Before the

FEDERAL MARITIME COMMISSION

Washington, D.C. 20573

Docket No. 21-05

MCS INDUSTRIES, INC. v. MSC MEDITERRANEAN SHIPPING COMPANY SA

COMPLAINANT MCS INDUSTRIES, INC.'S RESPONSE TO RESPONDENT MSC MEDITERRANEAN SHIPPING COMPANY SA'S EXCEPTIONS TO DECISION ON DEFAULT

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Complainant MCS Industries, Inc. ("Complainant"), by and through its undersigned attorneys, files this response to MSC Mediterranean Shipping Company SA's ("Respondent" or "Mediterranean") February 6, 2023 Exceptions (the "Exceptions") to the Presiding Officer's January 13, 2023 Initial Decision on Default (the "Decision").

INTRODUCTION AND SUMMARY OF ARGUMENT

Mediterranean's Exceptions perpetuate a course of conduct throughout this proceeding in which Mediterranean has displayed disregard for the Shipping Act, the Rules of Practice and Procedure promulgated thereunder (the "Rules"), the authority of the Presiding Officer, Chief Administrative Law Judge Erin M. Wirth, and the jurisdiction of the Federal Maritime Commission (the "Commission") itself. Mediterranean presents its Exceptions as a dense and tangled web of legal conclusions masquerading as "facts", twisted and selective retellings of this case's procedural history, and arguments based on a record that is patently incomplete as a direct result of Mediterranean's own discovery misconduct.[1] Having lost this case on default for a very simple reason—*i.e.*, Mediterranean's obdurate refusal to comply with an order compelling it to produce documents for ***over a year***—Mediterranean has apparently decided that it is best served by obscuring the issue of its discovery misconduct in a cloud of irrelevancies.

The Commission's review of the Decision, however, is far simpler than Mediterranean would have the Commission believe, for three reasons. *First*, under the deferential standard of review that the Commission applies to sanctions for discovery misconduct, the Commission may overturn the Decision only if it finds that the Presiding Officer abused her discretion in awarding

[1] Complainant addresses Respondent's principal Statements of Exception herein, and addresses Respondent's other Statements of Exception and Respondent's lengthy (and procedurally dubious) "FACTS RELEVANT TO THE EXCEPTIONS" in the Appendix at the end of this document.

sanctions. As the detailed and well-reasoned Decision demonstrates, the Presiding Officer had more than ample cause to impose a sanction of default within her sound discretion.

Second, the Commission need not address any of Mediterranean's Exceptions relating to the scope of discovery, because Mediterranean ***waived*** those issues by failing to timely appeal them, and the relevant discovery orders have long since become final orders of the Commission. In particular, Mediterranean's Exceptions implicating the Presiding Officer's December 8, 2021 Order Granting Motion to Compel (the "Order Granting Motion to Compel") and July 29, 2022 Order Requiring Production of Discovery (the "Order Requiring Production"), which lie at the heart of Mediterranean's default and the Presiding Officer's Decision, are untimely and are not properly before the Commission at this juncture. Section 502.150 of the Commission's Rules specifically provides that "[o]rders of the presiding officer directed to persons or documents located in a foreign country"—*i.e.,* the Order Granting Motion to Compel and the Order Requiring Production, directed to Mediterranean and its documents purportedly located in Switzerland—"must become final orders of the Commission unless an appeal to the Commission is filed within 10 days after date of issuance of such orders or unless the Commission on its own motion reverses, modifies, or stays such rulings within 20 days of their issuance." 46 C.F.R. § 502.150(d). The Order Granting Motion to Compel was issued over a year ago, and the Order Requiring Production over six months ago, and Mediterranean filed no appeal of either to the Commission within 10 days thereof (and the Commission did not reverse, modify, or stay either within 20 days of their respective dates). Indeed, Mediterranean did not even file its Exceptions within 10 days of the Initial Decision. Consequently, those discovery Orders, and the matters addressed in them, are already final orders of the Commission and not subject to review now.

Third, the Presiding Officer's Decision was detailed, well-reasoned, and supported by the factual record of this case, which is limited due to the fact that the case never proceeded past initial discovery because of Mediterranean's refusal to comply with its discovery obligations. Far from abusing her discretion, the Presiding Officer correctly applied the law governing decisions on default and properly awarded Complainant its claimed reparations on that basis.

The Commission should also reject Mediterranean's attempt to relitigate whether the Commission has jurisdiction over Complainant's Verified Amended Complaint (the "Amended Complaint"), and whether the claims therein are actionable under the Shipping Act. As the Presiding Officer has correctly ruled in numerous well-reasoned decisions, Respondent ***is*** subject to the Commission's jurisdiction, the Shipping Act, and its associated regulations, and Complainant ***has*** sufficiently stated its claims thereunder. And contrary to Respondent's further arguments that the Presiding Officer misapprehended relevant facts and the procedural posture of the case and erred as a matter of law, both in granting a decision on default to Complainant and awarding Complainant its alleged reparations, the applicable law fully supports the Presiding Officer's Decision.

For the reasons stated herein, as well as in the Presiding Officer's orders and Complainant's prior submissions in this case, the Presiding Officer's Decision clearly did not constitute an abuse of discretion, but instead was appropriate and correct, and should be affirmed and adopted by the Commission in full as its final decision in this case.

LEGAL ARGUMENT IN OPPOSITION TO THE EXCEPTIONS

A. Standard of Review

Pursuant to 46 C.F.R. § 502.227(a)(6), "[w]here exceptions are filed to, or the Commission reviews, an initial decision, the Commission, except as it may limit the issues upon notice or by rule, will have all the powers which it would have in making the initial decision."

The Commission generally reviews initial decisions of its Administrative Law Judges *de novo*, adopting their findings of fact and law where "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 Dkt. No. 13-01, 2014 WL 5316339, at *1 (FMC Feb. 6, 2014) (reviewing administrative law judge's decision on default). Importantly, however, in the context of reviewing "decisions sanctioning parties' failure to comply with orders compelling discovery"—*i.e.*, the context of the Exceptions before the Commission in this case—the Commission instead follows the U.S. Courts of Appeals in applying a more deferential "***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." *Muhammad Rana, Complainant, v. Michelle Franklin, D.B.A. "the Right Move," Inc., Respondents*, FMC Dkt. No. 19-03, 2022 WL 1744905, at *4 (FMC May 25, 2022) (emphasis added) (quoting *Parsi v. Daioleslam*, 778 F.3d 116, 125 (D.C. Cir. 2015)) (internal quotations omitted) (affirming discovery sanctions on the respondent for failure to comply with the Presiding Officer's order directing discovery responses). As detailed herein, the Decision is well-reasoned and adequately supported under either standard of review.

B. Respondent Waived the Right to File Exceptions to the Order Granting Motion to Compel and Order Requiring Production by Failing to Appeal Those Orders.

As noted above, the Rules set forth a specific procedure relating to the appeal ***and finality*** of orders compelling discovery "directed to persons or documents located in a foreign country":

> Orders of the presiding officer directed to persons or documents located in a foreign country must become final orders of the Commission unless an appeal to the Commission is filed within 10 days after date of issuance of such orders or unless the Commission on its own motion reverses, modifies, or stays such rulings within 20 days of their issuance. Replies to appeals may be filed within 10 days. No motion for leave to appeal is necessary in such instances and no orders of the presiding officer must be effective until 20 days from date of issuance unless the Commission otherwise directs.

46 C.F.R. § 502.150(d) (emphasis added).

The Order Granting Motion to Compel was issued on December 8, 2021, and the Order Requiring Production was issued on July 29, 2022. Both Orders were "directed to persons or documents located in a foreign country", and the time for appellate review of both Orders has long since passed without action by Respondent or the Commission. Consequently, under 46 C.F.R. § 502.150(d), those Orders have already become final orders of the Commission with which Respondent has consistently refused to comply. Accordingly, Respondent's Exceptions, which were explicitly filed under 46 C.F.R. § 502.227 (the Rule governing exceptions to initial decisions of the Presiding Officer) cannot extend to matters decided in already-final orders of the Commission, including belated complaints about alternative discovery paths previously addressed in those final orders,[2] and the Commission should disregard all Exceptions concerning the scope of discovery or the methods prescribed by those orders.[3]

[2] For example, Respondent makes an untimely argument that the Presiding Officer's Decision granting Complainant a decision on default was premature because the Presiding Officer did not first initiate the diplomatic consultation process described in 46 U.S.C. § 41108(c)(2). That issue, however, which arose upon the Presiding Officer's issuance of her Order granting Complainant's Motion to Compel, and again upon her issuance of her Order Requiring Production of Discovery, was waived when Respondent failed to seek review of those Orders by the Commission within the time prescribed by the Commission's Rules. Respondent's other contentions concerning the discovery Orders are similarly untimely. Notably, the July 29, 2022 Order Requiring Production of Discovery was issued ***after*** the parties had already submitted briefing on the 46 U.S.C. § 41108(c)(2) consultation process and alternatives under the Hague Evidence Convention, and ***after*** the Presiding Officer's Hague Evidence Convention Letter of Request—which was issued at ***Respondent's*** request and prepared at ***Complainant's*** expense—had been rejected by the Geneva court. Indeed, Respondent's newfound insistence on alternative discovery procedures is particularly bizarre in light of the fact that ***Respondent's own Swiss counsel*** previously opined in this case that "[f]rom a Swiss legal perspective, the Hague Convention is ***exclusively*** applicable among Contracting States as regards the taking of evidence", and ***not*** merely "an 'option'" because such an interpretation "deprives Switzerland of the ***exclusive*** use of the Hague Convention for document requests from the United States." Dkt. 40 at Mem. ¶¶ 21–22 (emphasis added). Respondent cannot now attack the Decision by reaching for an alternative that it previously rejected in favor of a Hague Evidence Convention process, and which its own Swiss counsel has opined is not, in fact, available.

