EFFECTIVE DATE

On May 28, 2024, the date the Federal Maritime Commission's (Commission or FMC) "Demurrage and Detention Billing Requirements" final rule, 89 FR 14330, went into effect, the Ocean Carrier Equipment Management Association (OCEMA) filed with the Commission a petition under 46 C.F.R. § 502.51(a) for an extension of the effective date of the rule by at least 90 days. The Commission denies the petition for the reasons below.

I. BACKGROUND

On June 16, 2022, the Ocean Shipping Reform Act of 2022 (OSRA 2022) was enacted into law.[1] Section 7 of the Act prohibits common carriers from issuing an invoice for demurrage or detention charges unless the invoice includes specific information required by the statute, and any additional information required by the Commission through regulation. OSRA 2022 mandated that the Commission, by June 16, 2023, issue a final rule "further defining prohibited practices by common carriers, marine terminal operators, shippers, and ocean transportation intermediaries under [46 U.S.C. § 41102(c)] regarding the assessment of demurrage or detention charges."[2]

On February 26, 2024, the Commission published the Demurrage and Detention Billing Requirements final rule in the FEDERAL REGISTER, 89 FR 14330. With certain limited exceptions, the Administrative Procedure Act (APA) requires rules to have an effective date no sooner than 30 days after publication in the FEDERAL REGISTER, 5 U.S.C. § 553(d). The rule had an effective date of May 28, 2024, 90 days after publication, except for 46 C.F.R. § 541.6 and 46 C.F.R.

[1] Public Law 117–146, 136 Stat. 1272 (2022).
[2] Section 7, codified at 46 U.S.C. § 41102.

§ 541.99.[3] The effective date of those two provisions was delayed pending approval of the associated Collection of Information by the Office of Management and Budget (OMB) as the Paperwork Reduction Act requires OMB to approve collections of information before an agency can enforce collection requirements.[4]

On May 9, 2024, the Commission issued a Correction to the preamble, 89 FR 39569. At page 14336 in the preamble to the February 26, 2024, final rule, the Commission responded to a comment requesting that the FMC revise the definition of ''billed party'' to address situations in which vessel-operating common carriers (VOCCs) enter into written contracts with motor carriers that use containers in the transportation of goods. The Commission responded by declining to adopt this proposed change. The supporting discussion explaining why the request was denied was intended to explain that the rule only addresses carrier-trucker relationships on through bills of lading. The Commission meant this to be understood in the context of its statement in the final rule that ''the FMC's jurisdiction, and thus this rule, would apply only to cargo moved inland under a through bill of lading and contracts between a VOCC [and] a motor carrier not based on a through bill of lading would likely be outside the scope of this rule.'' Accordingly, the Correction amended the preamble in the final rule to read:

> In regard to the second comment, the rule makes clear that demurrage and detention invoices can only be issued to either the person for whose account the billing party provided ocean transportation or storage of cargo and who contracted with the billing party for the ocean transportation or storage of cargo, or the consignee. As discussed in the NPRM, a primary purpose of this rule is to stop demurrage and detention invoices from being sent to parties who did not negotiate contract terms for ocean transportation or storage of cargo with the billing party. When a VOCC issues a detention or demurrage invoice, the VOCC must comply with the requirements of part 541. However, in our response to this specific comment, we presume that the FMC's jurisdiction would apply only to cargo moved inland under a through bill of lading, and that contracts between a VOCC and a motor carrier not based on a through bill of lading would likely be outside the scope of this rule.

The Correction did not amend any of the regulatory text of the final rule.

On May 14, 2024, following approval of the Collection of Information by the OMB, the Commission published notice in the FEDERAL REGISTER that 46 C.F.R. §§ 541.6 and 541.99 would become effective on May 28, 2024, the same date as the other provisions of the rule.[5]

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[3] Section 541.6 sets out substantive requirements for what billing parties must include in their demurrage and detention invoices. It added several provisions in addition to those required by OSRA 2022. While the statutory invoice elements are self-implementing and immediately became effective upon passage of OSRA 2022, regulated entities were not required to comply with the additional elements imposed by the Commission until 46 C.F.R. § 541.6 went into effect. Section 541.99 is an administrative provision that provides additional public notice of OMB approval of the collection of information; it does not impose requirements on the public.

[4] Paperwork Reduction Act (44 U.S.C. §§ 3501–3521).

[5] 89 FR 41895 (When processing the document, the Office of the Federal Register incorrectly specified the effective date in the Dates section. As a result, the Dates section read that the "correction is effective May 14, 2024", even

II. PETITION FOR DELAYED EFFECTIVE DATE

On May 28, 2024, the date the final rule went into effect, the Commission accepted for filing a petition from OCEMA requesting an extension of the effective date of the rule by at least 90 days.[6] Petitioner argues that the requested extension is necessary "to allow time for stakeholders to revise their practices based on the revised guidance provided in the [May 9, 2024] Correction and to address questions raised by the Correction." Petitioner asserts that "as a result of an apparent reversal in the FMC's position with regard to the assessment of detention and demurrage to motor carriers, VOCCs are now put in a position of needing to unwind and/or further revise the arrangements they made based on the FMC's previous guidance." OCEMA claims that as a result of the Correction, VOCCs only had 19 days to prepare to come into compliance with the rule and that they need more time. It further asserts that the Correction did not fully clarify the FMC's position with respect to invoicing motor carriers and that additional time is needed to understand the rule's requirements.

III. RESPONSES AND PUBLIC COMMENT TO THE PETITION

A petitioner seeking the amendment or repeal of an FMC rule must provide proof of service on all persons named in/that participated in such a rule,[7] and those served have the opportunity to respond[8]. OCEMA provided such proof of service. No replies were filed.

On June 10, 2024, the Commission published a notice of filing of the petition in the Federal Register and solicited comments from the interested public.[9] The comment period closed on July 1, 2024. Seventeen comments were submitted. Sixteen of the commenters said that the petition should be denied. One commenter, the National Customs Brokers and Forwarders Association of America (FMC-2024-0010-0018), proposed that, rather than an extension, the FMC should implement an interim period of "informed compliance," which would allow all ocean industry stakeholders to work toward full compliance and assess the practical applications of these new demurrage and detention billing requirements. The association noted that such "informed compliance" period would mirror U.S. Customs and Boarder Protection practice with respect to new Customs regulations. Commenters supporting denial of the petition cited concerns about an extension leading to massive confusion and a high administrative burden given that the rule has already gone into effect. Some commenters also said that an extension is not necessary because carriers are already complying with the rule.

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though the body of the notice itself correctly stated that the provisions would be effective May 28, 2024. The Office of the Federal Register issued a correction on May 24, 2024, 89 FR 45772, stating that the Dates section should have read that the rule was effective on May 28, 2024. The Commission did not receive any questions from the public concerning this error.).

[6] 89 FR 14330.

[7] 46 C.F.R. § 502.51(a) and 46 C.F.R. § 502.115.

[8] 46 C.F.R. § 502.21(a).

[9] 89 FR 48865.

IV. ANALYSIS

Delay of an effective date of a rule is itself a substantive rulemaking action that is subject to the requirements of 5 U.S.C. § 553 of the Administrative Procedure Act.[10] This includes the requirement that an agency must engage in the notice and comment process in accordance with 5 U.S.C. § 553(b)(B) prior to delaying a rule's effective date unless it finds good cause not to do so.[11] Section 705 of the Administrative Procedure Act permits an agency to "postpone the effective date" of a rule, without providing notice-and-comment, if the agency "finds that justice so requires." However, 5 U.S.C. § 705 does not permit an agency to suspend, without notice-and-comment, a rule that is already in effect.[12]

After thorough review of the petition requesting that the Demurrage and Detention Billing Requirements final rule's effective date be delayed, the Commission denies the petition for the following reasons.

1. Delaying the effective date of the Demurrage and Detention Billing Requirements final rule, as requested by the Petitioner, would directly impede the explicit instructions of Congress. OSRA 2022 mandated that the Commission issue a final rule "further defining prohibited practices by common carriers, marine terminal operators, shippers, and ocean transportation intermediaries under [46 U.S.C. § 41102(c)] regarding the assessment of demurrage or detention charges…not

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[10] *See*, *e.g*., *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) ("EPA's stay, in other words, is essentially an order delaying the rule's effective date, and this court has held that such orders are tantamount to amending or revoking a rule."); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) ("The [APA] makes no distinction, however, between initial agency action and subsequent agency action undoing or revising that action.").

[11] *E.g*., *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin*., 894 F.3d 95, 113 (2d Cir. 2018) ("Under the APA, before promulgating a rule an agency must publish '[g]eneral notice of proposed rule making ... in the Federal Register,' as well as 'an opportunity to participate in the rule making through submission of written data, views, or arguments.' These requirements apply with the same force when an agency seeks to delay or repeal a previously promulgated final rule. A basic principle of administrative law is that 'an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked.' Similarly an agency "may not alter such a rule without notice and comment," nor does the agency have any inherent power to stay a final rule…A significant body of authority reinforces this proposition." citations omitted); *NRDC v. EPA*, 683 F.2d 752, 761–62 (3d Cir. 1982) ("[S]uspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA § 553."); *See also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("The [APA] makes no distinction...between initial agency action and subsequent agency action undoing or revising that action.").

[12] *Ctr. for Biological Diversity v. Regan*, 691 F. Supp. 3d 1, 8 (D.D.C. 2023), judgment entered, No. CV 21-119 (RDM), 2024 WL 1591671 (D.D.C. Apr. 12, 2024) ("The Court has also previously suggested—and now holds—that Section 705 permits an agency to 'postpone the effective date' of a rule that has not yet taken effect, but does not permit an agency to suspend, without notice and comment, a rule that is already in effect. As the Court explained in *CBD I*, that understanding of Section 705 comports with: (1) the D.C. Circuit's non-precedential decision in *Safety-Kleen Corp. v. EPA*, 1996 U.S. App. LEXIS 2324, at 2–3 (D.C. Cir. Jan. 19, 1996); (2) the usual APA rule, which 'mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance;' and (3) the plain language of Section 705, which does not grant agencies the same broad equitable authority vested in courts but, rather, merely permits agencies to 'postpone'—that is, 'put off for a later time'—agency action that is subject to judicial review. *CBD I*, 597 F. Supp. 3d at 204–05 (first quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101, 135 S.Ct. 1199, 191 L.Ed.2d 186 (2015); and then quoting *Postpone*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/postpone (last visited Mar. 28, 2022))…Court now holds that an agency's authority to 'postpone the effective date' of a rule ends when the rule takes legal effect.").

later than [June 16, 2023]." Despite the best efforts of the agency, the Commission was unable to issue the Demurrage and Detention final rule until February 26, 2024. This was in large part because the agency needed the time, as required by the Administrative Procedure Act, to carefully analyze and respond to the 191 public comments submitted on the proposal. In the interest of fairness, based on those public comments, the agency granted an additional 60 days beyond the required 30-day period before the final rule became effective, with the final rule having an effective date of May 28, 2024. Granting the Petitioner's request—which was not effectively filed with the Commission until the day the rule went into effect—would result in pushing the rule's effective date even further beyond the explicit statutory deadline. Federal Register documents would need to be drafted, and comments analyzed and responded to. If, after analyzing comments on a notice of proposed rulemaking, the agency was to move forward with a final rule to temporarily delay the effective date, the final, permanent effective date of the rule would most likely be at least two years past the specified Congressional deadline. Courts have found that granting significant extensions to rules in direct contradiction to clear statutory deadlines is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," under 5 U.S.C. § 706(2)(C). For example, in *Sierra Club v. Pruitt*, the court found that the Environmental Protection Agency violated the Formaldehyde Act by extending a rule's compliance deadline well beyond the deadline set out in the statute.[13]

2. Petitioner asserts that the Correction created confusion about what the rule requires of regulated parties, but that claim is unpersuasive. While the Commission acknowledged in the Correction that the original preamble language was *potentially* "ambiguous," the Correction was not a "reversal" of position. The Correction was for the preamble language only; it did not change any of the regulatory text. The regulatory text is clear and unambiguous: "A properly issued invoice is a demurrage or detention invoice issued by a billing party to: (1) The person for whose account the billing party provided ocean transportation or storage of cargo <u>and</u> who contracted with the billing party for the ocean transportation or storage of cargo; or (2) the consignee." 46 C.F.R. § 541.4(a). A rule's preamble cannot be used to create ambiguity and contradict regulatory text.[14] As summarized by the U.S. District Court for the District of Columbia in *Texas Children's Hosp. v. Azar*: "To be clear, the preamble to a statute or rule may be used to help inform the proper interpretation of an ambiguous text. The preamble cannot, however, be used to contradict the text of the statute or rule at issue."[15] Furthermore, the comments submitted in response to this petition are counterweights to the petition's claims. Sixteen of the seventeen comments that were submitted

[13] 293 F. Supp. 3d 1050, 1060 (N.D. Cal. 2018) ("The clear purpose of the Act and the plain meaning of its core provisions was to set expeditious emission compliance standards (not to exceed 180 days past the promulgation of implementing regulations) and to allow the sell off or use of preexisting noncompliant inventory but to prohibit stockpiling. This clear purpose and plain meaning cannot be reconciled with the EPA's suggestion that a year-long extension of the designated date of manufacture in the sell-through provisions permissibly leads to a commensurate year-long extension of the mandatory compliance deadlines. The EPA's interpretation creates inconsistency within the full text of the Act, renders the 180–day compliance deadline superfluous, leads to the absurd result of permitting the perpetual delay of the effectiveness of the Formaldehyde Rule, and fails to satisfy the stated purpose of the Act."); *cf. Pennsylvania v. DeVos*, 480 F. Supp. 3d 47, 66 (D.D.C. 2020) ("And 'when the statute authorizing agency action fails to specify a timetable for effectiveness of decisions, the agency normally retains considerable discretion to choose an effective date.'" (internal citations omitted).

[14] *Texas Children's Hosp. v. Azar*, 315 F. Supp. 3d 322, 334 (D.D.C. 2018).

[15] *Id*. (citations omitted).

in response to the Federal Register notice argued that the petition should be denied and that billing parties are largely in compliance with the rule.

3. Granting the requested delay would lead to greater confusion in the regulated community than what the Petitioner claims was caused by the Correction. Because the rule would have to continue in effect until such time as a delay could be effectuated by rulemaking, the rule would be in effect at least six months, then be temporarily stayed, and then go back into effect. As commenters discussed in their submissions, this has the potential for massive disruption and confusion, as billing parties switch between systems, and would likely raise questions about what rules apply to any given transaction.[16]

4. By the time such a delay could take effect, after completion of the required administrative procedures, the Petitioner's justification for delay would no longer be present, as the Petitioner would have had ample time to make any necessary adjustments to their practices.

V. CONCLUSION

For the reasons explained above, the Commission **DENIES** the petition filed by the Ocean Carrier Equipment Management Association for a delay of the effective date of the Demurrage and Detention Billing Requirements final rule.

By the Commission.

David Eng
Secretary

[16] E.g., comments of the Shippers Coalition (FMC-2024-0010-0001), ContainerPort Group Inc. (FMC-2024-0010-0002), Agriculture Transportation Coalition (FMC-2024-0010-0011), Intermodal Motor Carriers Conference (FMC-2024-0010-0012).

FEDERAL MARITIME COMMISSION

M.E. DEY & CO., INC., *Complainant*

v.

HAPAG-LLOYD AG AND HAPAG-LLOYD (AMERICA) LLC,
Respondents and Third-Party Complainants

v.

CSX TRANSPORTATION, INC., *Third-Party Respondent*.

DOCKET NO. 22-35

Served: September 26, 2024

NOTICE OF COMMISSION DETERMINATION TO REVIEW
[final decision pending]

Notice is given that, pursuant to 46 C.F.R. § 502.227, the Commission has determined to review the Administrative Law Judge's August 27, 2024, Initial Decision Approving Confidential Settlement Agreement in this proceeding.

David Eng
Secretary

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

BAL CONTAINER LINE CO., LIMITED, *Complainant* v. SSA MARINE TERMINAL AND SSA TERMINALS (PIER A), LLC, *Respondents*.	**DOCKET NO. 23-11**

Served: September 26, 2024

ORDER OF: Alex M. CHINTELLA, *Administrative Law Judge*.

INITIAL DECISION APPROVING CONFIDENTIAL SETTLEMENT AGREEMENT[1]

[Notice Not to Review served 10/29/2024, decision administratively final]

On September 24, 2024, Complainant BAL Container Line Co., Limited ("BAL") and Respondents SSA Marine Terminal, SSA Terminals (PIER A), LLC and SSA Containers, Inc. ("SSA") filed a joint motion seeking approval of a confidential settlement agreement and dismissal with prejudice ("Settlement Motion") with a copy of the confidential settlement agreement.

Using language borrowed in part from the Administrative Procedure Act, Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b); *see* 5 U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

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

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.…The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims.…The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A Am. Jur. 2d *Compromise and Settlement* § 3 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, Docket No. 88-2, 1988 WL 340657 at *7 (FMC 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, Docket No. 07-01, 2009 WL 971291, at *2 (FMC, Apr. 1, 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

In the Settlement Motion, the parties state that they have engaged in settlement discussions at various points during the proceeding, including mediation with the Commission's Office of Consumer Affairs and Dispute Resolution Services. They further state:

> In this action, the parties, both sophisticated corporate entities, arrived at the Confidential Settlement Agreement through arm's length negotiations and support this motion and the relief that it seeks. The Confidential Settlement Agreement

> does not contravene any law or public policy and is neither unjust nor discriminatory. It does not contemplate any adverse effects on any third parties or the shipping public. Instead, the Confidential Settlement Agreement is a fair and reasonable resolution of the dispute between the parties and reflects their desire to resolve their issues without the need for costly and uncertain litigation. For these reasons, the Parties respectfully request that the Confidential Settlement Agreement be approved and, on that basis, the complaint in this matter be dismissed with prejudice.

Settlement Motion at 2-3.

Based on the representations in the Settlement Motion and my review of the confidential settlement agreement, the parties have established that their agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The parties are represented by counsel and have engaged in arms-length settlement discussions. The proceeding would require potentially expensive briefing. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. Accordingly, the settlement agreement is approved.

The parties further request that the settlement agreement be kept confidential. Settlement Motion at 3-4. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); see also 46 C.F.R. § 502.141(j). "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, Docket No. 00-04, 2000 WL 1920488, at *3 (ALJ Dec. 14, 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, Docket No. 95-06, 1996 WL 35079904 (ALJ Feb. 9, 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, Docket No. 81-5, 1991 WL 12030015 (ALJ Aug. 1, 1991).

The confidential settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

Upon consideration of Settlement Motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the joint motion to approve the settlement agreement between Complainant BAL Container Line Co., Limited and Respondents SSA Marine Terminal, SSA Terminals (PIER A), LLC and SSA Containers, Inc. be **GRANTED**; it is further

ORDERED that the parties' request for confidential treatment be **GRANTED**; it is further

ORDERED that the parties' request for dismissal with prejudice be **GRANTED.**

Alex M. Chintella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

OL USA LLC, *Complainant* v. MAERSK A/S, *Respondent*.	**DOCKET NO. 24-11**

Served: September 26, 2024

ORDER OF: Linda S. Harris CROVELLA, *Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

[Notice Not to Review served 10/29/2024, decision administratively final]

On September 11, 2024, Complainant OL USA LLC ("OL USA") and Respondent Maersk A/S ("Maersk") filed a joint motion seeking approval of a confidential settlement agreement and dismissal with prejudice of the complaint ("Motion"), with a copy of the confidential settlement agreement.

Using language borrowed in part from the Administrative Procedure Act, Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit" 46 C.F.R. § 502.75(b); *see* 5. U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in

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

> contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A AM. JUR. 2D *Compromise and Settlement* § 3 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, Docket No. 88-2, 1988 WL 340657 at *7 (FMC 1988). (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, Docket No. 07-01, 2009 WL 971291, at *2 (FMC 2009). (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

OL USA and Maersk, "both sophisticated corporate Parties," state that they "arrived at the Settlement Agreement after…extensive, arm's length negotiations in which counsel and representatives for both Parties participated…" and during which they considered "the relative strengths of their positions weighed against the risks and costs of continued litigation." Motion at 3. They further state:

> The Parties submit that the Settlement Agreement does not contravene any law or public policy, does not violate the Shipping Act, is neither unjust nor discriminatory, and is free of fraud, duress, or undue influence. The Settlement Agreement does not contemplate any adverse effects on any non-parties or the shipping public and is free of any other defects which might make it unapprovable.

Id. at 3-4.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, Docket No. 00-04, 2000 WL 1920488, at *3 (Kline, Dec. 14, 2000)(citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, Docket No. 95-06, 1996 WL 35079904 (Dolan, Feb. 9, 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, Docket No. 81-5, 1991 WL 12030015 (Kline, Aug. 1, 1991)..

The confidential settlement agreement has been reviewed by the undersigned and is available to the Commission. The request for confidentiality in the settlement agreement is reasonable. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

Based on the representations in the joint motion and other documents filed in this matter, the parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects that might make it unapprovable. The parties are represented by counsel and have engaged in arms-length settlement discussions. The proceeding would require further expensive discovery and briefing. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. Accordingly, the settlement agreement is approved.

Upon consideration of the motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the motion to approve the settlement agreement between Complainant OL USA and Respondent Maersk be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. The settlement agreement should be maintained in the Secretary's confidential files. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.

Linda S. Harris Crovella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

GENISIS RESOURCE ENTERPRISE INC., *Claimant*

v.

MAERSK LINE, LIMITED, *Respondent*.

DOCKET NO. 2014(I)

Served: September 27, 2024

NOTICE OF COMMISSION DETERMINATION TO REVIEW
[final decision 12/4/2024]

Notice is given that, pursuant to 46 C.F.R. § 502.304, the Commission has determined to review the Small Claims Officer's September 4, 2024, Order Approving Settlement and Dismissing Proceeding in this proceeding.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

COLOR BRANDS, LLC, *Complainant* v. AAF LOGISTICS, INC., *Respondent*.	**DOCKET NO. 22-18**

Served: September 27, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Chief Administrative Law Judge's August 27, 2024, Initial Decision on Remand has expired. Accordingly, this decision has become administratively final.

Pursuant to 46 C.F.R. § 502.253, Respondent AAF Logistics, Inc. shall pay to Complainant Color Brands, LLC by October 15, 2024, $325,376.12, the total reparations amount with interest, calculated as follows:

- $113,129.72 for insurance premium claims with interest in the amount of $13,165.38; plus
- $86,690.24 for improper practices claims for damaged shipments with interest in the amount of $10,030.96; plus
- $91,744.62 for improper practices claims for damaged shipments with interest in the amount of $10,615.20.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

SEAFAIR USA LLC, *Complainant*

v.

STERLING CONTAINER LINE LTD. AND ATLANTIC FORWARDING LTD., *Respondents*.

DOCKET NO. 22-34

Served: September 30, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's August 28, 2024, Order Denying Respondents' Petition for Attorney Fees has expired. Accordingly, this order has become administratively final.

David Eng
Secretary

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

ICL USA, INC., *Complainant* v. DEPENDABLE HIGHWAY EXPRESS, INC. AND MEDITERRANEAN SHIPPING COMPANY, (USA) INC., ON BEHALF OF MEDITERRANEAN SHIPPING COMPANY, S.A., *Respondents.*	**DOCKET NO. 24-04**

Served: October 3, 2024

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

ORDER DENYING RESPONDENT'S PETITION FOR ATTORNEY FEES[1]

[Notice Not to Review served 11/5/2024, order administratively final]

I. INTRODUCTION

A. Overview

On August 30, 2024, Respondent Dependable Highway Express, Inc. ("DHE" or "Dependable") filed a Petition for Attorneys' Fees ("Petition"). On September 5, 2024, Complainant ICL USA, Inc. ("ICL") filed a letter in opposition to DHE's Petition ("Opposition"). For the reasons discussed below, DHE's petition is denied.

B. Procedural History

This proceeding began on December 28, 2023, when ICL filed a complaint alleging violations of the Shipping Act by DHE and another Respondent, Mediterranean Shipping Company, (USA) Inc., on behalf of Mediterranean Shipping Company, S.A. ("MSC"). On January 12, 2024, the Commission issued a notice of filing of complaint and assignment. On January 18, 2024, an order designating Administrative Law Judge and initial order were issued.

On February 5, 2024, Respondent DHE filed a motion to dismiss the complaint on behalf of itself, which ICL opposed. On March 15, 2024, an order was issued denying DHE's motion to dismiss and ruling on a motion regarding MSC. After receiving input from the parties, on April 22, 2024, a scheduling order was issued. Discovery commenced.

[1] This order will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service of this order. 46 C.F.R. § 502.254(h).

On August 5, 2024, ICL, DHE, and MSC filed a stipulation of dismissal pursuant to 46 C.F.R. § 502.72(a)(2). On August 12, 2024, the Commission's Secretary issued a notice of voluntary dismissal discontinuing the proceeding.

C. Arguments of the Parties

DHE contends that the petition is timely; it is the prevailing party; and it is entitled to attorney fees because ICL had an improper motive in commencing this proceeding and the complaint and filings were devoid of legal and factual bases to support allegations of certain violations. Petition at 4-14.

ICL asserts that the petition was not properly filed; the Secretary's notice of voluntary dismissal was not a final decision for purposes of the attorney fee provision; DHE was not a prevailing party; DHE is attempting to relitigate its motion to dismiss; the facts do not support the petition; and the petition should be disregarded. Opposition at 2-6.

D. Burden of Proof

The successful party in a private party complaint proceeding under 46 U.S.C. § 41301 may petition for an award of attorney fees after the decision becomes administratively final. 46 U.S.C. § 41305(e); 46 C.F.R. § 502.254(a). The burden is on the applicant to prove that it is eligible and entitled to attorney fees. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (explaining that "the fee applicant bears the burden of establishing entitlement to an award."). The petition must include evidence to support the reasonableness of the rates claimed and specific documentation of hours worked at each identifiable stage of the proceeding. 46 C.F.R. § 502.254(d); *see Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984) ("[C]ourts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates."). Here, Respondent DHE, which filed the petition, has the burden of proof. The standard of proof is preponderance of the evidence. *Logfret, Inc. v. Kirsha, B.V.*, FMC Docket No. 18-10, 2 F.MC.2d 110, 113 (F.M.C. June 22, 2020). Pursuant to Rule 254(h), appeals of orders awarding attorney fees are governed by the rules at 46 C.F.R. § 227. 46 C.F.R. § 502.254(h).

II. DISCUSSION

A. Filings

The petition was properly served on the Commission's Office of the Secretary by email. The Office of the Secretary receives filings for both the Office of Administrative Law Judges and the Commission and provides the filings to the proper offices. 46 C.F.R. § 502.2. While the initial order requires parties to send courtesy copies of filings to the Office of Administrative Law Judges, failure to do so does not invalidate the filings. In addition, the petition was timely as it was filed within thirty days of the notice of voluntary dismissal. Therefore, the filing of the petition was proper.

The opposition was filed in a letter format which is not permitted. Initial Order at 4. However, to expedite resolution of this proceeding, the opposition will be accepted as submitted.

B. Eligibility for Attorney Fees

1. Definition of Decision

The Commission amended its Rules and Regulations governing the award of attorney fees to implement the statutory amendments made by the Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-282, § 402, 128 Stat. 3022 (Dec. 18, 2014); *see* Docket No. 15-06.

Section 502.254 provides in relevant part:

> *(a) General*. In any complaint proceeding brought under 46 U.S.C. 41301… the Commission may, upon petition, award the prevailing party reasonable attorney fees.
>
> *(b) Definitions.*
>
> *Attorney fees* means the fair market value of the services of any person permitted to appear and practice before the Commission in accordance with subpart B of this part.
>
> *Decision* means:
>
> (1) An initial decision or dismissal order issued by an administrative law judge;
>
> (2) A final decision issued by a small claims officer; or
>
> (3) A final decision issued by the Commission.

46 C.F.R. § 502.254.

The Commission conducts a two-step inquiry in determining whether to award fees. First, the Commission considers whether a petitioner is eligible for fees, that is, whether it is a "prevailing party." If the answer is yes, the Commission considers whether it should award fees to the petitioner. *Logfret*, 2 F.M.C.2d at 113. A party is the prevailing party if there has been a "material alteration of the legal relationship to the parties in a manner which Congress sought to promote in the fee statute." Final Rule: Organization and Functions; Rules of Practice and Procedure; Attorney Fees, 81 Fed. Reg. 10508, 10512 (Mar. 1, 2016) (citing *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)). A respondent is the prevailing party "when the complainant's challenge is rebuffed 'irrespective of the precise reason for the court's decision.'" *Baltic Auto Shipping, Inc. v. Hitrinov*, Docket No. 14-16, 2017 WL 4924883 at *9 (FMC Oct. 25, 2017) (citing *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 431 (2016)). A complainant is generally the prevailing party if the presiding officer awards damages, an injunction, or "at least some relief on the merits." Final Rule, 81 Fed. Reg. at 10512 (quoting *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)).

In the instant proceeding, the parties filed a joint stipulation of dismissal, signed by counsel for all parties. The stipulation was filed pursuant to Rule 72(a)(2), which states:

> **(2) By stipulation of the parties.** The parties may dismiss an action at any point *without an order from the presiding officer* by filing a stipulation of dismissal signed by all parties who have appeared. In the stipulation the parties must certify that no settlement on the merits was reached. Unless the stipulation states otherwise, the dismissal is without prejudice.

46 C.F.R. § 502.72(a)(2) (emphasis added). In contrast, Rule 72(a)(3) permits voluntary dismissal by the presiding officer.

Here, the dismissal was issued by the Commission's Secretary in a "Notice of Voluntary Dismissal" which stated in its entirety:

> On August 5, 2024, Complainant ICL USA, Inc. and Respondents Dependable Highway Express, Inc. and Mediterranean Shipping Company, (USA) Inc., on behalf of Mediterranean Shipping Company, S.A., filed a stipulation of dismissal with prejudice of the complaint in accordance with 46 C.F.R. § 502.72(a)(2). Therefore, the above-captioned proceeding is discontinued.

Notice of Voluntary Dismissal at 1.

The Secretary's notice of voluntary dismissal does not meet the Commission Rule 254 definition of a "Decision" as it was not (1) an initial decision or dismissal order issued by an administrative law judge; (2) a final decision issued by a small claims officer; or (3) a final decision issued by the Commission. 46 C.F.R. § 502.254. Indeed, the dismissal was not issued by a presiding officer. Moreover, the dismissal was requested by all of the parties.

Because the notice of voluntary dismissal does not meet the Rule 254 definition of a decision, DHE is not eligible for attorney's fees under the Commission's rules. However, this issue has not previously been addressed by the Commission. Therefore, the other factors will be discussed, including whether DHE was a prevailing party and whether DHE is entitled to attorney fees.

2. Prevailing Party

While some cases find that dismissal with prejudice may be a "material alteration of the legal relationship of the parties" sufficient to support attorney fees, other cases find that the "with prejudice" determination is not controlling. *See* 66 A.L.R.3d 1087 (summarizing cases). The Commission Statement on Attorney Fees states:

> Generally, a complainant is a prevailing party *if the presiding officer (Administrative Law Judge or Commission)* awards the complainant reparations or issues a cease-and-desist order. A respondent is generally a prevailing party when the presiding officer rebuffs a complainant's claims. For instance, *a respondent prevails if the presiding officer* grants the respondent's motion to

> dismiss with prejudice or *grants the complainant's request for voluntary dismissal with prejudice*.

Commission Statement on Attorney Fees, Docket No. 21-14, 3 F.M.C. 2d at 196-97 (FMC Dec. 28, 2021) (emphasis added) (citations omitted). Here, it was not a "presiding officer (Administrative Law Judge or Commission)" who granted the request for voluntary dismissal. Therefore, it appears that this statement is not applicable to dismissals by stipulation under Commission Rule 72(a)(2) but rather those by order of the presiding officer under Rule 72(a)(3). Therefore, this Commission statement does not require finding that a voluntary dismissal by stipulation of the parties makes the respondent a prevailing party.

The Supreme Court has held that the term "prevailing party" does not include "a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001). The DC Circuit utilizes a three-part test to determine whether an entity is a prevailing party: "(1) there must be a 'court-ordered change in the legal relationship' of the parties; (2) the judgment must be in favor of the party seeking the fees; and (3) the judicial pronouncement must be accompanied by judicial relief." *District of Columbia v. Straus*, 590 F.3d 898, 901 (D.C. Cir. 2010) (quoting *Thomas v. Nat'l Sci. Found.*, 330 F.3d 486, 492–93 (D.C. Cir. 2003)).

> A party who is only partially successful also can be deemed a prevailing party. Consequently, a claimant who has obtained some relief usually will be regarded as the prevailing party even though the party has not sustained all his claims. In some cases of this type, however, the court will apportion costs among the parties or reduce the size of the prevailing party's award to reflect the partial success.

§ 2667 Award of Costs to the Prevailing Party, 10 Fed. Prac. & Proc. Civ. § 2667 (4th ed.) (footnote omitted).

Because the Secretary's notice of voluntary dismissal was with prejudice, there was a change in the legal relationship. Because the voluntary dismissal prevents ICL from bringing the same claim to the Commission in the future, the dismissal was in favor of the Respondents. As discussed above, it was not clear that the voluntary dismissal was a "judicial pronouncement," as it was not issued by the presiding officer, however, because the dismissal was "with prejudice," it could be considered judicial relief. Therefore, if the dismissal counts as a "decision," Respondents could be considered prevailing parties.

C. Entitlement to Attorney Fees

Even if the dismissal were considered to be a decision and DHE viewed as the prevailing party, under Commission precedent, DHE would not be entitled to attorney fees under Commission precedent.

To determine entitlement to attorney fees, the Commission's primary consideration is "whether such an award is consistent with the purposes of the Shipping Act." Final Rule, 81 Fed. Reg. at 10515. There is not a general presumption for or against awarding attorney fees, and "parties should be encouraged to litigate meritorious claims and defenses." *Id.* The Commission considers the factors recommended in *Fogerty v. Fantasy, Inc.,* 510 U.S. 517, 534 n.19 (1994) as a helpful guide in deciding entitlement. *See Edaf Antillas, Inc. v. Crowley Caribbean Logistics, Inc.*, Docket No. 14-04, 2016 WL 5110081 at *5 (FMC Sept. 14, 2016). These factors include "frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Fogerty,* 510 U.S. at 534 n.19 (citing *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 156 (1986)). The Commission may consider additional factors depending on the issues raised in a specific case. Commission Statement on Attorney Fees, 3 F.M.C.2d 195, 198 n.22.

In *Edaf,* the Commission reasoned that because the complainant failed to prosecute its claim by becoming increasingly unresponsive, awarding attorney fees would further the purposes of the Shipping Act:

> Complainant failed to substantiate the legal and factual components of its case, knowingly disregarded the ALJ's orders on numerous occasions, abandoned its claim, forced multiple [r]espondents to expend significant resources of both time and money in their defense, and perhaps most egregiously, failed to terminate the claim when it could have limited the expenses of the [r]espondents.

2016 WL 5110081, at *5.

In *Baltic Auto*, the Commission denied attorney fees in a case that was dismissed on statute of limitations grounds and therefore did not reach the merits of the claim. The Commission found that the Complainant in *Baltic Auto* "had a colorable argument that its claim arose within the statute of limitations and that the claim was not objectively unreasonable." *Baltic Auto*, 2017 WL 4924883, at *12.

This case is more like *Baltic Auto* than *Edaf*. Here, the parties did not brief the case and no decision was issued on the merits. The only decision issued denied DHE's motion to dismiss the complaint, which raised similar issues as those raised in the petition.

The stipulation agreed upon by the parties states that the case was "initiated because facts were in dispute regarding certain payments, refunds, and amounts of money being owed among the Parties." Stipulation of Dismissal at ¶ 1. "Between December 2021 and March 2022 DHE paid the amount of $142,385 in per diem charges to MSC." *Id.* at ¶ 2. "ICL obtained waivers of the per diem charges from MSC" and DHE requested refunds from MSC for $142,385 for the ICL charges. *Id.* at ¶ 3-4. On November 10, 2023, MSC issued a check in the amount of $147,415.00 as a single cash payment. *Id.* at ¶ 5. Part of this MSC check was a refund by MSC to DHE in the amount of $117,235 for per diem charges related to ICL. *Id.* at ¶ 6.

"Following the filing of the Complaint in this matter, MSC further agreed to refund the additional amount of $13,795 of ICL per diem charges to DHE." *Id.* at ¶ 7. On June 3, 2024, DHE confirmed "a total receipt of $131,030 in ICL related per diem charges initially paid by DHE to MSC and refunded by MSC to DHE." *Id.* at ¶ 9. "ICL agrees with MSC's assessment that the remaining amount of $11,355 constitute valid charges which need to be refunded to DHE by ICL, as this amount was not waived by MSC." *Id.* at ¶ 11. The parties agree that the stipulation has no effect on DHE's rights to pursue its claim against ICL for payment of $11,355 in per diem charges. *Id.* at ¶ 13. "In view of the stipulations herein relating to refunds paid by MSC to DHE related to the waivers applicable to MSC alleged in the Complaint in the total amount of $131,030, ICL voluntarily dismisses, with prejudice, the Respondents on all counts." *Id.* at ¶ 14.

Thus, it appears that the dispute was focused on $142,385 in payments that DHE made to MSC and which DHE was seeking from ICL. During the course of the proceeding, the parties determined that MSC refunded $117,235 in ICL charges to DHE prior to the filing of the complaint; MSC agreed to further refund $13,795 in ICL charges to DHE; and ICL agreed that $11,355 were valid charges that ICL needed to pay to DHE. The amount that ICL agreed to pay Respondents ($11,355) is significantly less than the amount that the Respondents agreed were not due from ICL ($131,030). Therefore, ICL substantially obtained the relief it was seeking when it filed the complaint.

DHE asserts that "ICL stipulated to dismiss this proceeding without obtaining the cease and desist order it sought;" the "sole purpose in initiating this proceeding was as a litigation tactic to delay DHE's federal court action;" and ICL's "lack of factual or legal support for its objectively unreasonable allegations warrant an award of attorneys' fees here." Petition at 3.

In its complaint, ICL acknowledged that "generally it is contractually liable for the per diem amounts paid by DHE to ocean carriers and/or terminals related to per diem for shipments which were not waived by the ocean common carriers." Complaint at 5. ICL sought cease and desist orders from both Respondents regarding per diem funds which were entitled to waivers or which had been refunded. Complaint at 16.

The order denying DHE's motion to dismiss stated:

> [A]ny refunds from MSC for charges in violation of the Shipping Act may be paid to Dependable and ICL's desire to keep Dependable in the proceeding suggests that Dependable may not have passed those reimbursements on to ICL. Clearly the facts are disputed, and it is not clear that the parties know who has paid what fees. Discovery will help clarify the factual record which will in turn help to clarify the role played by Dependable in these transactions.

Order on Dependable's Motion to Dismiss and ICL's Notice of Dismissal at 6.

In the stipulation, the parties agreed that MSC refunded $117,235 in ICL charges to DHE prior to the filing of the complaint and while the complaint was pending, MSC agreed to further refund $13,795 in ICL charges to DHE. These facts undermine DHE's arguments regarding the relief obtained, purpose of the proceeding, and factual or legal support. ICL properly prosecuted the proceeding and once it obtained stipulations that clarified the status, amounts, and dates of

MSC refunds to DHE, ICL agreed to dismiss the complaint. DHE has not established that ICL's attorney fees are justified by frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence. Therefore, even if DHE is eligible for attorney fees, it would not be entitled to receive them.

For the reasons discussed above and in the order denying DHE's motion to dismiss, DHE has not established that attorney fees are appropriate under Commission Rule 254 as the Secretary's notice of voluntary dismissal was not a decision. Even if DHE were eligible for attorney fees, DHE has not established that it would be entitled to attorney fees.

III. ORDER

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

ORDERED that DHE's Petition for Attorney Fees be **DENIED**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of the Administrative Law Judges

WEBTRANS LOGISTICS, INC., *Claimant* v. HAPAG-LLOYD (AMERICA) LLC, *Respondent*.	**DOCKET NO. 2013(F)**

Served: October 8, 2024

ORDER OF: Richard AMBROW, *Administrative Law Judge*.

INITIAL DECISION GRANTING DISMISSAL[1]

[Notice Not to Review served 11/8/2024, decision administratively final]

For the reasons set forth below, I find that the Commission does not have jurisdiction to consider this dispute, and therefore I **GRANT** Respondent Hapag-Lloyd (America) LLC's motion to dismiss.

I. Background

Webtrans Logistics, Inc. ("Claimant"), filed a private complaint that the Office of the Secretary received on July 9, 2024 ("Claim"). The Claim names Hapag-Lloyd (America) LLC ("HLA") as a Respondent. Among other things, Claimant alleges that Claimant received an ocean export booking confirmation from HLA out of the port of Vancouver, and thus timely delivered its containers to the port. Allegedly, despite representing to HLA that Claimant's containers did not contain hazardous material, Claimant's containers were not shipped on the intended vessel due to a "'hazmat hold'." This resulted in port charges of $18,310.50, which has since become $22,705.02. Claimant cites 46 U.S.C. § 41102(c) in support of its Claim and alleges that Respondent is a "common carrier." (*See generally* Claim).

On July 15, 2024, the Secretary of the Federal Maritime Commission issued a Notice of Filing of Small Claims Complaint and Assignment.

On July 26, 2024, HLA filed Respondent Hapag-Lloyd (America) LLC's Motion to Dismiss Small Claims Complaint ("Motion to Dismiss"). HLA advanced two arguments in its Motion to Dismiss: 1) HLA is not a regulated entity; 2) the transportation at issue was between two ports in foreign countries. HLA also wrote that it does not submit to the informal procedure provided in Subpart S of the Federal Maritime Commission's Rules of Practice and Procedure. (Motion to Dismiss, p. 6). Finally, Exhibit A to the Motion to Dismiss is an invoice from HLA

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.318.

to Claimant showing a shipment from Edmonton, Alberta, Canada via Vancouver, British Columbia, Canada to Hai Phong, Vietnam.

On August 8, 2024, the Chief Administrative Law Judge issued a Notice of Reassignment to Administrative Law Judge ("Notice of Reassignment"). The Notice of Reassignment noted that HLA did not consent to informal procedures under Subpart S. Therefore, this case was reassigned to an Administrative Law Judge under Subpart T. The Notice of Reassignment directed Respondent to file an Answer to the Complaint by August 19, 2024. The Notice of Reassignment also indicated that Claimant may file a reply memorandum, supporting documents, and affidavits addressing Respondent's defenses within twenty (20) days of service of the answer.

On August 19, 2024, Respondent filed Respondent Hapag-Lloyd (America) LLC's Special Appearance Response & Answer to Complaint ("Answer"). In its Answer, Respondent reiterated the arguments set forth in the Motion to Dismiss. Respondent also contested the merits of Claimant's Claim.

Claimant did not file a reply to Respondent's Answer.

II. Applicable Authority

As noted above, this matter is proceeding under Subpart T. In general, motion practice is not permitted under Subpart T. (*Compare, e.g.*, 46 C.F.R. § 502.46 with 46 C.F.R. §§ 502.311-321). Nevertheless, the Commission must address the issue of its jurisdiction. "'It is elementary law that a tribunal should determine its jurisdiction before proceeding to the merits of a controversy.'" *Intermodal Motor Carriers Conf. v. Ocean Carrier Equipment Management Ass'n, Inc*., 6 F.M.C.2d 45, 63 (ALJ 2023) (quoting *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, 28 S.R.R. 1178 (ALJ 1999); *see also River Parishes Co. Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R 751, 762 (FMC 1999) ("As the ALJ correctly held, an agency must reach the jurisdictional issues before addressing the merits of the case")).

Claimant cites 46 U.S.C. § 41102(c) in support of its Claim. It provides: "A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practice relating to or connected with receiving, handling, storing or delivering property." In relevant part here, a "common carrier" means a person that:

(i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation;

(ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and

(iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . . .

(46 U.S.C. § 40102(7)).

In general, the burden of proof is on the proponent of a motion or order. (5 U.S.C. § 556(d); *see also* 46 C.F.R. § 405.203).

III. Analysis

For the reasons discussed below, I find that the Commission does not have jurisdiction over Claimant's Claim and grant the motion to dismiss.

In this matter, Claimant alleges that Respondent violated 46 U.S.C. § 41102(c). That provision prohibits various unfair practices by, among others, common carriers. Claimant alleges that HLA is a "common carrier." (*See* Claim, at p. 2). A "common carrier" is defined, in part, to include a person that transports passengers or cargo by water "between a port in the United States and a port in a foreign country[.]" (46 U.S.C. § 40102(7)).

Respondent argues that there is no nexus to a port in the United States. To support its assertion, Respondent attached a copy of an invoice to its Motion to Dismiss. The invoice shows a shipment from a point of origination in Canada through a Canadian port to a port in Vietnam. (Motion to Dismiss, Exhibit A).

Claimant does not appear to contest this representation. In its Claim, Claimant indicated that it booked transport for its shipment on a vessel out of the port of Vancouver. (Claim, at p. 1). The Claimant's Claim does not confirm transport to Vietnam, but neither does Claimant deny transport to Vietnam. Claimant had the opportunity to file a reply to Respondent's answer (*see* Notice of Reassignment, at p. 2), but did not file a reply.

Therefore, because Respondent submitted evidence to support its position, and Claimant did not rebut it, I find that Respondent carried its burden of demonstrating that there was no nexus to a port in the United States. Therefore, Respondent is not a "common carrier" for purposes of Claimant's allegations regarding 46 U.S.C. § 41102(c). The Commission lacks jurisdiction to hear this matter.

Respondent also asserts that HLA is not an ocean common carrier but is rather an agency for another entity. I do not reach that argument as it is unnecessary.

IV. Order

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

ORDERED that Respondent's Motion to Dismiss is **GRANTED**. It is

FURTHER ORDERED that this matter be **DISCONTINUED**.

Richard Ambrow
Administrative Law Judge

FEDERAL MARITIME COMMISSION

BAL CONTAINER LINE CO., LIMITED, *Complainant* v. SSA MARINE TERMINAL; SSA TERMINALS (PIER A), LLC; AND SSA CONTAINERS, INC., *Respondents*.	**DOCKET NO. 23-11**

Served: October 29, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's September 26, 2024, Initial Decision Approving Confidential Settlement Agreement has expired. Accordingly, this decision has become administratively final.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

OL USA LLC, *Complainant*

v.

MAERSK A/S, *Respondent.*

DOCKET NO. 24-11

Served: October 29, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's September 26, 2024, Initial Decision Approving Settlement Agreement has expired. Accordingly, this decision has become administratively final.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

BAKERLY, LLC, *Complainant*, v. SEAFRIGO USA, INC., *Respondent*.	Docket No. 22-17

Served: October 30, 2024

BY THE COMMISSION: Daniel B. MAFFEI, Chairman; Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, and Max M. VEKICH, Commissioners.

Order Denying Exceptions and Affirming Initial Decision

Complainant Bakerly, LLC (Bakerly), a shipper, hired Respondent Seafrigo USA, Inc. (Seafrigo), a non-vessel operating common carrier (NVOCC), to provide transportation for its imported food shipments from U.S. ports to inland warehouses, and Seafrigo provided the services under a negotiated rate arrangement (NRA). Seafrigo passed through demurrage and detention charges, including charges imposed when the port was closed due to a snowstorm. Bakerly disputes Seafrigo's interpretation of the NRA terms and contends that Seafrigo was contractually responsible for all detention and demurrage charges, while Seafrigo contends that it is only contractually responsible for charges caused by negligence.

Bakerly alleges that Seafrigo's pass through charges and billing practices violate 46 U.S.C. §§ 41104(a)(2)(A) and 41102(c) because it was contractually responsible for all disputed charges and that even if Seafrigo was only responsible for the charges it caused—its negligence led to the charges Bakerly disputes. Bakerly seeks reparations for the charges already paid, and a cease and desist order barring Seafrigo from attempting to collect charges still outstanding.

Chief Administrative Law Judge Erin Wirth dismissed claims based on Ocean Shipping Reform Act of 2022 (OSRA 2022) amendments not in effect when the claims arose, and found that Bakerly failed to prove the remaining claims. Bakerly argues that Judge Wirth erred in denying its motion for discovery sanctions, misapplied applicable law, and entered findings contrary to the weight of the evidence. Initial Decision (I.D.) (Jan. 3, 2024).

Judge Wirth's decision is consistent with applicable law and her findings are supported by the record. The NRA documents assign responsibility to the shipper (Bakerly) for the disputed charges unless they resulted from Seafrigo's failure to exercise due diligence, and the parties' contemporaneous emails show that Bakerly acknowledged and followed those terms until pandemic-related disruptions caused demurrage and detention charges to spike in 2020 and 2021.

Seafrigo followed reasonable billing practices and exercised due diligence in arranging for pick-ups, deliveries, and inland transportation to Bakerly's warehouses. With respect to disputed charges incurred when the port was closed due to a snowstorm, Seafrigo acted reasonably by requesting the vessel operating ocean common carriers (VOCCs) to waive the charges, but was not required under the circumstances to press the matter further by filing an action to compel the VOCCs to waive or refund those charges.

The Commission denies Bakerly's exceptions and affirms the Initial Decision in its entirety. All claims asserted in the Complaint are dismissed.

I. BACKGROUND

A. Relevant Facts

Bakerly is a U.S. company engaged in importing specialty foods from France. Seafrigo is an NVOCC licensed by the Commission. Bakerly contracted with Seafrigo for port to door transportation for imports arriving at the Ports of New York and New Jersey from 2015 to 2022. Seafrigo arranged transportation by motor carrier for Bakerly's refrigerated containers from the port to Bakerly's warehouse locations in Linden, New Jersey and Allentown, Pennsylvania. Bakerly's Allentown facility was managed by Lineage, which is not a party to the case. In February 2019, Bakerly began purchasing its inventory from its French parent company under free-on-board (FOB) terms, with Seafrigo handling approximately 1,000 FEUs annually arriving at the New York/New Jersey port.

Bakerly contracted for those services by accepting Seafrigo's quarterly rate proposals, which incorporated terms from its rules tariff and bills of lading. Seafrigo's quarterly rate proposals stated that the rates quoted did not include "other carrier-imposed charges" for which the shipper or consignee might be liable under the terms of its USA Standard Accessorial Tariff (submitted with the rate proposals), rules tariff, and bills of lading.[1] Seafrigo Tariff Rules 15 and 17 described its policies regarding free time and

[1] Complainant's Appendix filed May 8, 2023, Exhibits (CX) 226, 232 239, 245, 251.

demurrage and detention charges imposed by ocean common carriers or marine terminal operators (MTOs).

Port congestion and labor shortages caused by the global pandemic complicated the pick-up and delivery of Bakerly's imported shipments. In November 2020, Seafrigo commented on the "roller coaster" like conditions that affect "all of us" and complicate efforts to schedule and execute timely pick-ups and deliveries to inland locations and return the empty containers. CX 935-49. Problems escalated in early 2020 and deliveries were further complicated by a port closure during December 2020 and January 2021 due to a snowstorm. The ocean common carriers continued charging demurrage during the closure. Seafrigo met with the ocean common carriers and asked them to waive charges incurred when pick-ups and deliveries were impossible, but they flatly refused that request. Given the tight market and the carriers' significant leverage in that market, Seafrigo decided that further negotiations would not be fruitful and passed the charges imposed during the port closure through to Bakerly.

At the start of 2021, cascading problems with port congestion, driver shortages and warehouse space and staffing led to more delays and further difficulties picking up and returning containers within the allotted free time. Seafrigo continued its usual practice of passing through demurrage and detention charges to Bakerly. Those costs spiraled and the parties communicated frequently about conditions at the port, at Bakerly's warehouses, and how to coordinate pick-ups and deliveries to keep delays in check and hold down the escalating demurrage and detention charges.

The parties regularly traded information by email about containers awaiting pick up, scheduled deliveries, and shipments assigned or awaiting an assigned truck driver. CX 711. Seafrigo also flagged its concerns about "serious issues brewing" due to unloading delays at Bakerly's inland destination points. CX 720. For example, Seafrigo reminded Bakerly early in 2021 that the "obvious issue" is that unloading delays increase "per diem costs" and also pointed to a related consequence. *Id.* Seafrigo stated that some truckers "including Seafrigo transport are using their own chassis to service containers that we pay for and they are now sitting in Jersey City for an undetermined period of time." *Id*. Seafrigo noted that the truckers need the chassis returned because delays cost them money. *Id*. Seafrigo also offered a proposed solution--deliver newly arrived containers to Seafrigo's freezer and unload them there and truck them to Jersey City when they are ready to receive more cargo. *Id.*

The parties corresponded by email weekly and sometimes daily about delayed arrivals, containers awaiting pick-up at the port, empty containers awaiting return, per diem charges, and myriad other details. Some exchanges included Bakerly's warehouse manager, Lineage.

Despite the parties' frequent exchanges and efforts to solve the delays, the situation did not improve and demurrage and detention charges that Seafrigo passed through to Bakerly remained high. Bakerly fell behind in making payments to reimburse Seafrigo for the demurrage and detention charges it advanced to the ocean common carriers. Seafrigo urged Bakerly to bring its accounts current and reminded Bakerly that it was advancing the charges for convenience and to avoid confusion by introducing multiple parties to the transaction. CX 709-10. But, Seafrigo cautioned that its ability to continue advancing the payments was dependent on Bakerly bringing and keeping its reimbursement payments current. *Id.* Seafrigo reminded Bakerly at one point that that it was owed $100,000 to $125,000 for demurrage charges it paid on Bakerly's shipments arriving at the Port of New York/New Jersey. *Id.*

By the end of 2021, Seafrigo decided that advancing funds to pay demurrage and detention charges on Bakerly's shipments was no longer sustainable without some compensation for delayed payments, and it began imposing a finance charge. At or around the same time, Seafrigo suggested that Bakerly begin paying the demurrage and detention charges directly to the ocean common carriers. Bakerly persuaded Seafrigo to continue advancing the money for demurrage and detention and pass through the charges. Their relationship eventually broke down, and Bakerly filed this action seeking reparations for demurrage and detention charges it claims were never owed and an order barring Seafrigo from collecting any further charges.

B. Procedural History

Bakerly alleges that Seafrigo's billing practices and collection of pass through charges violate 46 U.S.C. §§ 41102(c) and 41104(a)(2)(A) and the Commission's interpretive rule, 46 C.F.R. § 545.5. Bakerly disputes $2,774,923.42 in demurrage and detention charges passed through by Seafrigo from December 2020 through March 2022. Bakerly seeks reparations for $973,227.05 in demurrage charges and $278,172.37 in detention charges paid to Seafrigo. The total charges in dispute were reduced by $198,551.87 when Seafrigo acknowledged responsibility for some disputed charges. I.D., 44. Bakerly also asks the Commission to order Seafrigo to cease and desist efforts to collect an additional $1,288,809.92 in demurrage and $234,714.08 in detention charges that Seafrigo claims are still outstanding. In February 2023, Judge Wirth denied Bakerly's partial motion for summary decision. After the parties concluded discovery, they exchanged briefs on the merits and submitted appendices with supporting documents.

Judge Wirth issued an Initial Decision in January 2024, finding that Bakerly failed to prove the Shipping Act claims alleged. I.D., 1-2. Judge Wirth cautioned that the findings are limited to the facts of this case and should not be considered to be minimum performance requirements or best practices endorsed by the Commission. *Id.*

The Commission issued a notice of intent to review, and Bakerly also filed timely exceptions in which it argues that the findings are not supported by the evidence and that it has proved the violations alleged. Seafrigo opposes the exceptions and urges the Commission to affirm the Initial Decision in its entirety.

II. DISCUSSION

A. Standard of Review and Burden of Proof

The Commission conducts a de novo review when exceptions are filed to an Initial Decision, can exercise "all the powers" it would have had in ruling on the motion initially, and may enter its own findings. 46 C.F.R. § 502.227(a)(6). Under the Administrative Procedure Act, the complainant has the burden of proving its allegations by a preponderance of the evidence, meaning that it must persuade the Commission that the allegations are more probable than not. 5 U.S.C. § 556(d); 46 C.F.R. § 502.203; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 WL 9966245, at *14 (FMC Dec. 17, 2014). The burden of proof never shifts to the respondents, and if the evidence is evenly balanced, the complainant does not prevail. *Waterman Steamship Corp. v. General Foundries, Inc.*, Docket No. 93-15, 1994 WL 279898, at *9 (FMC June 13, 1994) (complainants "must carry the burden of proving every element of the" claim that respondent engaged in conduct prohibited by the Shipping Act).

B. Bakerly's Motion for Discovery Sanctions

Bakerly argues that Seafrigo should be precluded from relying on late discovery productions and sanctioned for allegedly misrepresenting to Judge Wirth that its document production was organized by file folders. Exceptions, 21-23. Judge Wirth found no basis for sanctioning Seafrigo. I.D., 35-36. Judge Wirth acknowledged that Seafrigo's original document production was not well-organized and directed it to take remedial steps and provide a table of contents for its appendix. *Id.* at 36. Judge Wirth attributed the disorganization to the sheer number of documents produced, the manner in which they were originally stored, and outsourcing the Bates-stamping and conversion process. *See id*. Judge Wirth also dismissed as insignificant the delays that Bakerly protested as sanctionable conduct, noting that one production was a day late and another was 15 days late. *Id*. Judge Wirth concluded that Seafrigo was not trying to unduly burden Bakerly or prejudice its ability to litigate its claims and that sanctions were not warranted. *Id.*

Bakerly challenges that ruling and reasserts the grounds Judge Wirth found insufficient to prove Seafrigo engaged in sanctionable conduct. It argues that Seafrigo misrepresented the state of its discovery production in filings before Judge Wirth by falsely describing them as organized by file folder when the production consisted of zip files containing pdfs and folders labeled Images and Natives. Exceptions, 21. Seafrigo denies those assertions as baseless. Seafrigo explains the file organization and structure was the result of outsourcing the conversion of files into pdfs and the Bates stamping process. Reply, 10, 22-23. Seafrigo adds that the outsourcing was done in the ordinary course of preparing to turn over the documents, was not done for any improper or nefarious purpose, and that the production format did not prejudice Bakerly.

Seafrigo acknowledges that there were problems with its initial production but states that it complied with Judge Wirth's order and remedied the issues identified. *Id.* Seafrigo's Managing Director Alfonse Raffa states that: "Seafrigo provided documents in discovery properly labeled in folders along with supporting documents reflecting what amounts Seafrigo paid, email conversations related to same, and copies of its invoices sent to Bakerly." Raffa Decl., ¶ 166. He also states that Bakerly already had many of the documents and access to the information they contained because they consisted of communications between Bakerly and Seafrigo. *See id.*, ¶ 186.

There is a precursor to moving for discovery sanctions that Bakerly appears to have skipped in this case. Parties seeking relief from alleged discovery abuses must first move to compel the opposing party to comply with outstanding discovery requests or correct deficiencies in their responses or document production. *See* 46 C.F.R. § 502.150(a). Motions to compel give the responding party an opportunity to identify and correct deficiencies before sanctions are imposed. Bakerly does not mention taking that initial step, nor does Judge Wirth refer to a prior order which Seafrigo failed to follow. *See* I.D., 35-36; Exceptions, 21-23. That alone would be grounds for rejecting Bakerly's request to exclude Seafrigo's evidence.

Further, Bakerly does not prove grounds for sanctioning Seafrigo. The Commission's rules allow parties to "produce documents or electronically-stored information requested in discovery in the manner they are maintained "in the usual course of business." 46 C.F.R. § 502.146. In the alternative, parties can label and organize documents to correspond to individual discovery requests. *Id.* Parties are not required to produce "electronically stored information" in more than one format. *Id.* It is not clear that Seafrigo's document production was so deficient that it violated these rules. Bakerly complains about the organization but Seafrigo's explanation suggests that it turned over the documents in the order they were kept to a third party for processing which led to the issues Bakerly complains about. *See* Exceptions, 21-22. Bakerly does not claim that it was unfairly prejudiced by the disorganization or unable to access documents needed to prepare and brief its Shipping Act claims.

The Commission denies Bakerly's exceptions and affirms Judge Wirth's ruling denying its motion for discovery sanctions against Seafrigo.

C. Weight of the Evidence and Alleged Inconsistencies

Bakerly challenges Judge Wirth's findings of fact as contrary to the weight of the evidence and contends that Seafrigo's justifications for the charges are not credible. Bakerly bases its contention on alleged inconsistencies between two sets of spreadsheet summaries Seafrigo produced. Exceptions, 2-3. Seafrigo's spreadsheets sort the disputed charges into categories and total the amounts in each category. Seafrigo explains that when it prepared the first spreadsheets (Round 1), it did not include invoices for “smaller amounts” which it understood Bakerly was not contesting. Reply, 43-44. That perception later changed and when Seafrigo prepared the second spreadsheets (Round 2), it included charges not incorporated into Round 1. *Id.* Mr. Raffa, Seafrigo’s Managing Director, explains that the Round 2 spreadsheets added “numerous invoices for smaller amounts, which ‘[n]ot surprisingly. . . resulted in a larger number of transactions for which Bakerly was responsible’” and still owed. Raffa Decl., ¶ 168; *see also id.*, ¶ 170.

When it prepared the Round 2 spreadsheets, Seafrigo combed through the invoices and traced the origins of charges previously listed as “cause unknown.” It was able to link additional charges to a specific event and attribute them to a particular cause—decreasing the charges and totals attributed to unknown causes in the Round 1 spreadsheets and correspondingly increasing the totals linked to specific cause or event. *Id.*, ¶ 170. As Mr. Raffa explains: “Charges not caused by Bakerly (or Seafrigo) or not falling within other categories such as terminal closures, are rightly attributed to Port Congestion. While Seafrigo had allocated certain detention and demurrage charges as cause unknown, careful analysis reveals they are properly attributable to Port Congestion.” Raffa Decl., ¶ 58.

Bakerly also contends that notations on the Seafrigo spreadsheets show that it unreasonably reassigned charges previously attributed to unknown causes as resulting from port congestion. Exceptions, 2-5. Mr. Raffa explains that Bakerly is misconstruing what the notations signify. Reply, 44. For example, Mr. Raffa explains that “no” signifies there was no further follow up communication with Bakerly about those charges. *Id.* He also explains that Seafrigo used comments or notes on the Excel spreadsheets as a tool to identify and sort the charges and related data. Raffa Decl., ¶ 168; *see also id.*, ¶ 170.

Seafrigo logically explains the reasons the Round 1 and Round 2 spreadsheets differ. Those differences are not grounds for rejecting Seafrigo’s documents or testimony as inherently untrustworthy. The disputes charges were incurred over a year or more and recorded on more than 1,000 spanning invoices. It is not surprising that sorting them and tracing the origins of specific charges were monumental tasks or that totals changed as the process evolved and more data was reviewed.

The Commission denies Bakerly's exceptions asserting that Judge Wirth's findings are contrary to the weight of the evidence.

D. Section 41104(a) Claims

Bakerly alleges that Seafrigo violated the filed rate doctrine codified in 46 U.S.C. § 41104(a)(2)(A) by billing charges not compatible with its published tariff or the terms of the parties' negotiated rate arrangement. Exceptions, 24. Bakerly also alleges that Seafrigo violated § 41104(a)(14) and (15) but does not address those claims in its Exceptions beyond stating in the conclusion that it is entitled to relief based on those claims. *See* Exceptions, 48. Those provisions of § 41104(a) were added by OSRA 2022 which became effective after the pass through charges Bakerly challenges were incurred. Bakerly's § 41104(a)(14) and (15) claims were properly dismissed by Judge Wirth, because the changes to § 41104(a) made by OSRA 2022 are not retroactive.

Bakerly's § 41104(a)(2)(A) claim rests on its interpretation of the NRA governing the parties' arrangement as designating Seafrigo, not Bakerly, as the party responsible for all demurrage and detention charges incurred in connection with Bakerly's shipments, absent negligence or a dereliction of duty on Seafrigo's part. *See id.* That being the case, Bakerly argues, Seafrigo's actions in billing for and collecting those charges violated § 41104(a)(2)(A) because Seafrigo was not providing transportation services under the terms of its NRA *or* its published tariff.

Seafrigo disputes Bakerly's interpretation of the NRA as flatly contrary to the NRA's express terms in the quarterly rate proposals that Bakerly accepted. Seafrigo also contends that

Bakerly's interpretation of Seafrigo's rules tariff, its bills of lading, standard maritime industry practices, and the parties' course of dealing are erroneous. Reply, 35-36. It points to language in quarterly rate proposals and Tariff Rules 15 and 17 that expressly state that charges imposed by VOCCs, like demurrage and detention, are not included in the rates quoted and are the shippers' responsibility. *Id*. at 36-37.

Judge Wirth applied the Commission's regulations on NRAs and pass through charges and applicable case law to decide which party was responsible for the demurrage and detention charges under the NRA terms memorialized in the quarterly rate proposals, rules tariff and other documents. I.D., 47-49. Judge Wirth relied on language in the quarterly rate proposals "explicitly stat[ing] that the rates [quoted] did not include demurrage detention charges" in concluding that "the door delivery" rates Seafrigo quoted to Bakerly were not 'all-in' rates," meaning that Seafrigo did not assume overall responsibility for all "demurrage and detention" regardless of fault. *Id.* at 49. Judge Wirth also noted as telling that "Bakerly did not object to the charges because this was door delivery, but rather argued that Seafrigo was responsible for the charges due to failure to meet its obligations." *Id.*

Judge Wirth also addressed the language in Seafrigo's Rules Tariff Rule 17.2 applicable to "door delivery" service which Bakerly argued applied since it contracted to have Seafrigo pick up its containers at the port and transport them inland by motor carrier to Bakerly's Pennsylvania and New Jersey facilities. Rule 17.2 states in part that the merchant (Seafrigo) assumes responsibility for expenses incurred in transporting the container from the port to the shipper's facility. *See id.* Bakerly argues that provision overrides language to the contrary in other documents because any ambiguity in Seafrigo's tariff must be construed against it. Exceptions, 26-28. Judge Wirth found that although Bakerly had arranged for "door delivery," Rule 17.2 was not referring to charges incurred for demurrage and detention which are more specifically addressed in other documents that define the NRA terms—like the quarterly rate proposals, which expressly disclaim responsibility for carrier-imposed charges outside the rates quoted. *See* I.D., 47-50. Judge Wirth concluded that under the terms of the NRA, the shipper (Bakerly) was responsible for demurrage and detention so billing Bakerly for those charges was consistent with the parties' contract and not a violation of § 41104(a)(2)(A) or the Commission rules governing NRAs. *Id.* at 66.

1. Section 41104(a)(A)(2) and NRA Requirements

Section 41104(a) provides that common carriers can only provide ocean transportation services "in accordance with the rates, charges, classifications, rules and practices" in their published tariff or service contract unless an exception applies. 46 U.S.C. § 41104(a)(2)(A). The Commission's regulations carve out an exemption for licensed NVOCCs that allows them to offer transportation services under a negotiated rate arrangement as long as they comply with the conditions set forth in 46 C.F.R. §§ 532.4 and 532.2. Those conditions include allowing electronic public access to its rules tariff free of charge. *Id.* § 532.4. The NRA must also be in writing, name the parties and their representatives, and state the terms agreement prior to receipt of the cargo by the NVOCC. *Id*. § 532.2.

The shipper "is considered to have agreed" to the NRA terms if they: (1) return a signed agreement to the NVOCC; (2) send written communication (including an email) to the NVOCC accepting the terms; or (3) book a shipment after receiving the NVOCC's terms provided they include a warning that booking "constitutes acceptance of the rates and terms." *Id.* § 532.5. The NVOCC's rates and terms of service must be clearly spelled out. "If the rate is not an 'all-in rate,' the NRA must specify whether additional surcharges, additional assessorial charges, or ocean common carrier general rate increases ("GRIs") will apply." *Id*. § 532.5(d)(2)(i). Other specifications also apply:

(ii) The NRA may list the additional surcharges or assessorial charges, including pass-through charges, or reference specific surcharges or assessorial charges in the NVOCC's rules tariff.

(iii) If the additional surcharges or assessorial charges are included in the NVOCC's rules tariff, those additional surcharges or assessorial charges and the corresponding amounts specified in the rules tariff must be fixed once the first shipment has been received by the NVOCC until the last shipment is delivered, subject to an amendment of the NRA.

(iv) For any pass-through charge for which a specific amount is not included in the NRA or the rules tariff, the NVOCC may only invoice the shipper for charges the NVOCC incurs, with no markup.

Id. § 532.5(d)(2)(ii)-(iv).

NVOCCs must adhere to the terms of their NRA with that particular shipper. Those terms apply even if the shipper asserts that they were not aware of or did not understand the NVOCC's rates or service terms. *See generally Total Fitness Equipment, Inc. v. Worldlink Logistics, Inc.*, Docket No. 1831(F), 1998 WL 940255, at *4-5 (FMC Dec. 10, 1998); *pet. for review denied per curiam*, 203 F.3d 54 (table), 1999 WL 1021940 (D.C. Cir. 1999). That being the case, shippers can still challenge NRA terms or NVOCC actions under an NRA as violating Shipping Act requirements and restrictions. 1998 WL 940255, at *10. In issuing the rule authorizing NVOCCs to operate under NRA, the Commission reminded shippers and NVOCCs that: "cargo moving pursuant to an NRA may properly be interpreted as service pursuant to a tariff; tariff rules will apply, as will" other Shipping Act restrictions on common carriers. Non-Vessel-Operating Common Carrier Negotiated Rate

Arrangements, 76 Fed. Reg. 11351, 11359 (Mar. 2, 2011). "An NVOCC entering into an NRA is still a common carrier." *Id.*

2. NRA Service Terms

Bakerly accepted Seafrigo's NRA terms by using its NVOCC services after it received Seafrigo's quarterly rate proposals. Those proposals expressly stated that the quoted rates did not include "other carrier-imposed charges" for which the shipper or consignee might be responsible under the terms of Seafrigo's USA Standard Accessorial Tariff (submitted with the rate proposals), rules tariff and bills of lading.[2] The USA Standard Accessorials Tariff listed the per diem charge as "[a]t cost per terminal or carrier" and specified that demurrage and detention would be "[a]t cost per carrier." *See* CX 0054; *see also* CX 1412 (Raffa Decl., ¶ 5 (Dec. 7, 2022).

Seafrigo Tariff Rule 15 described its policies under the heading "Free Time, Detention and Demurrage" and explained that Seafrigo uses equipment owned by VOCCs who charge detention if containers are not returned within the allotted free time. CX 111 (Tariff Rule 15.2). Rule 15.2 pointedly states that: "Merchant [Shipper] shall be liable to Carrier [Seafrigo] for any detention charges imposed on Carrier by VOCC as a result of Merchants [Shipper's] failure to return containers within applicable free time." *Id.* Tariff Rule 15.3 further explains that demurrage charges are imposed by the VOCC "if loaded containers are not removed from the marine terminal within" the allotted free time. It further clarifies that: "Where service is port at destination and removal of containers from the VOCCs' marine terminal is [the] responsibility of the Merchant [Shipper], Merchant [Shipper] shall be liable to Carrier [Seafrigo] for any demurrage charges imposed on Carrier [Seafrigo] by VOCC as a result of Merchants [Shipper's] failure to return containers within applicable free time." CX 111.

[2] *See* CX 226, 232, 239, 245, 251.

Seafrigo's Tariff Rule 17 covers "Use of Equipment" and repeats the information conveyed in Rule 15 about Seafrigo (identified as Carrier in the tariff) not owning or operating the equipment (i.e., chassis or containers) used to move shippers' cargo. It further explains Seafrigo's use of the equipment is "subject to requirements of the VOCCs and/or chassis leasing companies that own and/or operate the containers and chassis used to transport Merchants [Shipper's] cargo." CX 113 (Tariff Rule 17.1). Rule 17.1 further specifies that the shipper "by tendering shipments to [Seafrigo] for transportation, appoints [Seafrigo] as its agent for acquiring containers and chassis for such transportation and agreeing to free time, as well as demurrage and detention, storage and other charges that accrue with respect to containers and chassis." *Id.* Seafrigo's bill of lading likewise describes responsibility for charges incurred in connection with the carrier's (VOCC's) containers. CX 57 (Section 9.4). It provides that the Shipper will "undertake[] to return such containers to Carrier [VOCCC] within the time provided for in Carrier's [Shipper's] applicable tariff; otherwise, [Shipper] shall pay Carrier [VOCC] for the demurrage or detention charges applicable to the containers." *Id*.

Tariff Rule 17.1 assigns responsibility for demurrage, detention and other carrier-imposed charges to the Shipper with one notable exception. If such charges are "solely attributable to actions or omissions of [the] Carrier [Seafrigo]," they are not the Shipper's responsibility. *Id*. Seafrigo's bill of lading similarly disclaims any responsibility or liability on Seafrigo's part for "any cause or events' which it could not avoid, and which could not be prevented by the exercise of due diligence." *Id*. Section 9.4 provides that the Merchant (Bakerly) will "undertake[] to return . . . containers to [the] Carrier within the time provided for in Carrier's applicable tariff," and if that is not done, "Merchant shall pay. Carrier for the demurrage or detention charges applicable to the containers." *Id.* (Finding No. 17). It also includes a general disclaimer excusing Seafrigo from liability for "any loss or damage arising from" the Merchant's act or omission or for any "cause or events" which Seafrigo could not avoid and which could not have been avoided through due diligence. *Id*. at 6 (Finding No. 16), and 48; CX 113 (Clause 6.5 of Bill of Lading).

Seafrigo's documents memorializing its NRA with Bakerly clearly and repeatedly convey that demurrage and detention charges are Bakerly's responsibility unless caused by a lack of due diligence on Seafrigo's part. This interpretation is also consistent with Seafrigo's Managing Director's statements on the parties' arrangement. Mr. Raffa stated that having NVOCCs assume responsibility for demurrage and detention charges "rather than having such charges be the responsibility of the shipper and/or consignee" would not be economically feasible. Raffa Decl., ¶¶ 121-122. He added that over his decades of experience in the industry, it is customary for the shipper/consignee to pay demurrage and detention charges unless the NVOCC failed to perform its duties. *Id*.

Contrary to Bakerly's arguments, a general statement in Rule 17.2 indicating that the merchant (Seafrigo) assumes the risk for expenses incurred between the port of loading and port of discharge does not override the specific provisions clearly assigning responsibility for the disputed charges to the shipper/consignee (Bakerly). The more specific provisions are controlling.

Further, Bakerly's contemporaneous emails and actions from November 2020 to February 2022 clearly show that it understood demurrage and detention charges were its responsibility and that it routinely paid those charges until they spiraled upward during the pandemic. *See* I.D., 45. Throughout the parties yearlong exchanges about invoices and amounts billed for demurrage and detention, Bakerly questioned the amounts, asked for back-up documents, requested summaries, and raised various other concerns. *See* Reply, 5-6. But Bakerly it did not argue that their contract Seafrigo was required to pay claim that all such charges were Seafrigo's responsibility under the terms of the NRA. *See id.* at 6-7. In fact, when Seafrigo notified it that was going to discontinue advancing the charges on Bakerly's behalf because it was no longer fiscally sustainable and Bakerly should instead pay them up front, Bakerly urged Seafrigo to continue advancing the charges and gave assurances that it would work to make the arrangement more stable and fiscally sustainable. *See* Reply, 7; CX 709-10. Bakerly did not assert that Seafrigo was shirking its contractual obligation to bear the charges. *See id.* These actions support Seafrigo's claims that "Bakerly was fully aware that Seafrigo was paying steamship lines and terminals" out of its own funds so the carriers would release Bakerly's containers, and fully acquiesced in that arrangement until costs spiraled. Raffa Decl., ¶116-18.

The Commission finds that Seafrigo's NRA with Bakerly clearly imposes responsibility for demurrage and detention charges on Bakerly as the shipper unless the charges were caused by Seafrigo's lack of diligence.

3. Pass Through Billing under NRAs

Bakerly contends that even if Seafrigo's NRA allowed it to pass through demurrage and detention charges, Seafrigo did not adequately substantiate the payments due. Exceptions, 37-41. Bakerly does not identify the standard that applies or specifically how Seafrigo's invoices fell short of that standard. *See id*. Although it cites the 2018 Final Rule amending 46 C.F.R. Part 532, it does not explain how the discussion or the rule text supports its position. *See id.* (citing Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements, 83 Fed. Reg. 34780 (July 23, 2018) [hereinafter 2018 Final Rule]. Rule 532.5 authorizes NVOCCs to collect pass through charges under an NRA but does not dictate what supporting or backup documents they must provide to the shipper. It only specifies that if a specific amount is "not included in the NRA or the rules tariff," the NVOCC can pass through "only" the charges that it "incurs, with no markup." 46 C.F.R. § 532.5(d)(2)(iv).

In issuing the 2018 Final Rule, the Commission incorporated with some "clarifications" its 2016 decision in *Gruenberg-Reisner v. Overseas Moving Specialists, Inc*., Docket No. 1947(I), 2016 WL

11942284, at *7 (FMC Oct. 7, 2016). Permitting common carriers "to recover their additional expenses" not covered by "basic freight costs" is justified because they temporarily incurred those costs in serving their shippers. *Id.* Judge Wirth applied Rule 532.5 and pass through billing requirements endorsed in *Gruenberg-Reisner*. I.D., 49-50. Bakerly contends that Judge Wirth misconstrued *Gruenberg-Reisner*, applied less stringent documentation requirements than the Commission requires, and erred in failing to "investigate" Seafrigo's charges. Exceptions, 42. It does not specifically define what documents or further substantiation Seafrigo was required to provide to bill for and collect the demurrage and detention charges—only that the invoices and spreadsheets it submitted to demand payment fell short of what is required. *See id.* Judge Wirth reviewed the 2018 Final Rule, Commission case law, and relevant case law but found no support for the more stringent requirement that Bakerly asserted must apply.

Gruenberg-Reisner did not establish specific or minimum requirements for billing and recouping pass through charges. 2016 WL 11942284, at *9. The Claimants in that case retained the NVOCC's services to ship their household goods overseas. Due to an error by the NVOCC or its agent, the goods were shipped under two Shipping Agreements—one qualified as an NRA and one did not because it was issued after receipt of Claimants' cargo. *Id.* at *7. As a result, the NVOCC could not rely on the NRA tariff publication exemption for cargo shipped under the second agreement. *Id.*

The charges evaluated in *Gruenberg-Reisner* fell into two categories. For some, there was not enough information in the record to confirm they were actually incurred and reasonable in amount. The Commission remanded the claims related to those charges to the Small Claims Officer (SCO) so the NVOCC could supplement the record. The Commission recommended the SCO request the invoices a second time, but emphasized that the invoices were not required evidence and instructed that if they could not be produced, the SCO consider circumstantial evidence, such as whether they were comparable to charges imposed by other NVOCCs. *Id*. at *10.

Gruenberg-Reisner established that: (1) NVOCCs can reasonably bill for pass through charges; (2) invoices showing no markup are sufficient to substantiate pass through charges but not required evidence: and (3) circumstantial evidence demonstrating that the charges were legitimately incurred in handling the shipper's cargo and the amounts are reasonable may be sufficient. *See generally* 2016 WL 11942284, at *5-*10. In acknowledging that circumstantial evidence may be sufficient, the Commission's relied on *C.H. Leavell & Co. v. Hellenic Lines, Ltd.*, 13 F.M.C. 76, 89 (FMC 1969). *See id.*

Bakerly's arguments that Judge Wirth misinterpreted Commission precedent, including a statement in the 2018 Final Rule and the principle articulated in *Leavell*, are not supported. Bakerly argues that *Leavell* requires the common carrier to submit evidence establishing surcharges are reasonable and payable to the common carrier. Exceptions, 39. Bakerly bases that assertion on text it takes out of context from the sentences that immediately follow and divorces from the facts the Commission was addressing. Read in context, the Commission's statements make clear that a common carrier invoking an emergency clause or some other extraordinary circumstance must justify that action as reasonable, but can rely on invoices or even circumstantial evidence (such as unexpected rerouting or other events) to show that the charges are reasonable and accurate.

Leavell was decided when common carriers were restricted to providing transportation services under their published tariffs. Leavell, a construction contractor, arranged to ship construction materials for a project it was building in the Sudan aboard Hellenic's vessels in May 1967. After the ships set sail, hostilities prompted Egypt to close the Suez Canal, and Hellenic's ships were rerouted. Hellenic's published tariffs and bill of lading provided that if the cost of transiting the Suez Canal increased or Hellenic decided it was unsafe to sail its vessels through the Suez Canal, it might levy a "[s]urcharge on all freights and charges . . . without notice" payable by the cargo owners. 13 F.M.C. at 81. Hellenic's bill of lading also reserved the right to alter its scheduled route if there was a risk of capture, delay or damage to the vessel or the cargo and rerouting would allow it to collect "reasonable extra compensation."

Leavell challenged the surcharges as unreasonable and a violation of Section 18(b) of the Shipping Act of 1916. *Id.* at 84. The Commission found that Hellenic was justified in rerouting the vessels and imposing surcharges under its tariff and bills of lading. *Id.* at 86-88. It was in that context that the Commission stated that "the fact of substantial surcharges alone is sufficient to require the carrier to come forward with some proof of their propriety." *Id.* The Commission did not *require* Hellenic to "justify its surcharge by showing its actual costs and the increase therein attributable to the lengthened voyage." *Id.* The Commission explained that demonstrating the actual costs is not the only way to show the surcharges are reasonable, and that Hellenic could rely on the increased distance and duration as evidence of reasonableness. *Id.* Hellenic was not required to produce a "dollars and cents justification for the level of its surcharge." *Id.* at 90.

In this case, the Commission finds that invoices are reliable evidence of pass through charges incurred and amounts paid by NVOCCs, but are not required evidence or the only means of substantiating those charges. NVOCCs can also rely on circumstantial evidence to validate charges incurred and amounts owed.

4. Compliance with Pass Through Billing Requirements

Under the Commission's regulations and the terms of Seafrigo's NRA, Seafrigo was authorized to bill and collect from Bakerly pass through charges without a markup unless the charges were caused by Seafrigo's lack of diligence. *See* 46 C.F.R. § 532.5. Judge Wirth found that nearly all the charges in dispute were "straight pass throughs of amounts that Seafrigo paid to third parties" with one exception. I.D., 8. The exception was finance charges that Seafrigo began billing in late 2021 when it decided it was no longer financially sustainable to carry Bakerly's outstanding debts on its books. *Id.*

Bakerly's allegations that Seafrigo failed to adequately substantiate the pass through charges are refuted by multiple emails between the parties in which Seafrigo routinely and consistently responded to Bakerly's request for more information or assistance with verifying or tracking particular charges and attempted to supply whatever was requested. If that was not feasible or practical, Seafrigo typically suggested a substitute or offered to provide what was readily available or could be compiled. Seafrigo consistently went to some lengths to provide additional documents, summaries or spreadsheets, responsive to Bakerly's requests. While Seafrigo undoubtedly had an interest in supplying requested information to facilitate Bakerly processing and paying the outstanding charges, the substance and tone of its communications suggest a good-faith undertaking on its part to address Bakerly's questions and provide information useful in validating the charges and verifying the amounts owed.

An email exchange in early 2021 is typical of Seafrigo's response to Bakerly. Bakerly requested shipping line invoices for the demurrage and per diem charges Seafrigo billed and noted the "necessary documents" were needed for Bakerly's timely approval. CX 718. Seafrigo responded days later and stated: "I have attached back-up invoices you had questioned. Additionally, I have added a batch of new invoices + back-up. I will put everything in a FEDEX pouch and send it to you." *Id.* at 723. In another exchange, Bakerly requested the demurrage charges presented in a spreadsheet format. *Id.* at 722. Seafrigo responded that would require running a customized report "trying to capture a timeframe," cautioned that it might include "some overlapping from previous invoices that you have already received," and asked it that would be acceptable. *Id.* Bakerly accepted the suggestion and thanked Seafrigo for its help. Seafrigo did not accommodate every request Bakerly made but would explain why that was not possible or proposal an alternative.

For example, when Bakerly asked for supporting documents to be sent or sent along with summary reports, Seafrigo explained the original invoices had already been sent to Bakerly so were not available to resend with account summaries. *Id.* at 904.

These email exchanges with Bakerly seeking and Seafrigo providing back-up information, explanations or summaries continued throughout 2021. They show that Seafrigo routinely entertained Bakerly's requests and provided information or further verification. Bakerly explains in some exchanges that its accounting department needs certain information to justify payment and link the charges to particular containers or shipments. Bakerly paid pass through bills totaling over $1 million involving over 1,000 carrier invoices. Bakerly's payments are further evidence that it ultimately had the information its accounting system required to process and track the charges.

Bakerly points to a limited number of errors, alleged errors and oversights as proving that Seafrigo had a flawed billing process and systematically overcharged. During the course of the parties' dealing and, in this litigation, Seafrigo credited Bakerly's account or withdrew certain charges it misclassified or discovered were billed in error. Seafrigo credited Bakerly's account with $30,000 as "a commercial gesture" of good will but emphasized that credit was not an admission that it had erred. CX 259. Seafrigo has also acknowledged sporadic errors that led to overbilling. *See, e.g.*, Raffa Decl., ¶ 139 ("For example, for container SEGU9388853, Seafrigo admits to overcharging Bakerly by $8,879.55."). It also acknowledges some instances of billing for duplicate charges. *Id.* ¶ 175 ("The invoice overcharged Bakerly for $3,650, which amount is not being sought and will be credited."). Seafrigo's admission to some errors in pass through billing does not prove the claims alleged—it was entitled under terms of the NRA to pass through these charges and the fact that its process was not error-free does not prove it failed to comply with § 41104(a)(2)(A).

Given that Seafrigo depended on the VOCCs and MTOs for the invoices, and had to make sense of their billing in passing the charges along to Bakerly and the number of invoices involved, occasional errors or misstatements or misclassification of charges does not prove that Seafrigo purposefully marked up the VOCC/MTO charges, taking them outside the § 532.4 restriction on charges for which specific amounts are not identified in the NRA or the rules tariff. Exceptions, 45-48.

The Commission finds that Bakerly has not proved that Seafrigo purposefully or routinely violated the terms of its NRA by marking up or misclassifying VOCC or MTO charges as Bakerly's responsibility in violation of the Shipping Act.

5. Bakerly Allegations of Negligence

Bakerly argues even if the NRA assigns it responsibility for all charges not caused by Seafrigo's negligence, Seafrigo was not diligent in arranging pick-ups, deliveries and transportation between the port and Bakerly's inland facilities. Bakerly points in particular to Seafrigo's decision to pay and pass through charges incurred when the Port of New York/New Jersey was closed due to a snowstorm and Seafrigo's alleged problems with hiring enough drivers to timely pick up and deliver shipments to Bakerly's inland warehouses.

Judge Wirth measured Seafrigo's performance by considering whether it met its obligation "not to impose avoidable charges." I.D., 50. Measured against that standard, Judge Wirth found that Seafrigo exercised due diligence made a sound decision to pay the charges incurred during the port closure because its efforts to get the charges waived were not successful and refusing to pay would have resulted in more charges accruing. *Id.* Judge Wirth concluded that "Seafrigo made a reasonable attempt to contest the charges," and that was sufficient to meet its obligation not to impose avoidable charges." *Id.* at 51. Bakerly did not assert, and Judge Wirth did not explore, whether Seafrigo had an obligation to further contest the charges by filing an action against the VOCCs or MTOs. *Id.*

The standard that Judge Wirth applied is consistent with the terms stated in Seafrigo's bill of lading which provides that Seafrigo is not responsible for charges incurred as the result of any "causes or events" that Seafrigo could not avoid and which it could not have prevented through the exercise of due diligence. *Id.* at 6 (Finding No. 16); CX 57. Bakerly does not argue that Judge Wirth applied the wrong standard or cite to a different standard that should have been applied. It has the burden of proving that Seafrigo did not use due diligence and relies principally on the Commission interpretive rule's incentive principle in arguing its position. Seafrigo's decision to pay rather than refusing and letting charges continue to accrue is consistent with the incentive principle. Seafrigo could not pick up the containers without paying the charges first. Outstanding charges are generally due before cargo is released because common carriers waive their lien against the cargo for unpaid charges if they release the cargo without providing notice in their tariff or otherwise of a continuing lien. *Capitol Transportation, Inc. v. U.S.*, 612 F. Supp. 2d 1312, 1324 (1st Cir. 1979).

Seafrigo's Managing Director explained that despite a provision in Maher Terminal's Marine Schedule stating that collecting demurrage for the ocean common carrier is optional, Maher refused to release Bakerly's containers unless the charges were paid. Raffa Decl., ¶ 141. According to Mr. Raffa, Maher always required payment before it would release Bakerly's containers, and had Seafrigo refused to pay, the containers would have remained at the port, accruing further charges. *Id.,* ¶¶ 104, 109, 111, 179.

Seafrigo's Jerome Lorrain explains that he and Mr. Raffa met separately with the VOCCs primarily engaged to carry Bakerly's shipments and asked them to waive charges incurred while the port was closed. He reports that the VOCCs "flatly refused" to waive the charges and given their significant leverage in a tight shipping market, they were not likely to relent. Lorrain Decl, ¶¶ 14-15. Seafrigo also "kept Bakerly informed of its efforts in this regard." *Id.* ¶ 16. Under the circumstances, paying the charges to promptly pick up Bakerly's containers was a reasonable decision, consistent with due diligence, and with the incentive principle in that it kept Bakerly's shipments moving toward their destination.

That brings us to the question of whether paying the charges and passing them through to Bakerly was all that due diligence required, or whether Seafrigo had a further obligation to challenge the VOCCs' refusal to waive the charges and file a claim to recoup the money it paid out or an obligation to assume the obligation itself and forgo collecting the money from Bakerly. Judge Wirth found that Seafrigo had no obligation to file a legal claim against the VOCCs to recoup the money and that imposing such a duty would be contrary to the incentive principle. I.D., 51. Judge Wirth reasoned that NVOCCs would be far less likely to advance payments to keep cargo moving if forced to assume the risk that they would not be paid by the shipper or obligated to file a complaint against the VOCC to recoup the money they paid out. *Id.* Judge Wirth noted that although OSRA 2022 does not apply to this case because the claims predate its June 2022 effective date, finding no obligation to file a complaint on the part of NVOCCs is consistent with OSRA 2022's safe harbor provision insulating NVOCCs from responsibility for improper invoices issued by VOCCs. *Id.* (citing 46 U.S.C. § 41104(e)).

In deciding whether to pay the charges and how to handle reimbursement from Bakerly, Seafrigo was confronted with several options: (1) refuse to pay legally questionable charges and contest them while charges continue to accrue which carried additional risks, i.e. that it might not prevail and could be held accountable for the charges that accrued while it battled the VOCCs; (2) pay legally questionable charges, forgo any pass through to the shipper (Bakerly) and seek a refund from the VOCCs; (3) pay the charges to secure the containers' release, pass them through to Bakerly while also pursuing a claim against the VOCCs and pay any charges refunded to Bakerly upon receipt; or (4) pay legally questionable charges and pass them through to Bakerly but take no further action against the VOCCs to recoup the charges. Seafrigo chose to pay the charges after attempts to obtain a waiver from the VOCCs failed, and pass them through to Bakerly without filing a legal action to recoup them from the VOCCs.

Bakerly does not point to any provision of the Shipping Act, the Commission's rules, or the NRA that required Seafrigo to bring a claim against the VOCCs to recoup charges incurred while the port was closed. *See* Exceptions, 45-46. Seafrigo denies any such obligation. *See* Raffa Decl., ¶ 104; Lorrain Decl., ¶ 17.

The Shipping Act requires NVOCCs to establish and follow reasonable and just practices in assessing charges, but does not impose a specific duty to refuse to pay or contest unfair or legally questionable charges. *See* 46 U.S.C. § 41102(c). Commission regulations provide a non-exclusive list of services that NVOCCs may provide to shippers: (1) purchasing transportation services from a common carrier and offering them for resale; (2) paying port-to-port or multimodal transportation charges; (3) arranging for inland transportation and paying for inland freight charges on through transportation movements; (4) "paying lawful compensation ot ocean freight forwarders"; and (5) "collecting freight monies from shippers and paying common carriers as a shipper on NVOCC's own behalf." 46 C.F.R. § 515.2(k).

Several authorized NVOCC services relate to retaining and paying for services from VOCCs or others. The functions that most directly relate to Seafrigo paying or contesting VOCC charges are collecting "freight monies from shippers" and remitting those payments to the VOCC. *See id*. Here, Seafrigo reversed the sequence and paid the VOCC charges, then sought reimbursement from Bakerly. Beyond authorizing NVOCCs to pay freight charges, § 515.2(k) does not provide further guidance on obligations the NVOCC owes the VOCC in carrying out that duty. The rules governing NRAs limit pass through charges "for which a specific amount is not included in the NRA or the rules tariff" to "charges the NVOCC incurs, with no markup" but do not address contesting legally questionable charges. *See id*. § 532.5.

Commission regulations and case law make clear that NVOCCs have responsibilities to shippers and the ocean common carriers whose services they engage on behalf of their customers. Generally, those obligations are not in conflict, but there is sometimes tension between the two. NVOCCs have a responsibility to pay freight and other charges lawfully owed to ocean common carriers for services provided on behalf of the NVOCC's shippers. 46 C.F.R. § 515.2(k)(11). If an NVOCC refuses to pay legitimate charges, it may risk liability under the Shipping Act for failing to perform its obligations to the VOCC and placing its shipper's cargo at risk. *See generally Capitol Transportation*, 612 F.2d at 1322.

Here, Bakerly agreed to have Seafrigo act as its agent in acquiring and using chassis and containers and handling related charges under the terms of the NRA. Seafrigo's Tariff Rule 17.1 specifies that the shipper "by tendering shipments to [Seafrigo] for transportation, appoints [Seafrigo] as its agent for acquiring containers and chassis for such transportation and agreeing to free time, as well as demurrage and detention, storage and other charges that accrue with respect to containers and chassis." CX 113 (Tariff Rule 17.1.

While NVOCC practices that violate § 41102(c) or other Shipping Act prohibitions likely fall outside the bounds of due diligence, there is not a bright line test. In those cases, due diligence is judged by considering all the relevant circumstances, such as the duties the NVOCC was retained to perform, conditions impeding its ability to provide those services, available options or decision points, and whether it exercised reasonable judgment in reaching or carrying out those decisions. Its actions should be assessed based on what it knew or should have known at the time, not with the benefit of hindsight. They must also be judged based on the law applicable at the time.

Several factors are relevant in assessing whether due diligence required Seafrigo to bring a claim against the VOCCs. The services it contracted to provide to Bakerly and the nature of NVOCCs services generally weigh against such a finding. NVOCC services are generally more closely associated with the cargo itself—handling it, arranging transportation, and otherwise ensuring that it is responsibly moved to the port or its destination. Bringing a legal action against a VOCC (or another entity) is in a different category altogether and not directly related to NVOCCs' routine cargo handling/transportation duties.

Depending on the size and sophistication of the NVOCC and the type of claim, pursuing legal action against a VOCC to dispute questionable charges might require hiring legal counsel to draft pleadings, engage in discovery, and other activities necessary to prove the claim and obtain relief. There are certainly instances where the task would be less onerous than that depending on nature of the claim and total amount at issue. Here, for example, Seafrigo conceivably could have challenged charges under the $50,000 threshold for the Commission's small claims process and spent less time and resources pursuing that claim. *See* 46 C.F.R. §§ 502.301-502.305. But it is also conceivable that the VOCCs would not have consented to the small claims process and would have vigorously defended the legitimacy of their charges in costly, resource-intensive, and lengthy litigation.

Second, NVOCCs are not obligated to pursue claims that are not legally or factually supportable. In this instance, a claim against the VOCCs for charging demurrage and detention during an unexpected port closure caused by a snowstorm was legally supportable. *See* 46 U.S.C. § 41102(c); 46 C.F.R. § 545.5(c). In fact, charging for demurrage and detention during an unanticipated port closure is one of the examples the Commission cited in issuing the Interpretive Rule as a situation outside shippers' control where charges are likely to be found unreasonable under § 41102(c). Interpretative Rule on Demurrage and Detention under the Shipping Act, 85 Fed. Reg. 29638, 29653 (May 18, 2020). That is not to say

Seafrigo was certain to prevail in an action against the VOCCs and it still would have to commit time and resources to proving the charges were unreasonable and rebutting the VOCCs defenses.

A third factor is the shippers' ability to pursue a claim against the charging VOCC. It appears likely that Bakerly had that capability here as an established importer bringing in regular refrigerated container shipments from Europe under a service arrangement with Seafrigo. Bakerly's staff engaged with Seafrigo on a weekly basis about the charges and Seafrigo forwarded invoice copies and summaries of charges paid or due. Bakerly staff regularly quizzed Seafrigo about particular charges or amounts, and its staff was clearly familiar with the charges regularly incurred. All of which suggests that Bakerly was equally capable of bringing a claim against the VOCCs that refused to waive demurrage and detention charges imposed during the port closure.

Here, the relevant factors in assessing whether Seafrigo had a duty to challenge charges VOCCs imposed while the port was closed due to a snowstorm weigh against finding any such obligation. Filing a claim against VOCCs for charges incurred during an unscheduled port closure is not the type of service Seafrigo contracted to provide Bakerly. Further, Bakerly could have brought a claim against the VOCCs on its own. While there was a legal and factual basis for challenging charges levied during the snowstorm-related port closure, that does not outweigh the other relevant considerations or lead to the conclusion that Seafrigo had duty to pursue that claim in this instance. Bakerly had access (through Seafrigo) to supporting evidence and was equally capable of assessing whether the charges appeared compliant with Shipping Act prohibitions against unreasonable practices. All of which points to the conclusion that Seafrigo did not have an obligation to bring a claim against the VOCCs when they refused to waive the snowstorm-related charges.

The Commission finds that due diligence did not require Seafrigo bring a claim against the VOCCs to compel them to cancel or refund charges imposed during the snowstorm-related port closure. Because Bakerly was responsible for those charges under the NRA, Seafrigo did not violate § 41104(a) in passing them through to Bakerly.

6. Alleged Mishandling of Container Pick-ups and Returns

Bakerly argues that responsibility for all the disputed charges shifted to Seafrigo because it did not diligently perform the NVOCC services it contracted to provide. It asserts that Seafrigo's inefficiencies in ensuring sufficient coverage by truck drivers and related delays picking up and returning causing the disputed charges.

Seafrigo disputes that assertion and contends that it was Bakerly's chronic management problems at its warehouses that caused the delays and increased charges. It asserts that Bakerly is pointing to "isolated, misleading instances involving [Seafrigo] truckers" as a way of diverting attention away from systemic and chronic problems at Bakerly's warehouses—the actual cause of the disputed charges. Raffa Decl., ¶ 22. Seafrigo contends that it was Bakerly's inability to resolve the problems that plagued its warehouses and unloading operations that prevented on-time pick-ups and deliveries and kept containers out of circulation past the allotted free time. *Id*. According to its Managing Director, Mr. Raffa, "Bakerly chose warehouses that not only were unable to handle the volume of shipments required by Bakerly but also unable to provide reasonable delivery appointment times in order for Seafrigo drivers to comply with DOT regulations." *Id.* ¶ 26.

Seafrigo points to a string of contemporaneous emails about the chronic inefficiencies at Bakerly warehouses and describes how they interfered with returning containers on time. Mr. Raffa describes long delays in unloading and truck turn times (even with scheduled appointments) caused by inadequate staffing or insufficient warehouse space. Raffa Decl., ¶¶ 16-42. Mr. Raffa describes instances where drivers waited hours for Bakerly's warehouse manager to unload a container only to be forced to leave and come back again another day. *See id.* He also points out that Bakerly's arguments faulting Seafrigo and its drivers fail to take into account Department of Transportation restrictions on the hours truck drivers can lawfully work before taking mandatory rest breaks. *Id.* ¶ 23. Seafrigo acknowledges that its pool of drivers was strained by global conditions and labor shortages caused by the pandemic, but maintains that those issues were greatly exacerbated by Bakerly's inefficiencies which taxed its pool of available drivers still further. *Id.* ¶¶ 39-42.

Finally, Bakerly points to disparities between Seafrigo and CEVA's performances as evidence that Seafrigo's performance was substandard. *See* Exceptions, 19-20. Bakerly does not identify CEVA or explain its role, but Mr. Raffa's supplies that information in his declaration. *See* Raffa Decl., ¶¶ 132, 158, 160. Mr. Raffa explains that CMA CGM owns CEVA—which gave CEVA "operational priority"—an advantage that Seafrigo did not have. *Id.* As Mr. Raffa explains, CEVA's performance in handling some cargo moves is not a fair comparison given its relationship with CMA CGM and the advantages that relationship conferred. *Id.* ¶¶ 158, 160. Those are valid points, and this is not a fair comparison.

The Commission finds that Bakerly has not proved a lack of diligence on Seafrigo's part in providing the NVOCC services it contracted to perform under the NRA. Consequently, responsibility for the disputed charges did not shift from Bakerly to Seafrigo under the "due diligence" clause in the NRA.

E. Section 41102(c) Claim Based on Billing Practices

Judge Wirth found that Bakerly failed to prove that Seafrigo's billing practices are unreasonable under section 41102(c). I.D., 66. Bakerly challenges that determination as contrary to the weight of the evidence. Exceptions, 41-52. It argues that the evidence shows Seafrigo's billing practices were confusing and that errors were made, which confounded Bakerly's ability to trace and verify the amounts owed.

1. Elements Required to Prove a Section 41102(c) Claim

Section 41102(c) requires common carriers "not fail to establish, observe, and enforce just and reasonable regulations and practices" related to "receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). Proving a violation requires the Complainant to show: (1) Respondent is a common carrier; (2) "claimed acts or omissions" that were "normal, customary, and continuous;" (3) which relate to "receiving, handling, storing or delivering property;" (4) are unjust or unreasonable; and (5) proximately caused Complainant's alleged loss. 46 C.F.R. § 545.4. The first three elements of Bakerly's § 41102(c) claim are not in dispute. Seafrigo is a common carrier and the claimed acts and omissions occurred while it was handling and delivering Bakerly's imported cargo. So, the discussion focuses on whether Seafrigo established and followed reasonable practices in billing pass through charges for demurrage and detention and, if not, whether Bakerly was harmed as a result.

2. Demurrage and Detention Reasonableness Standards

The Commission determines whether a common carriers' demurrage and detention policies for handling containerized cargo are unreasonable by applying the incentive principle explained in Rule 545.5(c) which means that it "consider[s] the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity." 46 C.F.R. § 545.5(c). Factors considering in making that assessment include: (1) whether "demurrage or free time" is related "to cargo availability for retrieval;" (2) whether detention fees apply to periods when empty containers cannot be returned; (3) when and how notice that cargo is available for retrieval is provided; and (4) whether the policies serve the intended purposes if cargo is held or detained for government inspection. *Id.*

The Commission also considers the reasonableness of common carriers' demurrage and detention policies in a broader context by evaluating the policies' accessibility and clarity, available dispute resolution procedures, information about points of contact, timeframes, and "corroboration requirements." *Id.* § 545.5(d). It may also factor into its reasonableness analysis whether policy terms are clearly defined and whether the definitions differ from standard usage in other contexts. *Id.* § 545.5(e).

Bakerly's arguments related to OSRA 2022 and whether it endorsed or adopted the concepts found in Rule 545.5 are irrelevant. *See* Exceptions, 23. Rule 545.5 became effective in May 2020 before Seafrigo billed for the disputed charges, so it applies in determining whether Seafrigo's billing policies were unreasonable or unjust under § 41102(c). The regulations governing demurrage and detention billing requirements issued in February 2024, 46 C.F.R. §§ 541.1-541.8, do not apply to the disputed charges. Like the OSRA 2022 billing requirements it implements set forth in 46 U.S.C. § 41104(a)(15) and (d), Rule 541 became effective after the disputed charges were incurred and is not retroactive.

3. Seafrigo's General Billing Practices

Bakerly challenges Seafrigo's billing process for pass through charges and collection of those charges as unreasonable and unjust under § 41102(c). To prevail on that claim, it must prove that Seafrigo's alleged acts or omissions in billing for pass through charges were unreasonable or unjust and were its normal, customary and continuous practice. *Crocus Investments, LLC v. Fed. Mar. Comm'n*, No. 21-1199, 2022 WL 3012275, at *4 (D.C. Cir. July 29, 2022). Judge Wirth found the evidence insufficient to prove Bakerly's allegations because it failed to establish that the practices it complained about, such as overcharges and charges appearing on more than one billing statement, were systemic or Seafrigo's regular practices. I.D., 47. Rather, the evidence indicated that they were sporadic or irregular occurrences. *Id.*

Judge Wirth found that Bakerly's "strongest argument" in support of its § 41102(c) claim may be its assertion that: "Seafrigo lacked the systemic controls to properly track and ship containers and invoice Bakerly for demurrage and detention [which] implies that Seafrigo had a normal, customary, and continuous practice of, essentially, sloppy recordkeeping." *Id.* Judge Wirth found that argument was not substantiated because the sporadic or isolated errors that Bakerly pointed to did not prove they were Seafrigo's customary billing practice. *See id.* at 66.

Bakerly points to the same evidence that Judge Wirth found insufficient in arguing that the Commission should reverse the Initial Decision. Judge Wirth's assessment of the evidence Bakerly relies upon is accurate. Exceptions, 34-43. The evidence of select instances of errors and mix-ups that Bakerly relies on do not match or prove its allegation that Seafrigo "had a practice of issuing duplicative invoices for detention, demurrage, and per diem and the practice was unjust and unreasonable." *Id.* at 35. Bakerly points to some instances of overcharging, carrier charges being repeated on a second billing statement, and similar mix-ups over the course of a year or longer. *Id.* at 34-43.

The inadequacy of these incidents in proving Seafrigo violated 46 U.S.C. § 41102(c) and 46 C.F.R. § 545.5(d) is particularly evident when viewed in the context of the sheer number of invoices Bakerly is contesting and the amounts billed, collected or still outstanding. Bakerly is contesting over one thousand invoices totaling $2.7 million for pass through charges Seafrigo billed from December 2020 through the end of 2021. I.D., 65. But the admitted or alleged overcharges are only a small part of that total. Further, Seafrigo is not seeking payment for $159,849.08 in overcharges it has identified or conceded were made in error. Seafrigo's willingness to acknowledge when it made errors speaks in its favor and counters allegations that overcharging and purposely or carelessly sending inaccurate bills were its standard practices. *Id.*

Seafrigo's reliance on the VOCCs or MTOs for accurate billing statements is also relevant. Mr. Raffa states that Seafrigo provided Bakerly with the invoices/information that it received from the billing carriers, but obviously could not provide information they did not supply. Raffa Decl., ¶ 84. The detailed billing requirements introduced by OSRA 2022 were not yet in effect. *See id.* ¶¶ 81, 115. In the pre-OSRA 2022 era, Mr. Raffa states, carriers "frequently failed to provide detailed invoices"—one of the factors which actually led to the changes effected by OSRA 2022. *Id.* ¶ 138. Mr. Raffa also explains that issuing multiple invoices for the same container was generally due to a container remaining at the port or terminal across for a longer period or billing cycles and in that respect, was a function of how the ocean common carrier billed, not a deliberate choice or strategy on Seafrigo's part. *Id.* ¶¶ 74, 99.

When Seafrigo's errors and alleged errors are viewed in the broader context of the pandemic-related unpredictable conditions it and other NVOCCs were operating under in 2020-2021, they have even less evidentiary weight. Seafrigo and Bakerly were dealing with a tidal wave of challenging conditions. As the parties chronicle in their email exchanges, they were dealing on a weekly basis with problems finding drivers to pick up containers at the port, labor shortages at Bakerly's warehouses which delayed unloading and container returns, unpredictable schedules, and other conditions outside their control. All of those conditions contributed to the unpredictability that both parties had to contend with while also sorting out charges imposed by VOCCs and MTOs on earlier shipments.