[3] "Within twenty-two (22) days after date of service of the ***initial decision***, unless a shorter period is fixed under § 502.103, any party may file a memorandum excepting to any conclusions, findings, or statements ***contained in such decision***". 46 C.F.R. § 502.227 (emphasis added).

C. The Initial Decision Correctly Concluded that Default Is the Appropriate Remedy for Respondent's Discovery Misconduct.

The Initial Decision correctly states that:

> As [Mediterranean] was advised previously, pursuant to Commission Rule 150(b), if a party "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," including "rendering a decision by default against the disobedient party." 46 C.F.R. 502.150(b).[4]

"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 (relying on federal court decisions to find sanctions appropriate in a case before the FMC); *Kawasaki Kisen Kaisha, Ltd. Complainant, v. the Port Authority of New York and New Jersey Respondent*, FMC Dkt. No. 11-12, 2014 WL 7328475, at *13–14 (FMC November 20, 2014) (awarding sanctions for discovery failures and finding that Commission Rule 150(b), then codified as Commission Rule 210(b), "was established to incorporate certain provisions in Fed. R. Civ. P. 37 related to sanctions for failure to comply with discovery-related orders").

Default judgment is appropriate "pursuant to Federal Rule of Civil Procedure 37(b)(2) when: (1) a party has failed to obey an order to provide or permit discovery; (2) one of the three *Webb* justifications for use of default judgment as a sanction has been met"— *i.e.*, where the failure (i) unfairly hampered the other party, (ii) burdened the tribunal through delay, or (iii) disrespected the tribunal and is the type of conduct that should be deterred in the future[5]—"and (3) lesser

[4] Dkt. 64 at 13.

[5] *See Webb v. D.C.*, 146 F.3d 964, 971 (D.C. Cir. 1998) ("First, the court may decide that the errant party's behavior has severely hampered the other party's ability to present his case—in other words, that the other party has been so prejudiced by the misconduct that it would be unfair to require him to proceed further in the case. Second, the court may take account of the prejudice caused to the judicial system when the party's misconduct has put an intolerable burden on a district court by requiring the court to modify its own docket and operations in order to accommodate the delay. And finally, the court may consider the need to sanction conduct that is disrespectful to the court and to deter similar misconduct in the future.") (internal citations and quotation marks omitted).

sanctions will not adequately deter and punish the misconduct." *SEC v. China Infrastructure Inv. Corp.*, 189 F. Supp. 3d 118, 129–32 (D.D.C. 2016) (awarding default judgment based on "the defendants' violation of the last three Court Orders, the most recent of which expressly compelled the defendants to respond to the[ir opponents'] interrogatories and requests for production of documents").

A party who flouts discovery obligations "does so at his peril." *Medina v. Gonzalez*, No. 08 CIV 01520 BSJ KNF, 2010 WL 3744344, at *15–16 (S.D.N.Y. Sept. 23, 2010) (quoting *Sieck v. Russo*, 869 F.2d 131, 133 (2d Cir. 1989)). Ignoring multiple discovery orders is the classic hallmark of conduct meriting a default judgment based on discovery failures. *See Am. Cash Card Corp. v. AT & T Corp.*, 184 F.R.D. 521, 524–25 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 354 (2d Cir. 2000) (finding "the extreme measure of a default judgment is required [because] Amcash has failed to obey not one but *five* orders") (emphasis in original); *Stirrat v. Ace Audio/Visual, Inc.*, No. 02 CV 2842(SJ), 2004 WL 2212096, at *2–3 (E.D.N.Y. Sept. 24, 2004) (awarding default where "despite court orders, Defendant failed to produce witnesses for depositions and failed to respond to court-ordered discovery [because] Defendant's disobedience appears to be willful, or at the very least grossly negligent"); *Communispond, Inc. v. Kelley*, No. 96 CIV. 1487 (DC), 1998 WL 473951, at *5 (S.D.N.Y. Aug. 11, 1998) (finding "that the entry of a default judgment against [defendants] is warranted . . . [where] defendants have wilfully disobeyed several of my oral discovery orders").

1. *The Initial Decision correctly found that Mediterranean has violated numerous discovery orders, satisfying the first element for a default judgment.*

Mediterranean does not dispute that it "failed to obey an order to provide or permit discovery", satisfying the first element of the standard for entering a sanction of default. *China Infrastructure Inv. Corp.*, 189 F. Supp. 3d at 129–32. In fact, Mediterranean disobeyed ***three*** of

the Presiding Officer's Orders in less than a year, a sufficient record to warrant a default judgment under federal standards. *See id.* at 129 (entering default judgment sanction where defendants violated three court orders over eight-month period). Crucially, each Order came with a warning of the potential for sanctions, including the possibility of a default decision.

First, the Order Granting Motion to Compel required Mediterranean to produce documents and answer interrogatories concerning a number of issues that go to the heart of the causes of action this case.[6] At that time, over fourteen months ago, the Presiding Officer admonished Mediterranean that "failure to produce discovery may result in sanctions, including an adverse determination."[7] ***To date, Mediterranean has not produced any documents or answered any interrogatories in response to the Order Granting Motion to Compel.***

Second, in the Order Requiring Production, the Presiding Officer stated once again that Mediterranean was "ORDERED to provide any outstanding discovery by August 29, 2022, including the discovery ordered to be produced in the Order Granting Motion to Compel."[8] The Presiding Officer again chastised Mediterranean that "parties appearing before the Commission are entitled to relevant evidence needed to adjudicate the proceeding [and that f]ailure 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."[9] ***Mediterranean has produced no documents and answered no interrogatories in response to the Order Requiring Production.***

[6] Dkt. 27.

[7] *Id*. at 13.

[8] Dkt. 50 at 4.

[9] *Id*.

Third, and most recently, the Order to Show Cause required Mediterranean "to show cause why a default decision should not be issued against it"[10]—a requirement that Mediterranean's response to the order to show cause utterly failed to fulfill. The Presiding Officer clearly instructed that "[t]he ***merits of the proceeding and remedy are not at issue and should not be addressed in these filings***—the question is ***only*** whether a default decision or other procedural consequence is appropriate for MSC Mediterranean Shipping's failure to produce discovery."[11] In contempt of the Presiding Officer's explicit instructions, Mediterranean's Response strayed far beyond the bounds of the Order to Show Cause, devoting fully half its considerable length to arguing that the Commission "lacks jurisdiction over this proceeding to begin with" and that there was no prejudice to Complainant from not receiving the discovery at issue despite the Presiding Officer's clear findings to the contrary nine months prior in the Order Granting Motion to Compel.[12]

Mediterranean's refusal to comply with three of the Presiding Officer's Orders—each of which came with a warning about the risk of a sanction or default—clearly satisfies the first element for a default judgment. *See China Infrastructure Inv. Corp.*, 189 F. Supp. 3d at 129–32; *Rana*, 2022 WL 1744905, at *6–7 (finding sanctions appropriate in an FMC case for a party acting *pro se* because "[t]he ALJ's recurring admonitions clearly put Respondent on notice that her continuing failure to cooperate could lead to sanctions and possibly a default judgment"); *Stirrat*, 2004 WL 2212096, at *2–3 (finding default judgment appropriate where "Defendant was given ample and adequate notice of the consequences of noncompliance"); *Lopez v. J & K Floral USA, Inc.*, 307 F. Supp. 3d 257, 259–60 (S.D.N.Y. 2018) (awarding sanctions because "if a court does not eventually follow through on its warnings, it risks undermining its ability to control current

[10] Dkt. 55 at 2.

[11] *Id.* (emphasis added).

[12] Dkt. 56 at 13–24 & 26–30.

and future would-be wayward litigants"); *Am. Cash Card*, 184 F.R.D. at 524–25 ("I warned Amcash four times that I would impose sanctions, including a default judgment, if it did not comply. Those warnings went unheeded").

2. *The Initial Decision correctly found that the second prong of the default judgment standard was satisfied and all three Webb factors were met, because the case cannot be decided on the merits based on the discovery provided, prejudice would result from any further delay, and Respondent's actions have demonstrated contempt of the FMC.*

The second element for a default judgment is satisfied where a party's conduct satisfies any "one of the three *Webb* justifications for use of default judgment as a sanction". *China Infrastructure Inv. Corp.*, 189 F. Supp. 3d at 129. Mediterranean's conduct in this case satisfied ***all three*** *Webb* factors.

Under the first prong of *Webb*, default is appropriate where "the errant party's behavior has severely hampered the other party's ability to present his case—in other words, that the other party has been so prejudiced by the misconduct that it would be unfair to require him to proceed further in the case." *Webb*, 146 F.3d 964 at 971. Unfairness to a party is inherent where the party will be hampered in proving its case without the discovery that the defaulting party refuses to provide. *U.S. Bank Nat'l Ass'n v. Poblete*, No. CV 15-312 (BAH), 2017 WL 598471, at *6 (D.D.C. Feb. 14, 2017) (granting default because it was unfair to plaintiff to have to proceed without "the information sought from [defendant which] is necessary to proceeding with [the] lawsuit"); *Perez v. Berhanu*, 583 F. Supp. 2d 87, 91 (D.D.C. 2008) (granting default after finding unfairness to "Plaintiffs [because they] are unable to present their case for a merits resolution without any discovery from defendants").