4. Seafrigo's Practices for Handling Disputed Charges

Bakerly's challenge to the reasonableness of Seafrigo's practice for handling questionable or potentially unlawful charges imposed by ocean common carriers is addressed above in Part D-5. For reasons already discussed, Seafrigo's attempt to have the VOCCs waive charges imposed while the port was closed and inaccessible for pick-ups or drop offs met its obligation to act with due diligence to protect Bakerly's interests and fulfill its duties as an intermediary between Bakerly and the VOCCs that transported its containers to the port.

The Commission finds that Bakerly has not proved that Seafrigo's customary billing practices for pass through charges were unreasonable or unjust under 46 U.S.C. § 41102(c) or 46 C.F.R. § 545.5.

III. CONCLUSION

The Commission hereby:

(1) **DENIES** Complainant's Exceptions to the Initial Decision;

(2) **DENIES** Complainant's Motion for Discovery Sanctions;

(3) **AFFIRMS** the Initial Decision in its entirety; and

(4) **DISMISSES** with prejudice all claims asserted in the Complaint.

By the Commission.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

ICL USA, INC., *Complainant*

v.

DEPENDABLE HIGHWAY EXPRESS, INC. AND MEDITERRANEAN SHIPPING COMPANY, (USA) INC., ON BEHALF OF MEDITERRANEAN SHIPPING COMPANY, S.A., *Respondents*.

DOCKET NO. 24-04

Served: November 5, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Chief Administrative Law Judge's October 3, 2024, Order Denying Respondent's Petition for Attorney Fees has expired. Accordingly, this order has become administratively final.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

WEBTRANS LOGISTICS, INC., *Claimant*

v.

HAPAG-LLOYD (AMERICA) LLC, *Respondent*.

DOCKET NO. 2013(F)

Served: November 8, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's October 8, 2024, Initial Decision Granting Dismissal has expired. Accordingly, this decision has become administratively final.

David Eng
Secretary

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

SAMSUNG ELECTRONICS AMERICA, INC., *Complainant* v. ORIENT OVERSEAS CONTAINER LINE LIMITED AND OOCL (EUROPE) LIMITED., *Respondents.*	**DOCKET NO. 24-17**

Served: November 18, 2024

ORDER OF: Alex M. CHINTELLA, *Administrative Law Judge*.

ORDER PARTIALLY GRANTING MOTION TO DISMISS[1]

[Notice Not to Review served 12/19/2024, order administratively final]

I. Background

On May 13, 2024, Respondents Orient Overseas Container Line Limited and OOCL (Europe) Limited ("OOCL") filed a motion to dismiss the complaint, arguing that Complainant Samsung Electronics America, Inc.'s ("SEA") claims are essentially allegations that OOCL did not adhere to the terms of the bills of lading, and that as consignee on those bills of lading, SEA's remedy is to file a claim in federal court as the Commission lacks jurisdiction over such breach of contract claims. OOCL also argued that the various counts of the complaint fail to state a claim, and that SEA's failure to specify an amount for its reparations claim warrants dismissal. After jointly requesting an extension of time, which was granted, SEA filed an opposition on June 14, 2024 and OOCL filed a reply on June 28, 2024.

For the reasons discussed below, the motion is GRANTED with respect to Counts II and III, and DENIED with respect to the remaining counts.

II. Discussion

A. Motion to Dismiss Standard

Although the Commission's Rules of Practice and Procedure ("Rules") do not explicitly provide for motions to dismiss, Rule 12 states that the Federal Rules of Civil Procedure ("FRCP") will be followed in instances that are not covered by the Rules, to the extent that application of the FRCP is consistent with sound administrative practice. 46 C.F.R. § 502.12.

[1] This order granting dismissal will become the order of the Commission in the absence of review by the Commission. Any party may file exceptions to this order within twenty-two days of the date of service. 46 C.F.R. § 502.227.

Respondents' motion is premised on the argument that the Commission lacks jurisdiction to adjudicate Complainant's claims, which are claims for breach of service contracts. Mot. to Dismiss, p. 5. The Commission looks to FRCP 12(b)(1) when considering dismissals based on lack of subject matter jurisdiction. *MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, Docket No. 16-16, 2020 WL 6445041, at *4 (FMC Oct. 29, 2020). Under FRCP 12(b)(1), there are two types of jurisdictional attacks: (1) a factual attack, which challenges the existence of subject matter jurisdiction using material extrinsic from the pleadings, such as affidavits or testimony; and (2) a facial attack, in which a respondent's challenge is confined to whether the complainant has sufficiently alleged a basis of subject matter jurisdiction. *Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232-33 (11th Cir. 2008); *see also Osborn v. United States*, 918 F.2d 724, 729-730 (8th Cir. 1990).

Where, as here, a respondent challenges the sufficiency of the allegations regarding subject matter jurisdiction—a facial challenge—a court will employ the *Twombly-Iqbal* "plausibility" standard, which is the same standard used to evaluate facial challenges to claims under FRCP 12(b)(6). *Pena v. Ortiz*, 521 F. Supp. 3d 747, 750 (N.D. Ill. 2021). Under this plausibility standard, the Commission will dismiss a claim if the complainant fails to plead "enough facts to state a claim for relief that is plausible on its face." *Maher Terminals, LLC v. the Port Auth. of New York and New Jersey*, Docket No. 12-02, 2015 WL 9426189, at *12 (FMC Dec. 18, 2015) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Facial plausibility requires factual content that allows a court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The factual content includes the facts alleged in the complaint, documents attached to or incorporated by reference in the complaint, and matters subject to official notice (including judicially noticeable facts and "technical or scientific facts within the general knowledge of the Commission"). *Id*. at *41 n.1 (*citing Farah v. Esquire Magazine*, 736 F.3d 528, 534 (D.C. Cir. 2013); *Chambers v. Time Warner, Inc*., 282 F.3d 147, 153 (2d Cir. 2002); 46 C.F.R. § 502.226(a)).

To allow the necessary inferences to be reasonably drawn, the complaint's factual allegations must be more than speculative, and must "nudge claims across the line from conceivable to plausible." *Id*. at *12 (*quoting Elemary v. Holtzmann,* 533 F. Supp. 2d 116, 130 (D.D.C. 2008)). The plausibility standard is not a probability requirement – while actual proof of the alleged facts may be improbable, and recovery may seem remote and unlikely, the standard does not require the pleading of specific evidence or extra facts beyond what is needed to make the claim plausible. *Id*.

While this standard does not require detailed factual allegations, it does require more than labels, conclusions, or a formulaic recitation of the elements of a cause of action. *Id*. The Commission need not accept as true legal conclusions or draw inferences that are not supported by the allegations. *Id*. Legal conclusions can provide the framework of the complaint, but they must be supported by factual allegations. *Id*. at *13. The factual allegations needed to reach plausibility will vary depending on the complexity of the case and require the presiding officer to draw on judicial experience and common sense. *Id*.

B. Count I: Claims alleging unreasonable practices under 46 U.S.C. § 41102(c)

OOCL first argues that SEA's claims under 46 U.S.C. § 41102(c) are based on the bills of lading for ocean transportation issued by OOCL and are therefore claims for breach of contract over which the federal courts, and not the Commission, exercise exclusive jurisdiction. Mot. to Dismiss, p. 7-8. OOCL cites *Norfolk Southern R. Co. v. James N. Kirby Pty, Ltd.*, among other cases, for the proposition that a bill of lading for ocean carriage is a maritime contract and that authority to interpret such contracts stems from the Constitution's grant of admiralty jurisdiction to the federal courts. 543 U.S. 14, 24-25 (2004).

While the federal courts undoubtedly have jurisdiction over a claim for breach of a maritime contract, the jurisdictional question here does not turn on whether SEA could obtain relief in federal court on a breach of contract theory for violations of the terms of the bills of lading, but whether it has stated a cognizable claim under the Shipping Act. The Shipping Act provides that a "person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *Cargo One, Inc. v. COSCO Container Lines Co.*, Docket No. 99-24, 28 S.R.R. 1635, 1645, 2000 WL 1648961, at *15 (FMC Oct. 31, 2000). The Commission *must* address alleged violations of the Shipping Act, which are within its exclusive jurisdiction; no common law remedy exists for such violations. *Id*. The Commission's obligation to hear Shipping Act claims extends even to cases where the relevant facts may give rise to other claims between the parties, where related proceedings regarding those claims are underway, and even where the parties have already obtained relief for those claims in another forum. *MCS Industries, Inc. v. Mediterranean Shipping Co. S.A*., Docket No. 21-05, 2024 WL 95383, at *7 (FMC Jan. 3, 2024); *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Docket No. 02-04, 30 S.R.R. 991, 2006 WL 2007808, at *10-11 (FMC May 10, 2006). Shipping Act claims are distinct from breach of contract claims, entailing a different analysis of statutory standards that includes review of the carrier's broader practices beyond those directly affecting the complainant. *MCS Industries,* 2024 WL 95383, at *7. The Commission set forth the standard for determining whether a complaint is inherently a contract claim or sufficiently alleges a Shipping Act cause of action in *Cargo One:*

> However, we find it inappropriate and contrary to the intent of the statute that section 8(c) bar any Shipping Act claim which bears some similarity to, overlaps with, or is couched in terms suggesting that the remedy may be available in a breach of contract action. We believe the more appropriate test is whether a complainant's allegations are inherently a breach of contract claim, or whether they also involve elements peculiar to the Shipping Act. We find that as a general matter, allegations essentially comprising contract law claims should be dismissed unless the party alleging the violation successfully rebuts the presumption that the claim is no more than a simple contract breach claim. In contrast, where the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support such a claim, that the matter is appropriately before the agency.

Cargo One, Inc., 2000 WL 1648961, at *14.

Although *Cargo One* arose in the context of an alleged violation of a service contract, the reasoning is equally applicable to this case. The question is whether SEA's allegations are inherently a breach of contract claim premised on OOCL's failure to comply with the terms of the bills of lading, or whether they also involve elements peculiar to the Shipping Act. SEA does allege in the complaint that OOCL "fail[ed] to properly perform its obligations for inland transportation to the inland destinations." Compl., ¶ 19. And if that was the extent of SEA's complaint, then OOCL's argument that this is essentially a breach of contract action might prevail. But the allegations about OOCL's responsibility for inland transportation appear to be background to the Shipping Act allegations, which are that, "beginning in 2021, OOCL instituted various unreasonable demurrage and detention practices against SEA," as a result of which "SEA has been forced to pay excessive and unlawful OOCL demurrage and detention charges." Compl., ¶¶ 20-21. These alleged practices include not only charging unreasonable demurrage and detention charges, but also threatening refusal to release unrelated containers if the allegedly unreasonable charges are not paid, actually refusing to release the unrelated containers, failing to provide adequate information to determine the basis for individual charges, failing to take into account the circumstances giving rise to the charges, rebilling SEA for previously paid charges, failing to take steps to address known delays, failing to have or engage in an adequate dispute resolution process, and failure to provide reasonable opportunity to return empty containers and chassis. Compl., ¶¶ 46-50. That these allegations arise in the context of a service contract, bill of lading, or other agreement is not, by itself, dispositive – all ocean freight is transported pursuant to some agreement. *Investigation of Tariff Filing Practices*, 7 F.M.C. 305, 321 (FMC Aug. 2, 1962). The existence of an agreement, and a potential cause of action arising out of that agreement, does not deprive the Commission of jurisdiction to determine the reasonableness of OOCL's practices with respect to the detention and demurrage charges, billing and dispute-resolution practices, and container and chassis handling described in the complaint.

OOCL next argues that SEA has not alleged a "practice" sufficient to state a claim under 46 U.S.C. §41102(c) because "[a]lthough the Complaint alleges a large number of shipments and even larger number of charges . . . SEA does not link any of those shipments/charges to any specific practice." Mot. to Dismiss, p. 20. OOCL further argues that SEA did not allege that the practices were generally applicable to other customers. *Id*.

Section 41102(c) of the Shipping Act, previously section 10(d)(1), states that a "common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). On December 17, 2018, after notice and comment, the Commission issued Rule 545.4, specifying the elements of a section 41102(c) claim. Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018). Rule 545.4 states:

> 46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:
>
> > (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
> >
> > (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;

> (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
>
> (d) The practice or regulation is unjust or unreasonable; and
>
> (e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4. The element at issue here is (b), whether OOCL's alleged actions were occurring on a normal, customary, and continuous basis. That is, whether they were a "practice" pursuant to 46 U.S.C. § 41102(c).

In the notice of proposed rulemaking for the interpretive rule, the Commission explained the intended construction of the word "practice" in 46 U.S.C. § 41102(c):

> It is this line of recent cases determining that a discrete failure to observe and enforce an established just and reasonable regulation or practice that the Commission seeks to reform in this rulemaking so as to return the scope of § 41102(c) to its proper role and purpose within the Shipping Act. In the future, the Commission intends to follow the reasoning in Intercoastal Investigation, Altieri, Stockton Elevators, European Trade Specialists, Deringer, and Kamara which offer precedent as to what properly applies the full meaning and purpose of "establish, observe, and enforce just and reasonable regulations and practices" under the Shipping Act and a violation of § 41102(c).

Notice of Proposed Rulemaking: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 45367, 43569-43570 (Sep. 8, 2018) ("NPRM"); *see also, generally*, Final Rule, 83 Fed. Reg. 64478 (adopting reasoning of NPRM and citing the same cases).

The cases cited by the Commission in the NPRM do not support OOCL's argument that complainants are required, in a case involving thousands of shipments, to explicitly link each allegedly unreasonable practice to each shipment to plead a "practice" for purposes of 46 U.S.C. § 41102(c). *Intercoastal Investigation* describes a practice as "an often repeated and customary action." *Intercoastal Investigation*, 1935, 1 U.S.M.C. 400, 432 (1935). In *Altieri*, the presiding officer found that, although respondent's withholding of money owed to complainant to offset a disputed claim of respondent against complainant was clearly unlawful, it was "an isolated or 'one shot' occurrence," and therefore not a "practice" within the meaning of the Shipping Act. *Altieri v. Puerto Rico Ports Authority*, 7 F.M.C. 416, 419-420 (Oct. 18, 1962). In *Stockton Elevators*, the Commission described a "practice" as "something habitually performed and it implies continuity . . . the usual course of conduct. It is not an occasional transaction . . . ." *Investigation of Certain Practices of Stockton Elevators*, 3 S.R.R. 605, 618 (FMC June 30, 1964). In *European Trade Specialists*, the allegation was that the freight forwarder had failed to notify the shipper of the dispute as to the applicable tariff rate for their commodities. The ALJ found that the freight forwarder's normal practice was to notify shippers of such disputes, that they had reached out to complainant for additional information regarding the classification of their shipment, and even if they had not, the failure to do so was a single incident, and so not a "practice," but went on to observe that even if they had not, that there would be no violation. *European Trade Specialists v. Prudential-Grace Lines*, 17 S.R.R. 1351, 1364 (ALJ Nov. 1,

1977) (*affirmed European Trade Specialists v. Prudential-Grace Lines*, 19 S.R.R. 59, 63 (FMC 1979)). In *A.N. Deringer*, the respondent's failure to specify the number of cartons on the bill of lading, which resulted in limitation of liability to loss for one carton rather than the 12 that were actually lost, was "an isolated error." The settlement officer noted that "an alleged violation of Section 10(d)(1) requires more than the showing of unjust or unreasonable activity," requiring proof of failure to enforce reasonable regulations and practices. *A.N. Deringer, Inc. v. Marlin Marine Services, Inc*., Docket No. 1652(I), 25 S.R.R. 1273, 1276, 1990 WL 427469, at *4 (SO Nov. 14, 1990). In *Kamara*, the settlement officer held that a carrier's failure to remit payment to a subcontracting carrier did not constitute a Shipping Act violation, although the shipper would have a contractual claim, since Section 10(d)(1) was not intended to cover "an isolated error or understandable misfortune," but rather a "pattern of behavior." *Kamara v. Honesty Shipping Service*, Docket No. 1841(I), 29 S.R.R. 321, 322 n.8, 2001 WL 898739, at *2 n.8 (SO July 26, 2001). The requirement described in these cases is to plead sufficient facts to show a pattern of behavior, rather than an isolated error, occasional transaction, or one-shot occurrence. By pleading that the alleged practices occurred over several years and with respect to thousands of shipments, SEA has met that burden. *See* Compl., ¶¶ 20-21, 32, 46-50, 58.

Nor do the cases OOCL cites support a requirement that a complainant plead specific instances of the allegedly unreasonable practices applied to other shippers – information that may be uniquely within the control of the carrier. *European Shippers* does not state that there is any such pleading requirement, instead observing that the record established only a single isolated incident of the allegedly unreasonable conduct:

> The record demonstrates that it is the "practice" of Hipage to notify shippers of problems arising over their shipments. Thus what we have here is not a question of the establishment of a just or unjust practice but an allegation of a single departure from a practice which I am sure complainants would characterize as just and reasonable.

European Trade Specialists, 17 S.R.R. at 1365. *Whitam* is similarly unhelpful to OOCL's position since the plaintiff in that case was not even pleading a "practice;" instead, defendant attempted to recharacterize the complaint as one alleging a practice so that exclusive jurisdiction would rest with the Interstate Commerce Commission (under a statutory provision similar to § 41102(c)):

> That plaintiff complains expressly of 'a practice' of the railroads is not found in his pleadings. The motion to dismiss can introduce no question of fact, but only can raise such questions as can be raised from the face of plaintiff's petition. We are bound by the facts set out in that petition. In effect, defendants say the plaintiff's petition is complaining of the practice of the carriers, any regulation or decision as to which they claim is purely administrative, and therefore, primarily for the [Interstate Commerce] Commission. Does plaintiff's petition construed as a whole, charge the railroads with 'a practice' such as comes within the meaning of 'practice' as used in the quoted decision? I do not think it does. As such, plaintiff does not complain of the rate whatsoever. Nor, as heretofore stated, does he in any sense complain of the rule. The word 'a practice' as used in the decision, or used anywhere properly, implies systematic doing of the acts complained of, and usually as applied to carriers and shippers generally. It

> appears to me that this question, or like questions, must be decided by the peculiar facts or alleged facts of each case. Plaintiff's contention is, he was cheated in the over weights, not that the applied rates were in any way improper. And, as far as the petition goes, he makes it an individual matter between himself and the defendants. He does not make it a practice even between them.

Whitam v. Chicago, R. I. & P. Ry. Co., 66 F. Supp. 1014, 1017 (N.D. Tex. 1946). That the court opined, in the context of the counterfactual it was considering, that a "practice" implies an act "usually" (not necessarily always) applied to "shippers generally," does not establish a pleading requirement for Shipping Act cases.

Even if there were a requirement to plead that a carrier's alleged practice was applied to other shippers, SEA has done so by reference to the "unreasonable detention and demurrage practices" in two other cases pending before the Commission. Compl., ¶ 26. In Docket No. 23-02, the complainant alleged that, during the same time period at issue in this complaint, OOCL charged the complainant detention and demurrage charges when the circumstances giving rise to the charges were outside the control of the complainant, OOCL failed to mitigate the charges despite acknowledging these circumstances, and refused to move containers until all outstanding detention and demurrage charges were cleared. *Bed Bath & Beyond Inc. v. Orient Overseas Container Line Ltd.*, Docket No. 23-02, Verified 1st Am. Compl., pp. 22-28. And in Docket No. 24-08, the complainant similarly alleged that during 2021 and 2022, OOCL charged detention and demurrage under circumstances where the charges did not incentivize movement of cargo, refused to increase the number of free days even when circumstances were outside the complainant's control, continued to accept shipments when it knew it could not provide adequate facilities, charged detention and demurrage for its own failures, and did not provide sufficiently clear invoices to allow the complainant to understand or contest the charges. *TZ SSE Buyer, LLC v. Overseas Container Line Limited*, Docket No. 24-08, Verified 2d Am. Compl., pp. 5-7.

Accepting the facts pleaded by SEA as true, OOCL unilaterally recharacterized certain shipments, then used that recharacterization as a justification for charging SEA detention and demurrage where SEA had no control over the movement of the cargo, and when challenged, refused to provide information or engage in reasonable dispute resolution. They did this over a period of two years and, it can be reasonably inferred from the complaint, with respect to some or all of the thousands of SEA shipments during that time period. Compl. ¶¶ 19-21, 46-50. The complaint does not describe an "isolated occurrence," "occasional transaction," or an "isolated error or understandable misfortune," but a conscious choice consistently applied or, in other words, a practice. *Altieri*, 7 F.M.C. at 419-420, *Stockton Elevators* 3 S.R.R. at 618, *Kamara*, 2001 WL 898739, at *2 n.8.

C. Count II: Retaliation under 46 U.S.C. §§ 41102(d) and 41104(a)(3)

OOCL argues that Count II should be dismissed because SEA is not a "shipper" as defined by the Act, and so is not protected by its anti-retaliation provisions, and because SEA did not bring OOCL's actions to the attention of the Commission, and therefore did not engage in protected activity. Mot. to Dismiss, pp. 20-21. SEA counters that "shipper" is defined broadly to include not only the party to the service contract, but also the consignee to whom the delivery is made, and that threatening to bring a complaint to the Commission is protected activity that triggers the anti-retaliation provisions of the Shipping Act. Opp'n to Mot. to Dismiss, pp. 15-17.

Prior to June 16, 2022, 46 U.S.C. § 41104(a)(3) provided that "a common carrier, either alone or in conjunction with any other person, directly or indirectly, may not… retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason." 46 U.S.C. § 41104(a). The Ocean Shipping Reform Act or 2022 ("OSRA 2022") amended the Shipping Act's retaliation provisions by expanding its reach to marine terminal operators and ocean transportation intermediaries and adding the prohibition against retaliation to 46 U.S.C. § 41102 as a new subsection (d). OSRA 2022, Pub. L. 117-146, June 16, 2022, 136 Stat 1272 §§ 5, 7. As amended by OSRA 2022, 46 U.S.C. § 41102(d) reads as follows:

> (d) Retaliation and Other Discriminatory Actions. -A common carrier, marine terminal operator, or ocean transportation intermediary, acting alone or in conjunction with any other person, directly or indirectly, may not--
>
> (1) retaliate against a shipper, an agent of a shipper, an ocean transportation intermediary, or a motor carrier by refusing, or threatening to refuse, an otherwise-available cargo space accommodation; or
>
> (2) resort to any other unfair or unjustly discriminatory action for--
>
> (A) the reason that a shipper, an agent of a shipper, an ocean transportation intermediary, or motor carrier has--
>
> (i) patronized another carrier; or
>
> (ii) filed a complaint against the common carrier, marine terminal operator, or ocean transportation intermediary; or
>
> (B) any other reason.

46 U.S.C. § 41102(d).

The Commission has clarified that "shipper" is defined broadly for purposes of retaliation:

> Unless amended by Congress, § 41104(a)(3) applies only to prohibited conduct directed at a "shipper." But this term protects entities other than just the cargo owner. The term "shipper" means a cargo owner, the person for whose account the ocean transportation of cargo is provided, the person to whom delivery is to be made, a shippers' association, or a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract. In contrast, passengers on a vessel, unless they otherwise fall within the definition of shipper, are not protected entities under § 41104(a)(3).

Statement of the Commission on Retaliation, Docket No. 21-15, 3 F.M.C.2d 201, 207, 2021 WL 9204128, at *4, (FMC Dec 28, 2021). This definition of "shipper" encompasses SEA, the consignee to whom delivery was made.

Having established that SEA is a protected entity under the Shipping Act's retaliation provision, SEA must also allege sufficient facts to show that it engaged in protected activity ("filed a complaint" or "any other reason") and that, because of this protected activity, OOCL refused or threated to refuse available cargo-space accommodation (or engaged in "any other unfair or unjustly discriminatory action"). The Commission has explained that the "for any other reason" language includes other ways a shipper might bring unlawful activity to the Commission's attention:

> Section 41104(a)(3) contains two types of shipper activity that are specifically protected: patronizing another carrier and filing a complaint. Filing a complaint refers to filing a sworn complaint alleging a violation under 46 U.S.C. § 41301(a). The statute also, however, protects shippers from being retaliated against "for any other reason." The Commission interprets "any other reason" to mean that protected activity under § 41104(a)(3) includes other ways that shippers may bring allegations of unlawful activity to the Commission, such as participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or using CADRS' dispute resolution procedures. This interpretation is consistent with congressional intent as set forth in the Alexander Report and with the important role shippers serve in assisting the Commission with its mission. Further, providing information to Commission investigators and enforcement attorneys, seeking assistance from CADRS, and commenting on Commission rules and notices fall within same class of conduct as filing a complaint.

Id., 3 F.M.C.2d at 207, 2021 WL 9204128, at *5.

OOCL argues that SEA has failed to allege any protected activity, while SEA contends that it threatened to file a complaint with the Commission, and that such threats constitute protected activity. Opp'n to Mot. to Dismiss, pp. 16-17. In *OJ Commerce*, the ALJ found that threats to file a complaint with the Commission, while not expressly included in the Commission's statement on retaliation, were part of the category encompassed in "any other reason":

> That this "any other reason" language may also apply to other conduct - such as participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or using CADRS's dispute resolution procedures - does not mean that "any other reason" may not also apply to threats to file an FMC complaint. . .
>
> Ideally, parties should be able to discuss what they think could be Shipping Act violations as soon as possible, so the parties can work toward resolving them before they become violations or lead to litigation. These conversations may be limited if "threats" to file a complaint are not included in the anti-retaliation provisions as shippers may hesitate to raise issues without the protection of the anti-retaliation provision. Moreover, just because a party threatens to file a complaint does not mean that the complaint is valid or would be successful. It

> simply advises the carrier that the shipper believes there may be a violation so that the carrier can ensure that their conduct conforms to the requirements of the Shipping Act. As long as carriers have a legitimate, transportation-related basis for their decisions and comply with the requirements of the Shipping Act, they will not face liability. Moreover, including "threats" to file a complaint as an "any other reason" is consistent with the Commission's statement that this section should be read broadly. Therefore, a threat to file a Commission complaint constitutes "for any other reason" in the anti-retaliation provision.
>
> For the reasons discussed above, OJC's threat to file a complaint with the Commission establishes that OJC engaged in protected activity and this element is met. Therefore, all four factors are met. OJC has established that common carrier HSDG retaliated against shipper OJC by refusing cargo space accommodations when available or resorting to other unfair or unjustly discriminatory methods because OJC had filed a complaint or for any other reason, which includes the threat to file a Commission proceeding. 46 U.S.C. § 41104(a)(3). The next issue is what reparations, commonly referred to as damages, are appropriate.

OJ Commerce, LLC v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft A/S & Co., Docket No. 21-11, 6 F.M.C.2d 165, 2023 WL 3969857, at *39 (ALJ June 7, 2023). The Commissions has since affirmed the ALJ's holding. *OJ Commerce, LLC v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft A/S & Co*., Docket No. 21-11, 2024 WL 4034610 (FMC Aug. 27, 2024).

Even though SEA is correct that a threat to file a complaint with the Commission constitutes protected activity, there is no allegation of such a threat anywhere in the complaint. The complaint speaks only to a demand letter alleging unspecified "unlawful charges," and which "invited OOCL to respond in a substantive manner, and asked that OOCL indicate its interest in discussing cooperative resolution." Compl. ¶ 51. That a complaint was ultimately filed is not sufficient for me to reasonably infer that the demand letter included a threat to file, as SEA urges. Opp'n to Mot. to Dismiss, p. 17; *see 20230930-DK-BUTTERFLY-1, Inc., v. MSC Mediterranean Shipping Co. SA*, Docket No. 23-12, 2024 WL 1299768, at *5 (ALJ March 25, 2024) ("Even if a threat to file a complaint with the Commission constitutes "any other reason," the complaint *sub judice* does not plead facts that demonstrate that [complainant] threatened to file a complaint, or engage in any way, with the Commission."). And while the demand letter does mention "unlawful charges," the mere mention of unspecified unlawful activity is not sufficient factual material from which to infer that SEA expressed an intention to engage with the Commission to resolve a dispute or raised a specific issue under the Shipping Act, such that the protections of the anti-retaliation provision would be necessary to encourage early discussion and resolution of alleged violations.

Even if SEA's allegations of protected activity were sufficient, it has failed to plead any retaliatory activity with respect to vessel-space accommodation or otherwise. SEA points to paragraph 68 of the Complaint, which merely incorporates the language of § 41102(d):

> 68. In response to Complainant's efforts to address OOCL's shipping and charging practices, resolve disputes, and dispute invoices, OOCL threatened to

> retaliate, and in fact did retaliate, against Complainant and SEA Containers with respect to delivery of cargo and refusing available cargo space accommodation.

Compl., ¶ 68. The Complaint does not state any particulars about who made the threats or what they were, how the retaliation was carried out, when it occurred (before or after the demand letter), or any other information from which to plausibly infer retaliation. It is simply a legal conclusion that there was retaliation. SEA's argument that ¶¶ 41-47 of the Complaint describe the retaliatory actions is unpersuasive because a reasonable reading of the Complaint (that is, a chronological reading) is that the actions described in those paragraphs led to the demand letter described later in ¶ 51, not that they were the result of the demand letter. Following ¶ 51, there is no further factual allegation of any illegal activity on the part of OOCL – the Complaint only states that the parties were unable to make progress towards a resolution and that SEA incurred "serious and substantial injuries and monetary damages." Compl., ¶¶ 52-53. Without more specific information about the dates of OOCL's allegedly unlawful activity, and with only a conclusory statement that retaliation occurred, I find that Count II does not plausibly establish a claim for retaliation.

D. Count III: Refusal to deal or negotiate under 46 U.S.C. § 41104(a)(10)

OOCL argues that Count III fails to state a claim since failure to accept a settlement demand does not constitute a refusal to deal and the Complaint fails to plausibly allege anything more than OOCL's refusal to cave to SEA's demands. Mot. to Dismiss, pp. 23-24. SEA argues that it has laid out the required elements of the claim – that OOCL is an ocean common carrier, that OOCL refused to deal or negotiate with respect to vessel space accommodations, and that the refusal was unreasonable. Opp'n to Mot. to Dismiss, p. 18. The statute provides that a "common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not . . . unreasonably refuse to deal or negotiate, including with respect to vessel space accommodations provided by an ocean common carrier." 46 U.S.C. § 41104(a)(10).

In its final rule (which took effect on July 23, 2024), the Commission explained the factors to be considered in determining reasonableness and the elements of a claim under § 41104(a)(10):

> (f) Elements for claims. The following elements are necessary to establish a successful private party or enforcement claim under 46 U.S.C. 41104(a)(10) with respect to refusals of cargo space accommodations provided by an ocean common carrier:
>
> > (1) The respondent must be an ocean common carrier as defined in 46 U.S.C. 40102;
> >
> > (2) The respondent refuses or refused to deal or negotiate with respect to vessel space accommodations; and
> >
> > (3) The ocean common carrier's conduct is unreasonable.

> (g) Non-binding considerations when evaluating unreasonable conduct. In evaluating the reasonableness of an ocean common carrier's refusal to deal or negotiate with respect to vessel space accommodations, the Commission may consider the following factors:
>
> > (1) Whether the ocean common carrier followed a documented export policy that enables the timely and efficient movement of export cargo;
> >
> > (2) Whether the ocean common carrier engaged in good faith negotiations;
> >
> > (3) Whether the refusal was based on legitimate transportation factors; and
> >
> > (4) Any other relevant factors or conduct.
>
> (h) Non-binding examples of unreasonable conduct. The following are examples of the kinds of conduct that may be considered unreasonable under 46 U.S.C. 41104(a)(10) when linked to a refusal to deal or negotiate:
>
> > (1) Quoting rates that are so far above current market rates they cannot be considered a good faith offer or an attempt at engaging in good faith negotiations; or
> >
> > (2) The de facto, absolute, or systematic exclusion of exports in providing vessel space accommodations.

Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier, 89 F.R. 59648 (Final Rule July 23, 2024) (the "Final Rule").

SEA's complaint fails to allege any facts supporting the second or third elements of the claim, that OOCL unreasonably refused to deal or negotiate with respect to vessel space accommodations. SEA argues that Complaint ¶¶ 68 and 73 provide sufficient factual material to establish these elements. Opp'n to Mot. to Dismiss, p. 18. But the allegations in ¶ 68 are the classic "labels, conclusions, or a recitation of the elements" that do not satisfy the *Iqbal-Twombly* pleading standard:

> 68. In response to Complainant's efforts to address OOCL's shipping and charging practices, resolve disputes, and dispute invoices, OOCL threatened to retaliate, and in fact did retaliate, against Complainant and SEA Containers with respect to delivery of cargo and refusing available cargo space accommodation.

Compl., ¶ 68; *Maher Terminals,* 2015 WL 9426189, at *12. And ¶ 73 has nothing to do with vessel-space accommodation, but specifically relates to the detention and demurrage practices in Section V of the Complaint:

> 73. In response to Complainant's efforts to: (a) address OOCL's shipping and charging practices with respect to inland services under through bills of lading and demurrage and detention charges and practices, (b) resolve disputes, and (c) dispute invoices, OOCL refused to meaningfully engage in good faith discussions

> or change its underlying practices, specifically including the practices and actions described in Section V above.

Compl., ¶ 73. Without any factual material describing OOCL's vessel-space accommodation practices, or any specific attempts at negotiations or communications that occurred, any specific non-transportation factors that played a role in those discussions, or unreasonable rates that OOCL quoted, or any other non-conclusory allegations, there is not enough factual material to carry SEA's claim into the realm of plausibility, and so Count III must be dismissed.

E. Count IV – Noncompliant invoices under 46 U.S.C. § 41104(a)(15)

OOCL seeks dismissal of Count IV to the extent it seeks reparations, arguing that the only remedy provided by 46 U.S.C. § 41104(a)(15) is issuance of a compliant invoice and not reparations, and because it may simply issue corrected invoices. Mot. to Dismiss, pp. 24-25. SEA argues that OOCL has not identified any basis on which to dismiss Count IV. Opp'n to Mot. to Dismiss, pp. 20-21. The statute outlines requirements for detention and demurrage invoices:

> (a) In general.--A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not--
>
> * * *
>
> (15) invoice any party for demurrage or detention charges unless the invoice includes information as described in subsection (d) showing that such charges comply with--
>
> (A) all provisions of part 545 of title 46, Code of Federal Regulations (or successor regulations); and
>
> (B) applicable provisions and regulations, including the principles of the final rule published on May 18, 2020, entitled "Interpretive Rule on Demurrage and Detention Under the Shipping Act" (or successor rule); or
>
> * * *
>
> (d) Detention and demurrage invoice information.--
>
> (1) Inaccurate invoice.--If the Commission determines, after an investigation in response to a submission under section 41310, that an invoice under subsection (a)(15) was inaccurate or false, penalties or refunds under section 41107 shall be applied.
>
> (2) Contents of invoice.--An invoice under subsection (a)(15), unless otherwise determined by subsequent Commission rulemaking, shall include accurate information on each of the following, as well as minimum information as determined by the Commission:

(A) Date that container is made available.

(B) The port of discharge.

(C) The container number or numbers.

(D) For exported shipments, the earliest return date.

(E) The allowed free time in days.

(F) The start date of free time.

(G) The end date of free time.

(H) The applicable detention or demurrage rule on which the daily rate is based.

(I) The applicable rate or rates per the applicable rule.

(J) The total amount due.

(K) The email, telephone number, or other appropriate contact information for questions or requests for mitigation of fees.

(L) A statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage.

(M) A statement that the common carrier's performance did not cause or contribute to the underlying invoiced charges.

* * *

(f) Elimination of charge obligation.--Failure to include the information required under subsection (d) on an invoice with any demurrage or detention charge shall eliminate any obligation of the charged party to pay the applicable charge.

46 U.S.C. § 41104. The statute relieves the invoiced party from the obligation to pay if the required information is not included. SEA’s complaint alleges that OOCL’s detention and demurrage invoices “routinely lacked adequate information to determine the basis for the individual detention and demurrage charges,” that OOCL rebilled for charges previously paid, and that at least some of these charges occurred after the effective date of OSRA 2022. Compl., ¶¶ 48, 77. That OOCL may reissue corrected invoices is irrelevant to whether SEA has stated a claim for violation of § 41104. As to the reparations issue, I note that Count IV does not specifically request reparations, so it is unclear what, exactly, OOCL is asking me to dismiss. *See* Compl., pp. 18-19. In any event, SEA has sufficiently stated a claim for violation of 46 U.S.C. § 41104(a)(15).

F. Count V: Unreasonable charges under 46 U.S.C. § 41104(a)(14)

OOCL seeks dismissal of Count V because the complaint does not allege that any particular charges were "assessed" after the effective date of OSRA 2022, June 16, 2022. Mot. to Dismiss, p. 26. SEA argues that the complaint sufficiently alleges that some of the over 4,000 charges were assessed after the effective date of OSRA 2022. Opp'n to Mot. to Dismiss, p. 22. The OSRA 2022 prohibition on unreasonable charges provides:

> (a) In general.--A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not—
>
> *   *   *
>
> (14) assess any party for a charge that is inconsistent or does not comply with all applicable provisions and regulations, including subsection (c) of section 41102 or part 545 of title 46, Code of Federal Regulations (or successor regulations);

46 U.S.C. § 41104(a)(14). While not a model of clarity with respect to the relevant dates, the complaint states enough to reasonably infer that some of the assessments occurred after the effective date. Compl. ¶ 53, 77. OOCL's argument that these incidents were not "assessments" of charges but rather "practices," "actions," or "invoicing" related to assessments is a factual dispute and not a basis for dismissal of Count V. Mot. to Dismiss, p. 26.

G. Count VI: Unreasonable practices with respect to dispute resolution under 46 U.S.C. § 41102(c)

In arguing for dismissal of Count VI, OOCL states that it has a published procedure for disputing detention and demurrage invoices, and that SEA did not follow those procedures, in addition to SEA failing to identify a practice. Mot. to Dismiss, pp. 26-27. SEA argues that it has alleged a practice, and regardless of any published procedures, OOCL's actual practices violate the Shipping Act. Opp'n to Mot. to Dismiss, p. 23. In its interpretive rule, the Commission made clear that dispute-resolution practices are part of the analysis of the reasonableness of a carriers' detention and demurrage practices:

> (d) Demurrage and detention policies. The Commission may consider in the reasonableness analysis the existence, accessibility, content, and clarity of policies implementing demurrage and detention practices and regulations, including dispute resolution policies and practices and regulations regarding demurrage and detention billing. In assessing dispute resolution policies, the Commission may further consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements.

46 C.F.R. § 545.5(d). The Complaint states that when SEA sought information from OOCL about the "dramatically increasing" demurrage and detention charges, OOCL failed to provide documentation or support, refused to mitigate the charges, continued to demand payment and

threatened to refuse release of SEA containers; and OOCL's alleged lack of dispute resolution practices, including its failure to engage in commitments to address disputed charges, forced SEA to pay the disputed charges to have cargo released. Compl. ¶¶ 43-48, 86. As a matter of organization, the allegations supporting Count VI are perhaps better addressed as a subpart of Count I, since §545.5(d) contemplates that dispute-resolution policies and practices are a relevant consideration in determining the overall reasonableness of demurrage and detention practices. Regardless, OOCL's argument that it did have a meaningful dispute resolution procedure, which SEA failed to use, is a factual dispute and not a basis for dismissal.

OOCL also argues that SEA's complaint is related to "settlement negotiations" and not resolution of a dispute about detention and demurrage charges. Mot. to Dismiss, pp. 26-28. As described in the Complaint, SEA's efforts relate to the resolution of disputes over the propriety of detention and demurrage charges, a factor explicitly identified by the Commission as relevant to the reasonableness of practices related to such charges for purposes of claims under § 41102(c). Compl., ¶¶ 45-48, 86; 46 C.F.R. § 545.5(d). It appears that OOCL characterizes SEA's complaint about dispute-resolution procedures as one about settlement negotiations to support its argument that the *Noerr-Pennington* doctrine bars consideration of the claim. Mot. to Dismiss, pp. 27-28. SEA in turn argues that the doctrine is applicable only in the context of antitrust liability. Opp'n to Mot. to Dismiss, pp. 18-19, 23.

Under the *Noerr-Pennington* doctrine – established by *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) – defendants are immune from antitrust liability for engaging in conduct (including litigation) aimed at influencing decisionmaking by the government. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 555-56 (2014). This includes concerted action aimed at influencing the government regardless of intent or purpose, including to engage in anticompetitive regulation. *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 379-80 (1991). The doctrine even shields concerted political action that could be characterized as involving deception or unethical. *Noerr*, 365 U.S. at 140-141.

In *Sosa*, cited by OOCL, the Ninth Circuit observed that the Supreme Court had applied the *Noerr-Pennington* doctrine outside the antitrust context. The court held the doctrine protected restauranteurs from an unfair labor charge a the National Labor Relations Board when they filed allegedly retaliatory civil suits seeking to enjoin employees from picketing. *Sosa v. DIRECTV, Inc.,* 437 F.3d 923, 930–31 (9th Cir. 2006) (*citing Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731 (1983)). The court concluded that the doctrine broadly applied to the rights protected by the Petition Clause:

> [W]e conclude that the *Noerr-Pennington* doctrine stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause. Under the *Noerr-Pennington* rule of statutory construction, we must construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise.

Id. (citation omitted). OOCL is correct that the doctrine's application is not limited to antitrust cases. OOCL is also correct that it has been applied to situations where a single party (without joint conduct) petitions the government. *See, e.g., Puerto Rico Tel. Co. v. San Juan Cable LLC*, 874 F.3d 767, 768-69 (1st Cir. 2017) (telecommunications provider shielded from antitrust liability for repeated regulatory petitions seeking to block potential competitor from entering market where petitions were not objectively baseless).

However, none of the cases OOCL cites address the applicability of *Noerr-Pennington* in the precise scenario here – where a respondent is alleged to have engaged in unreasonable dispute-resolution practices as part of a larger pattern of conduct in violation of the Shipping Act (and where those procedures are, by regulation, a relevant consideration). In this context, there is no support for OOCL's argument that the doctrine bars SEA's § 41102(c) claims.

H. Pleading Reparations under Rule 62

Finally, OOCL argues that because the complaint does not specifically state an amount of reparations sought, the claim for reparations must be dismissed. Mot. to Dismiss, p. 28. Rule 62 requires complainants seeking reparations to set forth in their complaint the amount of their alleged damages:

> (4) *Complaints seeking reparation; statute of limitations*. A complaint may seek reparation (money damages) for injury caused by violation of the Shipping Act of 1984. (See subpart O of this part.)
>
> (i) Where reparation is sought, the complaint must set forth the injury caused by the alleged violation and the amount of alleged damages.

46 C.F.R. § 502.62(a). Rule 62 is not a jurisdictional pleading requirement – the Shipping Act requires only that a claim for reparations be filed within three years of the accrual of the claim. 46 U.S.C. § 41301(a). If the compliant is filed within that time, the Commission "shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part." 46 U.S.C. § 41305(b). Rule 62 even allows an award of reparations where a complainant has not requested it (in "unusual" circumstances and for good cause). 46 C.F.R. §502.62(a)(4)(ii). In this case, SEA has filed within the statute of limitations, has requested reparations, and has described the injury caused by the violation. *See* Compl., ¶ 32, 58. Standing alone, the failure to state a specific dollar value of the requested reparations does not warrant dismissal.

While not jurisdictional, Rule 62 is mandatory, and SEA must amend its complaint to set forth the amount of alleged damages. SEA cites Rule 251 for the proposition that it is not required to plead a specific amount of damages. Opp'n to Mot. to Dismiss, pp. 26-27. But Rule 251 governs the presentation of evidence at hearing – it has nothing to do with pleading:

> If many shipments or points of origin or destination are involved in a proceeding in which reparation is sought (See § 502.63), the Commission will determine in its decision the issues as to violations, injury to complainant, and right to reparation. If complainant is found entitled to reparation, the parties thereafter will be given an opportunity to agree or make proof respecting the shipments and pecuniary amount of reparation due before the order of the Commission awarding

> reparation is entered. ***In such cases, freight bills and other exhibits bearing on the details of all shipments, and the amount of reparation on each, need not be produced at the original hearing unless called for or needed to develop other pertinent facts.***

46 C.F.R. § 502.251 (emphasis added). SEA will therefore be ordered to amend its complaint to specify the amount of damages in compliance with Rule 62. *See* 46 C.F.R. § 502.66(a).

III. Order

Upon consideration of the record, the arguments of the parties, and the findings and conclusions set forth above, it is hereby

ORDERED that Respondent's motion to dismiss is **GRANTED IN PART**; it is further

ORDERED that Counts II and III of Complainant's verified complaint are **DISMISSED**; it is further

ORDERED that Complainant file, no later than December 2, 2024, an amended complaint specifying the amount of alleged damages in accordance with Commission Rule 62; it is further

ORDERED that Complainant shall serve the amended complaint directly in accordance with 46 C.F.R. § 502.66(b); it is further

ORDERED that Respondent file an answer to the amended complaint no later than 10 days following service of the amended complaint; and it is further

ORDERED that the joint status report described in the Initial Order will be due no later than 15 days following service of the answer.

Alex M. Chintella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

WCG GROUP, LLC DBA AITOH CO., *Claimant* v. CHRIS PHILLIPS AND PAUL KNOTT, *Respondents*.	**DOCKET NO. 1999(F)**

Served: November 26, 2024

ORDER OF: Linda S. Harris Crovella, *Administrative Law Judge*.

INITIAL DECISION[1]

[Notice Not to Review served 12/27/2024, decision administratively final]

I. Introduction

A. Summary

Claimant WCG Group, LLC d/b/a Aitoh Co. ("Aitoh"), who is *pro se*, initiated this proceeding on November 28, 2023, by filing an informal complaint against two individuals: Chris Phillips, alleged to be the owner of InXpress NY, who is also *pro se*; and Paul Knott, alleged to be the CEO of InXpress Americas. The complaint alleges that InXpress NY was involved in shipping paper products that Aitoh was importing from India, and that the container in which its goods were carried was lost by the ocean carrier during a storm. Aitoh filed the instant claim because it was unable to get information regarding the status of its insurance claim, and it alleges violations of §§ 41102(c), 41104(a)(4)(E), 41104(a)(12), 41103(b)(2), and 41108(c) of the Shipping Act. Complaint at 2.

As discussed further below, Respondents are not common carriers, marine terminal operators, or ocean transportation intermediaries, which is required for the Shipping Act violations alleged by Aitoh. In addition, Aitoh offers no basis to pierce the corporate veil to find Respondents Phillips and Knott personally liable for the alleged violations. Aitoh's claims are therefore dismissed and its request for reparations is denied.

B. Procedural History

Aitoh initiated this proceeding on November 28, 2023, by filing an informal complaint against two individual Respondents, Chris Phillips and Paul Knott. On December 26, 2023, Respondent Knott filed an answer denying the allegations of the complaint and alleging various

[1] This initial decision will become final unless either party or the Commission requests review of the decision. A party's request for review must be filed within 22 days of the date of the decision and meet the other requirements of Rule 318. 46 C.F.R. § 502.318(a).

affirmative defenses, as well as a motion to dismiss the complaint and a memorandum in support of the motion to dismiss ("MTD"). Respondent Knott also filed an affidavit of non-consent to the informal adjudication of the claim in accordance with Subpart S 46 C.F.R. § 502.301. On February 7, 2024, the claim was reassigned to the undersigned Administrative Law Judge for adjudication under the procedures at 46 C.F.R. Subpart T. 46 C.F.R. § 502.311.

Respondent Phillips has received and responded to several electronic communications from the Secretary's Office and from the Judges' Office. While none of his email submissions were formally titled as an answer to the Complaint, as he is a *pro se* respondent, it is reasonable to deem his February 28, 2024, email as an Answer to the Complaint, denying all allegations. Knott Bates Nos. 24-42.

On February 21, 2024, an Order on Request to Extend Time to Respond to Motion to Dismiss ("Order on EOT") issued, granting Aitoh's February 16, 2024 request for additional time in which to respond to the MTD. This order also specifically allowed Aitoh to file an amended complaint adding as respondents the corporations for which the two natural persons identified as respondents work; and if Aitoh chose not to file an amended complaint, directing Aitoh to address the arguments raised in the MTD. Order on EOT at 2. Specifically, Aitoh was instructed that:

> Claimant's response should address whether it intends to seek reparations from the two individuals currently identified as the Respondents in this proceeding, or whether it seeks to add the corporations for which these individuals work. If Claimant wishes to add the corporations, it must send an amended complaint to the Secretary at OSMaritime@FMC.gov for service on the new respondent(s). Claimant may not change or add anything to the amended complaint beyond adding the additional respondent(s).
>
> If Claimant does not submit an amended complaint naming additional respondents, it must respond to the Motion to Dismiss by addressing the arguments raised therein. Specifically, Claimant must address whether it intends to submit evidence that it can pierce the corporate veil as to Respondent Knott and should submit that evidence. Similar evidence should be submitted regarding Respondent Phillips, as well.

Order on EOT at 2. Shortly after the order was issued, Aitoh filed its opposition to the motion to dismiss ("MTD Opposition"). The MTD Opposition did not address piercing the corporate veil as to the two natural persons currently named as respondents. Claimant did not file an amended complaint naming or substituting as respondents the corporations for whom Respondent Knott and Respondent Phillips work.

On February 23, 2024, Respondent Knott emailed a request to file a reply to Aitoh's opposition to the motion to dismiss. This request was denied by a February 29, 2024 Order on Request to Reply to Claimant's Opposition to Motion to Dismiss.

Pursuant to Commission Rule 502.314, which authorizes the administrative law judge in a Subpart T proceeding to "require the submission of additional affidavits, documents, or memoranda from complainant or respondent," the parties were ordered to provide additional documents and information on May 17, 2024. Order to Provide Additional Documents and Information ("Order to Supplement"). No response was received from Respondent Phillips. Aitoh filed its response on June 14, 2024 ("Aitoh Supp.") including documents labeled as Exhs. 1-22. Respondent Knott also filed his response on June 14, 2024 ("Knott Supp.") including documents bates numbered Knott 1-48. Respondent Knott then replied to Aitoh's response on June 28, 2024 ("Knott Opposition"). Aitoh replied to Respondent Knott's response on June 28, 2024 ("Aitoh Opposition"), as well.

In general, motion practice is not permitted under Subpart T. *Compare*, *e.g.*, 46 C.F.R. § 502.46 *with* 46 C.F.R. §§ 502.311-321. Therefore, the parties' motion to dismiss filings will be converted to and considered as briefing for this initial decision. Combined with the additional supplementary materials provided by the parties, the record is now complete, and Aitoh's claims may be evaluated.

C. Parties' Arguments

Aitoh asserts that "[b]oth Chris Phillips and Paul Knott . . . did not reply to reasonable and legit [sic] inquiries about the claim that was filed as per agreement by InXpress NY on Aitoh['s] behalf. The reticence in the disclosure of information leads us to allege that there were violations of the Shipping Act;" "the parties involved in the shipment (InXpress NY, Ex-Freight, Foreign Container Line, and Ocean Network Express), could have agreed to intentionally ignore or unjustly settle the claim with the insurance for reasons we do not know but we can reasonably suspect was prohibited under the Shipping Act[;]" and the "lack of information itself provided by InXpress Americas, InXpress NY, Ex-Freight and Ocean Network Express and their unreasonable refus[al] to provide any update on the status of the claim, is per se a violation of the Shipping Act[.]" Complaint at 1-3. Aitoh also asserts that "Chris Phillips, acting as an Ocean Transportation Intermediary, concealed facts and information needed for us to take action and directly contact the carrier" and that Respondents Knott and Phillips "together, acting as Ocean Freight Intermediary, are in violation of the Shipping Act under Section 41102(c), 41104(A)(4)(E), 41104(a)(12), and 41103(b)(2)." MTD Opposition at 3, 5.

Respondent Knott contends that the complaint fails to state a claim for relief under Rule 12(b)(6) of the Federal Rules of Civil Procedure; the complaint should be dismissed for lack of subject matter jurisdiction; the complaint fails to join necessary parties; Claimant has admitted that neither Respondent Knott nor InXpress are carriers or ocean transportation intermediaries which is a necessary predicate under the Act; and Claimant is not entitled to double recovery. Knott Opposition at 2-5; MTD at 5-11. Respondent Phillips contends that InXpress sells services through an NVOCC and the NVOCC is responsible for decisions made regarding Aitoh's claim. Knott Bates No. 24.

II. Findings of Fact ("FOF")

1. Claimant WCG Group, LLC d/b/a Aitoh Co. ("Aitoh") is a limited liability company formed in Texas and a wholesaler of art supplies imported from Asia. Complaint at 1-2.

2. Chris Phillips is an employee of InXpress NY. Knott 40; Aitoh Supp., Exh. 5; *see also* Aitoh Supp., Exh. 6 (listing as title in his email signature "Shipping & Freight Consultant" for InXpress Hudson Valley, New York).

3. Paul Knott is an employee of InXpress, LLC. Aitoh Supp., Exh. 5; *see also* MTD at 6; Knott Opposition at 1.

4. Neither Chris Phillips nor Paul Knott is a registered entity with the Federal Maritime Commission. Ocean Transportation Intermediary List, https://www2.fmc.gov/oti/ (last accessed November 25, 2024).

5. Aitoh signed an Account Application and Payment Authorization with InXpress, dated April 17, 2020. Aitoh Supp., Exh. 1.