The Order Granting Motion to Compel contained over a dozen individual orders requiring Mediterranean to respond to ***well over*** a dozen discovery requests. Each of those orders came with a finding that Complainant was entitled to the requested discovery because it was relevant to

Complainant's well-pled claims.[13] Approximately eight months later, the Order Requiring Production determined that Mediterranean had failed to "provid[e] relevant discovery which it was ordered to produce in the order granting motion to compel" and further noted that the evidence at issue is "relevant" and "needed to adjudicate the proceeding."[14]

Because the Presiding Officer found on multiple occasions that Complainant would be prejudiced without the discovery at issue, the only question is whether Mediterranean has produced the required discovery. Mediterranean has not. Since the Order Granting Motion to Compel, Mediterranean has not answered any of Complainant's first set of interrogatories or produced any additional documents in response to that Order, leaving both that Order and the more recent Order Requiring Production ***entirely*** unfulfilled. Moreover, the fact that the Decision was issued ***more than a year*** after the Order Granting Motion To Compel, during which time Complainant was forced to incur litigation expenses while Mediterranean, a much larger entity with a vast capacity to finance litigation, openly flouted its discovery obligations and the Presiding Officer's Orders, itself constituted unfair prejudice to Complainant. *See Peart v. City of New York*, 992 F.2d 458, 462 (2d Cir. 1993) ("prejudice resulting from unreasonable delay may be presumed as a matter of law"); *Am. Cash Card*, 184 F.R.D. at 524–25 ("AT&T has been prejudiced[, i]t has had to devote extensive time and resources to trying to obtain the most basic discovery and the case has been delayed").

Even if Mediterranean believed the Orders were wrongly decided and the discovery at issue was unnecessary, its conduct still unreasonably prejudiced Complainant and delayed the proceedings as a result of Mediterranean's repeated failure to use the correct mechanism under the

[13] Dkt. 27 at ¶¶ III(A)-(N).

[14] Dkt. 50 at 4.

Rules for challenging the Orders; *i.e.*, appealing them. As detailed above, since the Orders were discovery orders "directed to persons or documents located in a foreign country", Mediterranean could have appealed the orders pursuant to 46 C.F.R. § 502.150(d) if it had wished to prevent the orders from becoming final and binding. Yet Mediterranean chose not to do so, and the Orders became final orders of the Commission long ago. *See* 46 C.F.R. § 502.150(d).

Because the Presiding Officer has already long since ruled that Complainant is entitled to the discovery at issue—a ruling that is no longer subject to appeal, and thus not properly part of Respondent's Exceptions now—and because Mediterranean never produced any of that discovery, it is beyond cavil that Complainant was unfairly hampered in this action by Mediterranean's conduct, fulfilling the first *Webb* justification.

Under the second prong of *Webb*, default judgment is appropriate where a party's misconduct has created "prejudice to the judicial system caused by accommodating the delay due to a party's misconduct. " *Poblete*, 2017 WL 598471 at *6. Mediterranean's discovery misconduct has dominated this case, occasioning multiple delays and rounds of unnecessary filings—all of which have imposed burdens both on Complainant, a much smaller entity than Mediterranean, and on the Presiding Officer's docket.

The initial scheduling order required document production to be substantially complete by November 5, 2021.[15] During the initial phase of discovery, Complainant's counsel asked Mediterranean's counsel whether Mediterranean would take the position that Swiss law would interfere with discovery, and Respondent told Complainant it was not aware of any issues with Swiss discovery rules.[16] Since late November 2021, though, with the exception of filings relating

[15] Dkt. 15.

[16] Dkt. 53 at 1.

to Mediterranean's belated (and unsuccessful) motion to dismiss and Complainant's Amended Complaint,[17] ***every*** filing in this action was a direct result of Mediterranean's failure to comply with its discovery obligations, including:

- Complainant's Motion to Compel, Mediterranean's Response, and the Court's Order Granting Motion To Compel (Dkt. 21–27).
- Documents relating to Swiss legal and discovery processes and the Letter of Request pursuant to the Hague Evidence Convention (Dkt. 44, 47, 53).
- Joint Status Reports addressing Mediterranean's failure to produce discovery, Swiss law issues, and the Hague Evidence Convention process (Dkt. 28, 35, 41, 43, 45, 48, 51).
- A revised scheduling order (Dkt. 42), an Order Requiring Joint Status Report suspending the case schedule (Dkt. 46), and a Notice of Extension of Time (Dkt. 49), all reflecting delays occasioned by Mediterranean's discovery delays.
- Mediterranean's Motion for an Extension of Time (Dkt. 52, 53, 55).
- Filings relating to the Order to Show Cause (Dkt. 55, 56).

Mediterranean was well aware of the delays occasioned by its conduct, and of the burden such delays imposed on the Presiding Officer and on Complainant. Indeed, Complainant repeatedly requested that sanctions be imposed in light of the delay and burden created by Mediterranean's discovery misconduct. For example, one year ago today, in the parties' February 28, 2022 Joint Status Report, Complainant noted:

> [B]ecause the delay in obtaining Swiss legal clearance was entirely due to Respondent, which chose to wait over four months after Complainant raised the issue before filing its Memo, and because Respondent could have voluntarily answered Complainant's interrogatories and produced all relevant documents, communications, and information without forcing Complainant to file, and win, a motion to compel, Complainant respectfully suggests that ***if Respondent continues in its noncompliance with the Presiding Officer's Order past any new deadline set by the Presiding Officer, then additional sanctions, including without***

[17] Dkt. 29–34, 36–39.

limitation an adverse inference and entry of judgment, may become appropriate.[18]

In the April 4, 2022 Joint Status Report, Complainant again raised the issue of Mediterranean's discovery delays, noting that the "now months-long delay in obtaining Swiss legal clearance was entirely due to Respondent, which chose to wait over four months after Complainant raised the issue before filing its memo on the claimed Swiss legal issue", and that "Respondent could instead have answered Complainant's interrogatories and produced all relevant documents, communications, and information on a voluntary basis, avoiding the need to pursue any of these options."[19] In its September 2, 2022 opposition to Mediterranean's motion for a further extension of time, Complainant again argued that sanctions, including default judgment, were an appropriate remedy for Mediterranean's pattern of delay and noncompliance.[20]

In the very first scheduling order in this action, the Presiding Officer expressly reminded the parties that "a scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril".[21] Throughout this action, Mediterranean flouted the Presiding Officer's instructions, refused to comply with discovery orders, denied the Commission's jurisdiction over it, and cavalierly disregarded every attempt by Complainant and the Presiding Officer to move this case along.

The third and final *Webb* justification, regarding the need to deter conduct disrespecting the tribunal, is satisfied by Mediterranean's disregard for the jurisdiction of the Commission, the Presiding Officer's Orders, and the requirements of the Commission's Rules. *Webb*, 146 F.3d at

[18] Dkt. 41 at 8 (emphasis added).

[19] Dkt. 43.

[20] Dkt. 53.

[21] Dkt. 15 (citation omitted).

971. It is well settled that failure to comply with court orders and missing discovery deadlines constitute sanctionable disrespect for the tribunal. *See China Infrastructure Inv. Corp.*, 189 F. Supp. 3d at 131 ("the defendants' behavior has demonstrated a disrespect for the Court and a need to deter future misconduct[including, among other things, t]he complete refusal to respond to this Court's last three Orders"); *Guarantee Co. of N. Am. USA v. Lakota Contracting Inc.*, No. CV 19-1601 (TJK), 2021 WL 2036666, at *4 (D.D.C. May 21, 2021) (finding disrespect element met when, *inter alia*, defendants failed to respond to discovery requests and missed court-ordered deadlines); *Perez*, 583 F. Supp. 2d at 91 ("Defendants' disrespect for the Court is demonstrated not only by their failure to respond to plaintiffs' discovery requests, but also by their disregard of the [] discovery deadline").

Mediterranean is widely reported to be the largest container shipping line in the world, and is a repeat player before the Commission in both its regulatory and adjudicatory functions. Without the severe sanction of a default decision in this case, Mediterranean may continue to act in future cases as it has in this action; *i.e.*, as though it has authority to define unilaterally for itself the scope and nature of claims that may be brought against it and to decide, also unilaterally for itself, what its discovery obligations are under the Commission's Rules, without regard to the Orders of the Presiding Officer or the Commission itself. If Mediterranean's conduct in this case is not penalized through sanctions, Mediterranean would have a strong incentive to hamper other future complainants as it has Complainant here, hiding behind its own preferred interpretations of Swiss law—interpretations rejected by U.S. federal courts and the Presiding Officer in this action alike—while continuing to access and profit from its business at U.S. ports.

Mediterranean's conduct with respect to another current case appears to reinforce the need for stern sanctions to conform Mediterranean's conduct to the requirements and prohibitions of the

Shipping Act. In Commission Docket No. CC-001, a complainant initiated a charge complaint against Mediterranean. It appears from Mediterranean's response to an order to show cause entered by the Commission in that case that it was only ***after*** the Commission's regional officer had forwarded the case to the Office of Enforcement for further action that Mediterranean belatedly sought to settle the claim.[22] Mediterranean's pattern of failing to comply with its obligations under the Commission's Rules and the Shipping Act demonstrate that, without sanctions, Mediterranean will simply continue its pattern of delay and discovery misconduct.

Beyond deterring Mediterranean from repeating its misconduct in other cases, a sanction of default was appropriate in this case because such a sanction is necessary to deter similar misconduct by other litigants before the Commission. If this case were to establish a precedent that Mediterranean may flout the Commission's Rules, deny the Commission's jurisdiction despite litigating and losing that issue (without any attempt to appeal at the time), and disregard the Presiding Officer's discovery orders at will, then Mediterranean and other non-U.S. ocean common carriers, which collectively dominate the market for global transoceanic shipping, could employ the same tactics to thwart discovery that Mediterranean has employed in this case. *See Perez*, 583 F. Supp. 2d at 91 ("[a] lesser sanction may also yield similar misconduct by other litigants by indicating that flagrant violations will yield only minor sanctions"); *Cine Forty–Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1064 (2d Cir. 1979) ("[U]nless Rule 37 [sanctions are] perceived as a credible deterrent rather than a paper tiger, the pretrial quagmire threatens to engulf the entire litigative process.") (internal quotation marks and citations omitted); *Lopez*, 307 F. Supp. 3d at 259–60 ("if a court does not eventually follow through

[22] *See* Mediterranean's Petition to Dismiss the Charge Complaint and the Order to Show Cause, *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*, FMC Dkt. No. CC-001 (Feb. 23, 2023).

on its warnings, it risks undermining its ability to control current and future would-be wayward litigants").

Because Mediterranean refused to comply with multiple Orders of the Presiding Officer and missed deadlines set by such Orders, and because Mediterranean (and other litigants) would be incentivized to pursue this same course of misconduct unless adequately deterred, the third *Webb* justification has also been satisfied. Satisfaction of all three *Webb* justifications is more than sufficient to satisfy the second element for a default judgment.

3. *The Initial Decision's analysis of the futility of lesser sanctions was correct and within the sound discretion of the Presiding Officer.*

The third and final element for a default judgment is whether a lesser sanction would be appropriate. "A Court entering default judgment as a sanction under Rule 37 need not exhaust lesser sanctions before entering default judgment, but it must explain why a lesser sanction is inadequate." *Guarantee Co.*, 2021 WL 2036666 at *5. Because a default judgment is a comparatively severe sanction, it is, in fact, ***more*** appropriate than a less extreme sanction where the discovery failures were willful or in bad faith. "The Second Circuit Court of Appeals has recognized that, in determining whether ***litigation-ending*** sanctions are appropriate, wilfulness and/or bad faith may be exhibited by repeated defiance of the district court's orders, and sustained and willful intransigence in the face of repeated and explicit warnings from the court." *Medina*, 2010 WL 3744344 at *15–16 (emphasis added) (quoting *Baba v. Japan Travel Bureau Int'l*, 111 F.3d 2, 5 (2d Cir. 1997)).

Mediterranean's willfulness and bad faith in this action were palpable. Mediterranean's principal defense of its behavior is that its conduct was not in bad faith because it was simply trying to comply with Swiss law (despite the Geneva Tribunal de première instance's (the "Swiss Court") rejection of Mediterranean's interpretation), but this precise argument has been rejected

as a defense to default judgment before. *See Schindler Elevator Corp. v. Otis Elevator Co.*, No. 09–cv–0560 (DMC), 2011 WL 4594225, at *1-2 (D.N.J. March 24, 2011), *report and recommendation adopted*, 2011 WL 4594958, at *1 (D.N.J. Sept. 30, 2011) (upholding default against party who argued "that it could not produce the discovery because Swiss law would not permit it to do so [where] that excuse had been rejected three previous times, once in a published Opinion in th[e same] matter"); *SEC v. Euro Sec. Fund*, No. 98 CIV 7347 DLC, 1999 WL 182598, at *3-4 (S.D.N.Y. April 2, 1999) ("the Court believes it would be possible to enter a default judgment against" Defendant who "assert[ed] that providing the discovery sought could violate Swiss law, and that whether it is proper to make this revelation should in the first instance be decided by Swiss authorities").

Mediterranean's actions make clear that its Swiss law arguments were made for purposes of discovery gamesmanship, not in good faith. *First*, as reflected in the Decision:

> [A]t the outset of discovery in this action, Respondent told Complainant that it was not aware of any issues with Swiss discovery rules. As reflected in the February 28, 2022 Joint Status Report: "***Complainant's counsel raised with Respondent's counsel the issue of Swiss law, and whether it could interfere with discovery in this case, during conferences in September and October 2021. It was not until December 16, 2021, however—after Complainant had filed and prevailed on its motion to compel—that Respondent raised the issues of Swiss law***" that Respondent now contends preclude it from complying with the First Order Compelling Production.[23]

Second, Mediterranean's discovery conduct in other matters demonstrates that its refusal to produce discovery in this case is not based on a sincere fear of Swiss legal restrictions on discovery. Mediterranean is also a respondent in *Intermodal Motor Carriers Conference, American Trucking Associations, Inc. v. Ocean Carrier Equipment Management Association Inc., Mediterranean Shipping Company, et al.*, FMC Dkt. No. 20-14. At the very same time as

[23] Dkt. 53 at 1 (emphasis added).

Mediterranean was fighting tooth and nail against complying with its discovery obligations in this case, Mediterranean produced discovery located in Switzerland ***both before and after*** a motion to compel with respect to discovery in the *Intermodal* action. Mediterranean gave the following update in a joint status report in that action:

> MSC's data is maintained in servers located in Switzerland and transmittal was delayed due to compliance issues under Swiss privacy laws. The requests were first evaluated by MSC's headquarters in Geneva to determine the legality of compliance under Swiss law, a process which took a considerable period of time. There were also IT issues, because the data was maintained in Geneva and it took time to provide access for the conduct of initial searches from the U.S. and collect the data.[24]

Nonetheless, despite asserting (contrary to the ruling of the Swiss Court and the Presiding Officer's Orders) that Mediterranean fears criminal liability if it produces Swiss custodial data in this action, Mediterranean produced such data in the *Intermodal* action.

Finally, the bad faith of Mediterranean's conduct, and in particular its endless rehashing of already-rejected jurisdictional and Swiss law arguments, is apparent from the fact that it chose not to appeal any of the discovery Orders with which it refuses to comply. *See Schindler Elevator*, 2011 WL 4594225 at *1-2 (awarding default where the party "chose to willfully disobey the Court's Order compelling its production of discovery[because i]t did not choose to appeal"). As discussed above, the Orders were "directed to persons or documents located in a foreign country" and thus long ago became final orders of the FMC. 46 C.F.R. § 502.150(d). If Mediterranean truly believed that it was unable to comply due to Swiss law, it could and should have appealed the Orders. That it chose not to do so speaks volumes about the merit—or lack thereof—of its Swiss law arguments.

[24] Raleigh Decl., *Intermodal Mot. Carriers Conf. v. Ocean Carrier Equip. Mgmt. Ass'n, Inc.*, FMC Dkt. No. 20-14, 2021 WL 4287419, at *2 (FMC Sept. 14, 2021).

Mediterranean's response to the Order to Show Cause was an additional willfully contumacious act against the Presiding Officer and the FMC. The Order to Show Cause not only ordered Mediterranean to show good cause why default should not be entered, it ***expressly prohibited*** Mediterranean from rehashing "[t]he merits of the proceeding."[25] The Presiding Officer's instructions went unheeded by Mediterranean, which devoted half of its Response to arguments that were either outside the bounds of the Order or explicitly prohibited by the Order. At the outset of its Response, Mediterranean spent a dozen pages relitigating the Order Granting Motion to Compel by arguing that Complainant does not need and is not entitled to any of the discovery at issue.[26] Next, despite the Presiding Officer's instruction that "[t]he question of whether Swiss assistance with discovery is required has been answered",[27] Mediterranean argued again that the parties should re-submit a request to Swiss authorities, attaching 25 pages of Swiss legal opinions that were neither sought nor permitted by the Order to Show Cause.[28] Last, Mediterranean brazenly defied the Order To Show Cause's prohibition on arguing the merits by arguing once again that "this Commission does not properly have jurisdiction over this matter".[29]

In this case, a decision on default was especially appropriate because the lesser sanction of adverse inferences on issues implicated by Mediterranean's discovery misconduct would have led to the same result. As discussed above (and noted in, *inter alia*, the Presiding Officer's Order Granting Motion to Compel and Order Requiring Production), the discovery at issue cuts to the heart of the issues in this proceeding. Indeed, the discovery ordered by the Order Granting Motion

[25] Dkt. 55 at 2.

[26] *See* Dkt. 56 at 11–24.

[27] Dkt. 55 at 2.

[28] *See* Dkt. 56 at 24–26 & Exhs. 1–2.

[29] *Id.* at 4, 26–30.

to Compel covers so many critical issues that the Order made over a dozen independent findings of relevance.[30] The adverse inferences arising from those unfulfilled discovery requests, which were tailored to the essential elements of Complainant's causes of action under the Shipping Act, would fulfill those essential elements, rendering those causes of action subject to summary decision in Complainant's favor. *See S. New England Tel. Co. v. Glob. NAPs, Inc.*, 251 F.R.D. 82, 95 (D. Conn. 2008), *aff'd*, 624 F.3d 123 (2d Cir. 2010) ("the extent of defendants' noncompliance and either wilful withholding or destruction is so extensive that any adverse inference sufficient to sanction defendants and address the harm to SNET would effectively amount to a directed verdict or the equivalent of a default judgment"); *Aliki Foods, LLC v. Otter Valley Foods, Inc.*, 726 F. Supp. 2d 159, 181 (D. Conn. 2010) (adverse inferences on the discovery that was unproduced "would, in effect, be the same as dismissing the case (or nearly so), although the parties would have to expend further resources on a trial that would be unlikely to change the outcome"). After Complainant already spent over a year incurring substantial fees and costs in connection with needless motion practice and fruitless foreign judicial assistance requests, it would not have been proper to require Complainant to spend additional resources to litigate to the same result that would be achieved by a default.