6. The terms and conditions in the InXpress account application and payment authorization signed by Aitoh provide in relevant part:

> These terms and conditions apply to all services provided by InXpress. . . .
>
> 'InXpress' means InXpress Global, Ltd., any affiliate of InXpress, and any Master Franchise, Licensee or Franchisee of InXpress. . . .
>
> By ordering services from InXpress You . . . understand that InXpress is not a transportation company. You will **not** receive transportation services directly from InXpress but will receive discounted billing from InXpress for shipping services provided by a Carrier or Carriers. . . .
>
> You agree that InXpress acts solely as a Third Party "bill to" and bears no express or implied liability for Shipments. You agree that InXpress has not expressed or implied that InXpress is a Carrier, or represents a specific Carrier.

Aitoh Supp., Exh. 2 at pp. 2, 4 (emphasis in original).

7. There is no contract between Chris Phillips, in his individual capacity, and Aitoh.

8. There is no contract between Paul Knott, in his individual capacity, and Aitoh.

9. None of the shipping documents submitted by the parties list either Chris Phillips or Paul Knott. *See, e.g.*, Aitoh Supp., Exhs. 3-4, 8-10; Knott Supp., Knott Bates Nos. 10-18.

10. In September 2020, Aitoh emailed chris.phillips@inxpress.com asking for help with a freight import from India, described as one to two pallets consisting of sheets of handmade paper. Aitoh Supp., Exh. 21.

11. Later in September 2020, Mr. Phillips, whose title was listed as "Shipping and Freight Consultant" for InXpress, replied with quote information. Aitoh Supp., Exh. 21 ("I ran a quote on 2 pallets 48 x 40 x 40 @ a total of 4000 #'s it is a total of 42 transit days via

ocean and the rate is $1943.07 that is door to door with customs clearance. Any duty and tax would be owed. . . . if you get a better idea on size and weight we can get a more accurate quote.”).

12. The relevant shipment was intended to be transported from India to the United States, via ocean. Complaint at 2; Aitoh Supp., Exh. 21.

13. The parties refer to the relevant container as container number KCSU8889270. *See, e.g.*, Aitoh Supp., Exh. 11 (October 11, 2020, email from Forin Line, noting the “subject shipment is stuffed in container No: KCSU8889270”); Knott Supp., Knott Bates No. 40.

14. The parties also refer to HBL No. FCLMAA2021118 in connection with the relevant container. *See, e.g.*, Aitoh Supp., Exh. 15; Knott Supp., Knott Bates No. 18.

15. In December 2020, Aitoh learned that a vessel called ONE Apus had encountered a bad storm and lost a number of containers. Complaint, Ref. 1.b (Dec. 8, 2020, Ocean Network Express (“ONE”) Customer Advisory, pertaining to the ONE Apus 006E/W, indicating: “[W]e would like to inform you that ONE Apus is now confirmed to be safely berthed in the Port of Kobe after losing 1,816 containers overboard when it encountered severe weather on . . . November 30, 2020.”)

16. Aitoh was never directly told that its container had been lost on the ONE Apus, however, InXpress provided no alternate explanation and indicated after communications about the accident that the container had been lost. *See, e.g.*, Complaint, Ref. 2.c (On February 8, 2021, Chris Phillips emailed in response to Aitoh’s inquiry concerning the shipment from India, writing “Right now nothing new. Thy have the Pictures of the fright ?? not sure what they did. I an going to request either answer on what they are doing or file against them for a loose claim.”) (spelling as in original); Complaint, Ref. 2.d (In a March 1, 2021, email, Chris Phillips wrote to Aitoh: “I have another agent I deal with and he thinks the container is lost.”).

17. On March 8, 2021, Mr. Phillips wrote to Aitoh: “I talked with our us [sic] agent and have the attached claim form. We will claim a total loss, if you can [just] fill out the product info we will do the rest.” Aitoh Supp., Exh. 6.

18. Between March 2021 and January 2022 Aitoh exchanged emails with Mr. Phillips, but Aitoh received no definitive response from him regarding the outcome of any claim for loss. *See, e.g.*, Aitoh Supp., Exhs. 12, 19-20; Complaint, Ref. 2.b-2.d.

19. On February 10, 2023, Aitoh filed a claim for loss directly with Ex-Freight and indicated in the sending email: “You are receiving this email in reference to a claim for Cargo Total Loss HBL FCLMAA2021118. It could be possible that a similar or identical claim have been filed with ExFreight by InExpress [sic] on March 2021, but we have never been able to get any sort of update on the status of the claim itself.” Aitoh Supp., Exhs. 15, 17 (“This claim is relevant to total loss of the cargo that never arrived.”).

20. Aitoh's first contact with Paul Knott was not until April 2023, as Aitoh continued to seek information regarding compensation for the missing container. Knott Supp., Knott Bates No. 44 (emails from Aitoh, copying paul.knott@inxpress.com).

21. There is now some question whether the container at issue was in fact carried on the ONE Apus vessel. *See, e.g.*, Aitoh Supp., Exh. 11 (referencing container KCSU8889270, listed as carried by vessel X Press Jersey); Knott Supp., Knott Bates No. 29 ("As it seems we were told that this shipment was on ONE line ship and now being told it was on a different vessel we need an explanation of what exactly happened to the cargo."); *see also* Aitoh Opposition at 2-5.

III. Analysis

A. Applicable Law

A complainant alleging a violation of the Shipping Act must prove its allegations by a preponderance of the evidence; in order words, demonstrate that the allegations are more probable than not. *See, e.g., Crocus Investments, LLC v. Marine Transport Logistics, Inc.*, Docket No. 15-04, 2021 WL 3732849, at *3-4 (FMC Aug. 18, 2021) (Order Affirming Initial Decision on Remand). When direct evidence is unavailable, inferences may be drawn from certain facts and circumstantial evidence may be sufficient so long as the fact finder does not rely on mere speculation. *Waterman S.S. Corp v. General Foundries, Inc.*, Docket No. 93-15, 26 S.R.R. 1173, 1180 (ALJ Dec. 9, 1993) adopted in relevant part, 1994 WL 279898, 26 S.R.R. 1424 (FMC June 13, 1994).

The sections alleged to be violated apply to the conduct of regulated entities, not individual persons. *See* 46 U.S.C. § 41102(c) ("A common carrier, marine terminal operator, or ocean transportation intermediary may not . . . ."); 46 U.S.C. § 41104(a) ("A common carrier . . . shall not . . . ."); 46 U.S.C. § 41103 ("A common carrier, marine terminal operator, or ocean freight forwarder . . . may not"; 46 U.S.C. § 41108(c) ("If the Commission finds . . . that a common carrier has failed to supply information ordered").

"The term 'ocean transportation intermediary' means an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(20). An "ocean freight forwarder" is a person that –

> (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and
>
> (B) processes the documentation or performs related activities incident to those shipments.

46 U.S.C. § 40102(19). A "common carrier" is a person that –

> (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation;

(ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and

(iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . . .

46 U.S.C. § 40102(7). A non-vessel-operating common carrier is a common carrier that –

(A) does not operate the vessels by which the ocean transportation is provided; and

(B) is a shipper in its relationship with an ocean common carrier.

46 U.S.C. § 40102(17). The term "shipper" means –

(A) a cargo owner;
(B) the person for whose account the ocean transportation of cargo is provided;
(C) the person to whom delivery is to be made;
(D) a shippers' association; or
(E) a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract.

46 U.S.C. § 40102(23).

The Shipping Act requires that a claim for reparations be filed within three years of the accrual of the claim. 46 U.S.C. § 41301(a). A claim filed outside of this window would not be eligible for reparations. 46 U.S.C. § 41301(a) ("If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.").

B. Discussion

Aitoh does not allege or present evidence that Respondents Phillips and Knott are ocean common carriers or marine terminal operators. Aitoh does, however, allege Respondents are ocean transportation intermediaries ("OTIs") in filings subsequent to its Complaint. MTD Opposition at 5; Aitoh Supp. at 1. While Aitoh's allegations concerning Respondents' alleged OTI status are confusing, it would seem Aitoh contends that Respondents are ocean freight forwarders. Aitoh first indicates: "Mr. Chris Phillips (InXpress NY), acting as an Ocean Transportation Intermediary between the carrier, the shipper (Bluecat Paper, an Indian Company) and the consignee (Aitoh), arranged the shipment from India to US via ocean and by means of the vessel ONE APUS 006E/W." MTD Opposition at 2. Aitoh also alleges "Mr. Paul Knott and Mr. Chris Phillips together, acting as Ocean Freight Intermediary, are in violation of the Shipping Act under Section 41102(c), 41104(A)(4)(E), 41104(a)(12), and 41103(b)(2)." MTD Opposition at 5; *see also* Aitoh Supp. at 1 (Mr. Phillips "acting as an Ocean Transportation Intermediary between the carrier, the shipper (Bluecat Paper . . .) and the consignee (Aitoh), arranged the shipment from India to US via ocean by means of other parties.").

Yet, elsewhere in filings, Aitoh identifies InXpress as the OTI/ocean freight forwarder. MTD Opposition at 3 ("Our humble understanding about roles and regulations in the field of transportation brings us to consider that InXpress NY acted as legit [sic] Ocean Transportation Intermediary/Ocean Freight Forwarder."). Aitoh also acknowledges interacting with Respondents in their capacity as representatives of InXpress corporate entities. *See, e.g.*, Aitoh Supp. at 1 ("because all the communications were with Chris Phillips, we reasonably assumed that Chris Phillips was the authorized agent of InXpress."); Aitoh Supp. at 1 (at "the time of the engagement, we didn't know who Paul Knott was and only in 2023, in order to solve the issue, Aitoh contacted him as CEO of InXpress LLC."). Indeed, no evidence presented by the parties supports that Respondent Phillips or Respondent Knott are OTIs, common carriers, or marine terminal operators, or conducted themselves as such.

In other ways as well, Aitoh's own statements argue against the individual responsibility of Respondents. *See, e.g.*, Aitoh Supp at 3 ("the agreement for the transportation of our cargo was not with the Respondents Chris Phillips and Paul Knott but rather with InXpress NY"); Aitoh Supp. at 1 ("as per InXpress 'Term and Conditions' . . . InXpress NY was responsible for arranging the cargo movement, dispatching, booking, and communicating with third parties"); Aitoh Supp. at 2 ("Aitoh does not consider the Respondents <u>personally</u> liable for our losses, but, as agent/representative/owner/manager/officer of their respective companies, they were responsible for arranging the cargo movement, dispatching, booking, and communicating with third parties, including filing a claim with the carrier on our behalf.") (emphasis in original).

The evidence establishes that Aitoh contracted with InXpress, not with either Respondent in their personal capacity. FOF 5-9. Moreover, Aitoh dealt with Respondent Phillips and Respondent Knott as representatives of InXpress corporate entities. FOF 2-4, 10-11, 16-18, 20. In addition, Aitoh did not have contact with Respondent Knott until 2023, two years after the ONE Apus's accident. FOF 20.

In order to pierce the corporate veil and find that Respondents are personally liable for the actions of their respective enterprises, the evidence would have to demonstrate the necessity to do so, for example, proving among other factors that respondents exercised ownership and control of the relevant entity, failed to maintain corporate minutes or adequate corporate records or to follow corporate formalities, commingled business and personal funds and other assets, or diverted corporate funds for personal use. *See, e.g.*, *Rose Int'l, Inc. v. Overseas Moving Network Int'l Ltd.*, 29 S.R.R. 119, 167-168, 2001 WL 865708, at *51, 83 (FMC 2001). None of these factors are shown in this case. Accordingly, there is no evidence to support piercing the corporate veil concerning either respondent.

Moreover, an ocean freight forwarder is a person that "dispatches shipments *from* the United States via a common carrier[.]" 46 U.S.C. § 40102(19) (emphasis added). While it would violate due process to make findings about the role of any entity not named as a respondent in the claim and which has not had the opportunity to defend itself, this element is not met by Respondents or any other entity in the present case, because the relevant shipment was dispatched from India and was meant to be transported to the United States. FOF 12. Similarly, the evidence fails to establish that Respondents are non-vessel-operating common carriers. Neither Respondent is found to be a shipper in relation to a common carrier. FOF 9. Accordingly, neither Respondent is a non-vessel-operating common carrier as defined in 46

U.S.C. § 40102(17), or an ocean transportation intermediary as defined in 46 U.S.C. § 40102(20).

Taking into consideration the arguments of the parties and the facts particular to this case, Aitoh has not established that Respondent Phillips or Respondent Knott are ocean transportation intermediaries, or any other entity corresponding to the Shipping Act violations alleged. Moreover, Aitoh has not provided evidence to pierce the corporate veil and confer personal liability. Accordingly, the claims against both Respondents are dismissed.

IV. Order

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

ORDERED that the complaint against Chris Phillips be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that the complaint against Paul Knott be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED**.

Linda S. Harris Crovella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

GENESIS RESOURCE ENTERPRISE INC., *Claimant*, v. MAERSK LINE, LIMITED, *Respondent.*	Docket No. 2014(I)

Served: December 4, 2024

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*; Rebecca F. DYE, Louis E. SOLA, and Max M. VEKICH, *Commissioners*.

Order Affirming Small Claims Officer's Order Approving Settlement, and Reversing Confidential Treatment

The Small Claims Officer's ("SCO") Order Approving Settlement and Dismissing Proceeding ("Order") was issued on September 4, 2024. The Order approved the Settlement and Release ("Settlement"), granted confidential treatment, and ordered the proceeding dismissed with prejudice. Order at 3. The Commission determined to review this decision under 46 C.F.R. § 502.304(g) and now affirms the SCO's approval of the Settlement and dismissal of the claim with prejudice but reverses the grant of confidentiality. The SCO granted confidential treatment of the Settlement because it was "presumed" that the parties were seeking confidential treatment. The SCO presumed this because the words "Classification: Confidential" were printed on the Settlement and it included a confidentiality clause binding the parties and any related parties. Neither the Settlement nor the Motion to Dismiss requested confidential treatment from the Commission or explained why good cause existed for such a grant.

The Commission disagrees that confidential treatment is appropriate in this case. Informal claims proceedings are not bound by many of the Commission's regulations that prescribe procedures for formal claims. *See* 46 C.F.R. § 502.305. The Commission's rules for requesting confidential treatment of documents do not control, but the SCO's Order looks to the Commission's regulations for guidance and specifically looks to Commission precedent that discusses requests for confidential treatment. Order at 2-3. The SCO does not, however, look to the Commission's current regulations governing the requests for confidential treatment, and the cases cited by the SCO predate those regulations by many years. Those cases are premised on outdated regulations. Now, the Commission requires more formality and clarity, including a motion explaining the need for confidential treatment, two copies of the confidential document, and good cause demonstrating that the information is a trade secret or other confidential research, development, or commercial information. *See* Amendments to Rules Governing Service of Private Party Complaints and Documents Containing Confidential Information, 80 Fed. Reg. 14318, 14319 (Mar. 19, 2015). Though these current rules do not control SCO proceedings, they do reflect a desire by the Commission to put the burden on parties that desire confidential treatment.

Here, neither party requested that the SCO treat the Settlement confidentially either in the Settlement or the Motion to Dismiss. Even the Settlement only purports to bind the parties and their related parties; it says nothing about the Commission, let alone requesting confidential treatment by the Commission. The parties did not provide good cause demonstrating why any of the terms of the settlement are trade secret or other confidential research, development, or commercial information, and it is not apparent to the Commission why any of the terms would be treated as such. Based on this record, the Commission reverses the SCO's decision to presume the parties were seeking confidential treatment for the Settlement and granting that request.

The Commission hereby:

(1) **AFFIRMS** the SCO's September 4, 2024, Order Approving Settlement and Dismissing Proceeding as to approval of the Settlement;

(2) **REVERSES** the SCO's grant of confidential treatment; and

(3) **ORDERS** that the proceeding be discontinued.

By the Commission.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

PETITION OF CHINESE-POLISH JOINT STOCK SHIPPING COMPANY FOR AN EXTENSION OF TIME TO FILE A REBUTTAL TO ITS CLASSIFICATION AS A CONTROLLED CARRIER UNDER 46 C.F.R. § 565.3	Petition No. P1-24

Served: December 4, 2024

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*; Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, and Max M. VEKICH, *Commissioners*.

Order Granting Petition

On November 27, 2024, Chinese-Polish Joint Stock Shipping Company ("Chipolbrok") filed with the Federal Maritime Commission (Commission) the above-captioned petition for an extension of time under the provisions of 46 C.F.R. § 565.3, requesting an extension of time through January 31, 2025, in which to file a rebuttal against the Office of General Counsel's classification of Chipolbrok as a controlled carrier of the People's Republic of China. In support of this petition, Chipolbrok cites the difficulty of obtaining records from both China and Poland, whose governments own the carrier. Chipolbrok's initial 30 days to file a rebuttal ends December 4, 2024.

The Commission's regulations at 46 C.F.R. § 502.94 provide that the Commission may consider petitions of this nature. In this matter, the Commission finds that good cause has been shown for an extension to the rebuttal time permitted by 46 C.F.R. § 565.3.

THEREFORE, IT IS ORDERED, that the Petition is **GRANTED**. Chipolbrok may submit its rebuttal on or before January 31, 2025.

By the Commission.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

[Docket No. FMC-2024-0022]

Investigation into Conditions Affecting Shipping in the Foreign Trade and Denial of Entry of Vessels into Spanish Ports

AGENCY: Federal Maritime Commission.

ACTION: Notice of investigation and request for comments.

SUMMARY: The Federal Maritime Commission has initiated an investigation into reports that the Government of Spain (Spain) is creating conditions unfavorable to shipping in the foreign trade of the United States by denying entry to its ports to certain vessels, including those participating in the Maritime Security Program.

DATES: Submit comments on or before December 26, 2024.

ADDRESSES: You may submit comments, identified by Docket No. FMC-2024-0022, by the following method:

Federal eRulemaking Portal: Your comments must be written and in English. You may submit your comments electronically through the Federal eRulemaking Portal at www.regulations.gov. To submit comments on that site, search for Docket No. FMC–2024-0022 and follow the instructions provided.

FOR FURTHER INFORMATION CONTACT: For questions regarding submitting comments or the treatment of any confidential information, contact David Eng, Secretary; Phone: (202) 523-5725; Email: Secretary@fmc.gov.

SUPPLEMENTARY INFORMATION:

I. INTRODUCTION

On November 19, 2024, the Federal Maritime Commission (Commission) was informed that Spain had denied entry to its ports to at least three vessels, including some that are participants in the United States Maritime Administration's (MARAD) Maritime Security Program (MSP). The Commission is concerned that this apparent policy of denying entry to certain vessels will create conditions unfavorable to shipping in the foreign trade, whether in a particular route or in commerce generally. Chapter 421 of U.S. Code Title 46, section 42101, authorizes the Commission to investigate and, if necessary, adopt regulations to adjust or meet such conditions. Remedies under Chapter 421 include, but are not limited to, refusal of entry to vessels of a country that is named in the Commission's regulations and fines of up to $2,304,629 per voyage. 46 U.S.C. 42106(4), 42107(1)(a); 46 CFR Part 506.

II. SUMMARY OF INVESTIGATION

The Commission's statutory authority includes the mandate to monitor and evaluate conditions that affect shipping in the foreign trade of the United States. 46 U.S.C. 42101(a).[1] Chapter 421 encourages the maintenance of a United States merchant marine for the national defense and the development of domestic and foreign commerce. 46 U.S.C. 50101(b). Under a separate statutory provision, the Commission can also investigate whether a foreign government is unduly impairing the access of a vessel documented under the laws of the United States to ocean trade between foreign ports and take any action it finds appropriate to remedy any such violation. 46 U.S.C. 41108(d).

[1] The Commission may also investigate whether a foreign government or carrier's practices result in adverse impacts on United States carriers or United States oceanborne trade or creates conditions that do not exist for foreign carriers in the United States under the laws of the United States. 46 U.S. Code, Chapter 423. At this time, the Commission is not initiating an investigation pursuant to Chapter 423.

The Commission has consistently held that its powers do not only protect United States flagged shipping, and that foreign governmental actions that are detrimental to third-flag carriers can create conditions unfavorable to shipping in the United States foreign trade within the meaning of Chapter 421. *Petition of Ace Line*, 19 S.R.R. 481, 482 (FMC 1979). In the past, the Commission has investigated port practices in Japan that included restrictive and discriminatory licensing practices and refusals to grant licenses to United States carriers. *Port Restrictions and Requirements in the United States/Japan Trade*, 62 Fed. Reg 9696, 9699 (March 4, 1997). The Commission has also investigated conditions created in the United States – Korea, United States – Taiwan, and United States – Venezuela trades. *See* Randy L. Baldemor, Comment *Federal Maritime Commission Sanctions on Japanese Carriers: A Call for Fairer Methods of Resolving Disputes*, 8 Pac. Rim L & Pol'y J. 109, at 116 (1999).

The Commission received information on November 19, 2024, indicating that Spain is denying entry into Spanish ports to certain vessels. Spain appears to have denied docking privileges to the Maersk Denver in early November. *Maersk Line Vessel Diverts to Morocco Due to Allegations in Spain*, The Maritime Executive, November 11, 2024 (available at https://maritime-executive.com/article/maersk-line-vessel-diverts-to-morocco-due-to-allegations-in-spain) (last visited November 20, 2024). That vessel was owned and operated by a participant in the MARAD MSP Fleet and the vessel appears to have been receiving a retainer from MARAD in exchange for availability during times of need. *See* Maritime Security Program | MARAD, (https://www.maritime.dot.gov/national-security/strategic-sealift/maritime-security-program-msp) (last visited November 20, 2024). Spain also appears to have denied entry to the

Maersk Seletar, another MSP participant vessel, in early November.[2] Though not a participant in the MSP, another vessel appears to have been refused docking privileges in May. *Spain Denies Port of Call to Ship Carrying Arms to Israel*, The Guardian, May 16, 2024 (available at https://www.theguardian.com/world/article/2024/may/16/spain-denies-port-of-call-to-ship-carrying-arms-to-israel) (last accessed November 20, 2024).

MARAD's MSP maintains a fleet of commercially viable, militarily useful merchant ships active in international trade. The MSP fleet is available to support U.S. Department of Defense (DoD) sustainment sealift requirements during times of conflict or in other national emergencies. The program also provides DoD access to MSP participants' global intermodal transportation network of terminals, facilities, logistic management services, and U.S. citizen merchant mariners.

The Commission's statutory purposes include ensuring an efficient, competitive, and economical transportation system in the United States, encouraging the development of an economically sound and efficient liner fleet capable of meeting national security needs and supporting commerce, and promoting the growth and development of United States exports through competitive and efficient carriage of goods by water. 46 U.S.C. 40101. A law or policy by a foreign government that refuses entry to vessels documented under the laws of the United States is inconsistent with the Commission's goal of ensuring access to and supporting the complex and interdependent system for the common carriage of goods by water in foreign commerce. The Commission has therefore determined that it will investigate the apparent

[2] *See also* https://www.maritime.dot.gov/sites/marad.dot.gov/files/2022-08/MSP%20Fleet%20%208-1-2022.pdf for a list of vessels participating in the MSP.

decision by Spain to deny entry to vessels participating in MARAD's MSP, as well as its apparent decision to deny entry to other vessels.

At this initial stage of the investigation, the Commission will focus on providing a route for interested parties, including the Government of Spain and common carriers that have been denied entry into Spanish ports, to provide information, perspectives, and proposed solutions.

III. INVESTIGATION AND INITIAL REQUEST FOR COMMENTS

The Commission has determined that the above situation meets the threshold requirements for consideration under the relevant statutory and regulatory authority. *See* 46 U.S.C. 42101; 46 CFR Part 550. The Commission therefore initiates an investigation into whether the situation has created conditions that are unfavorable to shipping in foreign trade, whether in a particular trade or on a particular route or in commerce generally. *See* 46 U.S.C. 42101(a); 46 CFR 550.301. To that end, the Commission has designated the General Counsel to lead an investigation into the conditions and to prepare a report on the investigation's findings and recommendations for Commission consideration. The Commission has further determined to ask interested persons to submit written comments containing arguments, experiences, and/or data relevant to denials of entry into Spanish ports. In particular, the Commission seeks information about when this has occurred, the vessels that have been denied entry, and any reason or reasons given for the denial.

The Commission's jurisdiction under 46 U.S.C. 42101 is broad, and the agency welcomes comments not only from the Government of Spain, but also from container shipping interests, vessel owners, individuals and groups with relevant information on commercial considerations, and anyone else with relevant information or perspectives on this matter.

As the Commission proceeds with this investigation, it may determine to request additional comment or gather information through other means as authorized under 46 U.S.C. 40104 and 42104, and 46 CFR Part 550.

By the Commission.

David Eng,
Secretary.

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

INTERMODAL MOTOR CARRIERS CONFERENCE, AMERICAN TRUCKING ASSOCIATIONS, INC., *Complainant*

v.

OCEAN CARRIER EQUIPMENT MANAGEMENT ASSOCIATION INC.; CONSOLIDATED CHASSIS MANAGEMENT, LLC; CMA CGM S.A.; COSCO SHIPPING LINES CO. LTD.; EVERGREEN LINE JOINT SERVICE AGREEMENT, FMC NO. 011982; HAPAG-LLOYD AG; HMM CO. LTD.; MAERSK A/S; MSC MEDITERRANEAN SHIPPING COMPANY S.A.; OCEAN NETWORK EXPRESS PTE. LTD.; WAN HAI LINES LTD.; YANG MING MARINE TRANSPORT CORP.; AND ZIM INTEGRATED SHIPPING SERVICES, *Respondents*.

DOCKET NO. 20-14

Served: December 10, 2024

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

REMAND DECISION DISMISSING REMAINING CLAIMS [1]

[Notice of Commission Determination to Review served 1/6/2025, final decision pending]

I. INTRODUCTION

A. Summary

On August 24, 2020, Complainant Intermodal Motor Carriers Conference, American Trucking Associations, Inc. (“IMCC”) filed a complaint alleging violations of the Shipping Act of 1984, as amended (“Shipping Act”) by Respondents Ocean Carrier Equipment Management Association Inc. (“OCEMA”), Consolidated Chassis Management, LLC (“CCM”), and eleven individual ocean common carriers (“ocean carriers”).

Complainant IMCC is “a conference of the American Trucking Association, Inc. that represents the interests of motor carriers hired to transport containerized cargo between U.S. ports and inland facilities. Securing the chassis (wheeled metal frames) required to transport containers over the road between ports and inland facilities is an essential part of the motor carriers’ business.” Order Affirming Initial Decision and Remanding for Further Proceedings (“Commission Order”) at 3 (citations omitted). The complaint alleged Shipping Act violations

[1] This decision dismissing the remaining claims on remand will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

stemming from the CCM Pool rules, box rules at the Pool of Pools ("POP") in Los Angeles/Long Beach, and withdrawals from pools governed by the CCM Pool Agreement, as well as ocean common carrier Respondents' contracting practices with regard to merchant haulage ("MH"), for which the motor carrier or the beneficial cargo owner is contractually responsible. Complaint at 2-3.

Each of the thirteen Respondents filed an answer denying the allegations and raising affirmative defenses. Extensive discovery in four test regions selected by the parties was completed on April 15, 2022. On June 16, 2022, the parties completed briefing on their motions for summary decision.

On February 6, 2023, an Initial Decision ("I.D.") was issued, partially granting IMCC's motion for summary decision and denying the motions for summary decision filed by Respondents. For the four test regions, the Initial Decision found a violation of Section 41102(c) of the Shipping Act for Respondents' exclusive chassis practices in CCM rules and ocean carrier contracts which limited a motor carriers' ability to choose their own chassis provider for merchant haulage. The Initial Decision also found that the Commission has the authority to prevent regulated entities from withdrawing from interoperable pools and that ocean carrier designation of an intermodal equipment provider ("IEP") in the Pool of Pools at the ports of Los Angeles and Long Beach, while such designation cannot be altered by motor carriers for MH, violates the Shipping Act.

On February 13, 2024, the Commission issued an Order Affirming Initial Decision and Remanding for Further Proceedings. On June 5, 2024, the Commission issued another order holding in abeyance petitions for reconsideration and granting leave to file an amicus brief. The parties have filed two joint status reports addressing what they believe are the remaining issues in this proceeding.

While this case has been pending, there have been significant changes to the supply chain, including the chassis required to transport shipping containers. The Ocean Shipping Reform Act of 2022 ("OSRA 2022") was signed into law on June 16, 2022. Pub. L. No. 117-146, 136 Stat. 1272 (June 16, 2022). In part, OSRA 2022 directed the Commission to partner with the Transportation Research Board ("TRB") to study the "best practices for on-terminal or near-terminal chassis pools that provide service to marine terminal operators, motor carriers, railroads, and other stakeholders that use the chassis pools, with the goal of optimizing supply chain efficiency and effectiveness." Public Law 117-146, 136 Stat. 1272 (June 16, 2022). The consensus study report by the TRB and the National Academies of Sciences, Engineering, and Medicine, *Intermodal Chassis Provisioning and Supply Chain Efficiency*, was issued in 2024 and is available at: https://nap.nationalacademies.org/catalog/27806/intermodal-chassis-provisioning-and-supply-chain-efficiency-equipment-availability-choice ("TRB Report"). The study concluded that "policy interventions that seek to fine-tune the functioning and efficiency of the chassis provisioning system would be difficult to design in a manner that would be responsive to the circumstances of the country's highly varied drayage markets and to the changing dynamics of the marketplace." *Id.* at 6.

As discussed below, the significant changes in factual circumstances between those described in the complaint and now – exacerbated by the changing dynamics of the chassis market, changes compelled by the underlying decisions in this case, winding down of CCM managed cooperative interoperable pools, and ocean carrier contracts with IEPs having predominantly expired or been superseded by amendment – render the remaining issues as moot. Therefore, the remaining claims are dismissed, without prejudice, as moot.

The analysis begins with a summary of the procedural history, followed by a discussion of CCH and ocean carrier contracts.

B. Procedural History

1. Initial Decision

The Initial Decision adjudicated motions for summary decision for four geographic regions: Los Angeles/Long Beach, Chicago, Savannah, and Memphis. The Initial Decision found "as a matter of law, based on the undisputed material facts that the *exclusive* chassis agreements at issue violate the Shipping Act when the motor carrier is not able to utilize the chassis provider of its choice for MH transportation" but that *default* chassis agreements did not violate the Shipping Act "when the default arrangement does not prevent motor carriers from unilaterally using the chassis provider of their choice [for MH]." I.D. at 4 (emphasis added). Specifically, the Initial Decision found:

> [T]he practices found to be unreasonable are CCMP Operating Rules which limit motor carrier choice of chassis providers for MH; the contractual linkage of [carrier haulage ("CH")] price with MH volume; the designation of IEPs by Respondent ocean carriers for MH when motor carriers cannot unilaterally select a chassis provider of their choice; and ocean carrier designation of an IEP in the POP at the ports of Los Angeles and Long Beach, while such designation cannot be altered by motor carriers for MH.

I.D. at 56-57. The Initial Decision found the exclusive chassis agreements unreasonable as a matter of law. I.D. at 47.

The Initial Decision imposed a cease-and-desist order, requiring that "Respondents shall cease and desist from violating the Shipping Act in Chicago, Los Angeles/Long Beach, Memphis, and Savannah by ceasing and desisting adopting, maintaining, and/or enforcing any regulations or practices that limit the ability of a motor carrier to select the chassis provider of its choice for merchant haulage." I.D. at 61.

The parties were given an opportunity to appeal the Initial Decision "prior to determining next steps, including final briefing on the remaining issues in these four regions and discovery regarding other geographic regions." I.D. at 5. The Initial Decision identified the remaining issues to include allegations relating to whether withdrawal from an interoperable chassis pool violates section 41102(c) and whether reparations are appropriate. I.D. at 5, 52, 57.

2. Commission Order

On February 13, 2024, the Commission issued an Order Affirming Initial Decision and Remanding for Further Proceedings. The Commission found that "rules and practices designating an exclusive chassis provider for merchant haulage and using merchant haulage volume to lower their carrier haulage rates when motor carriers have no choice of providers are unreasonable under Section 41102(c).” Remand Order at 2. The Commission affirmed the Initial Decision and remanded the proceeding “to resolve the remaining claims and for further proceedings consistent with this Order.” Commission Order at 72.

3. Order Requiring First JSR

On February 23, 2024, an order was issued requiring the parties to file a joint status report with proposed schedule, discussing whether any issues remain for the four test markets in addition to interoperable chassis pools and reparations and, for the remaining issues, whether any discovery is needed before briefing on the merits. Order Requiring Joint Status Report at 1-2. The parties were also required to explain the scope of any requested discovery and its relevance to the remaining issues. *Id.*

4. First JSR

On March 14, 2024, Respondents filed joint and individual motions for reconsideration. On March 25, 2024, the parties filed their first remand joint status report (“First JSR”). In the First JSR, the parties primarily addressed the scope of the remaining proceedings and proposed scheduling.

Complainant IMCC identified two factors driving the scope of the remand proceeding, which can be described as: (1) whether CCM rules enjoined in the Remand Order can be enjoined in other locations and (2) what additional steps are needed at the Pool of Pools. First JSR at 2. IMCC requested a compliance report regarding how Respondents have complied and intend to comply with the Commission’s decision, the status of the Pool of Pools, and operational conditions at Savannah and Memphis under the new “SACP 3.0,” and further requested a second joint status report that would outline the remaining issues in the case, any discovery that may be needed, and a more detailed proposed schedule. *Id.* at 2-5. IMCC asserted that “pool operations at other geographies are not an issue” and that it “has no present intention to seek relief with respect to the operation of pools at locations beyond the four initial geographies.” *Id.* at 5. Moreover, IMCC asserted that Respondents “should explain why the Commission’s relief directed toward CCM rules and ocean carrier-IEP contracts should not become nationwide on the existing record.” *Id.*

In the First JSR, Respondents stated that they “seek to comply with the Decision’s cease and desist order through the restructuring of their obligations that are within their control” but that this matter should be stayed until the Commission rules on the request for reconsideration; that there is a new chassis provision model in the Southeast known as “SACP 3.0” and there have been “fundamental changes in the structure of the chassis pool in Savannah since the commencement of this proceeding;” that operational changes have occurred in the mid-south chassis consolidation pool; and that the conduct at issue in this proceeding should not be enjoined nationwide on the basis of the limited, existing record because reasonableness is a question of fact. First JSR at 6-9.

5. Order on Petition for Reconsideration

On June 5, 2024, the Commission issued an Order Holding in Abeyance Petitions for Reconsideration and Granting Leave to File Amicus Brief ("Reconsideration Order"). The Commission determined to hold Respondents' petitions for reconsideration in abeyance as premature under Commission Rule 261, pending a final ruling on the remaining claims. Reconsideration Order at 2.

6. Order Requiring Second Joint Status Report

On July 23, 2024, an order was issued requiring a second remand joint status report, stating:

> The Commission remanded this proceeding for a final ruling on the remaining claims. The remaining claims are those claims raised in the complaint filed on August 17, 2020, that have not been decided. The parties were asked in the JSR to identify next steps, including the remaining issues.
>
> In their JSR, the parties focus on changes in the industry since the initial decision, including compliance with the cease-and-desist order. It is not clear to the undersigned that compliance with the cease-and-desist order is within the scope of this proceeding. Compliance issues may be more appropriately addressed after a final decision in this proceeding. In addition, on June 18, 2024, the Commission initiated a non-adjudicatory investigation regarding compliance with chassis practices. FMC Special Investigation No. 24-02.
>
> This proceeding is focused on deciding the allegations in the complaint and compliance issues may be better raised elsewhere. Therefore, the compliance report requested by IMCC will not be required. However, understanding the current status of chassis provision in various markets may be helpful in determining what remaining issues need to be addressed. Moreover, IMCC states that it does not seek reparations. Therefore, fact finding regarding specific violations, and imposition of reparations, may not be necessary.

Order Requiring Second JSR at 3.

The order further stated:

> This proceeding was initiated by IMCC, alleging violation of the Shipping Act, section 41102(c). IMCC must clarify its position with respect to relief requested for non-CCM pools outside of Chicago, Los Angeles/Long Beach, Memphis, and Savannah. Further, IMCC should identify any practices by OCEMA, CCM, or the other respondents that were raised in the complaint and that remain unresolved and not moot, which are not discussed above as part of CCM pools or the POP. More broadly, the parties should both address other geographic regions, outside of those covered entirely by CCM pools, and indicate whether any issues raised in the complaint about those regions need to be addressed.

Order Requiring Second JSR at 5.

7. Second JSR

On August 23, 2024, the parties filed their second remand joint status report ("Second JSR"). In the Second JSR, the parties address: (a) CCM rules, (b) ocean carrier contracts and practices, (c) the Los Angeles/Long Beach Pool of Pools, (d) reparations, (e) factual clarifications, and (f) a proposed schedule. The parties' positions regarding each of these issues are summarized below.

a. CCM Rules

In the Second JSR, Complainant IMCC requests that the Commission's Order with respect to CCM be expanded nationwide, including to any pools not yet in existence, and that CCM be required to give IMCC sixty days' notice of any revision to the CCM Operations Manual pertaining to MH chassis choice. Second JSR at 2-3. IMCC states that:

> CCM Pools has posted Version 4.8 of its Operations Manual, effective May 1, 2024. Version 4.8 revises Sections 5.5 and 5.7 of the Manual to permit unilateral reassignment of usage on merchant haulage ("MH") moves to an equipment provider other than the default provider without the need for ocean carrier or equipment provider consent. IMCC welcomes these revisions to CCM's Operating Manual.

Id. at 2. IMCC argues that "Respondents' voluntary cessation of particular conduct that may recur in the future does not render IMCC's current requested relief moot." *Id.* at 3 n.3.

In the Second JSR, Respondents assert that regarding other CCM chassis pool locations, "discovery is necessary and was always contemplated as such prior to entry of any findings with respect to other markets" and that "the further discovery which is required will depend upon the ports and terminals which IMCC identifies." Second JSR at 4-5. Respondents further assert that "the relevant chassis use agreements for SACP 3.0 do not incorporate the Operations Manual by reference and therefore usage in SACP 3.0 is not governed by the Operations Manual," that "the rules have been amended to eliminate the issues raised in the Complaint," and "all cooperative interoperable pools owned by OCEMA and managed by CCM are in the process of permanently winding down operations." *Id.* at 4 n.4, 7. Additionally, Respondents assert that other geographic regions have different chassis provision models and that trucker-owned wheels may be a viable option. *Id.* at 5.

b. Ocean Carrier Contracts and Practices

IMCC states that it seeks to extend the Initial Decision nationwide, including elimination of current and future provisions and practices in or relating to ocean carrier contracts with IEPs that: restrict the unilateral decision of a motor carrier to select the chassis of its choice in MH movements; link MH chassis volumes with carrier haulage prices; and effectively lock the motor carrier's usage to the ocean carrier's default chassis provider for MH movements, including at wheeled terminals. Second JSR at 7-8.

Respondents "reiterate the need for further discovery prior to the application of the findings in the I.D. to any market beyond the four test locations," and assert that "in most, if not all, locations beyond the four test locations, motor carriers essentially always have a choice of chassis providers." Second JSR at 10-11. Regarding non-CCM pools, Respondents state that "no two locations share the same chassis provisioning model" and that "IMCC should first be required to specifically identify the ports and terminals to which the ruling should be extended," after which discovery should be permitted for those locations. *Id.* at 11-12. For example, at many inland rail locations, "the ocean carrier is the sole party held responsible for ensuring an adequate supply of chassis to receive its containers," and at the Port of Charleston and the Port of Norfolk, chassis are provided directly by the ports. *Id.* at 12-13. Respondents contend that "reasonableness is a factual issue which must be determined at each geographic location." *Id.* at 13.

c. Los Angeles/Long Beach Pool of Pools

"IMCC's position is that the Pool of Pools is unique, and that the analysis pertaining to it does not apply to any other current pool" and "any remaining issues are more properly subject to the ongoing enforcement investigation." Second JSR at 14. "Respondents generally agree that there are no remaining issues raised in the Complaint with respect to the Pool of Pools requiring further proceedings and that the Pool of Pools operates under a unique model." *Id.*

d. Reparations

IMCC states that it is not, itself, seeking reparations. Second JSR at 14. "Respondents agree that IMCC has not sought reparations in this proceeding." *Id.* at 15.

e. Factual Clarifications

IMCC states that Respondents are in the best position to clarify locations served by CCM chassis pools and SACP 3.0. Second JSR at 15. Respondents contend that the "cooperative interoperable chassis pools owned by OCEMA's subsidiary UIE Pools LLC and managed by CCM" have all "notified participants that the pool will be terminating and are now in the process of final wind-down." *Id.* Further, "SACP 3.0 is a descriptor for the current operating model for the UIE Pools LLC owned/CCM managed pool operating in the South Atlantic region," including Savannah, as of October 1, 2023, although "SACP 3.0 is not the sole source of chassis in the South Atlantic region and, in fact, trucker-provided wheels now constitute between 40-60% of gate moves in the South Atlantic region at locations at which SACP 3.0 operates" and "rates and pool rules are set forth in a uniform and publicly-available tariff." *Id.* at 16. Respondents assert that "SACP 3.0 imposes no restrictions on a motor carrier's ability to use chassis from the pool for MH moves by contracting directly with CCM (or to source and utilize chassis from outside of the pool)." *Id.*

f. Proposed Schedule

IMCC "believes that no additional factual discovery is needed to support IMCC's motion to extend the Initial Decision's relief nationwide" and proposes a briefing schedule. Second JSR at 16-17.

Respondents "believe that nothing further is required from the Presiding Officer or the Commission at this time," as "essentially all prior findings have been rendered moot with respect to the four test markets and would make little sense as applied to others" and urge that "rather than needlessly expending further time and expense, Respondents believe the matter should be concluded." Second JSR at 17. If the proceeding continues, Respondents contend that "IMCC should first be required to identify the specific ports and inland terminals to which the I.D. should apply and a schedule for conducting discovery with respect to each of those locations should be established." *Id.* at 18.

II. DISCUSSION

A. Remaining Claims

Before determining whether the Commission's Order should be expanded nationwide – both for CCM rules and ocean carrier contracts – it is necessary to determine if any remaining issues were raised in the complaint that have not been decided and have not become moot. The cease-and-desist order regarding the four test regions was not remanded and this decision does not address any issues that were previously decided in this proceeding. This order is focused only on determining whether or not there are *remaining* issues raised in the complaint that have not been satisfied.

The parties agree that a number of issues are no longer remaining. Specifically, the parties agree that the Pool of Pools is unique and that any remaining issues regarding it are more appropriately resolved as part of the pending enforcement proceeding. Second JSR at 14. In addition, the parties agree that reparations are not being sought by IMCC. *Id.* at 15. Rather, IMCC seeks to extend the Commission Order nationwide with respect to CCM rules and ocean carrier contracts and practices, including to any pools not yet in existence. *Id.* at 16. The CCM pools will be addressed first, followed by the ocean common carrier contracts.

B. CCM

IMCC has not identified any current OCEMA or CCM practices at specific ports that it challenges. Instead, it seeks "to extend the Commission's Order with respect to CCM nationwide, including with respect to any pool not yet in existence." Second JSR at 2. However, IMCC acknowledges that the CCM Pools' Operations Manual version 4.8, effective May 1, 2024, "revises Sections 5.5 and 5.7 of the Manual to permit unilateral reassignment of usage on merchant haulage ('MH') moves to an equipment provider other than the default provider without the need for ocean carrier or equipment provider consent. IMCC welcomes these revisions to CCM's Operating Manual." *Id.* Thus, IMCC agrees that the CCM Manual provisions at issue in the complaint are no longer utilized. Moreover, Respondents indicate that "all cooperative interoperable pools owned by OCEMA and managed by CCM are in the process of permanently winding down operations." Second JSR at 4 n.4, 7.

When a complaint is filed, the Shipping Act requires the Commission to "make an appropriate order" if "the complaint is not satisfied." 46 U.S.C. § 41301(c). This is similar to federal courts, which "'lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies.'" *Larsen v. U.S. Navy*, 525 F.3d 1, 4

(D.C. Cir. 2008) (quoting *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983)). The Supreme Court has stated that "[w]e have repeatedly held that an 'actual controversy' must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013) (citation omitted).

"The underlying concern is that, when the challenged conduct ceases such that 'there is no reasonable expectation that the wrong will be repeated[,]' then it becomes impossible for the court to grant 'any effectual relief whatever to [the] prevailing party.'" *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (citations omitted).

The Commission has dismissed cases when they became moot. Where a disputed fee was removed from the terminal schedule before it went into effect, the Commission dismissed the case as moot. *Petition of Direct Chassislink, Inc., Flexi-Van Leasing, Inc., & Trac Intermodal For an Order to Show Cause*, Petition No. P2-16, 2017 WL 2437501, at *1 (FMC June 1, 2017). Similarly, where a disputed charge was refunded, the Commission dismissed the issue as moot. *Mediterranean Shipping Company – Investigation for Compliance With §§ 41104(A) and 41102 of Demurrage or Detention Charges Under the Charge Complaint Procedures of 46 U.S.C. § 41310*, Docket No. CC-001, 7 F.M.C.2d 14, 20 (FMC Sept. 29, 2023) (charge was fully refunded, accordingly, "the refund issue is now moot."). In a case where service contract provisions in dispute were no longer in use, and the respondents agreed not to reintroduce them, the issue was dismissed as moot. *Distribution Services Ltd. v. Asia North America Eastbound Rate Agreement*, Docket No. 90-02, 1990 WL 454990 at *1, *3 (ALJ Nov. 2, 1990) (admin. final Dec. 7, 1990). Indeed, as early as 1939, in a case where the defendants disbanded a conference and voluntarily withdrew their contract rate system, the Commission's predecessor, the United Stated Maritime Board, dismissed the complaint as moot. *Kerr Steamship Co., Inc. v. Isthmian Steamship Co.*, 2 U.S.M.C. 93 (USMC July 25, 1939).

Respondents assert that the specific CCM rules challenged "have been amended to eliminate the issues raised in the Complaint," that "all cooperative interoperable pools owned by OCEMA and managed by CCM are in the process of permanently winding down operations," and "the issues raised in the Complaint are accordingly moot, and no further rulings are required." Second JSR at 7. IMCC acknowledges that the new rules "permit unilateral reassignment of usage on merchant haulage ('MH') moves to an equipment provider other than the default provider without the need for ocean carrier or equipment provider consent" and that "IMCC welcomes these revisions to CCM's Operating Manual." *Id.* at 2. Thus, it appears that the parties agree that the rules adopted by OCEMA and CCM that were objected to in the complaint have been withdrawn. This suggests that this issue has been satisfied and is moot unless an exception to the mootness doctrine applies.

There are two exceptions to the mootness doctrine. The first is the capable of repetition, yet evading review exception, which "applies only 'where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Cierco v. Mnuchin*, 857 F.3d 407, 415 (D.C. Cir. 2017) (quoting *Davis v. FEC*, 554 U.S. 724, 735 (2008)). IMCC does not suggest that the capable of repetition yet evading review mootness exception applies, and it would not, as chassis practices are not of short duration. Rather, IMCC asserts that the voluntary cessation exception should apply. Second JSR at 3 n.3.

The second mootness exception, voluntary cessation, "exists for cases in which a party voluntarily ceases the challenged activity. When the exception applies, the case remains live unless it is 'absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" *Pub. Citizen, Inc. v. FERC*, 92 F.4th 1124, 1128 (D.C. Cir. 2024) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 190 (2000)). The heightened voluntary-cessation standard is grounded in concerns that a party may be manipulating 'the judicial process through the false pretense of singlehandedly ending a dispute.'" *Id.* (quoting *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 15 (D.C. Cir. 2019) (per curiam)).

Here, the cessation by Respondents and the decision to wind down operations do not appear to be an effort to manipulate the judicial process, but rather, a response to changing dynamics of the marketplace and the underlying decisions.

Unlike *Erie*, where the winning party sought to have the case declared moot, here it is the party whose conduct was found to violate the Shipping Act in test regions which seeks a finding of mootness for the other geographic regions, so there is no risk of "preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." *City of Erie v. Pap's A.M.*, 529 U.S. at 278, 288. A finding of mootness at this juncture does not alter the findings in the underlying decisions. "What matters is not whether a defendant repudiates its past actions, but what repudiation can prove about its future conduct." *Fed. Bureau of Investigation v. Fikre*, 601 U.S. 234, 244 (2024).

The unreasonable practice of operating rules which limit motor carrier choice of chassis providers for MH, found to violate the Shipping Act in the test regions, is not reasonably expected to recur in other regions as the operating manual has already been changed and all cooperative interoperable pools owned by OCEMA and managed by CCM are in the process of permanently winding down operations.

In light of CCM's reformed practices, which appear to have resolved the concerns raised in the complaint related to OCEMA and CCM, the burdens of continuing this litigation vastly outweigh any benefit. Continuing this proceeding for CCM managed pools would require costly and time-consuming discovery, would delay a final decision, and would not impact any current practices. It is not an efficient use of party or Commission resources. Moreover, the Initial Decision and Commission Order and the reasoning behind them still stand. If new rules limit the ability of motor carriers to select the chassis provider of their choice, those practices will need to meet the legal requirements outlined in the decisions in this proceeding.

IMCC also requests an order that requires CCM to give IMCC sixty days' notice of any revisions to the CCM Operations Manual pertaining to MH chassis choice; however, IMCC does not provide any legal basis for such an order. Second JSR at 3. The Commission may order reparations for actual damages and crease-and-desist orders. However, similar to the request for compliance reports IMCC made in the First JSR, the request for an order that would require notice of revisions to the policy appears to be outside of the jurisdiction of the undersigned.

The only remaining issue then is IMCC's request to expand nationwide "current and future" contract provisions without additional discovery.

C. Ocean Carrier Contracts

With regard to ocean carrier contracts and practices, IMCC seeks to extend the Commission decision nationwide, specifically the "[e]limination of current and future provisions." Second JSR at 7-8. IMCC identifies the specific provisions as those that the previous decisions in this case found violated the Shipping Act, such as restricting the unilateral decision of a motor carrier to select the chassis provider of its choice in MH movements; linking MH chassis volumes with CH prices; and effectively locking the motor carrier's usage to the ocean carrier's default chassis provider for MH movements. *Id.* Further, IMCC asserts that a nationwide order could be issued without any further discovery. *Id.* at 9.

Respondents assert that "no two locations share the same chassis provisioning model;" IMCC should first be required to specifically identify the ports and terminals to which the ruling should be extended; and discovery is necessary as "reasonableness is a factual issue which must be determined at each geographic location." Second JSR at 11-13.

Respondents also suggest that the underlying decisions prohibiting contractual linkage of carrier haulage rates to merchant haulage volumes when the motor carrier does not have a choice of chassis providers is limited to CCM pools. Second JSR at 10-11. However, the underlying decisions are not so limited. *See* I.D. at 42-47; Commission Order at 39-50.

IMCC acknowledges that any issues within the four test regions "are properly subject to the ongoing enforcement investigation and, as enforcement matters, fall outside the scope of this proceeding." Second JSR at 10. Within the test regions, the parties completed discovery in early 2022. Discovery regarding other regions was delayed until after a decision on the test regions. IMCC now seeks a nationwide order that would extend the decisions to current and future practices nationwide without any additional discovery. *Id.* at 7-9. The current record and request to proceed without additional discovery will be addressed before discussing the request for a nationwide prohibition of current and future practices.

IMCC's complaint did not identify any specific agreements at issue beyond those created by OCEMA and CCM and the box rules in the Pool of Pools. Although the complaint does not identify specific ocean carrier contracts, in the Second JSR, IMCC states that the "record is replete with multimarket or nationwide contracts between ocean carriers and intermodal equipment providers containing provisions that the Presiding Officer's Order, affirmed by the Commission, has found to violate the Shipping Act." Second JSR at 8. Indeed, the parties' Joint Statement of Facts, briefing, and appendices provided prior to the Initial Decision included more than twenty different contracts between specific ocean carriers and chassis providers, many with multiple amendments. The Initial Decision and Commission Order addressed these contract provisions generally in the four test markets, without making any findings about specific contracts.

Given the changes in the market since discovery was completed in 2022, it is not possible to issue a nationwide order on the existing record. Respondents have a right to highlight differences in geographic regions. Indeed, the record includes numerous agreements with provisions specific to particular pools or geographic areas. *See, e.g.*, CX 2782-2794; CX 2544, CX 2555-2562, CX 2567-2570; CX 5835-36, CX 5842-5852. While it is not clear whether differences in geographic regions would impact the outcome, the TPB Report's statement that there are "highly varied drayage markets" further reinforces that additional discovery is appropriate.

For example, Respondents argue that in some locations, trucker-owned wheels provide a viable alternative to the ocean common carriers' IEP and therefore, "the restrictions complained of do not markedly impede the ability of competing chassis providers to compete for merchant haulage business." Second JSR at 6. The impact of trucker-owned wheels was briefed and considered in the four test markets. Thus, it is not clear whether this would be persuasive, as even if an ocean carrier provided options (i.e., the use of the ocean carrier's IEP *or* a specific alternative (either another IEP or trucker-owned wheels)) that would still limit the ability of the motor carrier to select the chassis provider of its choice. Therefore, determining whether the availability of trucker-owned wheels in certain locations impacts the facts, including the relevant product market or the legal analysis, would require additional discovery. Respondents also point to wheeled terminals at inland rail locations and ports such as the Port of Charleston and the Port of Norfolk where chassis are provided directly by the ports. Therefore, it would be necessary to permit additional discovery before applying the underlying decisions nationwide.

The record is not clear about whether any of the contracts in the record are still in effect. Respondents object to extending the decisions nationwide based on "outdated" facts regarding "the chassis market as it perhaps existed in very specific locations at least three to five years ago." Second JSR at 17. IMCC was asked twice after remand to identify the issues that remain, and they did not identify any specific contracts or specific geographic regions. In the First JSR, IMCC stated that "pool operations at other geographies are not an issue," while asserting that the Commission's relief directed toward ocean carrier-IEP contracts should become nationwide on the existing record. First JSR at 5. The most recent order specifically required IMCC to "identify any practices by OCEMA, CCM, or the other Respondents that were raised in the complaint and that remain unresolved and not moot." Order Requiring Second JSR at 5.