Mediterranean has repeatedly chosen to disregard the Commission's jurisdiction over it and the Presiding Officer's authority in this action. Respectfully, no sanction less than a default would have adequately addressed the willfulness and bad faith that Mediterranean exhibited in its defiance of the Orders and in its Response. The final element for a default judgment was satisfied.

[30] *See* Dkt. 27 ¶¶ III(A)-(N).

D. The Initial Decision Correctly Concluded that Damages Should Be Based on the Allegations of the Amended Complaint.

The Presiding Officer's Order to Show Cause instructed Complainant that, in its "response to MSC Mediterranean Shipping's filing, Complainant should identify the dollar amount of reparations that they are seeking." Complainant's response did precisely that.[31] As detailed in its Amended Complaint, Complainant sought 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". Specifically, Complainant sought 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 calculated such reparations to be $480,719. For the first three months of the 2021-2022 shipping year, Complainant 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).

Respondent argues that the Presiding Officer's award of such reparations to Complainant as a sanction for Respondent's default was erroneous. Respondent's citations of legal authority in this connection, however, are misleadingly quoted and unavailing. For example, Respondent quotes a prior decision for the proposition that "'the well pleaded factual allegations in the Complaint, except those relating to damages, are taken as true.'"[32] However, Respondent

[31] Dkt. 57 at 18–19.

[32] Dkt. 65 at 49 (quoting *CMI Distribution, Inc. v. Service By Air, Inc*., FMC Dkt. No. 17-05, 2019 FMC LEXIS 120 (ALJ May 24, 2019)).

conveniently omits ***the very next sentence*** in that decision, which acknowledged—consistent with 46 C.F.R. § 502.65—that Rule 55 of the Federal Rules of Civil Procedure "does not require a presentation of evidence as a prerequisite to the entry of a default judgment, although it empowers the court to conduct such hearings as it deems necessary and proper to enable it to enter judgment or carry it into effect." *CMI Distribution, Inc.*, 2019 FMC LEXIS 120 (quoting *Ford Motor Co. v. Cross*, 441 F. Supp. 2d 837, 848 (E.D. Mich. May 5, 2006)). Here, the Presiding Officer properly followed 46 C.F.R. § 502.65, "issu[ing] a decision on default upon consideration of the record, ***including the complaint***" and "requir[ing] 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(b)–(c). Contrary to Respondent's arguments, the Rules governing this case before the Commission do not limit the Presiding Officer's authority to impose reparations as a sanction for default to situations involving "liquidated damages or other sum certain amounts".[33] Moreover, it is clear from the Order to Show Cause and the Decision that the measure of Complainant's alleged damages—the simple arithmetic difference between the rates in Complainant's service contracts with Respondent and the rates Complainant paid to ship the same quantity of cargo between the same port pairs identified in the service contracts on the spot market—is hardly one that required hearings or detailed clarifications.

E. The Initial Decision Properly Awarded Reparations on Both the Early Months of the 2021–2022 Shipping Year and the 2020–2021 Shipping Year.

Respondent also attempts in its Exceptions to sneak in a belated argument that the Presiding Officer's Decision and award of reparations should be limited only to Complainant's alleged damages during the early months of the 2021–2022 shipping year, which were the focus of

[33] Dkt. 65 at 48–49.

Complainant's initial complaint in this case, and should not extend to Complainant's alleged damages from the 2020–2021 shipping year, which were included in Complainant's Amended Complaint filed after the Presiding Officer's Order Granting Motion to Compel. Respondent's argument ignores the relevant procedural history of this case and the Presiding Officer's Orders, and should be rejected.

Contrary to Respondent's argument, the Hague Evidence Convention letter of request prepared by the parties, signed by the Presiding Officer, and submitted to the Swiss Court expressly incorporated and attached ***both*** Complainant's first sets of interrogatories and requests for production of relevant documents and electronically stored information (which were the subject of the Presiding Officer's Order Granting Motion to Compel) ***and*** Complainant's second set of interrogatories and third set of requests for production of relevant documents and electronically stored information, which related to Complainant's claims in connection with the 2020–2021 shipping year.[34] Respondent acknowledged in its portion of a subsequent joint status report that it had objected to some of Complainant's second set of interrogatories and claimed that it was agreeing to produce documents "consistent with its response to prior discovery requests as to the 2021 contract year" and "objecting to other requests."[35] Despite this claimed agreement, ***Respondent never produced any documents in response to Complainant's third set of requests for production and never answered any additional interrogatories in Complainant's second set of interrogatories***—even after the Order Requiring Production explicitly ordered Respondent "to

[34] *See* Dkt. 44 at 5–6.

[35] Dkt. 45 at 2; *accord* Dkt. 43 at 2 (Respondent acknowledging in an earlier joint status report that Complainant's third set of requests for production of documents and electronically stored information "largely track prior discovery served on MSC for the first four months of the 2021 contract year, extending them to the 2020 contract year" and stating that Respondent "expects that its responses will thus be consistent with its prior responses.").

provide any outstanding discovery by August 29, 2022 . . . ."[36] Accordingly, the scope of the Presiding Officer's Decision, including her award of reparations, properly extended to Complainant's claims in the Amended Complaint concerning the 2020–2021 shipping year.

F. The Presiding Officer Correctly Found that the Commission Has Jurisdiction over Complainant's Claims and that Each Count in the Amended Complaint States a Claim.

1. *The Presiding Officer correctly found that the Commission has subject-matter jurisdiction over the causes of action in Complainant's Amended Complaint.*

Respondent's Exceptions rehash its previously rejected (and not appealed) argument that Complainant's causes of action in the Amended Complaint state nothing more than simple breach of contract claims that, in Respondent's view, do not constitute legally cognizable Shipping Act claims, and therefore deprive the Commission of subject-matter jurisdiction over them. Respondent's arguments, however, would require the Commission to disregard the plain language of both the Amended Complaint and the Shipping Act. The Presiding Officer correctly rejected them in her well-reasoned Order denying Mediterranean's motion to dismiss,[37] and the Commission should affirm and adopt her reasoning and reach the same conclusion.

As a threshold matter, the mere possibility that Respondent's alleged conduct could constitute ***both*** breaches of its service contracts ***and*** violations of the Shipping Act in no way required Complainant to pursue its potential breach of contract claims first (or at all), or to pursue both sets of potential claims simultaneously, especially when those sets of claims would have to be brought in different forums. Nor would that fact deprive the Commission of subject-matter jurisdiction over Complainant's causes of action under the Shipping Act—despite Respondent's subsequent institution of a retaliatory arbitration with the Society of Maritime Arbitrators arguing

[36] Dkt. 50 at 4.

[37] Dkt. 37.

that Complainant should have to pay liquidated damages to Respondent because the minimum quantity commitments in the service contracts were not satisfied. As the Presiding Officer explained in a recent decision in another case, "even when there is litigation between the parties in other courts, the Commission has an obligation to determine whether an entity has violated the Shipping Act." *Greatway Logistics Grp., LLC, v. Ocean Network Express Pte. Ltd.*, Dkt. No. 21-04, 2021 WL 3090768, at *2 (FMC ALJ July 16, 2021). Consequently:

> While [46 U.S.C. § 40502(f)] reasonably precludes the Commission from adjudicating breach of contract claims, the courts more properly equipped to address those matters are not authorized to address Shipping Act matters exclusively within the Commission's jurisdiction. Such issues are not addressed in actions for breach of contract and no remedy for such violations would be provided in a breach of contract action. Moreover, . . . reliance on the Commission to pursue such violations sua sponte in its investigatory role would eviscerate the reparations remedy afforded complainants by the statute. Therefore, we find that the ALJ should proceed to consider those claims.

Id. at *3 (quoting *Cargo One, Inc. v. Cosco Container Lines Co. Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000)); *see also Carlstar Group LLC f/k/a Carlisle Transportation Products, Inc. v. Uti, United States, Inc.*, Dkt. No. 17-08, 2018 WL 2356145, at *13, 1 F.M.C.2d 103, 118 (FMC ALJ May 18, 2018) ("Commission precedent establishes that an arbitration provision does not deprive the Commission of its authority to determine whether a respondent committed Shipping Act violations."). The existence of a service contract between the parties containing language requiring arbitration of breach of contract claims "'does not outweigh the Commission's duty to protect the public by ensuring that service contracts are implemented in accordance with the Shipping Act.'" *Carlstar Group LLC f/k/a Carlisle Transportation Products, Inc.*, 2018 WL 2356145, at *13, 1 F.M.C.2d at 118 (quoting *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 998 (FMC 2006)).

Although the Amended Complaint alleged the existence of service contracts between Complainant and Respondent,[38] as well as conduct by Respondent in connection with those service contracts,[39] the Amended Complaint nowhere alleged any cause of action sounding in contract. Instead, all of Complainant's causes of action allege violations of the Shipping Act—including, of course, provisions of the Shipping Act that specifically apply to ocean carrier conduct in connection with service contracts.

Importantly, the Amended Complaint alleged that Respondent's actions with respect to Complainant were ***not*** isolated incidents specific to Complainant, but instead part of ***broader practices by Respondent impacting not only Complainant, but other shippers, as well***.[40] Complainant's Amended Complaint set forth those broader practices in great detail, quoting explicit statements by Respondent's own employees and agents about such practices and the fact that they were being implemented with respect to other shippers, as well.[41] Complainant's claims allege far more than, for example, "straightforward breach of contract claims for alleged failures to charge what was agreed upon per the agreement, bill correctly, substantiate charges, and calculate a documentation fee properly", *Carlstar Group LLC f/k/a Carlisle Transportation Products, Inc.*, 2018 WL 2356145, at *18, 1 F.M.C.2d at 124, or mere "questions of fact and interpretations of the service contract", such as those at issue in *Global Link Logistics, Inc. v.*

[38] *See, e.g.*, Dkt. 38 ¶¶ 22.a.–b.

[39] *See, e.g.*, *id.* ¶¶ 26, 36.

[40] *See, e.g.*, *id.* ¶¶ 7, 12, 17, 20, 47, 50, 71, 95, 104, 108, 114.

[41] *See, e.g.*, *id.* ¶¶ 40 (MSC employee telling Complainant that "better revenue [*i.e.*, from other shippers] is getting more space" and that "if customers [*i.e.*, shippers such as, but not limited to, Complainant] need more space, we are going to have to increase revenue."), 59 (MSC employee telling Complainant that the "majority of accounts [*i.e.*, other shippers] have accepted" Respondent's demand for peak season surcharges ("PSS") above and beyond existing rates), 69 (MSC employee urging Complainant to pay PSS because "cargo with higher rates [*i.e.*, from other shippers] may have priority"), 70 (MSC employee telling Complainant that "[e]veryone [*i.e.*, other shippers] is accepting" PSS on top of existing rates).

Hapag-Lloyd AG, Dkt. No. 13-07, 2014 WL 5316345, at *20 (FMC ALJ Apr. 17, 2014), a decision that notably is "***not binding***" precedent because that case "settled prior to Commission review." *Bakerly, LLC, Complainant v. Seafrigo USA, Inc., Respondent*, FMC Dkt. No. 22-17, 2023 WL 1963459, at *7 (FMC Feb. 7, 2023) (emphasis added). Consequently, 46 U.S.C. § 40502(f) is no bar to Complainant's causes of action under the Shipping Act in this case—including Complainant's claim that Respondent's conduct constituted provision of service in the liner trade (or, indeed, ***failure*** to provide such service) not in accordance with its service contract with Complainant. *See, e.g.*, *Global Link Logistics, Inc.*, 2014 WL 5316345, at *11 ("Section 40502(f) does not deprive the Commission of jurisdiction over all disputes about service contracts, however.").[42] Contrary to Respondent's arguments, to conclude otherwise would effectively write 46 U.S.C. § 41104(a)(2)(A) out of the Shipping Act entirely.

Arguments such as Respondent's have been raised—and rejected—both in prior cases and by the Presiding Officer in this case, and should be rejected by the Commission, as well. In *Marine Transport Logistics, Inc. v. CMA-CGM (America) LLC*, FMC Dkt. No 18-07, 2019 WL 5206007 (ALJ Oct. 8, 2019), the respondent moved to dismiss a complaint alleging violation of several of the same provisions of the Shipping Act invoked in this case: namely, 46 U.S.C. §§ 41102(c),

[42] Respondent's extensive reliance on *Global Link Logistics, Inc.* for its arguments to the contrary is misplaced, as that case came before the Commission in a very different posture, is readily distinguishable, and is, as noted above, not binding precedent because the case settled prior to final decision. In that case, the respondent ocean carrier had first demanded payment for liquidated damages allegedly owed to it under its service contract with the complainant shipper and had demanded arbitration of that matter pursuant to an arbitration clause in the service contract. *See* 2014 WL 5316345, at *7. The shipper responded by filing a case before the Commission, alleging, *inter alia*, on the basis of the parties' alleged prior course of dealing that that the ocean carrier had violated the Shipping Act by refusing to reduce its rates from those agreed in the service contract and reduce the shipper's contractual minimum quantity commitment to match the shipper's actual bookings during the term of the service contract—in other words, by refusing to vary from the terms of the parties' written service contract. *See id.* If anything, the posture here is reversed, with Complainant having first alleged violations of the Shipping Act including conduct that was not in accordance with the parties' service contract, and Respondent subsequently initiating a retaliatory arbitration against Complainant. Moreover, as the Presiding Officer has already noted in a prior Order, Complainant's claims in this case go beyond specific transactional issues under the parties' service contract and implicate Respondent's broader practices. *See* Dkt. 27 at 6–7, 10.

41104(a)(9), and 41104(a)(10). There, as here, the respondent argued that the complainant's claims were mere breach of contract claims that were subject to dismissal pursuant to 46 U.S.C. § 40502(f). *See, e.g.*, *Marine Transp. Logistics, Inc.*, 2019 WL 5206007, at *6–7. The Presiding Officer rejected those arguments and denied the motion to dismiss, noting that the proposed amended complaint (which the Presiding Officer granted leave to file in the same order) did not allege breaches of contract, but instead violations of the Shipping Act, and therefore "the existence of a service contract would not be grounds to dismiss the proceeding where Shipping Act violations are alleged." *Id.* at *7.

In *Greatway Logistics Group, LLC v. Ocean Network Express Pte. Ltd.*, the Presiding Officer denied the respondent's motion to stay that action pending certain developments in a parallel litigation pending in federal district court. Unlike the district court action, which alleged breach of contract claims, the action before the Commission alleged, *inter alia*, violation of 46 U.S.C. § 41102(c). Although the parallel actions were "based on the same two bills of lading", the Presiding Officer determined that "the Commission and the district court are adjudicating different issues" and concluded that, "[a]s Shipping Act violations are raised in this proceeding and respondent is a regulated entity, the Commission has jurisdiction over this proceeding." *Greatway Logistics Grp., LLC*, 2021 WL 3090768, at *1, *4.

The same analysis applies in this case. The jurisdictional arguments Respondent raises in its Exceptions are the same arguments that Respondent raised, the Presiding Officer rejected, and Respondent failed to appeal, in ***both*** its motion to dismiss and its opposition to Complainant's motion to compel.[43] As the Presiding Officer noted in the Order Granting Motion To Compel,

[43] *See* Dkt. 23 at 7–8 & Dkt. 31.

"MSC Mediterranean Shipping's ***practices*** are at issue, not just the actions taken on specific bookings."[44]

2. *The Federal Arbitration Act does not deprive the Commission of jurisdiction in this case or preclude Complainant from bringing its Shipping Act claims before the Commission.*

Respondent argues briefly that the Commission cannot exercise jurisdiction because Respondent's service contracts contain an arbitration clause, and allowing the Federal Maritime Commission to adjudicate Shipping Act claims be inconsistent with the pro-arbitration policy enshrined in the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* That argument, however, is contrary to the well-settled Commission precedent cited in the Decision, which rejected precisely the argument that Respondent now makes. *See Anchor Shipping Co.*, 30 S.R.R. at 998. Notably, Respondent did not file a motion to dismiss at the outset of this case (instead waiting until after the Presiding Officer had issues the Order Granting Motion to Compel) and has never filed a motion to compel arbitration against Complainant in this case or in any venue. Instead, Respondent's own conduct—initiating a parallel retaliatory arbitration against Complainant only ***after*** its motion to dismiss had been denied and Complainant's motion for leave to file its Amended Complaint had been granted—demonstrates that contractual arbitration does not preclude, but instead can proceed in parallel with, a Shipping Act case before the Commission. Accordingly, Respondent's Exceptions in this connection are baseless and should be rejected.

3. *The Presiding Officer correctly found that Complainant has adequately alleged its Shipping Act claims.*

Respondent also rehashes its rejected arguments that the Amended Complaint failed to state claims under the Shipping Act. In particular, Respondent argues that Counts III and IV of

[44] Dkt. 27 at 6–7 (emphasis added).

the Amended Complaint, which invoke 46 U.S.C. §§ 41104(a)(5) and 41104(a)(9), respectively, failed to allege discrimination "as to ports."[45] Respondent's argument again ignores the plain language of the Amended Complaint, which explicitly alleged discrimination, prejudice, and disadvantage "***with respect to the ports*** for which Complainant contracted with Respondent"; *i.e.*, "***the ports*** identified in each respective service contract".[46] Respondent's argument also misconstrues the nature of Counts III and IV, as reflected by the authorities that Respondent cites.

Respondent's argument relies on a discussion of legislative history surrounding the Ocean Shipping Reform Act of 1998, Pub. L. 105-258 ("OSRA"); specifically, legislative comments concerning OSRA's elimination of so-called "me-too" rights: *i.e.*, demands by shippers with service contracts that an ocean carrier provide them the same terms as those provided in other, more favorable service contracts with similarly situated shippers. As Complainant previously noted in opposition to Respondent's unsuccessful motion to dismiss, that issue is not implicated in this case and, even if it were, Respondent's selective citation to legislative commentary is neither authoritative nor binding on the Commission. The case law Respondent cited for this argument addressed the same irrelevant "me-too" rights issue.

Contrary to Respondent's argument, the Amended Complaint clearly alleges discrimination, prejudice, and disadvantage based on Respondent's conduct with respect to particular ports identified in Complainant's service contracts with Respondent (in particular, the ports of Qingdao, Tianjin, and Ningbo, China). By way of example, one of Respondent's internal communications detailed in Complainant's Amended Complaint, which was forwarded (apparently inadvertently) by one of Respondent's employees to one of Complainant's employees,

[45] Dkt. 65 at 34–36.