Most of the over twenty contracts in the record were filed on April 29, 2022, and there are no exhibits in the record filed after June 16, 2022 – when OSRA 2022 took effect. At least one contract did not identify a specific expiration date, CX 4553; however, the agreements typically include an expiration date. *See, e.g.*, CX 4653, CX 4208, CX 2796, CX 3906, CX 5832. From reviewing the record, the vast majority of the contracts have already expired. *See* Joint Stipulations of Fact, ¶¶ 208-319. The record does include three contracts which have not reached their expiration date after this month. CX 3143 (term July 1, 2021, through June 30, 2026); CX 3535 (term Nov. 28, 2016, through Nov. 27, 2026); CX 3757 (term Oct. 22, 2019, through Oct. 21, 2029). However, the record also includes numerous amendments across these and similar contracts, demonstrating the frequency of such amendments. *See, e.g.*, CX 3815, CX 2521; *see also* JSF ¶¶ 218-221, 240. Even the few non-expired contracts would require additional discovery to determine if they are still in effect or have been amended. Similar to the situation with CCM discussed above, the expired contracts are moot.

Moreover, in the four test regions, ocean common carriers are prohibited from adopting, maintaining, and/or enforcing any regulations or practices that limit the ability of a motor carrier to select the chassis provider of its choice for merchant haulage. Therefore, the cease-and-desist order regarding contracts in the four test regions would have required changes for those geographic regions, further demonstrating that the contracts in the record are outdated and moot. If such contracts have not been updated as required, that would be better addressed in the Commission's enforcement proceeding. Thus, discovery would need to occur for other geographic regions, including any updates or amendments to the contracts in the record, if any are still in effect.

Given the underlying decisions, the passage of OSRA 2022, and the changing dynamics of the chassis marketplace, it would not be appropriate to make nationwide findings on the basis of the outdated and moot contracts in the record and additional discovery would be required. Therefore, IMCC's request to extend the decisions nationwide without additional discovery is denied. The next question is whether the proceeding can continue with additional discovery.

If this proceeding were to continue for locations other than the four test regions, the complaint would need to be amended to provide a more definite statement of IMCC's claims, including the specific contracts and geographic regions contested. IMCC seeks a ruling on current or future contracts but as noted above, they are not in the record. Typically, the contracts are between individual ocean carriers and IEPs. Given that the ocean carriers have different contracts, and that the ocean carriers compete with each other for chassis, it may be preferable to bifurcate the proceeding so that each Respondent and/or geographic region could be addressed separately. Neither IMCC nor the Respondents have requested such a complex and expensive undertaking, which would require pleading new allegations and providing a new factual record.

IMCC's request to address future contracts is also not well taken. Rather, it is appropriate to dismiss any remaining claims where continued proceedings would serve no practical purpose. "The practice of holding cases open for an indefinite period in the future to consider possible future violations is not favored by the Board." *The Port Commission of the City of Beaumont v. Seatrain Lines, Inc.*, 3 F.M.B. 581, 582 (FMB April 10, 1951). In *Beaumont*, subsequent to the decision in the case, complainants advised that respondent discontinued the operation of its vessels and argued that "if the complaint should be assigned for further hearing by the examiner as directed by the Board's prior decision, the parties would be dealing with a non-existent operation" and that such a hearing "would serve no practical purpose" so that the case should "be held in abeyance." *Id.* at 581-82. Respondent requested that the case be set for hearing or the complaint dismissed. *Id.* at 582. The Federal Maritime Board found "that since respondent has discontinued the carriage of cargo" that "the entry of an order granting the relief prayed for in the complaint would now be an idle gesture" and that it "appears the case has now become moot." *Id.* Accordingly, an order dismissing the proceeding without prejudice was issued. *Id.*

IMCC has not identified ocean carrier contracts objected to in the complaint that remain unresolved and not moot, therefore, dismissal of the remaining issues is appropriate. Continuing this proceeding to assess ocean carrier contracts nationwide would require costly and time-consuming motions practice and discovery and would delay final resolution. It is not an efficient use of party or Commission resources. This decision is not taken lightly as the parties have already expended significant resources in this proceeding. However, the Initial Decision and Commission Order, and the reasoning behind them, still stand. These underlying decisions have already ruled on contracts in the four test regions as a matter of law. Thus, if current or future contracts limit the ability of motor carriers to select the chassis provider of their choice, those practices will need to meet the legal requirements outlined in the underlying decisions.

While large proceedings such as this, which addressed the market for all chassis in the United States, have their place, in any future proceedings, it may be more efficient to focus on specific respondents, contracts, or geographic regions. The broad nature of the Respondents, including ocean common carriers who compete with each other, and OCEMA and CCM which are not part of these ocean carrier contracts, could be problematic. If IMCC or other entities wish to challenge specific respondents, contracts, or geographic regions, they may do so in a new proceeding.

III. ORDER

This proceeding was remanded to resolve the remaining claims and for further proceedings consistent with the Commission Order. Given the significant changes in factual circumstances between those described in the complaint and current CCM practices, specifically that the CCM rules have been changed and CCM managed cooperative interoperable pools are permanently winding down operations, therefore, the remaining CCM issues are moot. Moreover, the over twenty ocean carrier contracts with IEPs in the record are outdated or moot. Any current or future violations are best raised in other ongoing or new proceedings. Further, the parties have clarified that there are no remaining issues regarding the Los Angeles, Long Beach Pool of Pools and that IMCC is not seeking reparations.

For the reasons set forth above, it is hereby **ORDERED** that the remaining issues remanded by the Commission be **DISMISSED AS MOOT**. This decision does not address or alter the Initial Decision or Commission Order and the cease-and-desist order imposed in the underlying decisions continues to be in effect.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

ACCESS ONE TRANSPORT, INC., *Complainant* v. CMA CGM S.A., *Respondent.*	**DOCKET NO. 24-18**

Served: December 10, 2024

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION APPROVING CONFIDENTIAL SETTLEMENT AGREEMENT[1]

[Notice Not to Review served 1/13/2025, decision administratively final]

On November 22, 2024, Complainant Access One Transport, Inc. ("Access One") and Respondent, CMA CGM S.A. ("CMA") filed a joint motion seeking approval of a confidential settlement agreement and dismissal with prejudice ("Motion") with a copy of the confidential settlement agreement.

Using language borrowed in part from the Administrative Procedure Act, Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b); *see* 5 U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in

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

> contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A Am. Jur. 2d *Compromise and Settlement* § 3 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

The parties state that they "engaged in settlement discussions at various points in time following the filing of the amended complaint, ultimately concluding the Confidential Settlement Agreement accompanying this memorandum." Motion at 2; *see also* February 28, 2024, Respondents' Motion for Extension of Time to file Answer (the parties "are actively engaged in settlement discussions" and that there is a "high probability" that they will be able to resolve the issues in this proceeding).

The parties state:

> Through independent analysis, the Parties, both sophisticated corporate entities represented by experienced counsel, determined that a settlement was economically expedient and legally justified. They entered into a confidential mutual release settlement agreement to ensure that the dispute is entirely resolved.

> The settlement was reached through negotiations based on their independent analysis. Accordingly, the parties certify that the settlement is on the merits.

Motion at ¶ 3. The parties further state:

> This settlement is consistent with all applicable laws and public policies. It reflects the parties' mutual desire to resolve their differences without the costs and risks of continued litigation. The settlement is both fair and reasonable in light of the evidence. Therefore, it is neither unjust nor discriminatory, and does not negatively impact any third parties or the shipping public.

Motion at ¶ 5.

Based on the representations in the joint motion and other documents filed in this matter, the parties have established that the settlement agreement does not appear to violate any law or policy, or contain other defects which might make it unapprovable. The parties are represented by counsel and have engaged in arms-length settlement discussions. The proceeding would require potentially expensive discovery and briefing. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). The Commission recently stated, after the motion here was filed, that it "requires more formality and clarity, including a motion explaining the need for confidential treatment" and "good cause demonstrating that the information is a trade secret or other confidential research, development, or commercial information." *Genesis Resource Enterprise Inc. v. Maersk Line, Ltd.*, Docket No. 2014(I), Order Affirming Small Claims Officer's Order Approving Settlement, and Reversing Confidential Treatment, at 2 (FMC Dec. 4, 2024).

Here, the parties request confidentiality, stating that good cause exists due to the sensitive commercial information included.

> The parties request that the settlement remain confidential. The Commission has recognized that settlement agreements often contain sensitive commercial information, and thus should be protected from public disclosure and routinely grants appropriate requests for confidential treatment. *See D.F. Young, Inc. v. NYKLine (North America) Inc.*, FMC Dkt No. 16-02 (FMC May 22, 2018). "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (internal citations omitted).

Motion ¶ 6.

The confidential settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

Upon consideration of the motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the joint motion to approve the settlement agreement between Complainant Access One Transport, Inc. and Respondent, CMA CGM S.A. be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. It is

FURTHER ORDERED that the request for dismissal with prejudice be **GRANTED**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

[FMC 2024-0008]

Closure of Investigation into Conditions Affecting United States Carriers in Connection with Canadian Ballast Water Regulation in the United States / Canada Great Lakes Trade

AGENCY: Federal Maritime Commission.

ACTION: Notice of Closure of Investigation.

SUMMARY: The Federal Maritime Commission (Commission) has closed its investigation, initiated pursuant to Chapter 423, into conditions created by the Government of Canada (Canada) in connection with regulation of ballast water management systems that may adversely affect the operation of United States carriers in the United States / Canada Great Lakes trade. Although sufficient short-term improvements have been made to the conditions under review, the Commission's parallel long-term investigation of those conditions pursuant to Chapter 421 will remain open.

FOR FURTHER INFORMATION CONTACT: For questions regarding this Notice, contact David Eng, Secretary; Phone: (202) 523-5725; Email: Secretary@fmc.gov.

SUPPLEMENTARY INFORMATION:

I. INTRODUCTION

On May 22, 2024, the Federal Maritime Commission (Commission) initiated an investigation, pursuant to 46 U.S.C. 42302, of whether conditions created by the Government of Canada (Canada) in connection with regulation of ballast water management systems adversely affected the operation of United States carriers in the United States / Canada Great Lakes trade, in particular the carriers operating vessels that were to become subject to regulation in September 2024, within the meaning of 46 U.S. Code, chapter 423 (Foreign Shipping Practices) (46 U.S.C. 42301–42307). With respect to those vessels, Canada has now granted exemptions from the regulation, or issued determinations that exemptions were not needed. As a result, the Commission has determined to close this investigation but to keep open its parallel investigation pursuant to 46 U.S. Code, chapter 421 (Regulations Affecting Shipping in Foreign Trade) (46 U.S.C. 42101–42109) in order to address potential longer-term issues involving Canadian ballast water management regulation.

II. SUMMARY OF STATUS OF INVESTIGATION

In 2020, the Commission opened an investigation under 46 U.S. Code, chapter 421 following a petition by the Lake Carriers Association (LCA). *See* FMC Docket No. 20-10. That petition alleged that Canadian regulation set to take effect in September 2024 would create conditions unfavorable to shipping by requiring U.S. vessels to install new ballast water management systems. It became apparent that only a small group of U.S. Lakers built after 2008 would be affected by the Canadian regulation in 2024, with about 50 older Lakers not subject to it until 2030. *See* Investigation into Conditions Affecting United States Carriers in Connection with Canadian Ballast Water Regulation in the United States / Canada Great Lakes Trade, FMC-2024-0008, 89 FR 44979 (May 22, 2024) (May 2024 Notice of Investigation).

It also became apparent that the U.S. Environmental Protection Agency (EPA), in its rulemaking to implement the Vessel Incidental Discharge Act (VIDA), would likely issue rules as to ballast water management equipment that would be less restrictive than those of Canada. *See* May 2024 Notice of Investigation, 89 FR 44979. In October 2024, the EPA did issue such rules. Vessel Incidental Discharge National Standards of Performance, 89 FR 82074, 82094–82095 (Oct. 9, 2024).

Meanwhile, in May 2024 the Commission on its own motion initiated a chapter 423 investigation into whether Canadian ballast water management regulation in the Great Lakes adversely affected the operation of United States carriers in violation of 46 U.S.C. 42302(a). *See*

May 2024 Notice of Investigation, 89 Fed. Reg. 44979. Under the 120-day time limit set by 46 U.S.C. 42302(c), the initial deadline for the Commission to complete the chapter 423 investigation was in September 2024.

In response to the May 2024 Notice of Investigation, the Commission received 14 comments. The Canadian government and those representing the interests of Canadian carriers, as well as those representing environmental interests, opposed the potential imposition of sanctions. On the other hand, those representing the interests of U.S. carriers and workers were supportive of such measures.

In late July 2024 Transport Canada, the responsible Canadian agency, made available to U.S. carriers a procedure for seeking exemptions to the relevant ballast water management requirements, although the Commission understands that a comparable process had been available to Canadian carriers much earlier. *See* Procedure to request an exemption to install Ballast Water Management Systems under Ballast Water Regulations for foreign-flagged vessels in Canadian waters, Transport Canada (July 25, 2024) (Exemption Procedure), available at https://tc.canada.ca/en/marine-transportation/marine-safety-management-system-tp-13585-e-tier-ii-procedures/tier-ii-procedure-request-exemption-install-ballast-water-management-systems-under-ballast-water-regulations-foreign-flagged-vessels-canadian-waters. At the time this detailed exemption procedure for U.S. carriers was established, there was relatively little time to complete the application process before the relevant compliance date of the Canadian rule, which was September 8, 2024.

Accordingly, also in September 2024, the Commission extended the time for decision in its Chapter 423 investigation by 90 days, to December 18, 2024. Extension of Time for Decision in Investigation Into Conditions Affecting United States Carriers in Connection With Canadian

Ballast Water Regulation in the United States/Canada Great Lakes Trade, 89 Fed. Reg. 74273 (Sept. 12, 2024) (September 2024 Notice). At the same time, the Commission established a new comment period to gather more information on the apparent disparity between the exemption processes available to U.S. and Canadian carriers, and on whether those processes may have themselves led to adverse conditions in violation of 46 U.S.C. 42302(a). *Id*.

In response to the September 2024 Notice, the Commission received comments from six entities. *See* Comments, Investigation Into Conditions Affecting United States Carriers in Connection With Canadian Ballast Water Regulation in the United States/Canada Great Lakes Trade, Docket No. FMC-2024-0008, available at https://www.regulations.gov/document/FMC-2024-0008-0018/comment. Comments from those representing the interests of U.S. entities argued that the Canadian exemption processes did create disparate effects, particularly in that the U.S. process was not available until late July 2024, shortly before the early September compliance date. There were also statements that the process for U.S. Lakers was more complex and time-consuming. But Canada and those representing Canadian carriers argued that there was no unlawful disparity. Canada asserted generally that there had been no differential treatment with regard to exemptions, although it did not specifically dispute the difference in the application availability dates.

Information received to date indicates that the Canadian regulation at issue in this Chapter 423 investigation may create conditions that adversely affect the operation of the U.S. Lakers, in a way that Canadian carriers do not face under current U.S. law, within the meaning of 46 U.S.C. 42302(a). First, such adverse conditions may exist as a result of the substantive Canadian regulation involved here. There appears to be no dispute that the EPA does not currently require, at least as part of its VIDA implementation, that U.S. Lakers meet the same ballast water management equipment standards as Canada does, although Canada and some other commenters have argued that the U.S. has imposed comparably burdensome ballast water regulation on Canadian carriers through other rules. Second, it may be that the procedures for exemptions from Canada's rule have themselves created such disparate conditions, most notably in the failure until late July 2024 to establish a detailed process for U.S. Lakers that is arguably comparable to the one available to Canadian carriers. That delay appears to have prevented the completion of the process by the early September 2024 compliance date for post-2008 Lakers.

However, due in part to the statutorily imposed deadline of December 18, 2024, the Commission will not, at this time, make an affirmative determination as to disparate treatment under 46 U.S.C. 42302(a). The immediate concerns that prompted this investigation have been temporarily resolved. Information received indicates that Canada has granted exemptions for certain U.S. vessels affected in September 2024, and has determined that the other affected vessels would not be subject to the rule in 2024. In its most recent comments, Canada stated that three of the six exemption requests by U.S. carriers were granted on October 14, 2024, and that the other three vessels "will be informed that they do not require an exemption based on the regulations." Comments of Canada (Oct. 15, 2024) at 2. The LCA, in a public submission, provided an email attaching a chain of recent communications with Transport Canada. That email chain confirms that three of the six U.S. vessels had been granted exemptions and that two of the remaining vessels had been determined not to need an exemption. *See* LCA Submission (Oct. 28, 2024) at 2–6. The LCA's late October submission indicated that the sixth vessel had not yet received a final determination, but the Commission understands that that vessel received an exemption in early November 2024. However, the exemptions are only temporary in nature, so the vessels will be in a similar precarious operating position when the exemptions expire.

The Commission notes that the exemption process, due both to the lateness of its availability and the seeming onerousness of its process, may have imposed negative effects on certain U.S. carriers. Accordingly, there are ongoing concerns with respect to specific elements of the above exemption determinations. Those issues will be pursued in the agency's longer-term Chapter 421 investigation, which remains open. The Commission will continue to investigate these concerns and strongly encourages affected entities or anyone with relevant information to participate in the ongoing Chapter 421 proceeding.

III. CLOSURE OF INVESTIGATION

For the above reasons, the Commission has closed its Investigation into Conditions Affecting United States Carriers in Connection with Canadian Ballast Water Regulation in the United States / Canada Great Lakes Trade, FMC-2024-0008, 89 FR 44979 (opened May 22, 2024).

By the Commission.

Dated: December 5, 2024.

David Eng,
Secretary.

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

PORTS AMERICA CHESAPEAKE, LLC AND MARINE TERMINALS CORPORATION-EAST, *Complainants*

v.

APS EAST COAST, INC., *Respondent*.

DOCKET NO. 23-04

Served: December 16, 2024

ORDER OF: Richard AMBROW, *Administrative Law Judge*.

INITIAL DECISION[1]

[exceptions filed by Complainants and Respondent 2/7/2025, final decision pending]

I. INTRODUCTION

A. Overview.

Complainants Ports America Chesapeake, LLC ("PAC") and Marine Terminals Corporation-East ("MTCE") (collectively, "Ports America" or "Complainants") filed a Complaint alleging that Respondent APS East Coast, Inc. ("AMPORTS" or "Respondent") had violated the Shipping Act of 1984, as amended. Complainants, who are related companies that perform roll-on/roll-off ("RO/RO") stevedoring services at Respondent's terminals in the Port of Baltimore, allege that Respondent assessed a "baseless and punitive 'access fee' on allegedly 'non-preferred' stevedores[,]" subjected Complainants to "prejudicial treatment as compared to other stevedores without legitimate transportation justification[,]" engaged in unreasonable practices, including interfering with Complainants' business relationships and charging Complainants "in excess of $1.2 million for the alleged access fees without a legal basis for the collection, and "unreasonably refusing to deal with" Complainants, in violation of 46 U.S.C. §§ 41102(c), 41106(2) and 41106(3). (Complaint, pp. 3-4).

After an unsuccessful motion to dismiss, the Respondent filed an answer denying Complainants' assertions that Respondent engaged in unreasonable or unjustified conduct. (*See generally* Answer).

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[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. (46 C.F.R. § 502.227).

In its briefing, Complainants set forth several theories as to how the "preferred stevedore" program violated 46 U.S.C. §§ 41102(c), 41106(2), and 41106(3), which resulted in Complainants incurring $1.277 million in invoiced access fees, and caused Complainants to lose substantial business. (*See generally* Opening Brief of Complainants, Ports America Chesapeake, LLC and Marine Terminals Corporation-East Against Response APS East Coast, Inc. ("Opening Brief"); *see also* Complaint, p. 14). In addition, Complainants asserted that Respondent terminated the so-called "preferred stevedore" program in May 2024. A short time later, Complainants imposed new and allegedly unjust and unreasonable access charges on Complainants effective June 1, 2024, also in violation of 46 U.S.C. § 41102(c). (Opening Brief, pp. 24-28).

As discussed below, I find that Complainants have demonstrated that the "non-preferred stevedore" access fee, which is "much higher" than the fee charged to the preferred stevedore, violated 46 U.S.C. §§ 41102(c) and 41106(2). I find, however, that not all theories advanced by Complainants regarding how Respondent's conduct violated §§ 41102(c) and 41106(2) are meritorious. I also find that Complainants' allegation that Respondent's conduct violated 46 U.S.C. § 41106(3) is not meritorious.

Based on Complainants' successful claims, I find that a cease and desist order that requires Respondent to stop invoicing Complainants, or attempting to collect from Complainants, "non-preferred" stevedore access fees from January 1, 2023, through May 15, 2024, is appropriate. I find, however, that Complainants have not carried their burden of demonstrating that Complainants are entitled to reparations due to lost profits. I also find that Complainants are not entitled to a cease and desist order regarding the access charges Respondent imposed effective June 1, 2024.

B. Procedural History.

Complainants filed a three-count Complaint on June 2, 2023. (Complaint, CX_00001-CX_00025). In general, Complainants are related companies who provide stevedoring services in the Port of Baltimore. As is relevant here, Respondent operates two terminals in the Port that neighbor one another. The relevant terminals handle RO/RO cargo, which consists of vehicles such as automobiles that can be moved on and off a vessel by means of the vehicle's own power. (Complaint, CX_00004-CX_00005). Complainants generally allege that Respondent announced on November 1, 2022, that it entered into a "preferred stevedoring" agreement with a third party, Ceres Marine Terminal Services ("Ceres") that would be effective as of January 1, 2023. (*See* Complaint, CX_00001-CX_00007). In general, the "preferred stevedore" agreement provided that Respondent's customers would be required to use Ceres for stevedoring services, and that if the customer wanted to use a different, "non-preferred" stevedore (such as Complainants), the customer would be responsible to pay a "punitive" $25/per vehicle "access fee." (*See* Complaint, CX_00004, CX_00009). Complainants allege that the preferred stevedoring agreement, and related $25/per vehicle access fee for non-preferred stevedores, violate three provisions within the Shipping Act: 46 U.S.C. § 41106(2), which prohibits a Marine Terminal Operator ("MTO") from giving "undue or unreasonable preference or advantage or impos[ing] any undue or unreasonable prejudice or disadvantage with respect to any person" (Count I); 46 U.S.C. § 41102(c), which prohibits an MTO from failing: "to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property" (Count II); and 46 U.S.C. § 41106(3), which prohibits an MTO from unreasonably refusing to deal or negotiate (Count III). Complainants allege that they were injured because Respondent charged Complainants $1.277 million in access fees; Complainants assert that Respondent must pay reparations; finally, Complainants also seek a cease and desist order. (Complaint, CX_00023-CX_00024).

Also on June 2, 2023, the Commission issued a notice of filing of complaint and assignment. The matter was assigned to the Honorable Alex M. Chintella.

Respondent filed a Motion to Dismiss on June 27, 2024, along with an accompanying Memorandum in Support of the Motion to Dismiss ("Memo. Mot. Dismiss"). Among other things, Respondent argued that Complainants failed to include any allegations on how Respondent's actions affected the entire market, which is a necessary element of each of Complainants' first two counts. (Memo. Mot. Dismiss, pp. 4-9). As for the third Count, Respondent argued that there was no alleged failure to deal or negotiate. (Memo. Mot. Dismiss, pp. 9-11). On August 16, 2023, after the Motion to Dismiss was fully briefed, the ALJ issued an Order Denying APS East Coast, Inc.'s Motion to Dismiss.

Respondent filed an Answer on August 28, 2023. In general, Respondent admitted many of the basic factual allegations in the Complaint, such as the fact that Respondent entered into the preferred stevedoring agreement, and that Respondent imposed a $25/per vehicle access fee on the use of non-preferred stevedores. Respondent, however, asserted that the preferred stevedoring agreement, and the related $25/per vehicle access fee on non-preferred stevedores, were not unreasonable or unjustified. (*See generally* Answer).

On December 27, 2023, the parties filed Motions to Compel Discovery. On February 15, 2024, after the Motions to Compel Discovery were briefed, the parties requested a status conference. Judge Chintella held a status conference with the parties on February 20, 2024. On March 4, 2024, Judge Chintella issued a Memorandum Order Regarding Motion to Compel and Revised Scheduling Order ("Mot. Compel Order").

On May 29, 2024, the Complainants filed an Emergency Motion for Extension of Time ("Emergency Mot."). Complainants alleged that on May 15, 2024, Respondent amended its tariff schedule to remove the $25/per vehicle access fee altogether. (Emergency Mot., p. 2). Complainants also allege that they learned on May 24, 2024, that Respondent would be amending its tariff schedule again, effective June 1, 2024, to impose a $10/per vehicle access charge for any stevedore providing services at Respondent's relevant terminals in Baltimore. (Emergency Mot., pp. 1-3). Complainants sought an extension of time to address the new access charge in their briefing because the new access charge affected the issues in this case. (Emergency Mot., pp. 3-4). On May 30, 2024, Respondent filed Respondent's Response to Complainants' Emergency Motion for Extension of Time ("Emergency Mot. Response"). Respondent asserted that the amended tariff schedule was not relevant to this case. (Emergency Mot. Response, p. 1). In addition, Respondent stated that the new access charge was published in response to settlement negotiations. (Emergency Mot. Response, p. 2). Judge Chintella issued an Order Granting Complainant's Emergency Motion for Extension of Time ("Order re: Emergency Mot."), stating that the tariff changes seemed to be relevant.

On October 4, 2024, this matter was reassigned to the undersigned.

C. The Parties' Arguments.

The Complainants filed an Opening Brief on June 7, 2024 (the "Opening Brief"). Complainants allege Respondent violated 46 U.S.C. §§ 41102(c), 41106(2) and 41106(3). Regarding 46 U.S.C. § 41102(c), Complainants give four reasons why Respondent fail to engage in just and reasonable practices. First, the $25/per vehicle access fee for non-preferred stevedores was not reasonable because Complainants were unjustifiably charged a "much higher" per vehicle access fee than the preferred stevedore. Moreover, the $25/per vehicle access fee was not reasonably related to any services Respondent rendered Complainants. (Opening Brief, pp. 8-24). Second, the $10/per vehicle "terminal access charge" that became effective June 1, 2024, also violated 46 U.S.C. § 41102(c) because it, too, is not reasonably related to any services Respondent rendered Complainants. (Opening Brief, pp. 24-28). Third, Complainants argue that accrued access fees are unenforceable because the fees were not assessed on stevedores, but on carriers or original equipment manufacturers ("OEM")[2] customers. (Opening Brief, pp. 28-37). And fourth, the exclusive stevedoring agreement was unreasonable under § 41102(c) because it interfered with Complainant's long-standing business relationships with carriers and OEM customers. (Opening Brief, pp. 37-41). Next, Complainants make two arguments why the exclusive stevedoring agreement provided an unreasonable preference to Ceres in violation of § 41106(2): first, Complainants were excluded from the so-called "competitive bidding" process for inconsistent and unpersuasive reasons; and second, there was no legitimate reason for Respondent to charge one stevedore a much higher fee than the other stevedore. (Opening Brief, pp. 41-54). As for § 41106(3), Complainants argue that it was shut out of the competitive bidding process for no valid reason. (Opening Brief, pp. 54-59). Regarding reparations, Complainants allege that they lost most of their business that they previously performed for ocean carriers at the Respondent's terminals and suffered substantial lost profits. Complainants also seek a cease and desist order regarding accrued access fees. (Opening Brief, pp. 59-65).

Respondent filed an opposition brief on July 19, 2024 ("Response"). In opposition to Complainants' arguments, Respondent asserts that Complainants, who carry the initial burden of production and the ultimate burden of persuasion, fail to make a *prima facie* case of unreasonable conduct because Complainants fail to show how Respondent's conduct affected the relevant market, which is the Port of Baltimore. (Response, pp. 12-22). Respondent next argues that only after Complainants establish a *prima facia* case does the burden of production shift to Respondent to show that its business decisions were reasonable. (Response, pp. 22-23). Respondent further argues that its business decisions are generally entitled to deference, and, in any event, in response to Count I (unreasonable preference, prejudice or disadvantage in violation of § 41106(2)), Count II (alleging unreasonable practices under § 41102(c)), and Count III (unreasonable refusal to deal or negotiate under § 41106(3)), Respondent's business practices were and are reasonable. (Response, pp. 23-37). As for the new $10/per vehicle access charge effective June 1, 2024, Respondent argues that it is outside the Complaint, and, in any event, is unquestionably fair as it is imposed on all stevedores. (Response, pp. 33-34). As for the quantum of damages, Respondent argues that Complainants essentially seek damages under a tortious

[2] In terms of automobiles, OEMs would be the automobile manufacturers.

interference with contract claim, which is outside of the Commission's jurisdiction (Response, pp. 37-40), and, in any event, Complainants failed to prove their damages. (Response, pp. 40-44).

On August 6, 2024, Complainants filed a reply ("Reply"). Complainants' main argument is that Respondent's attempts to justify the $25/per vehicle access fee are unpersuasive. (Reply, pp. 9-13). Complainants argue that the authority Respondent cites regarding the relevant market is not relevant and that the $25/per vehicle fee, as well as the $10/per vehicle terminal access charge effective June 1, 2024, were unjust and unreasonable. (Reply, pp. 13-29). Complainants also contend that the Commission should not give deference to Respondent's business decisions unless the decisions are reasonable. (Reply, pp. 14-16). As for damages, Complainants argue that they, in fact, proved damages adequately, and introduced several new exhibits to support their damages claim. (Reply, pp. 30-35).

On August 30, 2024, Respondent filed a motion for leave to file a sur-reply ("Motion for Leave to File a Sur-Reply") and proposed sur-reply ("Proposed Sur-Reply"). In short, Respondent primarily argues in the Proposed Sur-Reply that Complainants supplemented their damages claim by adding new documents to their Reply that are untimely and unreliable. (Proposed Sur-Reply, pp. 4-13). Respondent also asserts that Complainants misrepresented Respondent's actions as retaliatory, the Complainants misrepresented the Commission's business judgment rule, and the Complainants misrepresented Respondent's argument regarding *Sec. & Exch. Comm'n v. Jarkesy*, 144 S.Ct. 2117 (2024). (Proposed Sur-Reply, pp. 3-4, 13-14). On September 6, 2024, Complainants filed an Opposition to Respondent's Motion for Leave to File a Sur-Reply ("Opp. Mot. Leave") arguing that Respondent fails to demonstrate extraordinary circumstances. (*See generally* Opp. Mot. Leave).

D. Motion for Leave to File a Sur-Reply.

Respondent's Motion for Leave to File a Sur-Reply is **GRANTED**. The Commission's Rules provide that a party filing a dispositive motion may file a reply. (46 C.F.R. § 503.70(c)). The rules also provide that: "The non-moving party may not file any further reply unless requested by the Commission or presiding officer, or upon a showing of extraordinary circumstances." (46 C.F.R. § 503.70(d)). Likewise, on May 30, 2024, Judge Chintella ordered that "no further extensions" of the briefing schedule would be "granted absent extraordinary circumstances." (Order re: Emergency Mot., p. 2).

Respondent argues that Complainants added new exhibits and arguments to their reply brief, specifically related to the issue of damages. (Motion for Leave to File a Sur-Reply, p. 4). Respondent also argues that Complainants made various misrepresentations, and that Complainants added new arguments. (Motion for Leave to File a Sur-Reply, p. 5). Finally, Respondent argues that, in the alternative, Complainants' supplementary materials and new arguments should be stricken. (Motion for Leave to File a Sur-Reply, p. 6).

The Complainants have added new evidence to their reply brief to support their claim for damages. Without permitting a sur-reply, Respondent would not have a chance to comment upon this evidence. If a party introduces evidence to compel the other party to pay monetary damages, it is only fair to let the other party comment upon the evidence. Therefore, the Motion for Leave to File a Sur-Reply is **GRANTED**. I accept Respondent's Proposed Sur-Reply and have considered it.

E. Motion for Confidential Treatment.

The parties filed several motions for confidential treatment that I **GRANT IN PART** and **DENY IN PART**. In particular:

- On June 7, 2024, Complainants filed Complainants Ports America Chesapeake, LLC and Marine Terminals Corporation-East's Motion for Confidential Treatment, seeking an order for confidential treatment of Complainants' Opening Brief, Proposed Findings of Fact and Appendix because those documents contain confidential business information, including financial information.

- On July 19, 2024, Respondent filed Respondent's Motion for Confidential Treatment, seeking an order for confidential treatment of Respondent's Appendix and Respondent's Responses to Complainants' Proposed Findings of Fact because those documents contain confidential business information.

- On August 6, 2024, Complainants filed Complainants Ports America Chesapeake, LLC and Marine Terminals Corporation-East's Motion for Confidential Treatment, seeking an order for confidential treatment of Complainants' Reply, Complainant[s'] Response to Respondent's Proposed Findings of Fact, and Supplemental Appendix because those documents contain confidential business information, including financial information.

- On August 30, 2024, Respondent filed Respondent's Motion for Confidential Treatment, for confidential treatment of Respondent's Proposed Sur-Reply because it contains business information that Complainants designated as confidential.

On June 21, 2023, Judge Chintella issued an Initial Order that provided detailed information about filing confidential material. The Initial Order provided that if confidential information is filed, a "motion justifying confidential treatment" that showed "good cause by demonstrating that the information is a trade secret or other confidential research, development, or commercial information" is required. (Initial Order, p. 5 (citing 46 C.F.R. § 502.141(j)(1)). The Initial Order also indicated that the confidential information should be clearly and conspicuously marked in the confidential version of the filings and blacked out in the public version. (Initial Order, p. 5).

Commission Rule 5 states that: "Confidential information in exhibits should be marked as specified above. If marking within the text is not feasible, individual pages may be replaced in the public version with a page indicating that confidential material is excluded. Entire exhibits should not be excluded, only those pages containing confidential material." (46 C.F.R. § 502.5(a)(2)(iii) (emphasis added)).

The parties submitted over 2,400 combined pages of exhibits in appendices. The parties largely complied with the Initial Order, as well as Commission Rule 5, generally limiting redactions appropriately. In addition, I am satisfied that most of the information marked confidential by the parties is, in fact, sensitive commercial information. For example, the terms of the so-called "preferred stevedore" agreement between Respondent and the Ceres, who is not a party to this case, have been designated as confidential. (*See, e.g.*, CX_01328-CX_01341). Most of the negotiations related to the terms of that agreement have also been designated as confidential.[3] (*See, e.g.*, CX_01308-10, CX_01321-CX_01322). In addition, information related to Complainants' business operations at the Respondent's terminals, such as its volume of business, have been designated confidential. (*See, e.g.*, CX_02040-CX_02043). Therefore, I will **GRANT IN PART** the parties' motions for confidential treatment identified above.

The parties request confidential treatment of information already disclosed. In particular, Complainants redact information about invoices provided to it by Respondent for the first three months of 2023. (*See* Complainants' Proposed Findings of Fact, p. 20; Respondent's Responses to Complainants' Proposed Findings of Fact, p. 37). The total amount of these invoices, however, was previously disclosed and are discussed below.[4] (Complaint, CX_00014, Attachment B). Therefore, I will **DENY IN PART** the motions for confidential treatment to the extent they seek to designate as confidential the total amount reflected on the invoices Respondent sent to Complainants for stevedoring vehicles at Respondent's terminal from January 2023 through March 2023, specifically Complainants' Proposed Findings of Fact, p. 20 and Respondent's Responses to Complainants' Proposed Findings of Fact, p. 37.

II. FINDINGS OF FACT

A. Parties and Background

1. Complainant Ports America Chesapeake, LLC ("PAC") is a limited liability company organized under the laws of the state of Delaware, authorized to do business in Maryland, with its principal place of business in Maryland at the Port of Baltimore. (Complaint, CX_00001-CX_00002).

2. Complainant Marine Terminals Corporation-East ("MTCE") is a corporation organized under the laws of the state of California, authorized to do business in Maryland, with its

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[3] Most of the negotiations related to the terms of the preferred stevedoring agreement were designated as confidential. One page, CX_01320, related to the negotiation of the agreement, was not designated as confidential in either the confidential version or the public version of Complainants' filings. No party objected or attempted to correct it. It is not necessary, however, to discuss this page.

[4] There are other facts that a party designates as confidential in one place but not others. For example, in its proposed findings of fact, Complainants designates as confidential the names of the businesses whom Respondent invited to bid on the proposed exclusive stevedore agreement. (*See* Complainants' Proposed Findings of Fact, p. 9). The identities of those businesses are revealed in an email that was not marked confidential. (CX_01306). It is not necessary for purposes of this Initial Decision to address each inconsistency.

principal place of business in Maryland at the Port of Baltimore. (Complaint, CX_00002).

3. Both PAC and MTCE (together, "Complainants") provide auto and RO/RO stevedoring services in the Port of Baltimore. (Complaint, CX_00002).

4. PAC and MTCE are wholly owned subsidiaries of Ports America Group, Inc. (MTCE's Answer to Interrogatory No. 5, CX_01530; PAC's Answer to Interrogatory No. 5, CX_01560; *see also* Beall Dep., CX_00922:13-CX_00925:15).

5. Complainants provide auto and RO/RO stevedoring services to ocean going RO/RO vessels loading and discharging in the Port of Baltimore. (Complaint, CX_00005; Answer, CX_00028).

6. Respondent APS East Coast, Inc., is an entity organized under the laws of the state of Delaware, registered to do business in the state of Maryland. (Complaint, CX_00002; Answer, CX_00027).

7. Respondent is in the auto processing business, describing itself on its web site as "one of the largest auto processors in North America" with a "global vision [] to be the premier Automotive Services Company & Port Terminal Operator…" (Complaint, CX_00002; Answer, CX_00027).

8. Respondent represents on its web site that in the U.S. it operates "seven US port facilities, located in Jacksonville (FL), Freeport (TX), Antioch (CA), Benicia (CA), and three facilities in Baltimore (MD). Respondent's Global Headquarters is located in Jacksonville, FL, with a Corporate Branch Office at our Atlantic port facility in Baltimore, (MD)." (Complaint, CX_00002; Answer, CX_00027).

9. Respondent is a Marine Terminal Operator ("MTO"), as that term is defined in the Shipping Act, 46 U.S.C. § 40102(15), subject to regulation by, and registered as an MTO with, the Commission, MTO Organization No. 019071. (Complaint, CX_00002; Answer, CX_00027).

10. Respondent operates two terminals that are relevant to this dispute: its Atlantic Terminal and its Chesapeake Terminal in Baltimore, MD. (Complaint, CX_00003, CX_00005; Answer, CX_00027-CX_00028).

11. Pursuant to 46 U.S.C. § 40501(f) and 46 C.F.R. § 525.2, Respondent has published a schedule of its rates, regulations, and practices to the public, applicable to Respondent's Atlantic and Chesapeake Terminals titled "APS ATLANTIC & CHESAPEAKE TERMINAL TARIFF NO. 2, 019071-002[.]" (Complaint, CX_00003; Answer, CX_00027).

12. The ocean transportation of cars processed by Respondent at the relevant terminals is arranged between the auto manufacturer and the ocean carrier, not by or between Respondent. (Complaint, CX_00006; Answer, CX_00028).

13. Complainants have contracts to provide stevedoring services with various ocean carriers. (*See*, *e.g*., CX_02062-CX_02256).

B. The Preferred Stevedoring Agreement.

14. On November 30, 2022, Respondent issued an announcement regarding a new, preferred stevedoring arrangement. The November 30, 2022, announcement stated, among other things, that: a. Respondent had selected a "sole stevedoring provider" for Benicia, CA, locations and its Atlantic/Chesapeake location in Baltimore, MD. Regarding the Baltimore location, Respondent selected Ceres Marine Terminal Services ("Ceres") to be its sole stevedoring provider. The announcement stated that each stevedore "will have exclusive rights to perform RO/RO vessel operations at their respective locations beginning January 1st, 2023[,]" that such stevedores "have agreed to honor existing stevedoring agreements currently in place at our locations until expiration. It may be beneficial for our customers to open dialog with both companies to explore a long-term deal[;]" representatives of such stevedores "will be in contact soon to discuss the change in stevedoring service at our locations and to answer any questions you may have; only the designated stevedoring companies would be "licensed to perform stevedoring services" at the Respondent's terminals after December 31, 2022; "[i]f a customer would like to continue to use their current partnership with another stevedoring company, they will be able to do so by paying a $25.00 per unit fee to enter our facility"; and all stevedoring activities performed by another stevedoring company must be "approved by Respondent's COO 14 days before vessel activities." (CX_01359; Complaint, CX_00007-CX_00008; Answer, CX_00029).

15. Prior to making this announcement, beginning in 2021, Respondent's officers considered growing Respondent's business in connection with stevedoring, and ultimately decided to enter into a licensing agreement with existing stevedores. (Brown Dep., CX_00072:2-CX_00073:24; Buben Dep., CX_00354:9-CX_00355:2).

16. Respondent entered into the preferred stevedoring agreement with Ceres. (CX_01328-CX_01341). The terms of the preferred stevedoring agreement are confidential. (*Id*.). But, non-confidential facts about it include that Ceres paid a per/vehicle fee to stevedore vehicles at the Respondent's terminals. (Brown Dep., CX_00092:6-16; RX_68). Complainants characterized the $25/per vehicle access fee Complainants paid as being "much higher" than the access fee that Ceres paid, which is a sufficient description for purposes of this Initial Decision. (*Compare* CX_01329 *with* CX_01751; *see also* Opening Brief, pp. 6, 39). The non-confidential headings in the preferred stevedore agreement indicate that there were indemnification and required insurance provisions. (CX_01328-CX_01341). In addition, Respondent's witnesses testified that the preferred stevedoring agreement contained a dispute resolution provision. (Brown Dep., CX_00283:19-CX_00285:13; Respondent's Answer to Interrogatory Nos. 11 and 17, CX_01508, CX_01510).

17. Respondent considered several stevedores for the exclusive licensing arrangement, including Complainant. (Brown Dep., CX_00074:21-CX_00074:25). Respondent invited

several stevedores to bid on the proposed exclusive licensing agreement. (CX_01306; Brown Dep., CX_00148:9-CX:149-10).

18. Although Respondent initially considered asking Complainants to bid on the exclusive licensing agreement, Respondent ultimately did not ask Complainants to bid. (Buben Dep., CX_00367:9-20; CX_00371:1-13).

19. Several of Respondent's officers and former officers testified that there were safety concerns involving Complainants' operations at Respondent's terminals. (Brown Dep., CX_00149:14-CX_00150:5; Buben Dep., CX_00417:6-CX_00417:13, Taylor, CX_00597:8-22; CX_00642:1-7; Molyneaux Dep., CX_00831:12-19). In particular, Respondent's COO had conversations with longshoremen in Baltimore who raised concerns regarding Complainants' safety record. (Brown Dep., CX_00149:14-CX_00150:5; CX_00151:24-CX_00152:6; Buben Dep., CX_00371:1-13). In addition, witnesses referenced accidents caused by Complainants' drivers that damaged vehicles on Respondent's terminals; one witness testified that accidents were not reported by Complainants. (Buben Dep., CX_00398:9-CX_00399:10; CX_00417:6-CX_00417:18; Molyneaux Dep., CX_00831:12-19). There is evidence in the record of an accident caused by one of Complainants' drivers on April 18, 2023. (CX_01540-CX_01554).

20. Witnesses for Complainant PAC testified that PAC has a safety rating based on objective data that is better than world-class. (Bevilacqua Dep., CX_01250:17-CX_01251:1; Schmidt Dep., CX_01154:12-CX_001154:22).

21. Respondent's officers considered several factors in arriving at a $25/per vehicle access fee for non-preferred stevedores, including capital expenditures, maintenance and upkeep of the terminal, such as snow removal and dredging the berths, and wear and tear on the terminal. (Brown Dep., CX_000082:18-CX_00084:19; Buben Dep: CX_00450:10-CX_00454:14; CX_00457:19-CX_00458:19). Respondent's witnesses testified that non-preferred stevedores were a financial risk, and thus were charged a higher per unit fee than the preferred stevedores, in part, because of the value of the indemnification and insurance requirements, as well as the dispute resolution provision in the preferred stevedore agreement. (Brown Dep., CX_00083:13-CX_00084:1, CX_00274:3-CX_00277:14; Buben Dep., CX_00450:23-CX_00451:4, *see also* Respondent's Answers to Interrogatory Nos. 11 and 17, CX_01508, CX_01510).

22. One of the motivations Respondent cited for developing the preferred stevedore arrangement was efficiency. (Taylor Dep., CX_00683:10-CX_00684:1, Buben Dep., CX_00355:3-15). One witness said: "The reasoning behind it is it made for a more efficient terminal in terms of staging, keeping our -- we didn't have two companies, three companies running over each other. It just -- it just made for a more efficient flow through our terminals. We could manage our terminals better." (Taylor Dep., CX_00683:17-23).

23. The record contains a copy of Respondent's tariff schedule as of April 12, 2023. (CX_01717-CX_01819). The April 12, 2023, tariff schedule contains the following provisions, which are relevant to this matter:

Rule 34 2, Effective 01Jan2023

Access and Use

. . .

(a)(2) Exclusive License for Ro/ro Unloading Services.

(i) Terminal reserves the right to enter into exclusive arrangement [for] the provision of handling services at the Terminal ("Exclusive License").

(ii) After a competitive bidding process, Terminal has granted an Exclusive License to Ceres Terminals, Incorporated ("Service Provider"), a company incorporated under the laws of Delaware, to provide unloading services for all roll-on/roll-off ("Ro/ro") Motor Vehicle cargo at the Terminal.

(iii) Service Provider will provide such Ro/ro unloading services pursuant to direct agreements to be entered between Service Provider and specific recipients of Ro/ro unloading services ("Customer"). If a customer would like to continue to use their current partnership with another stevedoring company, they will be able to do so by paying a $25.00 per unit fee. All stevedoring activities not performed by Ceres must be approved by AMPORTS COO 14 days before vessel activities.

. . .

(c) Compliance: Customer, including its employees, subcontractors and invitees, shall conform with all local, MPA, municipal, county, state and federal laws and regulations applicable to Customers operations at or concerning the Terminal, including without limitation those promulgated by the EPA, OSHA, WISHA, DOT, FMCSA, DHS and/or USCG, and shall be responsible for any violation of the same.

. . .

(g) Damage to Property (Other than cargo): customer shall be responsible for, and shall indemnify and hold Terminal Operator harmless (including legal fees and costs) from and against, all loss/damage to Customers owned/leased equipment and personal property, including all of its owned/leased materials, supplies, tools, equipment vessels, tractors, trucks, motor vehicles, trailers, containers, chassis, flatbeds and other equipment and/or personal property (but not Cargo, the loss/damage of which cargo is addressed elsewhere herein), howsoever caused and even if resulting in whole or part from the negligence (active or passive) or other fault of Terminal Operator. In addition, Customer shall be responsible for, and shall indemnify and hold Terminal Operator harmless (including legal fees and costs) from and against, any loss/damage to the personal property of others at the Terminal, including the personal property of Terminal Operator, which in any way arises out of and/or relates to customers access and/or use of the Terminal or terminal Services.

(h) Personal Injury: Customer assumes responsibility for any bodily/personal injury, illness and/or death of its employees (including those of its subcontractors), and agrees to indemnify and hold Terminal Operator harmless (including legal fees and costs) of and from the same. In addition, Customer assumes responsibility for, and agrees to indemnify and hold Terminal Operator harmless (including legal fees and costs) of and from, any bodily/personal injury, illness and/or death of any other person at the facility which arises out of or is in any way connected with Customers access and/or use of the Terminal or the Services. The foregoing indemnification shall be deemed to include any claim or suit by any employee (present or former) of Customer, and in furtherance thereof Customer waives any immunity from suit, exclusivity of remedy and limitation of liability under any workers compensation act or similar law.

(i) Assumption of Risk: Customer specifically understands, acknowledges and agrees that any and all providing of, access to and/or use of the Terminal and/or the Services of Terminal Operator by or on behalf of Customer shall be at Customers sole risk and expense. In addition to any other types of loss addressed herein, Customer assumes sole responsibility for, and agrees to defend, indemnify and hold Terminal Operator harmless from and against (including legal fees and costs), all other loss, damage, expense, claim, liability, suit, fine and/or penalty of any type or nature whatsoever which in any way arises out of and/or relates to any providing of, access to and/or use of the Terminal and/or the Services of Terminal Operator by or on behalf of Customer, including, without limitation, those respecting any loss/damage to the property of Terminal Operator, Customer or any other as well as those respecting the personal injury, illness and/or death claims of any person, including without limitation of any agent, employee, representative, guest, invitee, vendor and/or subcontractor of Terminal Operator, Customer or any other, howsoever caused and even if resulting in whole or part from the negligence (active or passive) or other legal fault of Terminal Operator. In furtherance of the foregoing, Customer shall waive any immunity from suit, exclusivity of remedy and limitation upon liability that would have otherwise been afforded pursuant to any workers compensation act or similar law

If a customer would like to continue to use their current partnership with another stevedoring company, they will be able to do so by paying a $25.00 per unit fee. All stevedoring activities not performed by Ceres must be approved by AMPORTS COO 14 days before vessel activities

Rule 34 3, Effective 01Feb2021

DEFINITIONS AND ABBREVIATIONS

. . .

CUSTOMER shall mean any vessel, vessel owner, carrier, agent, vessel operator, vehicle, conveyance, consignor, consignee, beneficial Cargo owner, person, Cargo, equipment, chassis, or any other person or entity, including but not limited to the agents, other providers, and other subcontractors (at any level) of any of the foregoing, that uses the Terminal facilities or is provided with, benefits from, or receives any services whatsoever from the Terminal Operator, or any person or business entity who owns or claims an interest in, right to, attachment, or lien regarding any vessel, vessel equipment, equipment, or Cargo.

. . .

Rule 34 10, Effective 01Feb2021

DAMAGE LIABILITY -- FACILITIES

(a) Every Customer or other user of the Terminal, including without limitation every vessel and its agent, owner and operator, shall be jointly and severally responsible to compensate the Terminal in full, without depreciation, for all damage to the Terminal resulting from its use of, including berthing at, the Terminal. Time is of the essence. The user expressly agrees that the Terminal has the right, at the user's expense, to promptly repair or replace, contract for repair or replacement, or otherwise cause to be repaired or replaced any such damage or destruction, and further expressly agrees to be responsible to pay the Terminal, upon demand, the full cost, without depreciation, to repair such damage or destruction, including without limitation, engineering, damage survey, project oversight, administrative and other costs. The Terminal may at its sole discretion, may provide the engineering and other services itself, in which case the cost shall be determined by the Terminal and shall be a minimum of 20 percent of the cost of using outside services. User shall be responsible to pay the invoiced amount, without regard for any right of the user to seek apportionment, contribution or indemnity from a third party.

. . .

Rule 34 11, Effective 01Feb2021

COLLISION LIABILITY INSURANCE

(a) All vessels berthing at the Terminal shall maintain Marine Collision Liability Insurance with limits of at least $3 million for each accident and $5 million policy limits for aggregate operations on an occurrence basis with umbrella liability coverage with a limit of at least $10 million with underwriters, deductibles and other terms satisfactory to the Terminal, and shall provide proof of such insurance acceptable to the Terminal.

(b) The vessel, her owners and operators shall indemnify, defend and hold Terminal harmless (including legal fees and costs) from and against any loss, damage, expense, claim, liability and/or suit resulting from failure of vessel to provide insurance as required and/or resulting from the failure of vessel's such insurance, including without limitation exposure to loss, damage, expense, claim, liability and/or suit which would have been covered had insurances been procured and maintained as required.

(CX_01751-CX_01753; CX_01762-CX_01763).

24. Respondent did not identify any unique benefit that is connected with the $25/per vehicle access fee. In answer to an Interrogatory that asked Respondent to describe the benefits related to the access fee, Respondent wrote:

> Respondent contends that a commercial entity that uses its privately-owned terminal to engage in for-profit activities benefits from access to the terminal properties, as such access is a necessary component of such commercial activities. Such entities also benefit from the provision of necessary related services, including the maintenance, repair, pavement, and improvement of terminal facilities including roadways and lighting, without which a stevedore could not carry out its operations, the provision of terminal security and surveillance systems that promotes the safety and security of the stevedore's personnel and the safety and security of cargo offloaded from the vessels, the provision of weather mitigation activities including snow removal, securing terminal properties against the risks of high winds including missile hazards, and the maintenance of drainage at the terminal, without which a stevedoring entity would not be able to carry out its operations, or would face significant burdens and delays, as well as increased risk to its personnel and risks of losses due to damage to cargo, and administrative services related to monitoring terminal access, tracking cargoes on terminal properties, and monitoring safety and security on the terminal, without which a stevedoring entity would face denial of access or increased costs and burdens on operations.

(Respondent's Answer to Interrogatory No. 20, CX_01510-CX_01511).

C. Correspondence Following the Announcement of the Preferred Stevedoring Agreement.

25. In November and December 2022, several carriers sent letters to Respondent generally complaining about the $25/per vehicle access fee to be paid for using the non-preferred stevedore. In particular, on December 2, 2022, Wallenius Wilhelmsen Ocean sent a letter to Respondent to "register our objections to the announcement in your November 1, 2022 letter . . . ." (CX_01367-CX_01368). On December 20, 2022, MOL (Americas) LLC and Kawasaki Kisen Kaisha, Ltd. sent a letter through counsel to Respondent demanding that Respondent "cease and desist from your unlawful behavior." (CX_01374-CX_01379). On December 29, 2022, Grimaldi Group S.p.A., sent a letter stating that it views the preferred stevedoring agreement "as commercially offensive to our longstanding relationship with Amports." (CX_01371-CX_01373).