[46] Dkt. 38 ¶¶ 19–20 (emphasis added); *accord id.* ¶¶ 90–95.

specifically discussed "that, since Complainant's main ports of load were Qingdao and Tianjin, 'it will be a challenge to release space without a full PSS'" and that "'[t]he way things are going, ***they will not get any space without the PSS***" from those ports.[47] Respondent nevertheless proceeded to contract with Complainant on terms that did not require PSS, waiting instead to "***advise about PSS starting May***"—*i.e.*, ***after*** the service contract for the 2021–2022 shipping year had already been signed and gone into effect.[48]

The Amended Complaint alleges that Respondent undertook a practice of failing to provide contracted space allocations to Respondent, and, upon information and belief, to other shippers, at certain of the ports identified in its service contracts in order to be able to sell that space from those ports on a spot-market basis at higher prices. Indeed, during the first three months of the 2021–2022 shipping year, "Respondent carried no cargo at all for Complainant from Qingdao . . . and carried less than half of Complainant's contracted space from Tianjin . . . ."[49] Complainant's motion to compel sought—and the Order Granting Motion to Compel ordered Respondent to produce—discovery concerning not only Complainant's specific booking attempts with Respondent from those ports, but Respondent's practices with respect to all shippers that sought carriage by Respondent from those ports, whether under a service contract or Respondent's tariff during the relevant time periods.

The inadvertently forwarded internal communication, which shows Mediterranean ***was*** discriminating with respect to ports and allocation of cargo, demonstrates the critical importance of the discovery Complainant sought in this case. That document is only the tip of the iceberg; it demonstrates that Mediterranean employed practices of discrimination with respect to ports, as

[47] Dkt. 38 ¶¶ 65, 42 (emphasis added); *accord id.* ¶¶ 90–95.

[48] *Id.* ¶¶ 66–67 (emphasis added).

[49] *Id.* ¶ 36.

well as a fraudulent practice of agreeing to undertake a service commitment without intending to perform the contracted services in accordance with the rates, charges, rules, and practices of the contract. More discovery into the nature of Mediterranean's unjust and discriminatory practices was plainly necessary, and the Presiding Officer ordered Mediterranean to produce it.

Of course, Respondent never complied with the Order Granting Motion to Compel, and refused to produce a ***single*** additional document pursuant to it or Complainant's subsequent, substantially identical document requests concerning the 2020–2021 shipping year, frivolously claiming over and over again that "Swiss legal issues" prevented Respondent from complying with its discovery obligations, and ultimately defaulting rather than fulfilling those discovery obligations. Accordingly, just as the Presiding Officer concluded in *Marine Transport Logistics, Inc. v. CMA-CGM (America) LLC* with respect to another claim under 46 U.S.C. § 41104(a)(9), the claims in Complainant's Amended Complaint "will require discovery and Complainant will be able to further develop the factual basis for these claims", and since "it is plausible that the facts will support a claim under these sections", these causes of action should "not [have] be[en] dismissed . . . ." 2019 WL 5206007, at *6. For all of these reasons, Counts III and IV of Complainant's Amended Complaint all state appropriate causes of action under the Shipping Act.

Respondent's Exceptions also briefly argue that Count V of the Amended Complaint fails to state a claim for refusal to deal under 46 U.S.C. § 41104(a)(10). Again, Respondent's arguments (and the case law Respondent cites) disregard the extensive allegations of Complainant's Amended Complaint, which detailed Respondent's "systematic refusal to deal with Complainant" and Complainant's agent, which included not only failures to provide space and respond to requests for space and complaints about inability to secure space, but also failure to provide basic information repeatedly requested by Complainant, including "a booking report showing bookings

and departures of Complainant's cargo."[50] Similarly, the internal communication described above evinces Mediterranean's deliberate refusal to deal with Complainant even after agreeing to a service contract, stating internally that Complainant "will not get any space without the PSS".[51] Plainly, the issue of whether Mediterranean's discrimination with respect to ports, and refusals to deal, violated the Shipping Act are questions of fact that required discovery to resolve.

G. The Presiding Officer's Entry of Default Was Not an Abuse of Discretion

For the reasons discussed above and in the well-reasoned Initial Decision, the Presiding Officer did not abuse her discretion in entering a decision on default as a sanction for Mediterranean's failure to comply with the Presiding Officer's discovery orders. *See Rana*, 2022 WL 1744905, at *4. Indeed, the Presiding Officer gave Mediterranean multiple opportunities first to comply with its discovery obligations, and then to justify its failure to comply, and at every turn Mediterranean refused to do so, instead relitigating discovery issues that had already been reduced to a final decision and jurisdictional issues that Mediterranean never bothered to appeal. Mediterranean's response to the Presiding Officer's Order To Show Cause is this case in a nutshell; despite the Presiding Officer's explicit instruction that "[t]he ***merits of the proceeding and remedy are not at issue and should not be addressed in these filings***—the question is ***only*** whether a default decision or other procedural consequence is appropriate for MSC Mediterranean Shipping's failure to produce discovery"—Mediterranean violated the instruction and, in open contempt of the Presiding officer and the Commission, devoted much of its brief to doing exactly what the Presiding Officer commanded it not to do. Mediterranean clearly wants to do the same thing here—cloud the Commission's review by raising a smokescreen of waived and irrelevant

[50] Dkt. 38 ¶ 86; *accord id.* ¶¶ 72–89.

[51] *Id.* ¶ 42 (emphasis added); *accord id.* ¶¶ 90–95.

issues, because Mediterranean's discovery misconduct is truly indefensible. The Commission should not take the bait. Because the Presiding Officer soundly exercised her discretion to enter default judgment as a sanction for Mediterranean's misconduct, the Commission need not reach any of the other issues raised in Mediterranean's Exceptions.[52]

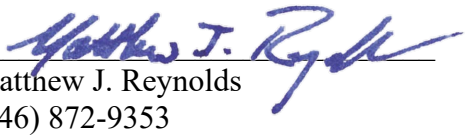
CONCLUSION

For the reasons stated above and in the Presiding Officer's well-reasoned Decision, Complainant respectfully requests that the Commission reject each of Respondent's Exceptions, and affirm and adopt the Presiding Officer's Decision in full.

Dated: February 28, 2023

Respectfully submitted,

HUTH REYNOLDS LLP



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[52] Of course, for the reasons discussed above, even if the Commission were to reach the other, irrelevant issues raised by Mediterranean, the Commission should affirm the well-reasoned and correct Initial Decision in full.

APPENDIX

RESPONSES TO RESPONDENT'S OTHER STATEMENTS OF EXCEPTION

Respondent's Exception VI: "Other 'conclusions, findings, or statements' in the Initial Decision objected to."[53]

Respondent's Exceptions[54]	**Complainant's Summary Response**
"A. The Initial Decision states that MSC 'disagrees with the Swiss court's decision' and has refused 'to abide by the decisions of the Swiss Judge,' suggesting a willful failure to follow a court order MSC disagrees with. This is incorrect. The Geneva court did not even address the applicability of the Swiss blocking statute or on whether MSC is allowed to comply with the discovery order. This was not within the scope of the Swiss Court's ruling. It ruled on whether the Hague Evidence Convention applied, and found that it did not based on an inadequately supported request. The court was under the mistaken impression, contrary to U.S. law, that proceedings before the Commission are not analogous to a "civil" proceeding. In any event the court did not order MSC to do anything or suggest that MSC was free to provide compelled discovery without risking exposure under Swiss criminal law."	This Exception chooses to ignore that the decision of the Swiss Court determined that the Hague Evidence Convention did not apply to this case, and that Respondent did nothing at the time to supplement the Hague Evidence Convention letter of request issued by the Presiding Officer (the "Letter of Request") with the additional support that it now claims was lacking from it. Indeed, it was Respondent who instigated the Hague Evidence Convention process and submitted a Swiss lawyer's opinion insisting that the Hague Evidence Convention process was the "exclusive" method by which discovery could be obtained. The Swiss Court disagreed and found that the Hague Evidence Convention did not apply.
"B. The Initial Decision states that the parties filed a joint status report on April 4, 2022, regarding the status of discovery and Swiss discovery issues, but omits that Complainant stated in that report that the Chief Administrative Law Judge should invoke the 'mandatory process set forth in 46 U.S.C. § 41108(c)(2).' *See* Doc. No. 43, at 6."	As noted above, Respondent cannot now seek to rely on Complainant's invocations of the 46 U.S.C. § 41108(c)(2) consultation process because Respondent's own Swiss Counsel opined that such a process could ***only*** be undertaken pursuant to the Hague Evidence Convention, as it already was (unsuccessfully).
"C. The Initial Decision states that the parties filed a joint status report on July 15, 2022 after the Geneva court decision, but omits that both	This Exception omits that Complainant has been raising the possibility of a decision on default as a sanction for Respondent's refusal

[53] Dkt. 65 at 7.

[54] *Id.* at 7–10.