26. On December 6, 2022, Complainants' counsel sent a letter to Respondent in response to the Respondent's November 1, 2022, announcement of the preferred stevedoring agreement. The December 6, 2022, letter describes Complainants' understanding that

Respondent had taken, or planned to take, the following actions: Respondent intended to "license" stevedores delivering or receiving cargo at certain of Respondent's terminals; Respondent intended to restrict allegedly "unlicensed" stevedores providing RO/RO stevedoring services to third-party vessels in Baltimore for cargo received from or delivered to Respondent's terminals after December 31, 2022; Respondent was coordinating with other allegedly "licensed" stevedores to interfere with existing stevedoring services relationships and agreements that ocean carriers have with stevedores such as Complainants; and if an ocean carrier failed or declined to change stevedores to a "licensed" stevedore—which in many cases would require an ocean carrier to breach an existing stevedoring agreement—Respondent intended to charge "a $25.00 per unit fee" on each car in order "to enter our facility." (CX_01380-CX_01383; Complaint, CX_00008-CX_00009; Answer, CX_00029). In relevant part, Complainants' December 6, 2022, letter states:

> Virtually every aspect of AMPORTS' actions violate (or if implemented would violate) the Shipping Act under multiple, well established Shipping Act principles. There is no legitimate basis for claiming that the purported "licensing," and a $25 fee for purportedly unlicensed stevedores, is necessary at the Atlantic/Chesapeake sites to "shorten drive times, design staging areas for cargo, and expedite vessel operations." Nor does your letter explain how assessing punitive access fees, interfering with existing stevedoring contracts and reducing competitive stevedoring choices is necessary to achieve such results.
>
> Even if there were a remotely plausible basis for AMPORTS assertions, AMPORTS has not identified the terms and has not made those terms available to similarly situated parties, such as [Ports America]. It is doubtful whether the terms of such contracts even address legitimate transportation distinctions, given that actual stevedoring contracts are between the stevedores and the ocean carriers, not AMPORTS. And whatever the terms or the service actually being provided by AMPORTS to purportedly "licensed" stevedores, or they to AMPORTS, if any at all, the intended charge of $25 per car to access the AMPORTS terminal without a contract is blatantly excessive, both in relation to the cost of providing the mysterious alleged service for access, and in relation to the overall economics of RO/RO stevedoring on a per unit basis.

(CX_01381-CX_01382; Complaint, CX_00009-CX_00010; Answer, CX_00029).

27. On December 29, 2022, three days before the tariff schedule with access fees was to take effect, Respondent responded though counsel to Complainants' December 6, 2022, letter. The Respondent response noted that: "[a]s you might expect, in addition to your letter, AMPORTS, INC. has received inquiries from other affected entities concerning the November 1, 2022[,] announcement advising of preferred stevedoring providers at the AMPORTS' Benicia, CA and Atlantic/Chesapeake, MD facilities;" that Respondent intended to prepare a "comprehensive response" to concerns raised by Complainants and others; and that in the interim Respondent was temporarily suspending "the collection of

the $25 per unit fee proposed to cover the costs associated with the use of other stevedoring companies at the . . . Atlantic/Chesapeake, MD facilities." (CX_02037; *see also* Complaint, CX_00010; Answer, CX_00029).

28. On March 31, 2023, Respondent sent a letter to Complainants stating that:

> Respondent is subject to the Shipping Act as an MTO; represented that the intended purpose of the "preferred stevedore" arrangement and the alternative $25 access fee was to "better optimize its terminal and operations, which it expects will increase the quality and efficiency of service for its vessel operating customers, while lowering costs at its terminals."; claimed that its "preferred stevedore" arrangement and the alternative $25 access fees were justified by three transportation factors: reducing berthing delays caused "when multiple stevedores would be chosen for the unloading of a single vessel[;]" reduction in terminal efficiency occurring "in the presence of an array of stevedores, each with their own equipment that may require storage, and cause congestion on the terminal, along with their own unique approaches to arranging customer vehicles on the terminal, reduced the amount of available yard space[;]" difficulty of identifying responsibility for terminal and cargo damage "[w]hen numerous stevedores are on the terminal at the same time, operating independently within the same terminal areas."; that Respondent undertook a selection process to determine its preferred stevedores, disclosing two of the factors upon which the selections were based: (1) "health and safety track records" and (2) "the ability to ensure sufficient and consistent dockside labor."; asserted that the $25 fee would be collected from "any unlicensed stevedore company for access to AMPORTS' facilities and it is not a charge payable by our carrier customers." Respondent stated that "We appreciate that the use of the term "they" in the Announcement may have been somewhat ambiguous[;]" stated that it would commence collection beginning on April 10, 2023; and asserted that "[w]e are advised that Ports America has accrued approximately USD $1.2 million in fees since January 1, 2023." Respondent concluded its letter stating: "Should Ports America or MTCE be interested in bidding to be AMPORTS' preferred stevedore provider in the future, for which it appears they may be well suited, AMPORTS will ensure that both entities are included in the next Request for Quote round. In connection with such future evaluations, AMPORTS' would be pleased to receive PAC and MTCE's safety records and any efficiency metrics available."

(CX_01520-CX_01524; Complaint, CX_00011-CX_00012; Answer, CX_00029-CX_00030).

29. On April 13, 2023, Complainants responded to Respondent's letter stating:

> In the interests of time, and in light of your statement in your letter that AMPORTS intends to start its previously suspended "collection of the $25

> per unit fee which was the subject of the Announcement," we are specifically writing to make it clear that (1) we reject AMPORTS assertion of the purported access fee; (2) we reject AMPORTS assertion that it has a legal basis upon which to assess or collect such a fee from a stevedore in Baltimore, specifically including [Complainants], and (3) we intend to continue providing stevedoring services to ocean carrier customers loading and unloading at AMPORTS facilitates at our discretion and expressly without agreeing to AMPORTS' assessment of its proposed $25/unit fees and without paying any such fees. . . .
>
> We also reject any claim that [Complainants], or anyone, owes AMPORTS for any such $25 fee for any period prior to your recent letters, including with regard to the perplexing statement in your March 31, 2023 letter that "[w]e are advised that Ports America has accrued approximately USD $1.2 million in fees since January 1, 2023." First, you admitted that AMPORTS "suspended" its proposed fee from the time of your December 29, 2022 letter until the time stated in your March 31, 2023 letter, which in the case of [Complainants], was April 10, 2023. Second, even if AMPORTS had not suspended the proposed January 1, 2023 start of its unlawful fee on December 29, 2022, [Complainants] clearly rejected the lawfulness of the proposed fee on December 6, 2022, and [Complainants] continue to reject the lawfulness of the proposed fee through and including today. AMPORTS' unilateral assertion that it has assessed, or intends to assess, the unlawful fee on [Complainants] does not constitute a legal basis to actually assess it or collect it from [Complainants].

(CX_02038-CX_02039; *see also* Complaint, CX_00013-CX_00014; Answer, CX_00030).

30. On April 7, 2023, Complainants' employee emailed at least two carriers asking each carrier to accept the $25/per vehicle fee as a pass through. (CX_01572-CX_01575).

31. On April 11, 2023, one of Complainants' customers, Grimaldi/ACL, responded that it is:

> . . . not in the position to risk absorbing these 25$ per unit for the time being. We have no options left than working the forthcoming few vessels with the stevedores imposed by Amports meanwhile we will approach our customer to look for a longterm solution allowing to still work with POA as this remains our goal.

(CX_01573).

32. An email chain from April 11 and 12, 2023, shows that Complainants engaged in negotiations with MOL Mol Ace, though the results are confidential. (CX_01577).

33. Complainants stevedored a substantial number of vehicles from January 1, 2023, through March 31, 2023, thereby incurring $1.277 million in access fees. (CX_01491; Complaint, CX_00014, Attachment B; Answer, CX_00030).

34. Respondent sent three invoices dated April 17, 2023, to Complainants for each of the first three months of 2023, totalling $1.277 million. (Complaint, CX_00014, Attachment B; Answer, CX_00030).

35. On May 23, 2023, and again on July 26, 2023, Respondent's employee emailed Complainants regarding the status of payment of invoices. On July 28, 2023, Complainants' employee responded stating that Complainants reject the invoices, asserting that they "are not valid" and that Complainants have no "obligation to pay the invoiced charges." (CX_01519).

36. Complainants submitted confidential spreadsheets showing the volume stevedored by PAC and MTCE at the "Fairfield" terminals, which included the Respondent's terminals, from 2019 through March 2024. It is sufficient to note that Complainants lost nearly all of their volume for some customers, Complainants lost approximately half of their volume vis-à-vis other customers, and Complainants lost a relatively small percent of their volume for other customers, namely the customers with whom they engaged in negotiations. (CX_02040-CX_02043; *see also* CX_01577).

37. On November 10, 2023, Complainants MTCE and PAC each provided answers and objections to Respondent's interrogatories. (CX_01525-CX_01539; CX_01555-CX_01569). Complainants' answers regarding damages have been designated as confidential. Without going into detail, it is sufficient to note that each Complainant identified a loss in business from a customer (*e.g.*, X% of customer Y's business was lost due to Respondent's actions). Each Complainant also identified an average volume of automobiles stevedored at Respondent's terminals in 2021-2022, as well as the estimated 2023 volume. In general, there was a significant decrease in automobiles stevedored for each Complainant. Each Complainant also calculated the approximate earnings before interest, taxes, depreciation, and amortization ("EBITDA") value for the lost volume. Neither Complainant provided an explanation regarding how the EBITDA value was calculated. (CX_01532; CX_01562).

38. On April 29, 2024, Respondent's counsel deposed PAC's corporate representative. (Schmidt Dep., CX_01039-CX_01200). The witness provided testimony regarding lost volumes for both PAC and MTCE for 2023 and 2024, as well as lost EBITDA for both PAC and MTCE. (Schmidt Dep., CX_01160:4-CX_01161:19). The witness was asked the following questions, and provided the following answers:

> Q Mr. Schmidt, do volumes between carriers vary from year to year?
> A Yes.
> Q What is the variance in those fluctuations?
> A It's different each year. It depends on their business and their scope of work and contracts that they're awarded.

(Schmidt Dep., CX_01166:12-19). The witness was also asked about conversations he had with representatives of various carriers, some of which was designated as confidential. (*See generally* Schmidt Dep., CX_01114-CX_01144). It is sufficient to note that the witness did not testify that he was told directly by any carrier, other than via email from Grimaldi (*see* CX_01573), that the carrier was taking business to another stevedore due to the Respondent's access fees. (*See* Schmidt Dep., CX_01114-CX_01144). The witness also testified that Complainants were able to enter into an arrangement with one of its carrier clients regarding the access fees. (Schmidt Dep., CX_01130:9-CX_01137:5).

D. Terminal Access Charge Effective June 1, 2024.

39. Effective May 15, 2024, Rule 34 2(a)(2) of Respondent's tariff schedule was amended as follows:

> (a)(2) Ro/ro Unloading and Loading Services.
>
> (i) Terminal does not currently provide Ro/ro unloading and loading services (i.e. stevedoring services) at the Terminal Vessel-related Customers may obtain such services with stevedoring service providers.
>
> (ii) Terminal Operator reserves the right to require service providers seeking to provide stevedoring services at the Terminal to be approved for such operations by Terminal Operator. In considering whether to approve a service provider for stevedoring operations at the Terminal, Terminal Operator may consider Customer requests, the service providers insurance arrangements, management and administrative performance, and such other factors as Terminal Operator deems relevant. Terminal Operators approval shall also be subject to the service providers express acknowledgement of the indemnification terms set out in this Tariff.
>
> (iii) Terminal Operator reserves the right to impose Terminal Access Charges on stevedoring services providers in such amounts as Terminal Operator deems appropriate upon 10 days' prior notice.
>
> (iv) Terminal Operator reserves the right to enter into exclusive arrangements for the provision of stevedoring services at the Terminal ("Exclusive License").

(CX_01854).

40. Respondent issued an announcement on May 24, 2024, indicating that it was discontinuing its exclusive stevedoring program and replacing it with uniform tariff-based requirements and standards and a uniform terminal access fee applicable to all service providers. (CX_01923).

41. On May 24, 2024, Respondent submitted a new version of Rule 34(a)(2) for publication effective June 1, 2024.

> (a)(2) Ro/ro Unloading and Loading Services.
>
> (i) Terminal does not currently provide Ro/ro unloading and loading services (i.e. stevedoring services) at the Terminal. Vessel-related Customers may obtain such services pursuant to direct agreements with stevedoring service providers.
>
> (ii) Terminal Operator reserves the right to require stevedoring service providers seeking to provide stevedoring services at the Terminal to be approved for such operations by Terminal Operator. In considering whether to approve a stevedoring service provider for stevedoring operations at the Terminal, Terminal Operator may consider Customer requests, the stevedoring service providers insurance arrangements, its safety, management and administrative performance, and such other factors as Terminal Operator deems relevant. Terminal Operators approval shall also be subject to the stevedoring service providers express acknowledgement and acceptance of the indemnification terms set out in this Tariff applicable to the stevedoring service provider as a Customer under this Tariff.
>
> (iii) Stevedoring service providers will be assessed an access fee of ten dollars ($10.00) for each import or export vehicle handled by such stevedoring service provider on the Terminal. Payment of the access fee is due within 15 days of receipt of the invoice.
>
> (iv) Terminal Operator reserves the right to enter into exclusive arrangements for the provision of stevedoring services at the Terminal ("Exclusive License").
>
> (v) Failure by a stevedoring service provider to: acknowledge and accept the indemnification terms in section (a)(2)(ii), pay when due the access fee in section (a)(2)(iii), comply with the further provisions of this Rule 34-2, including without limitation sections (c), (d), (e), (g), (h), and (j), or failure to comply with the stevedoring service provider insurance requirements of this Tariff may result in denial of access to the Terminal.

(CX_01924-CX_01927).

42. The published tariff schedule, effective June 1, 2024, had the language described in paragraph 41 above. (CX_01962).

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Burden of Proof.

To prevail in a proceeding brought to enforce the Shipping Act, "a complainant has the burden of proving by a preponderance of the evidence that the respondent violated the Act. In general, the burden of proof is on the complainant." (*Port Elizabeth Terminal & Warehouse Corp. v. The Port Authority of New York and New Jersey*, 1 F.M.C.2d 264, Dkt. No. 17-07, 2019 WL 1376529, at *13 (ALJ Mar. 25, 2019); *see also* 5 U.S.C. § 556(d)). If the complainant makes out a *prima facie* case of unreasonableness, the burden of refuting that case shifts to the respondent. (*River Parishes Company, Inc. v. Ormet Primary Aluminum Corporation*, Dkt. 96-06, 1999 WL 125991, at *23 (FMC, Feb. 3, 1999) ("*RIVCO*")).

B. Alleged Violation of 46 U.S.C. § 41102(c).

Complainants advance four arguments as to how Respondent violated § 41102(c). First, Complainants argue that the $25/per vehicle access fee was unreasonable. Second, Complainants assert that the $10/per vehicle access charge effective June 1, 2024, is also unreasonable. Third, Complainants argue that the tariff schedule's language does not impose a $25/per vehicle access fee on stevedores, and thus there is no basis for Respondent to charge Complainants. Fourth, Complainants aver that Respondent knew that the preferred stevedoring arrangement would interfere with Complainants' business relations with its carrier customers. I address each argument in turn below.

1. The $25/Per Vehicle Access Fee Was Unjust and Unreasonable.

Complainants allege that the preferred stevedoring agreement, which imposes a $25/per vehicle access fee on Complainants, violates 46 U.S.C. § 41102(c). Complainants argue that the access fee charged to the non-preferred stevedores was unreasonably and unjustifiably "much higher" than the access fee charged to the preferred stevedore. Complainants also argue that the $25/per vehicle access fee for non-preferred stevedores is not reasonably related to any benefit Respondent confers on Complainants. (Opening Brief, pp. 8-24).

Section 41102(c) of the Shipping Act provides that an MTO "may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling storing or delivering property." (46 U.S.C. § 41102(c)).

By regulation, the Commission identified the following five elements of a claim under § 41102(c):

> (a) the respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary; (b) the claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis; (c) the practice or regulation relates to or is connected with receiving, handling, storing or delivering property; (d) the practice or regulation is unjust or unreasonable; and (e) the practice proximately caused the claimed loss.

(46 C.F.R. § 545.4).

a. Complainants' Prima Facie Case Under § 41102(c).

I find that Complainants satisfied the first three elements of a claim under § 41102(c). First, Respondent admitted in its answer that it is an MTO and that it operates the two terminals at issue. (Complaint, CX_00003, CX_00005; Answer, CX_00027-CX_00028). Second, the $25/per vehicle fee was normal, customary and continuous – it was in the Respondent's tariff schedule effective January 1, 2023, through May 15, 2024, and Respondent invoiced Complainants $1.277 million dollars for the first three months of 2023. (CX_01751-CX_01753; Complaint, CX_00014; Answer, CX_00030). Third, the $25/per vehicle fee clearly relates to or is connected with the receiving, handling, storing or delivering property. Indeed, the complained-of practice relates to the stevedoring of cargo. (CX_01751-CX_01753).

The bulk of the dispute relates to the fourth element of a § 41102(c) violation, *i.e.*, whether the practice is unjust or unreasonable. In general, as it relates to terminal practices, the test for reasonableness is: "'that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view.'" (*Ceres Marine Terminal v. MD Port Admin.*, 27 S.R.R. 1251, 1997 WL 35281266, *38 (FMC 1997), *aff'd in part, rev'd in part on other grounds sub nom. MD Port Admin. v. Federal Maritime Comm'n*, 164 F.3d 624, 1998 WL 716035 (4th Cir. Oct. 13, 1998) ("*CMT*") (quoting *West Gulf Maritime Ass'n v. Port of Houston*, 21 F.M.C. 244, 248 (FMC 1978)). "This test remains the benchmark for assessing whether terminal practices are unjust or unreasonable under § 41102(c)." (*Intermodal Motor Carriers Conference v. OCEMA,* Dkt. 20-14, 2024 WL 641501, *20 (FMC, Feb. 13, 2024) ("*IMCC*")).

Respondent argues that the question of unreasonableness should not be reached. Respondent argues that Complainants failed to demonstrate that the stevedoring agreement was *prima facie* unreasonable. Respondent argues that to make a *prima facie* showing of unreasonableness, Complainants must first demonstrate that the exclusive stevedoring agreement at issue had an anticompetitive effect on the relevant marketplace, which would be the entire Port of Baltimore, and not just the terminals that were affected by the exclusive stevedoring agreement. (Response, pp. 12-22).

For support, Respondent primarily relies on three cases: *All Marine Moorings, Inc. v. Ito Corp. of Baltimore*, 27 S.R.R. 539, 1996 WL 264720 (FMC, May 15, 1996); *RIVCO*, 1999 WL 125991; and *Marine Repair Servs. of MD, Inc. v. Ports America Chesapeake, LLC,* 2013 WL 9808672, Dkt. No. 11-11 (ALJ, Jan. 10, 2013). In each of these three cases, although the respondent disallowed the complainant to provide a service, the disallowance was found to not violate the Shipping Act because the disallowance did not affect the complainant's ability to compete in the market as a whole.

In *All Marine,* the complainant, a provider of line handling services, complained of an unreasonable preference where the respondent, who leased a terminal from the port administration, was the sole provider of line handling services at its leased terminal. (*All Marine*, 1996 WL 264720, at *1-*2). The Commission upheld the ALJ's dismissal of complainant's unreasonable preference claim. It concluded that the appropriate relevant market for determining the reasonableness of the respondent's behavior was the Port of Baltimore, not just the terminal at issue. Moreover, the Commission found that the respondent's conduct had a minimal impact on the whole market. (*Id*., at *13-*14).

Similarly, in *RIVCO*, the complainant alleged that an exclusive service agreement between a terminal operator and one of the complainant's competitors for tug services was unreasonably prejudicial because it shut complainant out of the market for providing tug services at one terminal on the Mississippi River. (*RIVCO*, 1999 WL 125991, at *4). The Commission affirmed the ALJ's holding that the complainant failed to make a *prima facie* case of unreasonableness because the complainant failed to show that the relevant market was limited only to the terminal at issue or other, similarly situated terminals. (*Id*., at *26). In any event, complainant failed to show that the exclusive agreement at one terminal affected the otherwise competitive market for tug services as a whole. (*Id*., at *27-*29).

In *Marine Repair*, the respondent, who leased a terminal from the port administration and exclusively provided stevedoring services at the leased terminal, allegedly unfairly prejudiced the complainant, who had previously performed maintenance and repair services ("M&R") for refrigerated containers at the same terminal. Respondent allegedly limited complainant's access to the leased terminal and tied M&R services at the leased terminal to stevedoring services. (*Marine Repair*, 2013 WL 9808672, at *2-*7). The ALJ dismissed the complaint due to complainant's failure to make a *prima facie* case, noting that in exclusive arrangement cases, "the Commission must first determine the relevant market and then assess the effect of the respondent's practices on competition in that market." (*Id*., at *31). The ALJ concluded that the relevant market was not the leased terminal, but the entire port, and that despite any alleged anticompetitive behavior by the respondent, competition for M&R services still exists in the relevant market as a whole. (*Id*., at *32-*39).

These cases are distinguishable. They all involve a challenge to an exclusive service agreement. The preferred stevedoring agreement announced November 1, 2022, was not an exclusive services agreement. Instead, the preferred stevedore agreement still permitted Complainants to operate at Respondent's terminal, albeit for a "much higher" access fee. Moreover, Complainants do not argue that the preferred stevedore arrangement Respondent established violates the Shipping Act, nor do Complainants rely on cases involving exclusive arrangements. (Complaint, CX_00016; Opposition to Motion to Dismiss, pp. 7-8; Reply, pp. 22-23). Instead, Complainants argue that Respondent imposed a $25/per vehicle access fee on Complainants that is "much higher" than the access fee charged to a similarly situated stevedore, but Respondent conferred no additional benefits on Complainants for the higher fee.

There are many cases where a complainant was able to demonstrate a violation of the Shipping Act due to unjustified disparate treatment without the necessity of showing how the respondent's conduct affected the relevant market. For example, in *Plaquemines Port v. FMC*, 838 F.2d 536 (D.C. Cir. 1988), the D.C. Circuit affirmed the commission's conclusion that the complainant showed a'; violation of the Shipping Act where the port did not collect fees from smaller vessels and privately owned docks and wharves, even though the evidence showed that the administrative burden in collecting fees from smaller vessels was not too great, and the private entities received benefit from the port's fire services. In another example, in *CMT*, the Commission upheld the ALJ's finding of a Shipping Act violation where the Maryland Port Administration ("MPA") gave an ocean carrier more favorable lease terms than a stevedore, finding that the lessee's respective status alone as a carrier or stevedore to be insufficient justification for the different treatment. (*See generally CMT*, 1997 WL 35281266). More cases are discussed below. Therefore, it is not necessary for Complainants to show that Respondent's conduct affected the relevant market for Complainants to make a *prima facie* showing that Respondent violated § 41102(c).

Returning to Complainants' argument, Complainants assert that they were charged a "much higher" access fee than the preferred stevedore for no additional benefit. In a case where fees were imposed unevenly, the Supreme Court provided instruction that is helpful to the present case. In *Volkswagenswerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261 (1968) ("*VWA*"), an association of carriers, stevedores, and terminal operators entered into a collective bargaining agreement with the longshoremen's union that, among other things, created a fund for the union. (*VWA*, 390 U.S. at 263-64). To raise money for the fund, the association imposed a fee based on tonnage handled. (*Id*., at 264-65). But, the association applied a different, and much higher, formula for assessing a fee for automobiles. (*Id.,* at 265-66). In the resulting litigation, the Supreme Court ultimately found that the fee was unenforceable because the fee agreement was not properly filed with the Commission. (*Id*., at 268-78). The Court continued, stating that in the event the fee agreement is filed, and the Commission had to consider whether it violated Section 17 of the Shipping Act of 1916 (the predecessor to § 41102(c)), "[t]he question under [§]17 is not whether the petitioner has received some substantial benefit as the result of the Mech Fund assessment, but whether the correlation of that benefit to the charges imposed is reasonable." (*Id*., at 278-82). The Supreme Court continued that the proper inquiry is ". . . whether the charge levied is reasonably related to the service rendered." (*Id*., at 282).

The *VWA* test was rearticulated in *Baton Rouge Marine Contractors, Inc. v. Federal Maritime Comm'n*, 655 F.2d 1210 (D.C. Cir. 1981) ("*BARMA*"). There, a stevedore challenged a fee imposed on all stevedores by a terminal operator as being unreasonable under § 17, which, after a protracted history, the Commission concluded was reasonable. (*BARMA*, 655 F.2d at 1211-15). The D.C. Circuit remanded the matter to the Commission to determine the relative benefits the stevedore received vis-à-vis others, such as the carriers. (*Id*., at 1217-18). Discussing *VWA*, the D.C. Circuit stated: ". . . , if the challenger pays more than other parties pay, for fewer benefits than other parties receive, then the charge is unreasonable under § 17." (*Id*., at 1217).

In *Louis Dreyfus Corp. v Plaquemines Port*, 25 F.M.C. 59 (1982), the Commission applied the guidance from the Supreme Court's decision in *VWA*. There, the port imposed fees only on vessels over a certain size, thereby essentially exempting smaller vessels. (*Louis Dreyfus*, 25 F.M.C. at 60). The Commission stated that the complainants, who paid a substantial portion of the fees the port collected, made a *prima facie* showing of a violation of § 17 of the 1916 Act. Relying on *VWA*, the Commission stated that charges imposed on complainants did not bear a reasonable relationship to the comparative benefit obtained: the complainants did not receive benefit from the port proportionate to the costs allocated to them, whereas other users received the same benefits but did not have to pay the fee. (*Id*., at 68-69).

In general, a party's operating expenses cannot be allocated solely to a limited number of beneficiaries. In *Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist*., 27 S.R.R. 1123 (FMC 1997), railway switching charges were imposed on a stevedore. (*Flanagan Shipping*, 27 S.R.R. at 1125). The Commission rejected an argument that the stevedore benefits from the switching since the port would be inoperative but for the switching. (*Id*., at 1131-32). The Commission, citing *VWA*, stated a "substantial, correctly allocable benefit from rail switching has not been shown to flow to the stevedore; absent such a benefit, no charge can be reasonable." (*Id*., at 1132).

In this case, the key fact is that the Complainants were charged a $25/per vehicle fee, which is "much higher" than the fee charged the preferred stevedore. (*Compare* CX_01329 *with* CX_01751; *see also* Opening Brief, pp. 6, 39). Moreover, it appears that Complainants received no additional benefit for the higher fees. The tariff schedule identifies no additional benefits that the non-preferred stevedores receive for the much higher fee. (CX_01751-CX_01753; CX_01762-CX_01763). Moreover, in answer to an Interrogatory that asks about benefits received for the access fee, Respondent stated, in sum, that the non-preferred stevedore would receive access to the terminal, as well as the benefits of Respondent's efforts to maintain and operate the terminal. (CX_01510-CX_01511). But, these are benefits that the preferred stevedore would also receive without having to pay the "much higher" access fee. In short, Complainants were charged a much higher fee but received no more benefits than the preferred stevedore. (*See BARMA*, 665 F.2d at 1217) (". . ., if the challenger pays more than other parties pay, for fewer benefits than other parties receive, then the charge is unreasonable."). Thus, Respondent's practice appears to be unjust and unreasonable.

Returning to the elements of a § 41102(c) claim, the final element is proximate causation. (46 C.F.R. § 545.4(e)). This element is satisfied. Respondent sent invoices to Complainants for stevedoring vehicles during the first three months of 2023 that are based on the $25/per vehicle access fee, though Complainants have refused to pay the invoices. (CX_01491; Complaint, CX_00014; Answer, CX_00030; CX_01519). Nevertheless, it is more likely than not that the "much higher" access fee resulted in higher invoices than Complainants would have received had the Complainants been charged the same access fee as the preferred stevedore.

I find that Complainants have made a *prima facie* case of an unjust and unreasonable shipping practice in violation of § 41102(c). Therefore, the burden of proof shifts to the Respondent to justify the *prima facie* unjust and unreasonable practice. (*RIVCO*, 1999 WL 125991, at *23).

b. Respondent's Justifications.

Respondent advanced three justifications for the higher access fee imposed on the non-preferred stevedore. First, the higher fee serves the purpose of increased efficiency. Second, it serves the purpose of increased safety. And third, the higher access fee is justified by the increased financial risk of permitting the non-preferred stevedore to access the terminal. For the reasons discussed, however, I find that the practice of charging a higher fee to the non-preferred stevedore is not reasonably related, fit, and appropriate to any of these ends. (*See, e.g., CMT*, 1997 WL 35281266, *38 (quoting *WGMA*, 21 F.M.C. at 248) (noting that the benchmark test for reasonableness is whether the practice is "'otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view.'")).

Respondent's first justification is efficiency. There is evidence in the record that Respondent's personnel initially considered the stevedoring agreement to bolster efficiency, or quality. (Taylor Dep., CX_00683:10-CX_00684:1, Buben Dep., CX_00355:3-15). As Respondent's former CEO phrased it: "The reasoning behind it is it made for a more efficient terminal in terms of staging, keeping our -- we didn't have two companies, three companies running over each other. It just -- it just made for a more efficient flow through our terminals. We could manage our terminals better." (Taylor Dep., CX_00683:17-23).

In general, efficiency is a valid goal. (*See* 46 U.S.C. § 40101(2) ("The purposes of this part are to – . . . (b) ensure an efficient . . . transportation system . . . .")). Nevertheless, the "much higher" fee charged to the non-preferred stevedore does not achieve that goal because it allowed Complainants to continue to operate at the Respondent's terminal. In fact, the tariff schedule implementing the preferred stevedoring agreement specifically contemplates that a carrier may continue to use its own stevedore, albeit at an increased fee. (*See, e.g.*, CX_01751 ("If a customer would like to continue to use their current partnership with another stevedoring company, they will be able to do so only by paying a $25.00 per unit fee.")). Indeed, there is no question Complainants continued to operate at Respondent's terminals. Respondent sent $1.277 million in invoices to Complainants because Complainants moved a substantial number of vehicles in the first three months of 2023. (*See* Complaint, CX_00014, Attachment B; Answer, CX_00030; *see also* CX_01491). Moreover, even though Complainant alleges a loss of business at the terminals, Complainants did not lose all their business at the terminals. (*See, e.g.*, CX_02040-CX_02043). Thus, if the goal was to make the terminals more efficient by limiting the number of stevedores operating at the terminals, then the preferred stevedoring agreement, and accompanying terminal schedule, did not accomplish that goal. In fact, the terminal schedule was drafted in a way that did not actually limit access to the terminal. In short, the higher fee charged to the non-preferred stevedores does not accomplish the goal of efficiency.

Respondent's second justification is safety. There is evidence in the record that Respondent selected a stevedore, in part, based on the stevedore's safety record. (Brown Dep., CX_00075:21-CX_00076:22). In addition, there is some testimony in the record regarding Respondent's perception of Complainants' safety record. For example, one of Respondent's officers heard that Complainants had a poor reputation for safety. (Brown Dep., CX_00149:14-CX_00150:2; CX_00151:24-CX_00152:6; Buben Dep., CX_00371:1-13). There is testimony about incidents that Complainants did not report. (Buben Dep., CX_00417:6-CX_00417:18). There is also evidence in the record of accidents that happened in 2023, after the November 1, 2022, preferred stevedoring agreement was announced. (CX_01540-CX_01554).

Safety is a valid goal. But again, the higher access fee imposed on Complainants does not achieve that goal. As noted above, despite the higher access fee, Complainants continued to operate on Respondent's terminals. Indeed, the record contains reports of an accident in April 2023 involving one of Complainants' drivers on Respondent's terminal. (CX_01540-CX_01554). Therefore, the higher access fee does not achieve the safety goal.

Respondent's third justification for the higher fee is the financial risk of continuing to permit the non-preferred stevedore to operate at its terminals. The preferred stevedore agreement contains indemnity, insurance and dispute resolution agreements. (CX_01328-CX_01341; Taylor Dep., CX_00683:10-CX_00684:1, Buben Dep., CX_00355:3-15; Respondent's Answer to Interrogatory Nos. 11 and 17, CX_01508, CX_01510). Respondent asserted that non-preferred stevedores pose a financial risk because they did not sign an agreement with indemnity and insurance requirements, as well as a dispute resolution clause. (Brown Dep., CX_00083:13-CX_00084:1, CX_00274:3-CX_00277:14; Buben Dep., CX_00450:23-CX_00451:4, *see also*

Respondent's Answers to Interrogatory Nos. 11 and 17, CX_01508, CX_01510). I assume, without deciding, that offsetting increased financial risk may be a reason to justify charging one stevedore a higher fee than another.

Complainants respond first by asserting that Respondent's tariff schedule already contains indemnity provisions. I agree. Complainants are subject to the indemnification provisions in the tariff schedule. (*See* 46 U.S.C. § 40501(f) ("Any such schedule made available to the public is enforceable by an appropriate court as an implied contract without proof of actual knowledge of its provisions.")). The tariff schedule in effect from January 1, 2023, through May 15, 2024, provides that "customers" shall indemnify Respondent for damage to property other than cargo and personal injury, customers assume the risk of working on Respondent's terminals, and anyone using the Terminal is responsible for damage to the terminal. (*See* CX_01751-52, CX_01762). "Customer" is defined broadly essentially to include anyone who uses the terminal.[5] (CX_01753). Thus, Complainants are "customers" subject to the indemnification provisions. Because Complainants are subject to the indemnification provisions of the tariff schedule, Respondent cannot rely on a Complainants' lack of indemnification obligation to justify a higher fee charged to the non-preferred stevedore.

Complainants assert that the tariff schedule requires Complainants to carry insurance. Complainants argue that the tariff schedule requires that customers comply with all laws and regulations, including from the Maryland Port Authority. In turn, Complainant argues that MPA Schedule 23 requires insurance. (Opening Brief, pp. 19-20 n.5). I do not agree with Complainants' analysis, however. The MPA schedule appears to be limited in scope to terminals and facilities owned by MPA, such as the Fairfield Terminal, which neighbors Respondent's privately owned terminals.[6] (*See, e.g.*, Molyneaux Dep., CX_00845:25-CX_000846:2) ("Fairfield Terminal is owned by the Maryland Port Authority . . . ."). The only other insurance requirement in the tariff schedule relates to vessels berthing at the terminals. (CX_01763). Therefore, nothing in the tariff schedule appears to require Complainants, the non-preferred stevedore, to have insurance.

Nevertheless, I find that the insurance requirement in the preferred stevedoring agreement does not justify the "much higher" access fee charged to the non-preferred stevedore. As noted above, Complainants have indemnification obligations vis-à-vis Respondent per the tariff schedule. Moreover, because Complainants and Ceres are the only stevedores operating at the Respondent's terminals, Complainants are the only realistically foreseeable non-preferred stevedore who would operate at Respondent's terminals. Thus, Complainants would almost certainly be the only non-preferred stevedore who could cause an injury to a third party for which Respondent might be held liable. But, even without insurance, it appears that

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[5] Customer is defined in the tariff to mean any: "vessel, vessel owner, carrier, agent, vessel operator, vehicle, conveyance, consignor, consignee, beneficial Cargo owner, person, Cargo, equipment, chassis, or any other person or entity, including but not limited to the agent, other providers, and other subcontractors (at any level) of any of the foregoing, that uses the Terminal facilities…."

[6] *See* MPAScheduleNo23FinalCoverTOC12-04-2017.pdf (last visited December 16, 2024), pp. 6-7.

Complainants would be able to satisfy its indemnification obligations to Respondent. Indeed, Respondent argues that Complainants collectively are a large stevedore, with operations at several terminals within the Port of Baltimore, as well as at many other ports. Respondent even goes so far as to characterize Complainants as a "Goliath[.]" Therefore, Respondent cannot persuasively justify charging a "much higher" access fee to Complainants because the Complainants do not have an obligation to provide insurance to Respondent.

The final justification for charging Complainants a much higher access is that the preferred stevedore had a dispute resolution mechanism written into its agreement. I appreciate the general desire to avoid litigation, and thus a dispute resolution mechanism may have value. The value of such a mechanism is unclear, however. Parties with a dispute do not necessarily need a contractual provision to come to a mutually agreeable resolution. Conversely, a contractual dispute resolution clause does not guarantee litigation avoidance.

In short, I am not persuaded that the higher access fee is justified by the financial risk to Respondent. Complainants are subject to indemnification requirements; the lack of any insurance requirement is likely mitigated by the size of Complainants; and the absence of a dispute resolution mechanism between Complainants and Respondent does not appear to justify the "much higher" access fee.

Because the higher access fee imposed on the non-preferred stevedore does not appear to be reasonably related, fit and appropriate to the reasons given for the preferred stevedoring agreement, I find that Respondent has not carried its burden of proof to refute Complainants' *prima facie* case. I find that Complainants have demonstrated that the $25/per vehicle access fee imposed by Respondent on the non-preferred stevedores is unjust and unreasonable under § 41102(c).

2. The $10/Per Vehicle Access Charge Effective June 1, 2024.

Complainants also argue that the $10/per vehicle access charge assessed on all stevedores effective June 1, 2024, is also unreasonable under § 41102(c). Complainants argue that the Respondent failed to substantiate the basis for the charge, and also failed to provide sufficient notice of the charge imposition. (Opening Brief, pp. 24-28).

This issue is not properly before me. Complainants did not seek leave to amend their complaint. In general, amendments are allowed in the discretion of the Commission or presiding officer, but "[n]o amendment will be allowed that would broaden the issues, without opportunity to reply to such amended pleading and to prepare for the broadened issues." (46 C.F.R. § 502.66(a)).

Here, the Complainants are attempting to broaden the issues without giving Respondent an opportunity to respond and prepare a defense. Complainants, who filed the Complaint in May 2023, are broadening the scope of the litigation by making allegations and seeking an order related to a policy whose effective date was June 1, 2024, approximately a year after the Complaint was filed. The parties engaged in no discovery about the policy effective June 1, 2024. Indeed, discovery ended before the June 1, 2024, policy was announced in May 2024; fact discovery was completed March 15, 2024, and depositions were all completed by April 29, 2024. (CX_01201; *see also* Mot. Compel Order, p. 5).

Moreover, despite some similarities and the relationship between the two policies, the policy effective June 1, 2024, is materially different from the preferred stevedoring agreement that is the subject of the Complaint. I acknowledge that in granting the Emergency Motion, Judge Chintella indicated that the issue appeared to be relevant because Complainants described the impact of the access charge as continuing, and because Respondent asserted that it altered its access charge in response to this matter. (Order re: Emergency Mot., p. 1). I also acknowledge that Complainants argue that the $10/per vehicle access charge suffers from the same defects as the $25/per vehicle access fee, *i.e.*, the fee levied is not reasonably related to the service rendered. (*See, e.g., VWA,* 390 U.S. at 282). Nevertheless, the two policies are substantially different because the preferred stevedore agreement imposed different access fees on different stevedores. Indeed, the difference in access fee is a central allegation in both the first and second Counts of the Complaint. (*See* Complaint, CX_00016, CX_00018-CX_00021). Because of that difference, I find that the issue of the $10/per vehicle access charge effective June 1, 2024, is not properly before me.

Even if the $10/per vehicle access charge were properly before me, Complainants' arguments for why it is unreasonable are not persuasive.[7] First, Complainants argue Respondent failed to substantiate the access charge for any amount, asserting that the charge represents an attempt by Respondent to recover general capital expenditures without conferring new benefits on stevedores. (Opening Brief, pp. 25-26). All of the cases that Complainants cite for support, however, all involve a situation where one party or group was singled out or was made to bear a significantly higher share of costs than others. (*See VWA*, 390 U.S. at 266 (complainant auto carrier had to pay 10 times as much for automobiles than other cargo); *Louis Dreyfus*, 25 F.M.C. at 60 (only ships over 100 feet or 500 tons were required to pay fees); *Flanagan Shipping*, 27 S.R.R. at 1125 (only stevedore was required to pay fees related to railroad switching); *CMT*, 1997 WL 35181266, at *39 ("Ceres and Maersk used the Port's facilities for the same purpose but the rates assessed Ceres for the same services are excessive.")).[8] Here, the $10/per vehicle charge is assessed against all stevedores. Without more, Complainants' argument fails to carry

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[7] The first three elements of a claim under § 41102(c) (*see* 545 C.F.R. § 4) are met vis-à-vis the flat $10/per vehicle access charge that was effective June 1, 2024: Respondent is an MTO; the $10/per vehicle access charge constitutes a practice; and the charge is related to cargo handling. The fourth element is discussed in the main text and is not satisfied. Although I do not need to reach the fifth element, proximate causation, it is unclear that Complainants could satisfy the fifth element because all stevedores are treated equally under the policy effective June 1, 2024.

[8] Complainant also cites *Mar-Mol Co. and Copycorp. v. Sea-Land Service, Inc*., 1996 WL 734232 (ALJ 1996). That case is not instructive because the fee at issue there was based on the respondent's misrepresentation. There, the respondent attempted to pass a tax levy along to complainant – the respondent, however, was not required to pay the tax: "The phantom tax, a total misrepresentation, is grossly irregular, unjust, inequitable and an inappropriate means of revenue enhancement." (*Id*., at *26-*29).

its burden of showing how attempting spread the cost of expenditures among a class of terminal users, instead of upon a single, non-preferred stevedore, is unreasonable.

Second, Complainants argue that the $10/per vehicle access charge was imposed without proper notice, while at the same time acknowledging there is nothing in the FMC regulations that requires a 10-day notice period for fees on stevedores. (Opening Brief, pp. 26-28). Thus, Complainants essentially admit their argument lacks merit. Complainants assert that Respondent's amended tariff schedule of May 15, 2024, stated that Respondent would provide 10-days of notice before imposing a new access fee. (CX_01854). Complainants also assert that Respondent issued another new tariff on May 24, 2024, which became effective as of June 1, 2024, which was fewer than 10 days. (CX_01924-CX_01927). Complainants, however, point to no regulation or other authority that would prevent the revised access fee from becoming effective 10-days from May 24, 2024, or 10-days after Complainants obtained notice of the new access fee. In contrast, by statute, a carrier tariff increase cannot become effective for 30 days unless the Commission permits a fee increase sooner on good cause shown. (46 U.S.C. § 40501(e)). There is no analogous statutory provision for MTO schedules. Because there is no authority preventing the $10/per vehicle charge from becoming effective immediately, Complainants' argument is not persuasive.

Therefore, Complainants' arguments regarding the $10/per vehicle access charge are not properly before me. Even if they were, they are not persuasive.

3. Respondent's Schedule Reasonably Does Not Permit Respondent to Charge Fees Against Complainants.

Returning to the preferred stevedoring agreement, Complainants assert that it is unreasonable for Respondent to charge $25/per vehicle to the Complainants because the express language of the tariff schedule effective from January 1, 2023, through May 15, 2024, does not impose any such charge against Complainants. Complainants argue that the tariff schedule actually imposed the access fee on carriers and OEMs who utilize non-preferred stevedores. Therefore, it is unreasonable for Respondent to send invoices for access fees imposed pursuant to the preferred stevedore agreement to Complainants.

The first three elements of a claim under § 41102(c), as enumerated by 46 C.F.R. § 545.4, are satisfied. First, Respondent is an MTO. The second element, whether the claimed act occurs on a normal, customary or continuous basis, is satisfied. Respondent sent invoices to Complainants for several months of unpaid fees, and has consistently taken the position during this matter that Complainants owe the unpaid access fees to Respondent. (Complaint, CX_00014; Answer, CX_00030; Response, p. 28 ("With respect to the fourth element, the simple fact of the matter is that Ports America has not paid APS the fees which are owed under the tariff . . . . ")). And third, the access fees are connected with the receiving, handling, storing or delivering property because the access fees are imposed based on a stevedore's handling of cargo, namely RO/RO cargo such as automobiles.

At issue is whether Respondent's practice of charging Complainants for the $25/per vehicle access fee is unjust and unreasonable. In general, tariffs are construed reasonably, without a strained or unnatural construction. (*D.F. Young, Inc. v. NYK Line (North America) Inc.*, 2017 WL 3382690, *18 (ALJ Aug. 1, 2017) (quoting *S.A. Chiarella v. Paeon Express, Inc*., 2001 WL 1085424, *3 (FMC Aug. 15, 2001)). Tariff interpretation is governed by the express language of the tariff, not the unexpressed intent of the author. (*C.S.C. Int'l v. Lykes Bros*., 20 F.M.C. 552, 555 (ALJ, 1978)). If a tariff is ambiguous, the ambiguity is resolved against the drafter. (*Chiarella*, 2001 WL 1085424, at *3).

Here, the relevant tariff schedule describes the preferred stevedore agreement. (CX_01751). Afterwards, it provides: "If a customer would like to continue to use their current partnership with another stevedoring company, they will be able to do so by paying a $25.00 per unit fee." (CX_01751-52). The term "customer" is broadly defined to include a vessel and its owner, but also "any other person or entity." (CX_01753). In practice, however, despite the broad definition of "customer," stevedores generally work for carriers or OEMs. (Complaint, CX_00006; Answer, CX00028; CX_02062-CX_02256). Therefore, in context, the reasonable and natural reading of the term "customer" refers to those entities – *i.e.*, carriers and OEMs – that would have a "current partnership with another stevedoring company[.]"

Reading the provision in context, it is fairly rephrased, and best understood, as meaning: "if a carrier/OEM would like to continue to use its current partnership with another stevedoring company, it [the carrier/OEM] will be able to do so by paying a $25.00 per unit fee." Thus, the fee is imposed not on the non-preferred stevedore, but on the carrier/OEM that wishes to use the non-preferred stevedore. Therefore, based on the plain language of the tariff schedule, it was not reasonable for Respondent to bill the Complainants for the non-preferred stevedore access fees.

Finally, the fifth element of a violation of § 41102(c) is proximate cause. (46 C.F.R. § 545.4). Complainant easily clears this hurdle because the invoices Respondent sent Complainants (Complaint, CX_00014; Answer, CX_00030) are directly related to the practice at issue.

The burden thus turns to Respondent to justify its practice. Respondent asserts that its "language may have originally been unclear and required clarification." (Response, p. 32). I disagree, however, with Respondent's assertion that the tariff schedule's language is "unclear." It is clear. Given the context of who hires stevedores, the reasonable and natural reading of the tariff schedule provision at issue clearly provides that the carriers and OEMs are responsible for paying the access fee.

Respondent argues that it sent Complainants a letter clearly stating that Complainants are responsible for the $25/per vehicle fee, and Complainants confirmed that understanding in communications with third parties. (Response, p. 32; *see also* CX_01520-CX_01524). That is not a relevant fact. As noted above, the express language of the tariff is operative. (*C.S.C. Int'l*, 20 F.M.C. at 555). The express language of the tariff provision at issue, understood in context, provides that the carriers and OEMs responsible for the payment of the $25/per vehicle access fee. And even if the express language of the tariff schedule were ambiguous, it would be interpreted against the drafter. (*Chiarella*, 2001 WL 1085424, at *3). Respondent's letter does not change the express language of the tariff schedule, nor does Respondent cite to any authority allowing its letter to affect a change to the tariff schedule.

Therefore, Respondent does not justify its practice of asserting that Complainants were responsible for paying the $25/per vehicle access fee.[9]

Because the tariff schedule provides that the $25/per vehicle access fee is actually imposed on a carrier/OEM using a non-preferred stevedore, there was no basis in the tariff schedule for Respondent to send $1.277 million in invoices to Complainants for January 2023 through March 2023. As will be discussed below, I will order Respondent to cease and desist efforts to collect the $1.277 million in unpaid invoices from Complainants because it was not a just and reasonable practice.

4. Argument Related to Interference with Business Relations with Carrier Customers.

Complainants fourth argument is essentially an alternate theory as to why the preferred stevedoring agreement and the $25/per vehicle access fee violates § 41102(c). In short, Complainants are now arguing that the $25/per vehicle access fee unreasonably interfered with Complainants' contractual relationships with carriers and OEMs. Complainants assert that Respondent knew that Complainants had existing business relationships with carriers and OEMs, that the preferred stevedoring agreement would interfere with those arrangements, and that would potentially cause Complainants' customers to take their business to Ceres. (Opening Brief, pp. 38-40). Complainants also assert that Respondent had no valid justification for its interference with Complainants' business relationships. (Opening Brief, pp. 40-41). Complainants argue that this conduct violated § 41102(c) by unjustly and unreasonably interfering with Complainants' contractual relationships. Complainants cite Maryland cases discussing tortious interference with contract for support. (Opening Brief, pp. 37-38).

As an initial matter, Complainants have already demonstrated that Respondent violated § 41102(c) by imposing a higher access fee on Complainants than on the preferred stevedore, without conferring any additional benefit and without sufficient justification. Accordingly, this argument presents an alternative theory for a violation Complainants have already shown.

I am not persuaded that Complainants advance a valid theory. As noted, Complainants essentially try to argue that Respondent's conduct both constitutes a tort under state law and, for the same reason, is unjust and unreasonable under § 41102(c). Complainants, however, do not explain how a business tort under Maryland law is also an unjust and unreasonable practice under § 41102(c). The Commission stated that: ". . . while tenets of state and common law may be evidence of reasonableness and of local business practices, they are not alone dispositive of Shipping Act issues, absent a showing that these principles directly apply to Shipping Act considerations." (*WGMA*, 21 F.M.C. at 249) (citation omitted). Without more, Complainants

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[9] It is not clear from the record if Respondent has sent invoices to the carriers and OEMs. If Respondent did, however, it appears that the carriers and OEM would likely be able to challenge the reasonableness of the preferred stevedoring agreement successfully. The preferred stevedore agreement requires the carriers and OEMs to pay substantially higher fees to use Complainants as opposed to Ceres for the same services, but with no valid justification for the higher fees.

have not demonstrated how Respondent's conduct violated was also unjust and unreasonable for purposes of § 41102(c).

In any event, in *MRS*, 2013 WL 9808672, an ALJ permitted the respondent to engage in practices which resulted in driving business away from the complainant. There, the respondent leased a terminal from the port administrator. (*Id*., at *23). Respondent, who was the exclusive stevedore at one of the few container terminals in the port, offered customers repair services and tied its services to lower stevedoring rates. (*Id*., at *23). The complainant alleged that it lost several customers to respondent, alleging that some of its customers informed complainant that "they would have preferred to continue to use [complainant], but felt compelled to enter into the bundling arrangements so as to obtain reduced stevedoring rates." (*Id*., at *23). The ALJ rejected that argument. (*Id*., at *39). The ALJ noted that while complainant lost customers, "[t]he fact remains that those customers have made voluntary business decisions to put cost savings above their loyalty to MRS. . . ." (*Id*., at *39). In the present case, while the preferred stevedoring agreement would add a cost to services Complainants provided third party carriers and OEMs, the third parties could continue to choose to use Complainants. In fact, some of them did as is evidenced by the fact that Complainants apparently stevedored a substantial number of vehicles in the first three months of 2023, and continued to use Complainants' services, albeit at a reduced volume. (Complaint, Attachment B; CX_01491; CX_02040-CX_02043).

In short, Complainants do not advance a valid theory of how conduct that would constitute a tort under Maryland law is also a violation of § 41102(c). Nevertheless, as discussed above, Complainants already demonstrated a violation of § 41102(c) under another theory.

C. Alleged Violation of 46 U.S.C. § 41106(2).

Complainants allege that the preferred stevedoring agreement announced on November 1, 2022, constitutes a violation of 46 U.S.C. § 41106(2). (*See* Complaint, CX_00015-CX_00017). That section states that an MTO may not "give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person[.]" (46 U.S.C. § 41106(2)). For the reasons discussed below, I find that Complainants have demonstrated that Respondent violated § 41106(2) to the extent that Respondent charged different fees to competing stevedores. Complainants have not demonstrated Respondent violated § 41106(2) for failing to invite Complainants to bid on the licensing agreement.

The parties agree that there are generally four elements of a claim under § 41106(2): (1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury. (*CMT,* 1997 WL 35281266, at *31).

Complainants advance two theories regarding how Respondent violated § 41106(2). First, Complainants assert that Respondent treated Complainants differently by excluding Complainants from the RFQ process. Second, Complainants argue that they were treated differently than Ceres, as Complainants were charged a much higher per/vehicle access fee.

Respondent again argues that it is unnecessary to reach the elements of a claim under § 41106(2) because Complainants fail to show an effect on the market. (Response, pp. 12-22). Cases have found an unreasonable preference without a discussion of the effect of the respondent's conduct on the market. For example, in *Santa Fe Discount Cruise Parking, Inc., D/B/A EZ Cruise Parking v. The Bd. of Trustees of the Galveston Wharves*, 2021 WL 1575018, *13-*20 (FMC 2021) ("*EZ-Cruise*"), the Commission found an unreasonable preference existed where a cruise-ship terminal operator charged access fees to courtesy buses from a long-term parking lot, whereas limousines were not charged any such fees, and other shuttle buses were not charged the correct amount. Therefore, I will now address the four factors identified in the Commission's decision in *CMT* in turn.

1. Competitive Relationship.

Respondent does not contest the first issue, namely that Complainants and Ceres were in a competitive relationship. (Response, p. 26). Therefore, I find that this element is satisfied.

2. Different Treatment.

Regarding the second element, that Complainants and Ceres were afforded different treatment, I find that Respondent treated Ceres and Complainants differently and unequally. Respondent acknowledges that it did not ask Complainants to bid on the stevedore license, whereas it asked several other stevedores to bid. (CX_01306; Brown Dep., CX_00112:6-10; Buben Dep., CX_00367:9-20; CX_00371:1-13). In addition, under the preferred stevedore arrangement Respondent announced on November 1, 2022, the parties represent that the $25/per unit fee charged to non-preferred stevedores is "much higher" than the amount charged to the preferred stevedore. (Opening Brief, p. 6; Dkt. 37, pp. 20-21, ¶¶ 59-60).

Respondent tries to negate the second element of a claim under § 41106(2) by asserting that it gave consideration to Complainants, as well as others, as a possible stevedoring partner. Respondent argues, therefore, that Complainants were not treated differently. (Response, p. 26). Respondent, however, asserts that it ultimately did not seek a bid from Complainants due to concerns about Complainants' safety record. (Response, pp. 26-28). Respondent's argument is better considered under the third element, *i.e.*, whether the unequal treatment is justified.

3. Justification for Unequal Treatment.

The third element of a claim under § 41106(2) asks whether the unequal treatment was justified by differences in transportation factors. While the ultimate burden of persuasion rests on the complainant, the burden of production regarding the justification of the unequal treatment on the respondent. (*EZ-Cruise*, 2021 WL 1575018, *8-*9).

Complainants advance two theories for how they were treated unequally. Complainants' first theory is that they were treated unequally because Complainants were not offered the opportunity to bid on the preferred stevedoring agreement.

Respondent asserted that Complainants were not asked to submit a bid because Complainants had a poor safety reputation around the Baltimore port as well as Respondent's own poor experiences with Complainants. (Response, pp. 26-28).

Based on the evidence in the record, I find that Respondent carried its burden of demonstrating that it was justified in declining to ask Complainants to bid on becoming the preferred stevedore. The reasons given for Respondent's claim that Complainants had a poor safety record – such as unsubstantiated rumors or vague allegations of unreported incidents (Brown Dep., CX_00149:14-CX_00150:2; CX_00151:24-CX_00152:6; Buben Dep., CX_00371:1-13, CX_00417:6-CX_00417:18) – are not strong. Nevertheless, I accept that this is more likely than not the reason Respondent did not consider the Complainants to be a viable potential stevedoring partner. Several witnesses pointed to safety as a concern with Complainants. (Brown Dep., CX_00149:14-CX_00150:5; Buben Dep., CX_00417:6-CX_00417:13, Taylor, CX_00597:8-22; CX_00642:1-7; Molyneaux Dep., CX_00831:12-19). Moreover, no other reason for excluding Complainants from the bidding process is discussed in the record. I acknowledge that the record has evidence of Complainant PAC's "world class" safety record. (Bevilacqua Dep., CX_01250:17-CX_01251:1; Schmidt Dep., CX_01154:12-CX_001154:22). Regardless, Respondent, presumably acting in its own best interests, found sufficient reason for excluding Complainants from consideration as a stevedoring partner due to Respondent's understanding of Complainants' safety record. For these reasons, I find that Respondent had a sufficient, valid transportation-related reason for not wanting Complainants to be the preferred stevedore.

Complainants second theory for unequal treatment is the difference in access fee charged Complainants versus the access fee charged to Ceres. This is similar to one of Complainants' arguments under § 41102(c), *i.e*., it was unreasonable for Respondent to charge a much higher per vehicle access fee to Complainants than the preferred stevedore. Likewise, Respondent points to similar justifications for the higher fee: efficiency, safety, and mitigation of financial risk. (Response, p. 28). I discussed above, however, why those justifications are not persuasive.

Respondent also argues that the Commission gives significant deference to reasonable commercial decisions. (Response, pp. 23-25). But, this argument is not persuasive. In one of the cases cited by Respondent, the Commission reversed an ALJ's initial decision and found that the terminal operator violated § 41106(2). (*EZ-Cruise*, 2021 WL 1575018, at *14-15). The Commission found that a terminal operator offered essentially no justification for its decision to charge no terminal access fees to limousine operators, whereas it charged access fees to a shuttle bus company. (*Id*.). The Commission stated that: ". . . the Commission shows deference to public port authorities and will usually not second guess their reasoning." (*EZ-Cruise*, 2021 WL 1575018, at *15). The Commission, however, continued, stating that: "But a port authority must provide its reasoning before the any deference can be shown." (*Id.*). Here, even though Respondent provided some reasons for its disparate treatment of one stevedore vis-à-vis the other, the reasons do not justify the disparate treatment – even considering some deference to the reasons Respondent offered.

Accordingly, I find that two stevedores operated at Respondent's terminals, with one owing a "much higher" access fee than the other one, but there being no convincing reason for the one stevedore owing a higher amount.

4. The Resulting Prejudice or Disadvantage is the Proximate Cause of Injury.

Finally, the last element of a claim under § 41106(2) is proximate causation. Complainant satisfies this element. At the very least, Respondent gave invoices to Complainants for stevedoring vehicles in early 2023 that were based on the "much higher" access fee charged to the non-preferred stevedore. Had the invoices been based on the rate charged to the preferred stevedore, it is more likely than not that the invoices would have been for a substantially lesser amount.

Therefore, I find that Complainants have established a violation of § 41106(2).

D. Alleged Violation of 46 U.S.C. § 41106(3).

The Complainants' third count alleges a violation of § 41106(3), which provides that an MTO may not "unreasonably refuse to deal or negotiate." "This requires a two-part inquiry: whether [respondent] refused to deal or negotiate, and, if so, whether its refusal was unreasonable." (*Canaveral Port Auth*., *Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, 29 S.R.R. 1436, 1448 (FMC 2003)). Refusal to deal or negotiate can be justified by legitimate transportation reasons. (*See New Orleans Stevedoring Co. v. Bd. of Comm'rs of the Port of New Orleans*, 29 S.R.R. 1066, 1070 (FMC 2002)).

Complainants allege that Respondent unreasonably did not permit them to bid for the preferred stevedoring arrangement, and did not give Complainants meaningful consideration for the future. (Opening Brief, pp. 54-59). Respondent contends that Complainants were considered as a potential stevedoring partner, but Complainants were ultimately considered unsuitable as a partner. As for future consideration, Complainants never followed up on an invitation to provide information to Respondent. Finally, Respondent had well-founded concerns about Complainants' safety. (Response, pp. 34-37).

I accept Complainants' assertion that it was excluded from competing for the exclusive stevedoring agreement. Respondent's response – that Complainants were not a suitable partner – goes to whether the exclusion was reasonable. Thus, the first element of a violation of § 41106(3) is satisfied.

I am not persuaded, however, that Respondent acted unreasonably in concluding that Complainants was not a suitable partner. As discussed above, several of Respondent's witnesses testified that Respondent had concerns regarding Complainants' safety record. (Brown Dep., CX_00149:14-CX_00150:5; Buben Dep., CX_00417:6-CX_00417:13, Taylor, CX_00597:8-22; CX_00642:1-7; Molyneaux Dep., CX_00831:12-19). Although Complainants protest by claiming PAC's safety record was "world class" (Bevilacqua Dep., CX_01250:17-CX_01251:1; Schmidt Dep., CX_01154:12-CX_001154:22), it is not clear that Respondent would have had such information. Regardless, I accept that Respondent may have had too many bad experiences with Complainants despite Complainants' safety record. Indeed, as noted above, evidence shows Complainants' stevedore caused an accident on Respondent's terminal in April 2023. (CX_01540-CX_01554). In light of the evidence in the record, I find it to be more likely than not that Respondent's concern about Complainants' safety record was a legitimate concern, and thus a basis for concluding that Complainants would not be a suitable stevedore partner.

Complainants also allege that Respondent violated § 41106(3) because Respondent stated in a letter that Complainants may be well-suited to be a preferred stevedore in the future, but requested safety records and efficiency metrics from Complainants. (Opening Brief, pp. 56-58; CX_01524). I am not persuaded that Respondent's asking for records and metrics constitutes an unreasonable refusal to deal – especially when there is some evidence in the record that Respondent had concerns about Complainants' safety record. Indeed, given Complainants' "world class" safety record, it seems like Complainants would want to share information about its safety record. Ultimately, Respondent eliminated the preferred stevedoring arrangement altogether, and imposed an access charge on all stevedores. (CX_01854; CX_01962). Thus, Respondent appears to have dealt or negotiated with no one regarding a follow-up to the preferred stevedore arrangement.

For these reasons, I find that Complainants' allegation that Respondent violated § 41106(3) does not have merit.

IV. REMEDIES

As noted above, I find Respondent violated § 41102(c) and § 41106(2) by charging a "much higher" access fee to the non-preferred stevedores operating at its terminals compared to the access fee charged to the preferred stevedore without sufficient justification. Complainants seek both a cease and desist order and reparations. I discuss these remedies in turn.

A. Cease and Desist.

Complainants seek an order requiring Respondent to "cease and desist from any further charging, invoicing or collection efforts in connection with the $25 access fee." (Opening Brief, pp. 37, 65). Respondent no longer charges the $25/per vehicle access fee to non-preferred stevedores, so I do not need to discuss Complainants' request for a cease and desist order regarding "further charging [or] invoicing" the $25/per vehicle access fee into the future. I also do not need to address Complainants' request for a cease and desist order regarding the $10/per vehicle access fee imposed on all stevedores, as I find that Complainants have not carried their burden of demonstrating that it violates § 41102(c). I will, however, order that Respondent cease and desist from collecting the $25/per vehicle access fee from Complainants.

"The Commission has the authority to order regulated entities to cease violating the Shipping Act. A cease-and-desist order is justified if the Commission finds a Shipping Act violation and has determined that the unlawful conduct is likely to continue or resume unless Respondents are ordered to stop." (*IMCC,* 2024 WL 641501, at *43 (citations omitted)). "Where, as in this case, the complainant is seeking a cease-and-desist order, it needs to prove that the order will address harm proximately caused by violating Section 41102(c)." (*Id*., at *19) (citations omitted).

As noted above, the tariff schedule, when read fairly, imposed the access fee on the carriers and OEMs, not the stevedores. (CX_01751-CX_01753 ("If a customer would like to continue to use their current partnership with another stevedoring company, they will be able to do so by paying a $25.00 per unit fee.”)). Although Respondent sent a letter to Complainants indicating that Respondent would charge the access fee to the Complainants, the tariff schedule itself, which is enforceable as an implied contract (46 U.S.C. § 40501(f)), was not changed. Respondent cites no authority allowing it to alter the meaning of the published tariff schedule by means of a letter. Indeed, publishing the schedule provides public notice of the MTO’s rates, terms and conditions; altering the meaning schedule by a private letter undermines the public notice aspect of the published schedule.

Because the tariff schedule did not permit Respondent to charge the Complainants the $25/per vehicle access fee, I find above that it was unjust and unreasonable and a violation of § 41102(c) for Respondent to do so. I also find that charging Complainants the $25/per vehicle access fee caused harm to Complainants in the form of $1.277 million in invoices for the first few months of 2023. In addition, Respondent essentially takes the position that Complainants would owe the $25/per vehicle access fee so long as the tariff schedule that was first published January 1, 2023, was in effect, that is, until May 15, 2024. (Response, pp. 43 (“Ports America further fails to acknowledge the fact that it neither passed through, nor paid to date **any** amount in access fees[.]”) (emphasis in original)). Thus, Respondent would also cause harm to the extent Respondent charges Complainants additional access fees for the rest of the January 1, 2023, through May 15, 2024, time period, over and above the invoices it already sent Complainants.

I find that a cease and desist order requiring Respondent to stop invoicing Complainants for the $25/per vehicle access fee from January 1, 2023, through May 15, 2024, or attempting to collect the $25/per vehicle access fee from Complainants, would address the harm resulting from Respondent’s caused by collecting fees in contravention of the published schedule in violation of § 41102(c). I also find that it is more likely than not that that the harm caused by Respondent’s conduct will not be resolved without a cease and desist order. Accordingly, I will order that Respondent cease and desist from violating the Shipping Act by establishing, observing and enforcing the unreasonable practice of charging Complainants with the $25/per vehicle access fee in connection with receiving, handling, storing or delivery property at Respondent’s Atlantic and Chesapeake terminals in the Port of Baltimore from the period of January 1, 2023, through May 15, 2024.

B. Reparations.

The Commission “shall direct the payment of reparations to the complainant for actual injury caused by a violation” of the Shipping Act. (46 U.S.C. § 41305(b)). The term “actual injury” includes “the loss of interest at commercial rates compounded from the date of injury.” (46 U.S.C. § 41305(a)). Complainants bear the burden of proving that they are entitled to reparations. (*MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, Docket No. 16-16, 2022 WL 2209421, at *3 (FMC June 10, 2022)). The Commission explained that: “‘(a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.’” (*MAVL Capital*, 2022 WL 2209421, at *3 (quotations omitted)). Reparations will only be awarded based on actual damages. (*MAVL Capital*, 2022 WL 2209421, at *3) (citations omitted). “Actual damages means ‘compensation for the actual loss or injuries sustained by reason of the wrongdoing’ which complainants must show to a reasonable degree of certainty.” (*MAVL Capital*, 2022 WL 2209421, at *3 (quotations omitted)). "That does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained." (*MAVL Capital*, 2022 WL 2209421, at *3) (citations omitted).

The Commission's decision in *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, 2001 WL 865708, Dkt. No. 96-05 (FMC June 7, 2001) is instructive. There, the complainant tried to demonstrate lost profits by submitting a profit and loss statement and journal entries prepared by the complainant and introduced through its officer. The complainant calculated the number of containers it would have moved but for respondent's actions, as well as its per-container profit to calculate its lost profits. (*Rose Int'l*, 2001 WL 865708, at *76). The Commission affirmed the ALJ's decision rejecting the complainant's lost profit claims. (*Id*., at *79). The Commission noted that lost volume is not the same as lost profit, and noted that the complainant's calculations failed to consider that costs may vary based on volume of work performed. (*Id*., at *77-*78). The Commission also noted that the complainant failed to consider competition and other market factors in its analysis. (*Id*., at *78). The Commission noted that the complainant assumes that its customers would have shipped with complainant but for the respondent's actions, but there was no proof in the record to substantiate that assertion, such as "testimony or affidavits from its former customers to support that claim." (*Id*.). Further, the Commission noted that complainant's profit and loss statements and journal entries were not independently and objectively verified. (*Id*., at *79).

Complainants' evidence of lost profits consists of three general elements. (*See generally* Opening Brief, pp. 60-65). First, Complainants show lost volume by way of confidential spreadsheets, confidential interrogatory answers, and deposition testimony from PAC's corporate representative. (*See generally* CX_02040-CX_02043, CX_01532, CX_01562, Schmidt Dep., CX_01114-CX_01144). Second, Complainant states the amount of lost EBITDA in confidential interrogatory answers and via confidential deposition testimony. (CX_01532, CX_01562, Schmidt Dep., CX_01114-CX_01144). Third, Complainants point to correspondence from carriers protesting the $25/per vehicle access fee, correspondence between carriers and Complainants regarding the access fees, and deposition testimony regarding the access fees. (CX_01367-CX_01368; CX_01371-CX_01379; CX_01573; Schmidt Dep., CX_01160:4-CX_01161:19; CX_01166:12-19).

Complainants' evidence does not persuade me that the amount of damage claimed by Complainants is more likely than not.

The evidence of the volume loss is not persuasive. Although the evidence of volume loss appears in spreadsheets, interrogatory answers and deposition testimony, there is no evidence that any of the volume loss numbers were corroborated by an outside, independent source. Similarly, the Commission in *Rose Int'l* looked unfavorably on the unverified documents the complainant in that matter submitted. (*Rose Int'l*, 2001 WL 865708, at *79).

Even if the evidence of the lost volume was accurate, it is unclear whether the loss of volume was caused by the $25/per vehicle access fee. I appreciate that the evidence shows that one carrier, Grimaldi, directly stated in an email that that the carrier took its business to Ceres due to the access fee. (CX_01573). Also, Complainants entered into an arrangement with one carrier, and, correspondingly, lost relatively a small amount of volume vis-à-vis that carrier.

(Schmidt Dep., CX_01130:9-CX_01137:5; *see also* CX_02040). Both facts are consistent with the idea that the higher access fee led to a loss of volume. Further, I also appreciate that, in general, if two competitors offer similar services, but one has a substantially lower price than the other, then business will likely flow to the lower-priced service provider.

Nevertheless, I do not find Complainant's evidence to be persuasive. Complainants' witness testified that there are fluctuations in volume from year to year. (Schmidt Dep., CX_01166:12-19). In addition, the evidence shows that some of Complainants' customers kept utilizing Complainants' services, albeit at a reduced volume, despite the increased prices. (CX_02040). This suggests that at least some carriers were willing to continue to use Complainants as stevedores even with the higher per-vehicle access fee. Complainants provide direct evidence of only one carrier that switched to using Ceres due to the access fee. (CX_01573). Even then, the customer says that it will work with the other stevedore for the forthcoming "few vessels," and the customer's long-term goal is to continue to work with Complainants. (*Id*.). Moreover, it is possible that there were other causes for a reduction in volume that are independent of any access fee issues. The Commission in *Rose Int'l* noted that the marketplace is not static, and that the complainant would need to present evidence to show that the respondent's actions led to a loss of business. (*Rose Int'l*, 2001 WL 865708, at *78). More persuasive would be "testimony or affidavits from [Complainants'] former customers to support that claim." (*Id*.).

Even if Complainants were able to prove that it is more likely than not that the lost volume was caused by Respondent's actions, I also find that Complainants have not carried the burden of proving the quantum of lost profits. Complainants state in Interrogatory answers and through testimony that its loss of EBITDA was a certain amount for each Complainant. Complainants do not show their work, however. They do not indicate the per-vehicle revenue, they do not show how overhead costs were figured in, they do not indicate if they figured in costs saved (*e.g.*, lower labor expenses). Complainants simply give blanket amounts of EBITDA based on the volume loss without any evidence or explanation how the amount was calculated. In *Rose Int'l*, the Commission indicated that lost volume is not the same as lost profit, and noted that the complainant's calculations failed to consider that costs may vary based on volume of work performed. (*Rose Int'l*, 2001 WL 865708, at *77-*78).

As noted above, damages are not presumed, and showing a violation without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation. (*MAVL Capital*, 2022 WL 2209421, at *3 (citations omitted)). Here, I find that Complainants have not provided sufficient evidence of lost volume, of a nexus between the access fee and the lost volume, or of the amount of profit loss. For these reasons, I will not order reparations.

V. ORDER

Upon consideration of Complainants' Opening Brief, Respondent's Response, Complainants' Reply, the related filings of each, including proposed statement of facts and responses, as well as exhibits; Complainants' and Respondent's Motions for Confidentiality; and Respondent's Motion for Leave to File a Sur-Reply, along with related filings, including the proposed Sur-Reply and the Complainants' opposition, it is hereby:

ORDERED that the four Motions for Confidential Treatment be **GRANTED IN PART AND DENIED IN PART**. Confidentiality is granted as requested with the exception of the total amount reflected on the invoices Respondent sent to Complainants for stevedoring vehicles at Respondent's terminal from January 2023 though March 2023, and specifically Complainants' Proposed Findings of Fact, p. 20 and Respondent's Responses to Complainants' Proposed Findings of Fact, p. 37. It is

FURTHER ORDERED that Respondent's Motion for Leave to File a Sur-Reply is **GRANTED** and the Proposed Sur-Reply is accepted for filing. It is

FURTHER ORDERED that judgment is granted to Complainants regarding their claims that Respondent violated 46 U.S.C. §§ 41106(c) and 41106(2). It is

FURTHER ORDERED that upon this decision becoming final, Respondent shall cease and desist from violating the Shipping Act by establishing, observing and enforcing the unreasonable practice of charging Complainants with the $25/per vehicle access fee in connection with receiving, handling, storing or delivery property at Respondent's Atlantic and Chesapeake terminals in the Port of Baltimore from the period of January 1, 2023, through May 15, 2024. It is

FURTHER ORDERED that Complainants' claim for reparations is **DENIED**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED**.

Richard Ambrow
Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

MARINE TRANSPORT LOGISTICS, INC., *Complainant*

v.

CMA CGM, S.A., *Respondent*.

DOCKET NO. 22-23

Served: December 18, 2024

ORDER OF: Mary Apostolakos HERVEY, *Administrative Law Judge*.

INITIAL DECISION[1]

[exceptions filed by Complainant 1/8/2025, final decision pending]

I. INTRODUCTION

A. Overview

This proceeding began on September 7, 2022, when the Federal Maritime Commission ("Commission" or "FMC") issued a notice of filing of complaint and assignment. On December 7, 2022, the Commission issued a notice of filing of amended complaint and assignment indicating that Marine Transport Logistics, Inc. ("MTL") had filed an amended complaint against Respondent CMA CGM, SA. ("CMA"). The amended complaint alleges that Respondent violated 46 U.S.C. § 41102(c) by failing to establish, observe, and enforce just reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivery of property.

B. Procedural History

On October 3, 2022, Respondent filed a motion to dismiss. On October 11, 2022, Complainant filed a response to Respondent's motion to dismiss and additionally filed a cross motion to amend. On October 19, 2022, Respondent filed its response to Complainant's motion for leave to file an amended complaint and reply to Complainant's response to Respondent's motion to dismiss. On October 28, 2022, an order denying motion to amend complaint was issued. On November 7, 2022, Complainant filed a motion seeking leave to file a revised amended complaint. On November 14, 2022, Respondent filed its reply to Complainant's motion for leave to amend the complaint. On December 8, 2022, an order was issued granting the revised motion to amend the complaint and denying Respondent's motion to dismiss as moot.

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

On December 28, 2022, a joint motion for substitution of Respondents and modification of deadline for answer was filed. On December 29, 2022, an order granting the joint motion was issued. On January 20, 2023, Respondent filed its verified answer to Complainant's amended complaint. On January 31, 2023, a scheduling order was issued, commencing discovery.

On March 9, 2023, Respondent filed a motion for an extension of time and for compliance with French law and the Hague Convention, requesting a 30-day extension to respond to Complainant's document request and a Letter of Request to French authorities under the Hague Evidence Convention. On March 15, 2023, Complainant filed a response to Respondent's motion. On March 16, 2023, Respondent filed a motion for leave to reply, contesting Complainant's response and offering to provide a memorandum from a French law firm explaining French law. On March 28, 2023, an order was issued denying Respondent's motion for letter of request and extension of time, finding that Respondent did not establish that the Hague Evidence Convention procedures are necessary and appropriate in this proceeding.

On April 7, 2023, Respondent filed an appeal pursuant to 46 C.F.R. § 502.221(d) to the March 28, 2023, order. On April 17, 2023, Complainant filed its response to Respondent's interlocutory appeal. On July 7, 2023, an order to file a joint status report describing the status of discovery and the parties' positions on whether a stay of the proceeding is appropriate in light of Respondent's appeal was issued. On July 27, 2023, an order staying the proceeding was issued. On October 30, 2023, the Commission issued an order affirming denial of motion, finding that Respondent "failed to show that the ALJ abused her discretion in rejecting CMA's unprecedented demand that it be permitted to provide no documents in response to MTL's discovery requests except through Hague Convention procedures." Order Affirming Denial of Motion at 2.

On October 31, 2023, an order requiring joint status report was issued and lifted the stay of this proceeding. On November 17, 2023, a revised scheduling order and a separate order entering protective order and confidentiality stipulation were issued. On January 23, 2024, an order on Respondent's partial consent motion to extend discovery was issued, granting two of Respondent's discovery deadline changes and holding the request for the indefinite extension of the close of discovery to receive discovery from a non-party in abeyance. On January 31, 2024, an order on motions to compel was issued, requiring both parties to provide additional limited discovery by February 15, 2024. On February 27, 2024, an order on Respondent's motion for reconsideration and second revised scheduling order was issued.

On May 14, 2024, Complainant filed its brief, proposed findings of fact, and appendix. On June 12, 2024, Respondent filed its opposition brief, replies to Complainant's proposed findings of fact, and appendix. On June 27, 2024, Complainant filed its response to Respondent's proposed findings of fact and its reply brief with exhibits. On July 3, 2024, Respondent filed a motion to strike specific portions of Complainant's reply brief because it included new arguments that were not in Complainant's opening brief and requesting in the alternative leave to submit a sur-reply. On July 10, 2024, Complainant filed its response to Respondent's motion to strike. On July 11, 2024, the law firm of Jeffrey/Fenneman Law & Strategy ("JFLS") and individual JFLS attorneys Rebecca Fenneman, Eric Jeffrey, Kaya Massey, and Nicholas Webb filed a Notice of Withdrawal as Counsel for Respondent CMA CGM SA ("CMA") in this proceeding, stating that CMA has consented in writing to this withdrawal and remains represented in this proceeding by Wiley Grandy, Esq. and Chelsea Crews, Esq. of CMA CGM (America).

By order dated October 1, 2024, this proceeding was reassigned to the undersigned Administrative Law Judge. By order dated October 30, 2024, Respondent's Motion to Strike was granted and the new arguments and evidence (Complainant's Exhibits 55, 56, and 57) regarding lost profits raised for the first time on reply were stricken. On October 31, 2024, MTL filed a Motion for Reconsideration or to Reopen Discovery. On November 8, 2024, CMA filed Respondent's Response to Complainant's Motion for Reconsideration or to Reopen Discovery. On November 12, 2024, MTL's motion for reconsideration or to reopen discovery was denied. Order on Complainant's Motion for Reconsideration or to Reopen Discovery. On November 8, 2024, CMA filed Respondent CMA CGM S.A.'s Motion for Confidential Treatment. On November 19, 2024, the motion for confidential treatment was granted as to service agreements, but otherwise denied. Order on Respondent's Motion for Confidential Treatment.

C. Arguments of the Parties

MTL alleges that CMA violated § 41102(c) of the Shipping Act by failing to establish, observe, and enforce just reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivery of property by failing to: (1) follow shipping instructions; (2) timely advise MTL of any perceived shipping issues leading to increased demurrage charges; (3) respond in a reasonable manner to timely filed disputes, which caused an increase in the demurrage charges; (4) timely process change in destination in a manner that would avoid demurrage/storage/detention charges; (5) provide timely, accurate and complete accounting of demurrage/storage/detention charges; and (6) include accurate aspects of such charges in the service contract as provided by CMA. Amended Complaint ¶42.

MTL's complaint as amended alleges that violations occurred with respect to the shipment of eight containers, including: (1) five that were shipped from New York to Odesa Ukraine, but diverted to Constanta, Romania, after Russia invaded Ukraine, and eventually delivered to Bremerhaven ("Ukraine Shipments"); (2) one bound for Libya that was rolled because it contained a jet ski ("Libya Shipment"); and (3) two others that were rolled due to inadequate or untimely documentation ("Rolled Shipments").

With respect to the Ukraine Shipments, MTL argues that CMA never provided copies of any of the invoices for Constanta and never explained the reason for billing more than one year after charges accrued. Brief of the Complainant. MTL argues that because CMA withheld from its discovery responses three emails exchanged between the parties, it is entitled to a negative inference that the only reason for not loading the containers at Constanta and then not releasing them in Bremerhaven was to improperly assess and collect demurrage charges, and that CMA's true intended purpose was revenue generation rather than promoting the prompt movement of cargo. Reply Brief of the Complainant. MTL argues that because CMA produced responsive documents on the discovery deadline it was prevented from conducting follow up. Reply Brief of the Complainant. MTL argues that the delays in shipment of containers impacted shippers other than MTL that were subjected to additional charges that had not been imposed before the war in

Ukraine. Reply Brief of the Complainant. MTL argues that delays in shipment were intended to increase demurrage, storage, and detention charges and not due to an inability to move the containers. Reply Brief of the Complainant. MTL argues that CMA engaged in similar conduct with respect to the shipments at issue in FMC Proceeding 18-07, in which shipments were alleged to have been subjected to excessive detention and demurrage charges after not being delivered to their destination for six months. Brief of the Complainant.

With respect to the Libya Shipment with the jet ski, MTL alleges that CMA failed to produce documents from Malta customs showing that the jet ski was banned. MTL alleges that the container was "in gated" and in the port for seven days before CMA notified MTL of the restriction. MTL alleges that it was unreasonable for CMA to not notify MTL for this many days and that it did so for the purpose of assessing demurrage fees, that CMA placed the container on hold subjecting it to additional charges, that CMA did not advise MTL that charges would continue while the dispute was pending, and that CMA did not apply the contracted free period to the demurrage invoice. Amended Complaint ¶¶ 31-33.

With respect to the two Rolled Shipments, MTL alleges that demurrage and detention charges were assessed despite the fact that MTL provided evidence that it submitted all required documentation timely pursuant to CMA's instructions. MTL alleges that CMA failed to advise MTL of the change in the deadline for submission and that this practice resulted in a rollover subjecting MTL to additional charges. Amended Complaint ¶ 34. MTL argues that CMA failed to communicate changes in documentation deadlines, and delayed cancelling charges despite being presented with proof that the containers should not be rolled. Reply Brief of the Complainant.

MTL argues that it lost potential business, lost two customers, and suffered damage to reputation due to CMA's violations. Reply Brief of the Complainant. MTL argues that lay testimony is sufficient to establish the lost profits underlying its damages claim. Reply Brief of the Complainant.

CMA argues that MTL has failed to identify any unreasonable practice contemplated by § 41102(c) and has failed to demonstrate a practice connected with receiving, handling, storing, or delivering property that occurred on a normal, customary, and continuous basis with respect to the shipments at issue. CMA argues that neither MTL's amended complaint nor briefs tie any particular violation alleged to any of the 8 shipments at issue. CMA argues that MTL's allegations are insufficient to sustain a cause of action. CMA argues that MTL's allegations are fatally vague and lack specificity as to how CMA failed to respond in a reasonable manner, that is whether it was unreasonable by time, content, or consequences. CMA argues that MTL's allegation that it failed to include accurate aspects of such charges in the service contract is fatally vague. CMA argues that MTL has improperly combined disparate types of alleged unreasonable behavior in an attempt to show a practice. CMA argues that discrete or occasional actions by regulated entities do not reflect a practice or regulation that would constitute a violation of § 41102(c). Additionally, CMA argues that MTL failed to meet its burden to prove an actual injury, forfeited its claim to reparations when it failed to comply with the order directing it to produce financial information about its finances, and offered an affidavit to establish actual injury that is not competent evidence. With respect to the Ukraine Shipments, CMA argues that the Russian invasion delayed normal business operations due to the sorting and processing of change of destination and change of consignee requests, and rerouting to new destinations at a time of confusion, conflict, and danger in the Black Sea. In addition, CMA argues that once the Ukraine Shipments arrived in Bremerhaven, the consignee sent in letters of renouncement stating that MTL had placed it as consignee without its consent. CMA contends that it waived all charges when the consignee indicated it would pick up the containers if the charges were waived, and that MTL paid none of the charges as a result. With respect to the Libya Shipment, CMA argues that the shipment was rolled because it contained a jet ski that was not permitted per Malta customs, that MTL incurred additional charges after free time expired, and that the container was transported once MTL removed the jet ski. With respect to the Rolled Shipments, CMA argues that MTL alleges Shipping Act violations due to its confusion about whether documents had been timely presented. CMA also argues that MTL has not produced competent evidence of injury. Respondent's Opposition Brief.

D. Evidence

Under the Administrative Procedure Act, an administrative law judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 98-102 (1981). This initial decision is based on the pleadings, exhibits, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations in the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent that individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

II. FINDINGS OF FACT[2]

A. Background

1. CMA CGM, S.A. ("CMA") is a vessel-operating common carrier ("VOCC") as defined by 46 U.S.C. § 40102(7). Answer ¶ 3.

[2] Complainant's exhibits are designated "CX" followed by the exhibit number and Bates Stamp number or page number when no Bates Stamp number is available. Respondent's exhibits are designated "RX" followed by the exhibit number and Bates Stamp number or page number when no Bates Stamp number is available. Respondent's Proposed Findings of Fact are designated "RPFF" followed by the paragraph number. Deposition references are to page numbers with line numbers following the colon. References to the Findings of Fact within the body of this decision are designated "F of F" followed by paragraph number.

2. CMA is privately owned and organized under the laws of France with its principal place of business at 4 Quai d'Arenc, 13215 Marseilles Cedex 02, France. Answer ¶ 3.

3. CMA's agent in the United States is CMA CGM (America) LLC ("CCA") with offices at 1 Meadowlands Plaza, Suite 201, East Rutherford, NJ 07073 and 1 CMA CGM Way, Norfolk, VA 23502. Answer ¶ 3.

4. CMA provides ocean transportation of property between the United States and foreign ports. Answer ¶ 3.

5. Marine Transport Logistics, Inc. ("MTL") is a corporation organized under the laws of the state of New York, with a place of business at 63 New Hook Road, Bayonne, NJ 07002, a place of business at 172 Baekeland Avenue, Middlesex, NJ 08846, and a place of business at 300 West Service Road, Staten Island, NY 10314. RX1 (Privalova Deposition) at 21:17-19; RX2 (Solovyeva Deposition) at 17:9-18.21.

6. MTL is principally owned by Alla Solovyeva. RX2 (Solovyeva Deposition) at 16:15-19.

7. Julia Privalova has been employed as the logistics manager for MTL since 2004. RX1 (Privalova Deposition) at 13:11-14:4.

8. MTL is a non-vessel operating common carrier ("NVOCC"), freight forwarder, and ocean transportation intermediary as defined by 46 U.S.C. § 40102(17), (19), and (20). RX1 (Privalova Deposition) at 21:1-2, 30:1-6; RX2 (Solovyeva Deposition) at 69:19-21.

9. MTL has one overseas office, located in Odesa, Ukraine and established in 2018. RX1 (Privalova Deposition) at 23:1-6.

10. MTL's primary business is shipping used automobile exports from the United States. RX1 (Privalova Deposition) at 23:7-11.

11. Until February 2022, MTL acted as an NVOCC and freight forwarder of U.S. export cargo shipped by ocean and destined for, inter alia, Ukrainian and Russian ports, including the Port of Odesa. RX1 (Privalova Deposition) at 24:6-20.

12. CMA has transported MTL's cargo for years pursuant to a series of service contracts filed at the Federal Maritime Commission. RX2 (Solovyeva Deposition) at 69:19-70:4.

B. Ukraine Shipments

13. Between December 28, 2021, and February 17, 2022, MTL booked shipments with CMA bearing bills of lading nos. NAM4996094, NAM4887650, NAM4887651, NAM5020932, and NAM4887632 for transportation from Maher Terminal at the Port of New York to Odesa, Ukraine (the "Ukraine Shipments"), which shipped between December 30, 2021, and February 17, 2022. RX5 (Waybill for NAM4996094); RX6 (Waybill for NAM4887650); RX7 (Waybill for NAM4887651); RX8 (Waybill for NAM5020932); and RX9 (Waybill for NAM4887632).[3]

14. The containers comprising the Ukraine Shipments include:

    1. NAM4996094, Container No. UETU5251612, aboard the La Traviata, on February 17, 2022. RX5;
    2. NAM4887650, Container No. SEGU6471959, aboard the Dalila, on January 22, 2022. RX6;
    3. NAM4887651, Container No. UESU5180789, aboard the Vienna Express, on January 31, 2022. RX7;
    4. NAM5020932, Container No. TRLU7542206, aboard the La Traviata, on February 13, 2022. RX8; and
    5. NAM4887632, Container No. TGBU5073710, aboard the Chicago Express, on December 28, 2021. RX9.

15. The contracts of carriage applicable to each of the Ukraine Shipments included: (1) the applicable CMA tariff provisions. RX15 (CMA Tariff Publication); (2) CMA's standard bill of lading terms and conditions. RX16 (CMA Bill of Lading); and (3) a service contract between CMA and MTL. RX2 (Solovyeva Deposition) at 69:19-70:4.

16. CIS Development Foundation, Inc. ("CIS") is a 501(c)(3) non-profit organization with a principal place of business at 77 Mill Town Road, Suite A2, East Brunswick, New Jersey, 08816. RX4 (Bondareva Deposition) at 11:5-9.

17. CIS's principal activities are sending humanitarian assistance to recipients located in Tajikistan, Ukraine, Estonia, Latvia, and Moldova. RX4 (Bondareva Deposition) at 11:21-12.2, 13:19-21.

18. Maria Bondareva is the president of CIS and is responsible for decisions as to where, when, and how to send cargo overseas from the US. CX5 (Bondareva Deposition) at 11:5-20.

[3] All references to NAM4996094, NAM4887650, NAM4887651, NAM5020932, and NAM4887632 in this decision are to bill of lading numbers.

19. CIS hired MTL to deliver the five containers comprising the Ukraine Shipments from New York to Odesa in early 2022, with either Kodryanka or FavoritPlus as consignees. CX5 (Bondareva Deposition) at 14:22 to 15:11.

20. MTL charged CIS $11,525.00 for shipping the five Ukraine Shipments. RX1 (Privalova Deposition) at 79:2-12; RX2 (Solovyeva Deposition) at 208:22-209:3; CX27A (MTL's transaction history with Kondryanka).

21. On February 24, 2022, Russia invaded Ukraine. RX1 (Privalova Deposition) at 24:11-12; Department of Defense Office of Inspector General at DoDig.mil>Ukraine.[4]

22. On February 24, 2022, the International Maritime Organization, and the North Atlantic Treaty Organization issued warnings to vessels in the Black Sea. RX11 (International Maritime Organization Communication from the Government of Ukraine).

23. On February 25, 2022, the Government of Ukraine closed all Ukrainian ports for the duration of martial law. On February 26, 2024, the Embassy of Ukraine requested that this information be urgently circulated among International Maritime Organization (IMO) Member States, international organizations that have concluded agreements of cooperation with the IMO, and nongovernmental organizations in consultive status with the IMO. RX12 (IMO communication from the Embassy of Ukraine).

24. The Russian invasion of Ukraine caused disruptions to global trade. Respondent's Proposed Findings of Fact at RPFF26; Complainant's Response to CMA's Proposed Findings of Fact at RPFF26; RX12 (IMO communication from the Embassy of Ukraine).

25. The Port of Odesa closed in February of 2022. CX5 (Bondareva Deposition) at 17:1-2; RX13 (CMA Black Sea and Ukraine update).

26. Andre Ristic is the key account manager for CMA CGM America. RX10 (Ristic Deposition) at 3:22-4:8.

27. Constanta, Romania was a force majeure port that was used after the Russian Invasion of Ukraine. RX10 (Ristic Deposition) at 20:6-7.

28. On February 24, 2022, when Russia invaded Ukraine and it was announced that the Port of Odesa would be closed, CMA published a public notice to its customers stating:

[4] Pursuant to 46 C.F.R. § 502.226, Official Notice is taken of the fact that Russia invaded Ukraine on February 24, 2022.

> The CMA CGM Group has been closely monitoring the situation in Ukraine and the Black Sea region. Over the past several days, we have taken all necessary measures to protect our employees and ensure as much as possible the continuity of the supply chain. The safety of our employees and their families in Ukraine is our main focus. We are thankful to report that at the moment all of them are safe. As part of our business continuity plan, they will be working from home until further notice. Our security team will be monitoring developments 24/7 to ensure constant contact with them. In the interest of safety, the Group has decided to suspend all vessel calls to Ukraine as of today and until further notice.

RX13 (CMA Black Sea and Ukraine update).

29. The advisory also informed the shipping public that "floating cargo to Ukraine will be redirected to the ports of Constanza (Romania), Tripoli (Lebanon) or Piraeus (Greece)." RX13 (CMA Black Sea and Ukraine update).

30. MTL learned of the closure of the Port of Odesa by email notices from ocean carriers. RX2 (Solovyeva Deposition) at 51:1-4.

31. When it was announced that the Port of Odesa would be closed as of February 26, 2024, all CMA ships bound for Odesa were diverted to other destinations. RX10 (Ristic Deposition) at 20:7-8.

32. The Ukraine Shipments were diverted to the Port of Constanta, Romania. RX10 (Ristic Deposition) at 20:7-8.

33. With respect to diversions, Article 10 of the Bill of Lading provides:

> 10. MATTERS AFFECTING PERFORMANCE
>
> If at any time the Carriage is or likely to be affected by any hindrance, risk, delay, difficulty or disadvantage of any kind (other than the inability of the Goods safely or properly to be carried or carried further which is provided for in Clause 24 infra) and howsoever arising (even though the circumstances giving rise to such hindrance, risk, delay, difficulty or disadvantage existed at the time this contract was entered into or the Goods were received for Carriage), the Carrier (whether or not the Carriage is commenced) may, without prior notice to the Merchant and at the sole discretion of the Carrier, either:
>
> (a) carry the Goods to the contracted Port of Discharge or Place of Delivery, whichever is applicable, either by the intended or the alternative route to that indicated in this Bill of Lading or that which

> is usual for Goods consigned to that Port of Discharge or Place of Delivery. If the Carrier elects to invoke the terms of this Clause 10 (a) hereof, he shall be entitled to charge such additional Freight, including extra war risk charge as the Carrier may determine, or
>
> (b) suspend the Carriage of the Goods and store them ashore or afloat upon the Terms and Conditions of this Bill of Lading and endeavor to forward them as soon as possible, but the Carrier makes no representations as to the maximum period of suspension. If the Carrier elects to invoke the Terms and Conditions of this Clause 10 (b) then, he shall be entitled to charge such additional Freight as the Carrier may determine, or
>
> (c) abandon the Carriage of the Goods and place the Goods at the Merchant's disposal at any place or port which the Carrier may deem safe and convenient, whereupon the responsibility of the Carrier in respect of such Goods shall cease. The Carrier shall nevertheless be entitled to full Freight on the Goods received for Carriage, and the Merchant shall pay any additional costs of the Carriage to, and delivery and storage at, such place or port.
>
> If the Carrier elects to use an alternative route under Clause 10(a) or to suspend the Carriage under Clause 10(b) this shall not prejudice its right subsequently to abandon the Carriage under Clause 10(c).

RX16 (CMA Bill of Lading).

34. With respect to diversions, the CMA Tariff Rule provides in pertinent part:

> B) Diversion requests must be received no less than two working days prior to the vessel's arrival at the interchange port. The Carrier will endeavor to satisfy the request but will not be responsible if the diversion cannot be effected. Customs authorities/local regulations at some destinations may require that diversions be effected earlier than two working days. In such instances it is the Shipper's responsibility to comply with such regulations. Fines resulting from failure to comply will be for the account of the cargo.

RX15 (CMA Tariff Publication).

35. In the event of an agreement to amend the place of delivery, Article 11(6) of the Bill of Lading governs the continued application of its terms, and provides in pertinent part:

11. NOTIFICATION AND DELIVERY

(6) In the event the Carrier agrees, at the request of the Merchant, to amend the Place of Delivery stated herein, the Terms and Conditions of this Bill of Lading shall continue to apply, only to the extent provided by the Applicable Tariff, until the Goods are delivered by the Carrier to the Merchant at the amended Place of Delivery. If the Applicable Tariff does not explicitly provide for the continued application of the Terms and Conditions of the Bill of Lading then the Carrier shall act as agent only to the Merchant in arranging for delivery of the Goods to the amended Place of Delivery but shall then be under no liability whatsoever for loss, damage or delay to the Goods, howsoever arising.

RX16 (CMA Bill of Lading).

36. Between March 3 and March 25, 2022, MTL, through Account Manager Julia Privalova, requested a Change of Destination ("COD") for each of the five Ukraine Shipments, from Odesa to Bremerhaven, "due to the ongoing war in Ukraine." RX17 (CMA 133) (email from MTL to CMA); RX19 (CMA 188) (email from MTL to CMA); RX1 (Privalova Deposition) at 62:17-64:11; CX1 (CMA 585) (email from MTL to CMA); CX21 (email from MTL to CMA); CX30 (email from MTL to CMA); CX38 (email from MTL to CMA).

37. With respect to NAM4996094, after the first request to CMA for a change of destination to Bremerhaven on March 3, 2022, MTL sent follow up requests on March 9, 2022, and March 11, 2022. (CX21, 22, 23) (emails from MTL to CMA).

38. With respect to NAM4887650, after the first request to CMA for a change of destination to Bremerhaven on March 3, 2022, MTL sent a follow up request on March 11, 2022. (CX30, 31) (emails from MTL to CMA).

39. In general, it was "very rare" for MTL to request a change in destination. RX2 (Solovyova Deposition) at 59:1-9.

40. The Ukraine Shipments stayed in Constanta for several months before eventually being delivered to Bremerhaven as requested by MTL. CX5 (Bondareva Deposition) at 14:22-15:11.

41. Pursuant to CMA's tariff, the re-routing of cargo from Constanta to other ports required a change of destination request ("COD") from the shipper. RX15 (CMA 1282-1285) (CMA Tariff Publication).

42. CMA's autoreply email to Ms. Privalova stated, in red capital letters:

> ***PLEASE NOTE THE BELOW INFORMATION FOR ALL COD REQUESTS***
>
> • All COD requests are subject to approval and are not guaranteed." RX20 (CMA 82) (email from CMA to MTL).

43. In an internal email dated March 15, 2022, related to NAM4887632, CMA stated: "TRADE - The customer has requested a COD to BREMERHAVEN. I [sic] not found rates per 21-1782. I have found routing on AMERIGO service from ROCND - ALIAGA-BEANR-DEBRV. Please advise if any additional charges. AGENTS - Please confirm the deadline (DATE AND TIME) to complete the requested COD." CX2 (CMA95) (internal CMA email).

44. Because the original consignee of the shipments diverted due to the closure of the port of Odesa may have been located in Ukraine, some shippers also requested a change of consignee ("COC"). CX18, 19 (CMA internal emails). Respondent's Proposed Findings of Fact at RPFF38; Complainant's Response to CMA's Proposed Findings of Fact at RPFF38.

45. On March 25, 2022, Ms. Privalova requested that CMA change the consignee on the bills of lading for the Ukrainian Shipments from the original consignee, Andrey Kodryanka in Odesa, to FavoritPlus (for bill of lading NAM4887632) and Interfracht (for bills of lading NAM4996094, NAM5020932, NAM4887650, and NAM4887651) in Bremerhaven. RX22 (email from CMA to FavoritPlus); RX18 (CMA 146); RX17 (CMA 133) (email from MTL to CMA); RX1 (Privalova Deposition) at 62:17- 64:1; Respondent's Proposed Findings of Fact at RPFF 49; Complainant's Response to CMA's Proposed Findings of Fact at RPFF49.

46. On April 1, 2022, CMA advised MTL that the bill of lading NAM4887632 cargo had already been discharged in Constanta and asked if MTL wanted to pick cargo up there, to which MTL replied on the same date that customer is insisting on Bremerhaven. CX3 (CMA 579) (email from CMA to MTL); CX4 (CMA 577) (email from MTL to CMA).

47. On April 5, 2022, CMA advised MTL that the destination had been revised to Bremerhaven on NAM4887650 and NAM4996094. CX33 (email from CMA to MTL).

48. On April 12, 2022, MTL requested invoices for NAM4887650 and NAM4996094 from CMA. RX17 (email from MTL to CMA).

49. On April 14, 2022, CMA wrote to MTL's client's agent (FavoritPlus) and said

"Dear Customer, POD for NAM4887632 is updated to Constanta. Pls advise when you are going to pick up the cargo. Demurrage and storage are increasing on a daily basis." (CX6) (email from CMA to FavoritPlus).

50. On April 21, 2022, Julia Privalova from MTL sent the following email to CMA regarding container NAM4887632: "Please help. Container is idling in Constanta port, but we didn't ask to deliver I [sic] there, we asked to deliver to BREMERHAVEN!!! Why nothing is being done?? Why is my customer being chased and asked to pay for storage/demurrage????? I need this to be resolved today, please." CX7 (CMA 557-558) (email from MTL to CMA).

51. On May 6, 2022, an internal CMA email concerning NAM4887632, Container No. TGBU5073710 states: "This is to inform that subject shipment is still idling in Constanta port. Pls urgently inform shipper and let him push cnee to pick up the cargo asap as demurrage and storage surcharges are increasing on a daily basis." CX8 (CMA 70989-70990) (CMA internal email).

52. Pursuant to CMA's tariff, the requests for a COD or COC were subject to additional charges, including an administrative fee to cover the additional work by CMA to process the diversion and any additional operational costs and charges for the new destination in accordance with the tariff and applicable service contract. RX15 (CMA Tariff Publication).

53. In connection with its COD requests, MTL was advised by email dated May 6, 2022, that it would be responsible for "additional costs, not covered under service contract rate" including "i.e., storage charges, customs fines, etc." for each of the Ukraine Shipments, and that CMA needed a "clear response stating that the charges are accepted before we can move on the request." RX17 (CMA 128) (email from MTL to CMA); RX18 (CMA 141-142) (email from CMA to MTL); RX23 (CMA 172-173) (internal CMA email).

54. On June 3, 2022, MTL notified CMA that they forgot to change the consignee on NAM4887650 and urgently requested change to Interfracht. CX35 (email from MTL to CMA).

55. By email dated June 5, 2022, Ms. Privalova replied to the May 5, 2022, email regarding additional costs for COD requests: "Confirmed, please proceed." RX17 (CMA 122) (email from MTL to CMA); RX18 (CMA 139) (email from MTL to CMA).

56. The credit note for Ukraine shipment NAM4887650 shows that it was discharged at Bremerhaven on June 8, 2022. RX28 (CMA 2152) (credit note for NAM4887650).

57. Ukraine shipments NAM5020932, NAM4887650, NAM4887651, and NAM4996094 arrived in Bremerhaven on the same day on the same vessel. RX29 (CMA 1152-1153) (internal CMA email).

58. An email dated June 10, 2022, from Julia Privalova to the CMA team concerning NAM5020932 states: You forgot to change consignee and notify for the subject booking, please URGENTLY change to: Interfracht Container Overseas Service GmbH Bergiusstr 1. 28816 Stuhr-Brinkum." CX39 (email from MTL to CMA).

59. By email from Julia Privalova dated June 14, 2022, MTL notified CMA that the consignee had not been changed per her instructions for NAM4996094 but that NAM4887650 was "ok." CX26 (email from MTL to CMA).

60. On June 30, 2022, CMA advised FavoritPlus by email that a new POD was updated to Bremerhaven on NAM4887632 and asked if FavoritPlus would stay as consignee. CX6 (email from CMA to FavoritPlus).

61. A CMA email to FavoritPlus dated July 5, 2022, concerning NAM4887632 indicated a plan to load the container for shipment to Bremerhaven on July 19, 2002, but stated that it would not be loaded without payer information on the charges incurred in Constanta. CX9 (email from CMA to FavoritPlus).

62. A July 8, 2002, email from Julia Privalova to Alla Soloveva regarding NAM4887651/UESU5180789, NAM4887650/SEGU6471959, NAM5020932/TRLU7542206, and NAM4996094/UETU5251612 states that CMA has ignored requests to change destination and consignee resulting in demurrage/storage charges caused by CMA delays. CX11 (CMA 495-496) (internal MTL email).

63. On July 11, 2022, Ms. Muraya from CMA wrote to FavoritPlus: "We'll fail to catch Stadt Dresden ETS Jul. 19 without payment confirmation and confirmed CNEE [sic] Please revert with payer and payment location and let us know if FavoritPlus will stay CNEE in Bremerhaven." (CX12) (email from CMA to FavoritPlus).

64. On July 14, 2022, CMA again requested by email that FavoritPlus advise if it would remain consignee on NAM4887632 and if not to provide a letter of renouncement. CX13 (CMA 961) (email from CMA to FavoritPlus).

65. On July 14, 2022, Maria Bondareva forwarded to Alla Solovyeva the email message she received earlier that day from FavoritPlus in which FavoritPlus forwarded CMA's inquiry the same date asking whether or not FavoritPlus would remain consignee on NAM4887632. RX22 (CMA 961) (email from CMA to FavoritPlus).

66. On July 18, 2022, an internal CMA email regarding NAM4887632. states that FavoritPlus will submit letter of renouncement and that consignee should be amended to an unnamed entity. CX16 (CMA 1118) (internal CMA email).

67. An internal email dated July 18, 2022, from CMA VIP accounts executive Oksana Muraya states: "Please note since CNEE address hasn't been updated for NAM4887632, container has been cut from loading list and rolled on Ambarli Aug. 07. We'll revert with updated charges of storage asap." CX16 (CMA 1119) (internal CMA email).

68. Following arrival on June 8, 2022, of the Ukraine shipments NAM5020932, NAM4887650, NAM4887651, and NAM4996094 at the port of Bremerhaven, Interfracht, the consignee named by MTL, refused to take delivery. RX24 (CMA 1217-1220) (internal CMA email).

69. In rejecting the containers, Interfracht stated that MTL had designated it as consignee of the four shipments without its approval or confirmation. RX24 (CMA1220) (internal CMA email), RX29 (CMA 1153) (internal CMA email).

70. As of July 15, 2022, MTL was aware of the rejection by Interfracht and was "looking for a solution." RX24 (CMA 1220) (internal CMA email).

71. As of July 21, 2022, Interfracht was continuing to refuse to take delivery of containers NAM5020932, NAM4887650, NAM4887651, and NAM4996094. RX24 (CMA 1217-1220) (internal CMA email).

72. On July 27, 2022, CMA representative Antwaun Majors emailed MTL about the four containers stuck in Bremerhaven, stating: "[T]he consignee sent in letters of renouncement. Can you please check and confirm with them if they are still accepting cargo?" RX30 (CMA 1006) (email from CMA to MTL).

73. On August 2, 2022, CMA's Andre Ristic again asked MTL "Can you please check and confirm with them [Interfracht] if [they] are still accepting cargo?" RX30 (CMA 1004-1005) (email from CMA to MTL).

74. On August 2, 2022, MTL advised CMA that Interfract would accept the four Ukraine shipment containers if all charges were removed. RX30 (CMA 1003) (email from MTL to CMA).

75. By an internal CMA email dated August 9, 2022, regarding NAM5020932, NAM4887650, NAM4887651, and NAM4996094, CMA stated "Demurrage and Storage need to be cleared for the above BLs due to CCA error in COD and Doc completion. The shipments were diverted due to going to Ukraine, but BL details were not update at time COD as status was not corrected. The final SWB were not released timely once confirm that docs were completed and LFDs were pasted." CX28 (CMA Bates 1145).

76. By email exchanged dated August 9, 2022, Alla Solovyeva complained to MTL that there were no invoices for the containers stuck in Bremerhaven due to unpaid demurrage and storage charges. RX30 (CMA 995-997).

77. According to CMA, the Ukraine Shipments idled at Bremerhaven due to agency error. By email dated August 18, 2022, CMA directed that the charges would be rejected and cargo released. RX35 (internal CMA email); RX28 (CMA credit notes).

78. CMA waived in advance all storage, detention and demurrage charges with respect to each of the five Ukraine Shipments. RX31 (CMA 519) (CMA credit note); RX32 (CMA 520) (CMA credit note); RX33 (CMA 711) (CMA credit note); RX 34 (CMA 95417) RX29 (CMA 1129) (CMA credit note); RX2 (Solovyeva Deposition) at 153:11-14, 166:4-6, 180:18-181:2.

79. MTL was not required to pay detention, demurrage, or storage charges for any of the Ukraine Shipments. RX27 (CMA credit note); RX28 (CMA credit note); RX31 (CMA 519) (CMA credit note); RX32 (CMA 520) (CMA credit note); RX33 (CMA 711) (CMA credit note); RX34 (CMA 95417) (CMA credit note); RX29 (CMA 1129); RX2 (Solovyeva Deposition) at 153:11-14, 166:4-6, 180:18-181:2.

80. On August 10, 2022, Alla Solovyeva complained to CMA that invoices had not been received for NAM5020932, NAM4887650, NAM4887651, and NAM4996094 that were being held in Bremerhaven due to unpaid balance for demurrage and storage charges. CX29 (CMA 967) (email from MTL to CMA).

81. On September 5, 2022, CMA's agent in Germany reported that NAM5020932, NAM4887650, NAM4887651, and NAM4996094 had been picked up by Interfracht (September 3-4), and CMA waived ("rejected" in CMA's LARA system) all demurrage and detention charges that had accrued. RX35 (CMA 1164-1169) (internal CMA email).

82. On September 12, 2022, CMA issued a Credit Note to MTL for basic freight and bunker charges on NAM4996094/UETU5251612 in the amount of $934.00. RX31 (CMA 519) (CMA credit note).

83. On September 12, 2022, CMA issued a Credit Note to MTL for basic freight and bunker surcharges on NAM4887651/UESU5180789 in the amount of $934.00. RX32 (CMA 520) (CMA credit note).

84. On September 12, 2022, CMA issued a Credit note to MTL for basic freight and bunker charges on NAM3887632/TGBU5073710 in the amount of $474.00. RX33 (CMA 711) (CMA credit note).

85. On September 22, 2022, CMA issued a Credit Note to Interfracht on NAM4887650/SEGU6471959 for equipment detention and demurrage import in the amount of EUR 11,940.00. RX28 (CMA 2152) (CMA credit note).

86. On September 22, 2022, CMA issued a Credit Note to Interfract on NAM5020932/TRLU7542206 for equipment detention and demurrage import in the amount of EUR 12,210.00. RX27 (CMA 2152) (CMA credit note).

87. On February 4, 2024, CMA issued an invoice to MTL for NAM4887632 in the amount of $1,787.10, consisting of storage in the amount of $1,679.70 and restow age in the amount of $107.40. CX10 (CMA 95461) (CMA invoice).

88. On February 5, 2024, CMA issued a Credit Note to MTL for storage at transshipment ports full container and restowage of AM4887632/TGBU5073710 in the amount of $2,028.00. RX34 (CMA 95417) (CMA credit note).

C. Libya Jet Ski Shipment

89. Booking No. NAM3933751 involved the shipment of Container No. TCNU3475181, which contained used cars and a jet ski to be loaded at the Port of New York, and delivered to El Khoums, Libya, with an intermediate transshipment at Valetta, Malta. RX36 (CMA 516-518) (Bill of Lading for NAM3933751); RX 39 (CMA booking confirmation).

90. The jet ski in the container was a 2004 Yamaha jet ski. RX36 (CMA 516-518) (Bill of Lading for NAM3933751).

91. The CMA booking confirmation for this shipment stated, inter alia: "For Automobile Shipments, if the container is received at the port and fails to meet any customs requirements. . . the booking will be rolled and applicable charges will be assessed." RX39 (CMA 163) (Bill of Lading for NAM3933751).

92. EU Council Regulation 2017/1325, of July 17, 2017, amended EU Council Regulation 2016/44, and imposed restrictive measures on transportation of cargo from EU member states to Libya, adding motor and inflatable boats to the list of items for which prior authorization was required for transport to Libya. It provides that prior authorization is required for the sale, supply, transfer or export, directly or indirectly of the listed items whether or not originating in the Union, to any person, entity or body in Libya or for use in Libya. RX40 (EU Jet Ski Regulation).

93. Jet skis are included in the boat category under EU Council Regulation 2017/1325. RX1 (Privalova Deposition) at 89:1-13; RX2 (Solovyeva Deposition) at 229:3-11; RX40 (EU Jet Ski Regulation).

94. On June 22, 2020, CMA advised Julia Privalova that jet skis are not allowed to be transported to Libya in an email stating: "Per Malta customs Jet skis fall under the same category" and that cargo will be held. CX40 (EU Jet Ski Regulation); RX 41 (CMA 926-CMA 937) (email from CMA to MTL); RX2 (Solovyeva Deposition) at 224:9-12.

95. On June 26, 2020, MTL sent an email to CMA regarding the NAM3933751 dispute, asserting that the booking was rolled by mistake. RX43 (CMA 953) (email from MTL to CMA).

96. Booking No. NAM3933751 was rolled again in July 2020, because it still contained the jet ski. RX43 (CMA 948-950) (email from CMA to MTL).

97. On August 7, 2020, Alla Solovyeva advised Andre Ristic by email that MTL received the announcement about the Libya import restriction two days after the container was already in port. RX41 (CMA 932) (email from MTL to CMA).

98. On August 7, 2020, CMA's Account Manager for MTL, Andre Ristic, responded via email to Alla Solovyeva regarding the NAM3933751 dispute. He stated that there would be no discount on the roll charges, extra handling, and terminal fees totaling $2,964.03, explaining: "MTL was twice made aware that jet skis would not be accepted effective immediately on the automatic notice & my notice which were sent before both rolls occurred." RX43 (CMA 948-949) (email from CMA to MTL).

99. On August 7, 2020, Andre Ristic sent an email to Julia Privalova regarding the NAM3933751 dispute, stating: "Understand it was in-gated a week prior to the notification, but that still does not change the fact that EU regulations prohibited this container from moving to Libya." RX41 (CMA 930) (email from CMA to MTL).

100. Mr. Ristic offered at that time to discount MTL's accrued detention and demurrage charges for this shipment but stated that "CMA cannot absorb [extra drayage /unstuffing /re-loading charges] for any customers as this was not a CMA decision to reject this cargo. It was EU mandate." RX43 (CMA 948-949) (email from CMA to MTL).

101. MTL has not shipped any jet skis to Libya since first notification that they are not allowed to be exported. Rather, they only ship used vehicles and forklifts. RX2 (Solovyeva Deposition) at 40:13-41:21.

102. By invoice dated June 23, 2020, MTL billed Almotwasit for Selling and Purchasing the amount of $2,900 for ocean freight service for the transport of three cars and a jet ski. CX48 (MTL invoice).

103. On July 14, 2020, CMA issued a Credit Note to MTL for basic freight, bunker

surcharges NOS, and change of vessel or destination, including roll over charges on NAM39333751/TCNU3475181 in the amount of $2,034.00. RX46 (CMA 1398) (CMA credit note).

104. By email dated July 24, 2020, CMA advised Julia Privalova that all costs cannot be waived because it is the shipper's responsibility to comply with EU regulations. CX46 (email from CMA to MTL).

105. The CMA invoice for NAM3933751 dated September 11, 2020, sets forth equipment export demurrage charges for 15 days in the amount of $6,140. CX44 (CMA invoice).

106. MTL did not receive the announcement regarding customs requirements until two days after the container was already in port. RX41 (CMA 931, 935) (email exchange between MTL and CMA).

107. Booking No. NAM39333751 was rolled and subject to additional charges and fees after MTL was twice made aware after the container was in-gated that jet skis would not be accepted effective immediately. RX41 (CMA 933) (email from CMA to MTL).

108. There is no evidence in the record that MTL paid demurrage charges related to the Libya Shipment.

D. 2021 Rolled Shipment NAM4588370

109. The original document cut off deadline for Booking No. NAM4588370 from New York on CMA CGM Dalia was August 10, 2021. CX51 p. 320 (screen shot of CMA website showing document cut deadline).

110. The document cut deadline was subsequently changed on CMA's website from August 10, 2021, at 20:00 to August 9, 2021, at 20:00. Following the schedule change, CMA's website showed a document cut off deadline of August 9, 2021, at 20:00 and a port cut off deadline of August 10, 2021, at 16:00. CX51 pp. 320-321 (screen shots of CMA website showing document cut deadline).

111. The shipping instruction for Booking No. NAM4588370 shows a customer submission date of August 10, 2021, at 18:35:51. RX37 (CMA 1286-1287) (INTTRA shipping instruction).

112. MTL submitted its documentation on August 10, 2021. CX51 p. 319 (email from MTL to CMA).

113. An email dated August 23, 2021, regarding the NAM4588370 dispute from MTL account manager Olga Kirillova to CMA disputes states: "Dear CMA-CGM team. This container has been rolled due to allegedly missing documentation, [W]hich

both the shipping instructions and validated titles have been submitted before due time. Please also see attached correspondence with your team proving the same. Kindly remove all the roll over and demurrage charges. Thank you!" CX51 p. 325 (email from MTL to CMA).

114. A CMA email to MTL account manager Olga Kirillova dated October 25, 2021, regarding the NAM4588370 dispute states: "The disputed file has been reviewed and rejected. Per our records, the doc cut was on August 9, 2021, at 20:00, however, the documents were not submitted until the following day which makes the Change of Vessel/Destination and the Extra Container Handling fee applicable. If you have any additional questions or concerns, please reach out to your sales team directly." CX51 p. 325 (email from CMA to MTL).

115. An email dated October 25, 2021, regarding the NAM4588370 dispute from MTL account manager Olga Kirillova to Andre Ristic states: "Andre, I need your help in here please. For this booking, with auto cut on 08/10 and documentation cut off 08/10 all the docs were submitted 08/10 before 8:00 PM EST. Your team has rolled this container, obviously by mistake and I do not know where to escalate this further. My upper management insists that I forward this to FMC with you in cc, but before doing so, I am asking you to please look into it one more time and let me know how to proceed. Andre, Auto cut off for the booking was Aug 10th, as the subject says. Documentation cut off, as I've already mentioned, was 08/10. You know, Andre, that in NY there cannot be any documentation deadlines, before auto cut off, And [sic] if vessel is still opened for the cars, then we OK to submit SI on auto cut off day. You just have to pull this out and you will see for yourself that the doc cut was on 08/10/2021 20:00PM." CX51 p. 325 (email from CMA to MTL).

116. An email dated January 7, 2022, regarding the NAM4588370 dispute from MTL account manager Olga Kirillova to Andre Ristic states: "There is no such a thing as documentation cut off 1 day prior to auto cut off! Never, ever. All your booking confirmations show doc cut 1 day prior to port cut, And [sic] you and your Autodesk team very well aware that NJ port cut is always few days later then [sic] auto cut off…" CX51 p. 317 (email from MTL to CMA).

117. By Email dated January 7, 2022, Andre Ristic responded: "As per attached PDF's, you can see CMA provided the updated doc cut for the Dalila (page 3 of each PDF) on 8/9. Our website is updated 3x per day and the first update was at 8:07 am showing the cut for docs was 8/9. This meant MTL had just under 12 hours to submit the SI which is why disputes analyst and management rejected the dispute. There is no FMC rule on a notice being sent to customers about doc changes, CMA updating doc cuts 3x per day is actually very customer friendly and has been welcomed by our customer base." CX51 p. 317 (email from CMA to MTL).

118. The record does not contain the booking confirmation for Booking No. NAM4588370.

119. The record does not contain an invoice or other documentation showing the amount of charges MTL incurred due to the rolling of Booking No. NAM4588370.

E. 2022 Rolled Shipment

120. Booking No. NAM5194626 involved the shipment of used automobiles bound for Riga, Latvia, in March of 2022 that CMA rolled. RX44 (email chain between MTL and CMA).

121. By email dated May 17, 2022, regarding Booking No. NAM5194626, MTL advised CMA that its documentation was timely and that the shipment was mistakenly rolled. RX44 (CMA 47602) (MTL email to CMA).

122. The CMA invoice for Booking No. NAM5194626 dated May 24, 2022, includes equipment export demurrage charges for 7 days in the total amount of $3,100. CX54 (CMA invoice).

123. On July 26, 2022, CMA issued a Credit Note to Lat Fast Logistics for Booking No. NAM5194626 for equipment detention and demurrage import in the amount of EUR 190.00. RX47 (CMA 2150) (CMA credit note).

124. By email dated January 18, 2023, from CMA Disputes to MTL account manager Olga Kirillova regarding Booking No. NAM5194626, CMA stated: "Good Morning, Apologies for the delay in response. Invoice NAEX3962959 has been cancelled as it has been confirmed that the booking was rolled in error. Thank you." RX44 (CMA 47595) (email from CMA to MTL).

125. On January 18, 2023, CMA issued a Credit Note to MTL for equipment export demurrage charges on NAM5194626 / FFAU4420241 in the amount of $3,010.00. RX50 (CMA 2216) (CMA credit note).

126. CMA canceled all invoices for charges associated with the rolling. RX44. (CMA 47595) (email chain between MTL and CMA).

F. MTL's Business Losses

127. According to Alla Solovyeva, MTL suffered damages in an unspecified amount related to the four containers stuck in Bremerhaven due to the loss of business from its customer Kodryanka in the amount of $82,000 per year in addition to potential business from unidentified customers resulting from damage to its reputation, but MTL refused to produce income tax returns showing annual profits for the relevant time frame. RX2 (Solovyeva Deposition) at 239:16-246:3.

128. According to Alla Solovyeva, MTL suffered damages in an unspecified amount related to the Libya jet ski shipment due to the loss of an unspecified amount of business from customer Almotwasit. RX2 (Solovyeva Deposition) at 246:15-248:22.

129. The record does not contain tax returns, profit and loss statements, or expert testimony showing that MTL suffered lost profits as a result of the alleged violations of the Shipping Act by CMA.

G. Other Shipments

130. A company by the name of TMM International wrote to CMA as follows on June 30, 2022, concerning Booking CMAU6207108/Container TCNU2194554: "3 MONTHS AGO WE REQUESTED DESTINATION TO POTI… WHY STILL SITTING AT ROMANIA AND NOT CHANGED TO POTI? CX18 (CMA 66718) (email from TMM to CMA).

131. Concerning the same containers referenced in paragraph 131 above, the original consignee wrote: "Before the war in Ukraine, our company was the CNEE of these containers. The Shipper of these containers made corrections to change the recipient and port of destination, for their immediate redirection. At the moment, these containers are in the port of Constanta and there are no changes and forecasts for their redirection. Previously, we tried to leave these containers in Constanta for import to UA without redirecting to Georgia because they just stand there. But the Shipper of these containers said that according to the information of the CMA company of the American office, in this case we need to pay for demurrage and storage. For us, it is unacceptable (and there is no such possibility for the recipients of the cargo) to pay demurrage, since we are not to blame for the fact that the containers do not go to Georgia, but simply stay in the Port of Constanta." CX19 (CMA 66849-66850) (email from original consignee to CMA).

132. On May 6, 2022, an internal CMA email concerning the same container and containers belonging to other customers states: "This is to inform that subject shipment is still idling in Constanta port. Pls urgently inform shipper and let him push cnee to pick up the cargo asap as demurrage and storage surcharges are increasing on a daily basis." CX8 (CMA 70989-70990) (CMA internal email).

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

The Shipping Act provides that a "person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Docket No. 02-04, 30 S.R.R. 991, 2006 WL 2007808, at *10-11 (FMC May 10, 2006) (the Commission was obligated to hear allegations particular to the Shipping Act, even where the complainant has already obtained an arbitration award for related breach of contract claims); *see also Cargo One, Inc. v. COSCO Container Lines Co.*, Docket No. 99-24, 28 S.R.R. 1635, 1645, 2000 WL 1648961, at *15 (FMC Oct. 31, 2000) (the Commission must address allegations of violations of the Shipping Act, which are within its exclusive jurisdiction; no common law remedy exists for such violations).

The Commission has an obligation to address Shipping Act claims, even if the relevant facts may also give rise to other claims between the parties. *MCS Industries, Inc. v. Mediterranean Shipping Company S.A.*, Docket No. 21-05, 2024 WL 95383, at *7 (FMC Jan. 3, 2024). The Commission has jurisdiction over Shipping Act claims even if a related proceeding is underway. *Id*. Shipping Act claims are distinct from breach of contract claims, entailing a different analysis of statutory standards that includes review of the carrier's broader practices beyond those directly affecting the complainant. *Id*. While breach of contract claims are resolved in court or as otherwise agreed by the parties, a claim for violation of the Shipping Act may only be resolved by the Commission.

2. Burden of Proof

To prevail in a proceeding to enforce the Shipping Act, a complainant bears the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.203; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, Docket No. 08-03, 2014 WL 9966245, at *14 (FMC Dec. 17, 2014). Under the preponderance standard, a complainant must show that their allegations are more probable than not. *Crocus Investments, LLC v. Marine Transport Logistics, Inc.,* Docket No. 15-04, 2021 WL 3732849, at *3-4 (FMC Aug. 18, 2021). It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, Docket No. 93-15, 26 S.R.R. 1173, 1180 (ALJ Dec. 9, 1993), adopted in relevant part, 26 S.R.R. 1424, 1994 WL 279898 (FMC June 13, 1994).

B. Relevant Law

1. Demurrage and Detention

a. Section 41102(c)

Section 41102(c) of the Shipping Act, previously section 10(d)(1), states that a "common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

b. Demurrage and Detention Rule

On December 17, 2018, after notice and comment, the Commission issued Rule 545.4, specifying the elements of a section 41102(c) claim. Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018). Rule 545.4 states:

> 46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:
>
> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
>
> (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
>
> (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
>
> (d) The practice or regulation is unjust or unreasonable; and
>
> (e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4.

On April 28, 2020, the Commission issued an Interpretive Rule on Demurrage and Detention Under the Shipping Act, effective May 18, 2020, with minor changes from the proposed rule. 85 Fed. Reg. 29638 (May 18, 2020) ("Demurrage and Detention Rule"). "The rule followed years of complaints from U.S. importers, exporters, transportation intermediaries, and drayage truckers that ocean carrier and marine terminal operator demurrage and detention practices unfairly penalized shippers, intermediaries, and truckers for circumstances outside their control." 85 Fed. Reg. at 29638. The demurrage and detention rule provides "guidance as to what [the Commission] may consider in assessing whether a demurrage or detention practice is unjust or unreasonable" under section 41102(c). 85 Fed. Reg. 29638.

Commission Rule 545.5 provides in pertinent part:

(a) *Purpose.* The purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and § 545.4(d) in the context of demurrage and detention.

(b) *Applicability and scope.* This rule applies to practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, the terms demurrage and detention encompass any charges, including "per diem," assessed by ocean common carriers, marine terminal operators, or ocean transportation intermediaries ("regulated entities") related to the use of marine terminal space (*e.g.,* land) or shipping containers, not including freight charges.

(c) *Incentive principle*—

(1) *General.* In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.

(2) *Particular applications of incentive principle*—

(i) *Cargo availability.* The Commission may consider in the reasonableness analysis the extent to which demurrage practices and regulations relate demurrage or free time to cargo availability for retrieval.

(ii) *Empty container return.* Absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable.

(iii) (iii) Notice of cargo availability. In assessing the reasonableness of demurrage practices and regulations, the Commission may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The Commission may consider the type of notice, to whom notice is provided, the format of notice, method of distribution of notice, the timing of notice, and the effect of the notice.

(iv) Government inspections. In assessing the reasonableness of demurrage and detention practices in the context of government inspections, the Commission may consider the extent to which

> demurrage and detention are serving their intended purposes and may also consider any extenuating circumstances.

46 C.F.R. § 545.5.

C. Discussion

As set forth above, to establish a violation of § 41102(c), a complainant must demonstrate that: (1) the respondent is a regulated entity; (2) the claimed acts or omissions occurred on a normal, customary, and continuous basis; (3) the practice or regulation is connected with receiving, handling, storing, or delivering property; (4) the practice or regulation is unjust or unreasonable; and (5) the practice or regulation is the proximate cause of the claimed loss. 46 C.F.R. § 545.4.

1. Regulated Entity

Section 41102(c) governs the activities of common carriers, marine terminal operators, and ocean transportation intermediaries. Respondent CMA is a common carrier. Amended Complaint ¶¶ 2, 3; Answer to Amended Complaint ¶¶ 2, 3. Accordingly, the first element is met.

2. Normal, Customary, and Continuous Practice

With the enactment of the rule codified at 46 C.F.R. § 545.4, the Commission restored its interpretation of Section 41102(d) to its pre-2010 understanding and returned the Commission's focus and priority to the activities of maritime regulated entities that generally affect the broader shipping public, 83 Fed. Reg. at 64,479, including that a party is liable only for acts or omissions occurring on a normal, customary, and continuous basis. *See Crocus Investments, LLC v. FMC*, 2022 WL 3012275, at *1 (D. D.C. 2022).

Prior to 2010, the Commission consistently required that the alleged unreasonable regulation or practice at issue to have been the normal, customary, often repeated, systematic, uniform, habitual, and continuous manner in which the regulated common carrier was conducting business in order to find a violation of § 41102(c). This understanding as to what constitutes "regulations and practice" under the Shipping Act is supported by multiple accepted rules of statutory construction. Final Rule, 83 Fed. Reg at 64479.

An example of the application of this understanding is found in the case of *Investigation of Certain Practices of Stockton Elevators*, 8 F.M.C. 187, 200-201 (Examiner 1964), *aff'd,* 8 F.M.C. 181 (FMC 1964). In that case, Stockton Elevators was a grain elevator that operated terminal facilities that in one instance charged a customer wharfage at less than the tariff rate. Additionally, with respect to five shipments in the spring and fall of 1961, Stockton Elevators charged the same customer the wharfage as set forth in the tariff but subsequently paid the customer an "allowance," effectively defraying the wharfage. This conduct occurred in several months in the spring and fall of 1961, and all the shipments were transported in different voyages. The Commission not only found that this conduct was not unjust or unreasonable, but it also held that Stockton Elevators had not engaged in a "practice" within the meaning of section 17 of the Shipping Act of 1916, the predecessor of § 41102(c), stating "The essence of a practice is uniformity. It is something habitually performed and it implies continuity . . . the usual course of conduct." Rather, the Commission found the six instances constituted an "occasional transaction." *Id*. at 201.

The Commission's current understanding of what constitutes regulations and practices is in accord with the prior requirement. In *Hangzhou Qianwang Dress Co., Ltd. v. RDD Freight International, Inc*., 2020 WL 5406762, at *5 (FMC 2020), the Commission affirmed the ALJ's initial decision on remand that complainant had failed to meet its burden of proof to establish a normal, customary, and continuous practice of releasing shipments without the original bill of lading despite finding that practice unreasonable. In making this determination, the ALJ found that releasing three shipments of one shipper to one consignee over two months did not appear to be customary based on the finding that it was not normal because respondent's employee had been induced to do so.

In order to establish a violation of the Shipping Act, MTL must prove that the specified practice or regulation is unjust or unreasonable. 46 C.F.R. § 545.4(d); *Crocus Investments, LLC v. Marine Transport Logistics, Inc*., 3 F.M.C. 110, 118-19 (FMC 2021). In *Crocus*, the ALJ explained that the "normal, customary, and continuous" requirement of § 41102(c) requires a showing that the carrier's unreasonable conduct was representative of the "course of conduct between these parties", i.e. the "normal and customary arrangement." The ALJ concluded that two similar actions by respondent were not enough to make out a practice. The Commission affirmed, stating: "Commission precedent has made clear that a single shipment or isolated act or omission does not show a pattern or practice." *Id*. at 117 (citations omitted).

In *Crocus*, the "unreasonable conduct" that formed the basis of complainant's § 41102(c) claim was a broad allegation that respondent Marine Transport Logistics, complainant in the instant case, conducted its business unreasonably and was generally a bad actor. The Commission rejected this argument, explaining: "Crocus's approach would result in liability if a regulated entity's "practice" was behaving unreasonably. That is not how § 545.4 is structured, and Crocus cannot combine disparate types of allegedly unreasonable behavior into a practice for purposes of § 41102(c)." *Id*.

MTL does not allege in its amended complaint or briefs that any of CMA's regulations or practices occurred on a "normal, customary, and continuous basis." In its initial brief, however, MTL attempts to addresses this deficiency by arguing that a dispute as to liability for demurrage or a persistent and continuing shuffling of accounts of importers might constitute a practice, citing *J.M. Altieri v. Puerto Rico Ports Authority*, 7 F.M.C. 416, 420 (Examiner 1962) (admin. final Oct. 18, 1962).

In support of this theory of recovery, MTL's initial brief describes a series of email communications between the parties regarding the five Ukraine Shipments in which MTL requests changes in destination to Bremerhaven, requests changes in consignee, inquires as to why the containers are idling in Constanta, advises CMA that the requests for consignee have not been honored, and complains that it has not received invoices. The brief also describes a series of email communications between the parties regarding the rolling of the Libya Shipment due to the presence of a jet ski, and MTL advising CMA that the container was in-gated prior to notification that jet skis were included in the customs restriction against boats. The brief states that CMA failed to advise

MTL that demurrage would continue to accrue while the dispute was pending, and that MTL suffered business losses because its client, Almotwasit, stopped working with it as a result. With respect to the rolled shipments, the brief states that the containers were improperly rolled due to documentation deficiencies that did not exist, that CMA produced no documentation as to one of the shipments and admitted ten months after the fact that the other had been rolled in error. Finally, the brief references the amended complaint in another proceeding, FMC Docket No. 18-07, in which it was alleged that CMA sought excessive demurrage fees after not delivering shipments to their final destination for over six months. Brief of the Complainant.

Rather than establishing that CMA's unreasonable practices were normal, customary, often repeated, systematic, uniform, habitual, and continuous manner in which the regulated common carrier was conducting business, the record supports a finding to the contrary. In this regard, the Ukraine Shipments were diverted from the original destination in Odesa, Ukraine due to Russia's invasion of Ukraine in February of 2022, resulting in the need for both changes of destination and of consignee for all five shipments. MTL admits that the war resulted in disruptions in global trade. Complainant's Response to CMA's Proposed Findings of Fact at RPFF26. MTL also admits that it was "very rare" for MTL to request a change in destination. RX2 (Solovyova Deposition) at 59:1-9. These admissions suggest that the events related to the Ukraine Shipments were not customary and habitual, but rather the result of a unique disruption as a result of war. With respect to the Libya Shipment, there is only one allegation of a shipment that was rolled due to an export violation. Similarly, the Rolled Shipments involve two containers that MTL alleges were rolled for improper documentation despite having complied with all documentation requirements, one of which CMA admitted after the fact was rolled in error.

Although MTL also alleges that other containers were improperly rolled, it offers no competent proof on this point. Rather, MTL relies in part on allegations in the amended complaint filed in FMC 18-07; but these are only allegations – not evidence – and therefore do not support a finding that CMA engaged in unreasonable practices against other shippers. *See A.K.L v. Moreno Valley Unified School District*, 2021 WL 4352362, at *3 (C.D. Cal. 2021) (finding that allegations in a complaint do not constitute evidence). Although MTL also relies on emails showing that other shippers expressed concern to CMA that their containers were idling in Constanta, Romania despite requests for a change in destination, MTL failed to provide sufficient detail regarding the circumstances surrounding the delay of those shipments to show the existence of an unreasonable practice. Reply Brief of the Complainant at 3. In the absence of facts illuminating the circumstances under which any of the other containers were idling in Constanta, the emails alone are not probative of whether or not CMA acted unreasonably to increase demurrage, detention, and storage charges as MTL alleges. Moreover, emails in the record from July of 2022 show that MTL designated a new consignee for four of the Ukraine Shipments who renounced that role because it had not agreed to serve in that capacity and that the containers were idling in Bremerhaven while MTL looked for a solution, F of F 68-73, which supports CMA's argument that delays in transportation of the Ukraine Shipments occurred as a result of the disruption that occurred when the Port of Odesa was closed due to Russia's invasion of Ukraine.[5]

[5] The undersigned rejects MTL's argument that it was deprived of an opportunity to conduct follow up about other shipper's experiences due to CMA's production of responsive documents on the discovery deadline of April 16, 2024. MTL argues in its reply brief that it was precluded from moving for an extension of the discovery deadline or deadline to file its brief due to Judge Wirth's January 31, 2024, order stating that no further motions may

MTL argues that CMA's collective conduct surrounding the 8 shipments supports a finding that CMA's intent was to improperly increase demurrage, detention, and storage charges using a variety of means, but this type of disparate conduct argument was rejected by the Commission in *Crocus,* 3 F.M.C.2d 110, 119. In *Crocus*, the Commission found that much of the evidence that Crocus relied on in trying to show "normal, customary, and continuous" unreasonable conduct related to other aspects of Marine Transport's purchase and handling of boats, as opposed to the storage-charge-conduct the ALJ determined was unreasonable. *Id.* at 118. It noted that Crocus listed multiple transgressions allegedly committed by Marine Transport ranging from charging for services it failed to provide, falsifying documents, unreasonably withholding cargo, committing conversion, mishandling and failing to account for funds held in escrow, and not following Crocus's instructions, among other things to show that it was Marine Transport's "regular custom and practice to steal, lie, and defraud its clients at each and every step of the shipping process." *Id*. On this record, the Commission found that the ALJ correctly rejected claims unrelated to storage charges as irrelevant to a determination as to whether Crocus had met its burden of proving a normal, customary, and continuous practice. *Id*.

In this proceeding, MTL relies on disparate types of alleged unreasonable conduct to make the same general bad actor argument that was rejected in *Crocus*. The record here consists of unique and isolated events involving CMA's handling of MTL's eight containers rather than a pattern and practice. Accordingly, MTL has failed to sustain its burden of proof on this element.

3. Connected with Receiving, Handling, Storing, or Delivering Property

The disputed charges were imposed as part of invoicing demurrage, detention, and storage charges related to the delivery of MTL's cargo. Thus, the third element is met.

4. Unjust and Unreasonable

The Commission has stated that "'[t]he test of reasonableness" for practices is that "the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view." *Kawasaki Kisen Kaisha, Ltd v. The Port Authority of New York and New Jersey*, 2014 WL 7328475, at *9 (FMC 2014) (quoting *W. Gulf Mar. Ass'n v. Port of Hous. Auth*, 21 F.M.C. 244, 248, 18 S.R.R. 783, 790 (FMC 1978), *aff'd without opinion sub nom. W. Gulf Mar. Ass'n. v. FMC*, 610 F.2d 1001 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 822 (1980)).

MTL alleges in its Amended Complaint that CMA failed to comply with § 41102(c) in the following ways:

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be filed. Complaint's Reply Brief at 4; Order on Motions to Compel at 9. But MTL also acknowledged in its motion to reconsider the order granting CMA's motion to strike that CMA filed a motion for extension of the discovery deadline after the January 31st order, which was granted. Order on Respondent's Motion for Reconsideration and Second Revised Scheduling Order at 2. As such, MTL's argument that any motion for extension it filed would have been summarily rejected is not supported by the record. Moreover, the relevance of similar unreasonable conduct by CMA against other shippers should have been apparent to MTL from the time the action was filed. As such, it was incumbent on MTL to ask CMA to identify shippers with similar complaints through interrogatories and then to follow up directly with those shippers through depositions or subpoena duces tecum to obtain all relevant information necessary to prove its case.

A. By failing to timely advise MTL of any perceived shipping issues leading to increased demurrage charges;

B. By failing to respond in a reasonable manner to timely filed disputes, which caused an increase in the demurrage charges;

C. By failing to timely process Change in Destination in a manner that would avoid demurrage/storage/detention charges, which would allow for the release of the subject containers;

D. By failing to provide timely, accurate and complete accounting of demurrage/ storage/detention charges; and

E. By failing to include accurate aspects of such charges in the service contract as provided by CMA.

Amended Complaint ¶ 42.

Although MTL's amended complaint references eight containers, neither the Amended Complaint nor MTL's briefs correlate any of the violations alleged to a particular shipment or demonstrate how the evidence in the record proves the existence of an unreasonable regulation or practice. Rather than explaining its theory of the case and outlining the evidence that supports that theory, MTL argues shotgun style that CMA's failure to promptly respond to MTL's concerns or apprise MTL about various matters, failure to promptly invoice charges, and failure to produce several emails in discovery leads to the inevitable conclusion that CMA acted with an intent to improperly increase demurrage, detention, and storage charges as opposed to promoting the movement of cargo. As noted above, this is the same type of generalized allegation of wrongdoing that the Commission rejected in *Crocus*. The lack of specificity in MTL's filings makes it virtually impossible to determine what particular conduct MTL alleges constitutes an unreasonable practice. This fact notwithstanding, the undersigned will attempt to address MTL's allegations to the extent possible with respect to each shipment category.

The Ukraine Shipments

To the extent that MTL is arguing that CMA acted in an unreasonable manner to delay the five Ukraine Shipments, Commission precedent indicates that mere delay does not constitute a violation of the Shipping Act. In *Yakov Kobel and Victor Berkovich v. Hapag-Lloyd A.G, et al.*, 2012 WL 11914695, at *21 (ALJ 2012), *aff'd*, 2013 WL 9808671, at *19 (FMC 2013), the ALJ found that the seven-month delay in delivery of a container was not alone unreasonable and unjust because mere delay is not a violation of the Shipping Act. In reaching this conclusion, the ALJ cited *Meyan SA v. International Frontier Forwarders*, 30 S.R.R. 1397, 1400 n. 2 (FMC 2007) for the proposition that it unlikely that mere delay in shipping cargo would amount to a violation of section 10(d)(1) of the Shipping Act, 46 U.S.C. § 41102(c), because previous cases have found a Shipping Act violation for prolonged delay only when additional factors are present, such as a pattern of deception. In this case, MTL has not demonstrated that CMA engaged in unreasonable practices. Rather, the record demonstrates that the five containers were diverted from their original destination due to Russia's invasion of Ukraine on February 24, 2022, that delays were caused in part by the need to change the destination and consignee, that delays were caused in part by CMA's error in processing change requests, that delays occurred in part because MTL did not obtain consent for the new consignee it designated who refused to pick up the containers in July of 2022, and that all containers were picked up by the consignee on September 5, 2024, after CMA waived all demurrage and detention fees. As such, the containers were delivered less than seven months after they were diverted due to Russia's invasion of Ukraine on February 24, 2022. As there is no competent evidence of any additional factors present here beyond mere delay, there is no violation of 46 U.S.C. § 41102(c) with respect to the delay in delivery of the Ukraine Shipments.

To the extent that MTL is arguing that CMA engaged in unreasonable practices by failing to advise MTL of shipping issues, failing to timely respond to disputes, failing to timely process change of destination requests, and failing to provide a timely and accurate accounting of such charges, MTL makes bald assertions of these deficiencies without describing in detail the relevant events and without outlining the evidence that supports its claim. For this reason, MTL failed to establish a sufficient factual predicate to support these allegations. Accordingly, the undersigned finds that MTL has failed to satisfy its burden of proof on these claims.

To the extent that MTL alleges that CMA violated the Shipping Act "by failing to include accurate aspects of such charges in the service contract as provided by CMA," it is unclear what conduct MTL alleges to be unreasonable. Because this allegation is fatally vague, the undersigned finds that MTL has failed to meet its burden of proof to establish an unreasonable practice on this issue.

The Libya Shipment

The record shows that the Libya Shipment that included a jet ski in addition to used automobiles was rolled twice due to the presence of a jet ski in the container that violated customs restrictions and was transported once the jet ski was removed from the container. F of F 89-93, 96-98. The CMA booking confirmation for this shipment stated, inter alia: "For Automobile Shipments, if the container is received at the port and fails to meet any customs requirements. . . the booking will be rolled and applicable charges will be assessed." F of F 91. MTL argues that it learned of the jet ski ban only after the container was in-gated, was not advised that charges would continue to accrue during time when they were being disputed, and alleges that CMA lied about Malta customs prohibiting jet skis under the boat ban because other carriers were shipping jet skis and boats to Libya during the same time frame.

As proof of the fact that jet skis and boats were being shipped to Libya by other carriers, MTL relies on a quote for transport of jets skis, boats, and autos from NY to Al Khums, Libya dated September 18, 2020. As an initial matter, the undersigned finds that a quote to transport jet skis and boats by another carrier is not sufficient to prove that jet skis were not banned from export to Libya because the quote only establishes that a carrier agreed to transport the jet ski but not whether or not it was actually able to do so under applicable export restrictions.

Additionally, MTL witnesses testified at deposition that jet skis were included in the boat category under EU Council Regulation 2017/1325. RX1 (Privalova Deposition at 89:1-13); RX2 (Solovyeva Deposition) at 229:3-11; RX40. As such, the undersigned finds that the record shows that export of jet skis to Libya was banned and that the container was properly rolled for this reason.

Although MTL appears to argue that CMA was required to advise it of the customs restriction before it was in-gated, and therefore the container was improperly rolled and subjected to additional demurrage and detention charges for this reason, MTL offers no evidence to support a finding that CMA had a duty to advise MTL of any customs restrictions. In the absence thereof, the undersigned finds that it is reasonable for a carrier to place the burden of knowing the customs restrictions on the shipper. The undersigned also finds that it is appropriate for charges to accrue during a dispute over alleged customs violations because doing so incentivizes shippers to ensure in advance that there are no customs restrictions, encourages shippers to timely remove banned items, and serves as a financial incentive to promote freight fluidity. Notably, had CMA loaded the jet ski and the entire container been rejected by customs, MLT would have been subjected to additional charges because CMA Tariff Publication provides that "Except as otherwise provided, this tariff does not provide for returned cargo. All returned cargo will be handled as regular shipments, and rates quoted will be those in effect at the time of the return cargo." RX42 (CMA Tariff Rule 018).

Although MTL argues that CMA did not apply the contracted free period to the demurrage invoice, it offered no evidence concerning the number of free days to which it was entitled or how the amount charged on the invoice differs from the amount that should have been charged had the proper free period been applied. As such, the record does not support a finding that the invoiced charges were overstated.

Accordingly, to the extent that the record shows that CMA's practice was to roll containers due to customs violations subjecting the shipper to additional demurrage and detention charges, the undersigned finds the practice to be reasonable and MTL has failed to sustain its burden of proof on this issue.

The Rolled Shipments

With respect to the 2021 rolled shipment, CMA admits that it updated its documentation deadlines on its website without additional notice to MTL, asserting that there is no FMC rule requiring it to provide additional notice. F of F 118. In this case, the record shows that CMA changed the documentation deadline on its website for the 2021 rolled shipment from August 10, 2021, to August 9, 2021, approximately 12 hours before the deadline and provided MTL no other notice. F of F 110, 113-117. MTL was unaware of this change, submitted its documentation late on August 10, 2021, on the assumption that it was timely, but its container was rolled as a result of the late filing. F of F 112-117. The undersigned finds that changing the date of documentation deadline 12 hours in advance of the deadline with no other notice to MTL other than the updated website is an unreasonable practice. Logic dictates that direct communication with the shipper to notify them of a last-minute change in schedule is necessary to ensure that the shipper is aware of the new deadline. For this reason, the undersigned finds that MTL has sustained its burden of proof to establish an unreasonable practice in failing to give sufficient advance notice to the shipper of changes in the documentation deadline.

With respect to the 2022 rolled shipment, MTL did not offer evidence regarding the details of this shipment, but rather merely complains that CMA did not provide a rollover notification and that it was mistakenly rolled. CMA later admitted that the container was rolled in error. There is no evidence that this is anything more than an isolated incident. Moreover, in the absence of MTL providing a sufficient factual predicate to establish the existence of an unreasonable practice, MTL has failed to sustain its burden of proof on this issue.

MTL's Request for a Negative Inference

In its reply brief, MTL seeks the imposition of a negative inference against CMA arising from CMA's failure to produce three emails between CMA and MTL's client (Public Organization Kondryanka) and/or agent (FavoritPlus) in 2022 that CMA admits to not producing in its April 16, 2024, document production. Reply Brief of the Complainant at 1-3. For the reasons set forth below, the imposition of a negative inference is not appropriate.

The three emails MTL argues justify a negative inference are:

1. CMA email to MTL's client's (Public Organization Kodryanka) agent (FavoritPlus) dated April 14, 2022, stating: "Dear Customer, POD for NAM4887632 is updated to Constanta. Pls advise when you are going to pick up the cargo. Demurrage and storage are increasing on a daily basis." CX6 (email from CMA to FavoritPlus).

2. CMA email to MTL's client's agent (FavoritPlus), on July 5, 2022, stating: "We are planning to load container on Stadt Dresden on Jul.19 to Bremerhaven. Please advise if Cnee will be Favorit Plus or to be amended. Thanks to revert with payer and payment location of charges occurred in Constanta, i.e. storage and yard moves since without duly manifested charges container won't be loaded." CX9 (email from CMA to FavoritPlus).

3. CMA email to MTL's client's agent (FavoritPlus) on July 11, 2022, stating: "We'll fail to catch Stadt Dresden ETS Jul. 19 without payment confirmation and confirmed CNEE Please revert with payer and payment location and let us know if Favorit Plus will stay CNEE in Bremerhaven." CX12 (email from CMA to FavoritPlus).

MTL argues that CMA's failure to produce these emails entitles it to a negative inference that the only reason for not loading the containers at Constanta and then not releasing them in Bremerhaven was unpaid demurrage charges that CMA improperly assessed and tried to collect and not the sorting through the huge number of containers, processing the many change of destination and change of consignee requests, and getting containers re-routed as CMA claims. Reply Brief of the Complainant at 2-3.

Similar to Fed. R. Civ. P. 37(b), 46 C.F.R.§ 502.150(b), provides for the imposition of discovery sanctions in the current proceeding, and states:

> (b) Failure to comply with order compelling disclosures or discovery. If a party or a party's officer or authorized representative fails or refuses to obey an order requiring it to make disclosures or to respond to discovery requests, the presiding officer upon his or her own initiative or upon motion of a party may make such orders in regard to the failure or refusal as are just. A motion must include a certification that the moving party has conferred in good faith or attempted to confer with the disobedient party in an effort to obtain compliance without the necessity of a motion. An order of the presiding officer may:
>
> (1) Direct that the matters included in the order or any other designated facts must be taken to be established for the purposes of the action as the party making the motion claims;
>
> (2) Prohibit the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; or
>
> (3) Strike pleadings in whole or in part; staying further proceedings until the order is obeyed; or dismissing the action or proceeding or any party thereto, or rendering a decision by default against the disobedient party.

In December 2023, CMA and MTL filed cross motions to compel discovery against each other. In the Order on Motions to Compel dated January 31, 2024, Judge Wirth directed the parties to answer discovery and produce documents by February 15, 2024, and stated that the failure to do so may lead to an adverse finding regarding those facts. It also provided that no further motions may be filed. Order at 9.

On February 14, 2024, CMA filed a motion for reconsideration of the order on motions to compel seeking enlargement of time to complete discovery. On February 26, 2024, MTL filed a response. On February 27, 2024, Judge Wirth entered the Order on Respondent's Motion for Reconsideration and Second Revised Scheduling Order. The order, *inter alia*, extended the discovery deadline to April 16, 2024, limited CMA's discovery responses to 2022 complaints concerning U.S. exports that were diverted from one European country to another European country, directed that the responsive discovery be provided as soon as it is available, and provided that no new discovery requests may be served.

The imposition of a negative inference is appropriate where a party intentionally ignores its discovery obligations, and its purpose is to prevent a party from benefitting from the failure to engage in discovery. *Qi Qing Weng v. Hana Japanese Steakhouse, Inc*., 2020 WL 102313434, at *3 (E.D. Tenn. 2020). The imposition of a negative inference is not appropriate in the absence of willful conduct. *Jackson v. Harvard University,* 900 F.2d 464, 469 (1st Cir. 1990.) Courts are entrusted with broad discretion in imposing discovery sanctions under the federal rules, but the imposition of sanctions must be guided by the concept of proportionality between the offense and the sanction. *See McDowell v. Government of District of Columbia*, 233 F.R.D. 192, 200-

201 (evaluating the imposition of discovery sanctions under Fed. R. Civ. P. 37(b)) (D.D.C. 2006).

In this case, the record does not support a willful disregard by CMA of its obligation to produce responsive documents. As an initial matter, MTL does not identify in its reply brief the document request propounded upon CMA by number or specify what documents it requested. In the absence of these details, it is impossible to determine whether or not CMA was required to produce the three emails identified by MTL as improperly withheld by CMA in its discovery response. Assuming, *arguendo*, that the emails were responsive, the record does not support a finding that CMA intentionally withheld them. In this regard, MTL admits in its reply brief that it provided two of the three emails to CMA in its document production on February 1, 2024, at 8:59 am. Reply Brief of the Complainant at 1-2. It is illogical to conclude, as MTL suggests, that in its April 16, 2024, production CMA intentionally withheld documents from MTL that were already in MTL's possession because they had been served on CMA in MTL's February 1, 2024, production. Moreover, the record shows that CMA produced 20,000 documents to MTL on April 16, 2024, which supports a finding that it made a good faith effort to produce responsive documents. Although MTL alleges that the three withheld emails go to the heart of the Shipping Act violations at issue, the undersigned finds that the emails are merely cumulative of other evidence produced by CMA showing the communications between CMA, MTL, and its agents concerning the five containers diverted to Constanta and the actions taken before they were eventually picked up in Bremerhaven. As such, the imposition of a negative inference is not warranted in this instance.

Proximate Cause of Claimed Loss

In order to prove a claim for reparations, a party must show that it is entitled to a specific reparation, i.e., that it sustained actual loss or injury and that the violation of law was the proximate cause of that loss or injury with "reasonable certainty." *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11, 25 (1991); *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213, 1230 (1990). Speculative damages are not allowed, and there must be reasonable certainty regarding a claim for lost profits. *OJ Commerce, LLC v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft A/S & Co. KG, et al.*, 2023 WL 3969857, at *40 (ALJ June 7, 2023) (*aff'd* 2024 WL 4034610 (FMC August 27, 2024)).

MTL alleges in its amended complaint that it is seeking "actual and consequential damages, including loss of business to MTL, in the amount of $600,000." Amended Complaint at 9. MTL does not detail the damage it claims to have suffered in its opening brief. Brief of the Complainant. Rather, MTL alleged for the first time in its reply brief that it suffered lost profits as a result of CMA's unreasonable practices, and supplemented the record with exhibits offered to prove the amount of lost profits it suffered, including: Exhibit 55, a transaction report showing the income and expenses for a client MTL claims to have lost (Kodryanka); Exhibit 56, a profit statement from a second client MTL claims to have lost (Almotwasit); and Exhibit 57, a certification that Exhibits 55 and 56 are true and accurate. Because the issue of lost profits was raised for the first time on reply, the arguments regarding lost profits in MTL's reply brief and Exhibits 55, 56, and 57, were stricken from the record by the order granting CMA's motion to strike dated October 30, 2024, and the subsequent order denying MTL's motion for reconsideration dated November 12, 2024. Order on Respondent's Motion to Strike; Order on Complainant's Motion for Reconsideration or to Reopen Discovery.

With respect to the Ukraine Shipments, the record shows that CMA waived all charges prior to the five containers being picked up in Bremerhaven on September 5, 2022. F of F 79. With respect to the Libya Shipment, the record shows that MTL was invoiced demurrage charges in the amount of $6,140 for 15 days that were not waived because CMA concluded that it was the shipper's responsibility to comply with EU regulations. F of F 99-100, 104-105. MTL claims the invoice did not account for the contracted free days but does not cite to evidence in the record showing the number of contracted free days to which it was entitled or whether or not the invoiced amount accounted for those free days. MTL also does not allege that it paid any amount of demurrage. With respect to the 2021 Rolled Shipment, there is no evidence in the record of any charges assessed against MTL. With respect to the 2022 Rolled Shipment, the record shows that CMA waived the charges upon a determination that the shipment was rolled in error. F of F 124-126.

With the exception of the allegation in the amended complaint that CMA did not apply the contracted free period to the demurrage invoice for the Libya Shipment, MTL does not assert a claim for any amount of improperly assessed demurrage, detention, and storage charges in its amended complaint or briefs. The record shows that the demurrage fees for six of the other shipments were waived and contains no demurrage information regarding the remaining shipment. With respect to the Libya Shipment, CMA denies in its answer that the contracted free period was not applied to the demurrage invoice. Answer ¶ 33. There is no evidence in the record that any amount of demurrage, detention, and storage charges was paid. Based on this record, the undersigned finds that MTL failed to meet its burden to establish that it was subject to demurrage charges related to any of the shipments at issue.

With respect to MTL's alleged business losses, the record contains limited evidence. When CMA requested lost profit information during discovery in an effort to determine the nature of MTL's alleged injury, MTL refused to produce income tax returns showing annual profits for the relevant time frame. RX2 (Solovyeva Deposition) at 239:16 to 246:3. Pursuant to cross motions to compel filed thereafter by the parties, MTL was ordered to answer Interrogatories 30, 31, 32, and 33 in which CMA sought an explanation of exactly how MTL calculates its injury, despite that MTL argued that it "reserves the right to supplement this response as the full extent of MTL's damages is not yet known. Alla Solovyeva will be produced to testify on this point during the deposition." Order on Motions to Compel at 6. MTL's statement that it planned to address its damages claim during Alla Solovyeva's deposition establishes that MTL understood that Alla Solovyeva's testimony would provide CMA with the information necessary to determine how MTL's alleged injury was calculated.

According to Alla Solovyeva's testimony at deposition, MTL suffered damages related to the four containers stuck in Bremerhaven due to the loss of business from its customer Kodryanka in the amount of $82,000 per year in addition to potential business from unidentified customers resulting from damage to its reputation. Additionally, Alla Solovyeva testified that MTL suffered damages in an unspecified amount related to the Libya jet ski shipment due to the loss of an unspecified amount of business from customer Almotwasit. RX2 (Solovyeva

Deposition) at 246:15-248:22. MTL does not allege that it suffered any particular damages arising from the Rolled Shipments.

The record does not contain tax returns, profit and loss statements, or expert testimony substantiating MTL's claim that it suffered lost profits as a result of the alleged violations of the Shipping Act by CMA. In its reply brief, MTL cites authority for the proposition that a business owner is competent to testify as to lost profits based on his day to day knowledge of the business. Presumably, MTL is arguing that Alla Solovyeva's limited deposition testimony on the business losses suffered by MTL is sufficient to establish the amount of injury MTL sustained.

Assuming, *arguendo*, that Alla Soloveva is competent to testify regarding MTL's business losses, her testimony alone is insufficient to satisfy MTL's burden of proof on the damages issue because there is no competent evidence in the record that CMA's practices were the proximate cause of the losses MTL claims to have suffered. In this regard, MTL's business loss claim is based on the assertion that MTL lost customers and suffered damage to its reputation due to CMA's unreasonable practices with respect to the eight containers at issue. But other than the self-serving statements of MTL's principles, there is no evidence to corroborate this claim. No customer testified that they no longer did business with MTL due to CMA's unreasonable practices or that MTL had suffered reputational damage during the time frame at issue. Moreover, in the absence of tax returns and annual profit and loss statements there is insufficient data in the record to support a finding that MTL suffered any business loss whatsoever as a result of the eight shipments at issue in this proceeding. Other than the unsupported assertions by MTL's principals that MTL lost customers, lost profits, and suffered reputational harm, the record lacks competent evidence to support MTL's business loss claim. MTL's speculative assertions of business losses uncorroborated by reliable data are insufficient to support its claim for damages. *Rose International, Inc. v. Overseas Moving Network*, 2001 WL 865708, at *23, 80 (F.M.C. June 7, 2001) (rejecting claim for lost profits, lost future growth, and liquidated damages as speculative and unsupported by evidence.)

Additionally, the fact that MTL's lost profit information was not produced by CMA in discovery despite being requested by CMA and ordered to be produced by Judge Wirth in the order on motions to compel discovery dated January 31, 2024, supports a negative inference that the requested tax returns and profit and loss statements would not support MTL's claim of lost profits if they had in fact been produced. A claim as speculative in nature as "loss of business" requires far more supporting evidence than MTL has provided. Based on this record, the undersigned finds that MTL's business loss claim is speculative, and insufficient as a matter of law to support a claim for damages arising from lost profits.

For these reasons, the undersigned finds that MTL failed to meet its burden to establish that it suffered damages as the proximate result of CMA's practices. In the absence of evidence of MTL's payment of demurrage and detention charges, an analysis under 46 C.F.R.§ 545.5 is not required.

D. Conclusion

Complainant's claim fails because it has not established that CMA engaged in any unreasonable regulation or practice on a normal, customary, and continuous basis. Moreover, while MTL's failure to demonstrate the above element makes it unnecessary to determine whether the remaining elements under 46 C.F.R.§ 545.4 have been demonstrated, with the exception of the 2021 Rolled Shipment it is not clear from the evidence that CMA's conduct was unjust and unreasonable or that the alleged conduct was the proximate cause of the injury alleged by MTL. In the absence of proof that MTL paid demurrage, an analysis under 46 C.F.R.§ 545.5 is not required. Accordingly, MTL failed to meet its burden to establish a violation of 46 U.S.C. § 41102(c).

IV. ORDER

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

ORDERED that MTL's be **DENIED**. It is

FURTHER ORDERED that CMA's motion to file a sur-reply be **DENIED**. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED.**

Mary Apostolakos Hervey
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SAMSUNG ELECTRONICS AMERICA, INC., *Complainant* v. ORIENT OVERSEAS CONTAINER LINE LIMITED AND OOCL (EUROPE) LIMITED, *Respondents*.	**DOCKET NO. 24-17**

Served: December 19, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's November 18, 2024, Order Partially Granting Motion to Dismiss has expired. Accordingly, this Order has become administratively final.

David Eng
Secretary

FEDERAL MARITIME COMMISSION

WCG GROUP, LLC DBA AITOH CO., *Claimant* v. CHRIS PHILLIPS AND PAUL KNOTT, *Respondents*.	**DOCKET NO. 1999(F)**

Served: December 27, 2024

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's November 26, 2024, Initial Decision has expired. Accordingly, this decision has become administratively final.

David Eng
Secretary