Respondent's Exceptions[54]	**Complainant's Summary Response**
parties asked for additional consultative procedures to address the decision, and that neither party asked for the order requiring immediate production that was issued instead."	to comply with its discovery obligations for nearly a year, long before the July 15, 2022 Joint Status Report, and that Respondent failed to appeal the Order Requiring Production, which was entered ***after*** the Swiss Court's decision and took the Swiss procedural posture into account.[55]
"D. The Initial Decision states that on October 28, 2022, Complainant filed a letter objecting to the Notice MSC had provided of the FDJP's decision that providing the discovery at issue is 'an act of taking of evidence in a civil and commercial matter' and 'must therefore be made in accordance with the rules of the 1970 Hague Convention,' but omits that the objection did not provide any basis on which to conclude that the FDJP's decision requiring use of the Hague Evidence Convention was incorrect either as a matter of Swiss law or as a construction of the Convention."	This Exception once again misses the point. As Complainant explained in its October 28, 2022 response letter, the informal decision from Swiss authorities addressed issues that had already been decided or rendered moot by the Presiding Officer's prior orders, which Respondent failed to appeal.[56] Complainant did not need to take any position with respect to Swiss law, and the Presiding Officer did not need to revisit such issues.
"E. The July 29 Order quoted in the Initial Decision incorrectly suggests that MSC faces no criminal exposure under Article 271 because this is not a criminal investigation or proceeding, but Article 271 applies to the provision of discovery in civil or commercial cases, as do the Hague procedures."	Respondent waived this Exception by failing to timely appeal the Order Requiring Production, which is now a final order of the Commission and no longer subject to review. The Presiding Officer's Order Requiring Production correctly applied relevant federal jurisprudence to conclude that Article 271 is not, in fact, implicated in this case and therefore Hague Evidence Convention processes are not necessary.[57]
"F. The Initial Decision and prior orders incorrectly state that MSC has made 'statements that it will not produce the required discovery.' This is incorrect. MSC has in fact said, and the Swiss authorities have now	To the extent this Exception addresses unspecified "prior orders",[58] Respondent waived this Exception by failing to timely appeal the Order Granting Motion to Compel and Order Requiring Production, which are now final orders of the Commission and no

[55] Dkt. 41 at 8.

[56] Dkt. 60 at 1–2.

[57] Dkt. 50 at 1–3.

[58] Dkt. 65 at 9.

Respondent's Exceptions[54]	**Complainant's Summary Response**
confirmed, that MSC is first required to obtain authorization before doing so."	longer subject to review. Respondent has repeatedly refused to produce relevant discovery in this case. Its refusals to produce clearly relevant documents, and to answer ***any*** of Complainant's first interrogatories, led to the Order Granting Motion to Compel;[59] it could have voluntarily produced the requested documents and answered the interrogatories at any time. Indeed, as noted above, Mediterranean ***did*** produce Swiss discovery both before and after an order to compel in the simultaneous *Intermodal* case, showing that Mediterranean's position in this case is pure self-serving sophistry. Moreover, although Respondent argues in its Exceptions that a decision on default should not apply to Complainant's discovery requests served after the Order Granting Motion to Compel, Respondent ***never produced a single document*** in response to Complainant's third set of requests for production of documents and electronically stored information, reinforcing that this was not a mere issue of obtaining authorization.
"G. The Initial Decision and prior orders incorrectly state that MSC has failed to respond to discovery orders, but MSC has diligently responded to each with efforts to assure that the requirements of Swiss law are met, and those efforts have resulted in authoritative advice from the Swiss government as to how those requirements can be met."	To the extent this Exception addresses unspecified "prior orders",[60] Respondent waived this Exception by failing to timely appeal the Order Granting Motion to Compel and Order Requiring Production, which are now final orders of the Commission and no longer subject to review. Respondent has continued to invoke the "requirements of Swiss law"[61] even after the Presiding Officer determined that no further efforts in that area were required.[62]

[59] Dkt. 27 at 4–12.

[60] Dkt. 65 at 9.

[61] *Id.*

[62] Dkt. 50 at 1–3.

Respondent's Exceptions[54]	**Complainant's Summary Response**
"H. The Initial Decision incorrectly states that the Chief Administrative Law Judge was asked 'to resolve a conflict between the judicial and executive branches in Switzerland.' There is no conflict, as complying with the advice of the FDJP is in no way precluded by the ruling of the Geneva court. If there were a conflict, the Shipping Act requires that it be resolved by intergovernmental consultations, not by default, and those consultations would likely involve the FDJP and the FOJ, not a Tribunal of First Instance."	The Presiding Officer was correct to note the conflict between the Swiss Court, which determined that the Hague Evidence Convention did not apply to this case, and the Swiss Federal Department of Justice and Police ("FDJP"), which opined that it did apply. Respondent's speculative claim that inter-governmental "consultations would likely involve the FDJP and the" Swiss Federal Office of Justice ("FOJ")[63] appears inconsistent with Switzerland's participation in the Hague Evidence Convention, which designates a different central authority for each canton. In any event, Respondent failed to appeal the Order Requiring Production, which was issued after the Swiss Court's decision, and has waived this issue.
"I. The Initial Decision incorrectly states that MSC 'failed to respond at all' to twelve categories of evidence or provide answers to certain interrogatories, without any consideration of the extensive discussion in MSC's Response to the Order to Show Cause demonstrating that much of that evidence had in fact been provided."	This Exception is factually incorrect and misquotes the Decision; the quoted phrase "failed to respond at all" does not appear in the Decision. To the extent the Decision relied on the Order Granting Motion to Compel or the Order Requiring Production for its discussion of Respondent's discovery failures, Respondent waived this Exception by failing to timely appeal the Order Granting Motion to Compel and Order Requiring Production, which are now final orders of the Commission and no longer subject to review. Moreover, as detailed above, Mediterranean has in fact failed to produce the discovery ordered in the Order Granting Motion To Compel and made no supplemental productions to comply with the Order Granting Motion To Compel or the Order Requiring Production.
"J. The Initial Decision incorrectly states that MSC sought to 'relitigate the relevance of the discovery ordered.' MSC instead sought to show, under the legal standard applicable to default judgments, that default was not	Respondent's creative characterization of its unilaterally narrowed discovery production as "substantial" is inconsistent with the fact that Respondent refused to answer a ***single one*** of Complainant's initial interrogatories and stood

[63] Dkt. 65 at 9.

Respondent's Exceptions[54]	**Complainant's Summary Response**
warranted given the substantial discovery it had provided."	on its objections with respect to numerous of Complainant's requests for production of documents and electronically stored information. The Order Granting Motion to Compel made clear the central importance of the discovery that Respondent has refused to produce, belying any claims that Respondent's cherry-picked partial production was complete or sufficient.[64] Mediterranean cannot seriously object to the Presiding Officer's finding that Mediterranean chose to "relitigate" discovery issues that were already final, unappealed orders; Mediterranean relitigated, and continues to relitigate, such issues *ad nauseam.*
"K. The Initial Decision errs in assuming that Complainant was prejudiced by not receiving answers to interrogatories 'regarding identifying individuals with knowledge, communications concerning Complainant, and identifying potential witnesses,' when that information was already provided in discovery exchanged among the parties."	Without complete responses to Complainant's interrogatories and the production of the compelled internal documents, it is impossible to verify that Respondent's self-serving statement that it provided complete information about relevant individuals, communications, and witnesses is in fact true. The procedural history of this case certainly casts doubt on Respondent's self-serving and unsupported assertion. It is hard to believe that any rational party would, as Respondent did, refuse for over a year to comply with an order granting a motion to compel if the party did not have something to hide.
"L. The Initial Decision errs in assuming that Complainant was prejudiced by the delay resulting from MSC's continuing efforts to seek the necessary authorizations from the Swiss authorities after the Geneva court decision, when there is no evidence of prejudice in the record, and when Complainant itself requested further consultations after that decision rather than asking for an order	The Decision did not need to "assume" that Complainant was prejudiced by the delay resulting from Respondent' discovery obstruction; Complainant has repeatedly demonstrated such prejudice and requested relief, including the additional attorneys' fees incurred as a result of Respondent's protracted discovery battle and relitigation of previously decided issues, and the possibility of a decision on default for nearly a year.[65] Moreover, to the extent the Decision relied on the Order

[64] Dkt. 27 at 4–12.

[65] *See, e.g.*, Dkt. 57 at 10–12; *see also* Dkt. 41 at 8.

Respondent's Exceptions[54]	**Complainant's Summary Response**
requiring immediate production of documents."	Granting Motion to Compel or the Order Requiring Production for its discussion of the prejudice occasioned by Respondent's delays and discovery failures, Respondent waived this Exception by failing to timely appeal the Order Granting Motion to Compel and Order Requiring Production, which are now final orders of the Commission and no longer subject to review.
"M. The Initial Decision errs in finding prejudice to the proceeding itself from the delay resulting from MSC's continuing efforts to seek the necessary authorizations from the Swiss authorities, when only two of the six deadlines listed were affected by those efforts, and those efforts were necessary to allow the discovery at issue to be provided. MSC proposed in July, 2022, six months before the Initial Decision, that the Letter of Request be resubmitted to allow the discovery to move forward, and the decision of the Swiss FDJP has confirmed that this would allow the Hague Procedures to be used and allowed discovery to proceed."	Here again, Complainant has detailed the ways in which Respondent's delays have prejudiced it,[66] providing the Presiding Officer with ample basis for her conclusion in that connection,[67] and to the extent the Decision relied on the Order Granting Motion to Compel or the Order Requiring Production for its discussion of the prejudice occasioned by Respondent's delays and discovery failures, Respondent waived this Exception by failing to timely appeal the Order Granting Motion to Compel and Order Requiring Production, which are now final orders of the Commission and no longer subject to review.
"N. The Initial Decision's conclusion that default is necessary to assure deterrence is based on the many incorrect findings above and assumes, incorrectly, that MSC and other like parties can chose not to comply with foreign criminal laws they are subject to."	The Decision's conclusion that default is the appropriate remedy to assure deterrence has an ample basis in Respondent's approach to and conduct in this case, as detailed in the Decision, and discussed herein. Respondent cannot simultaneously flout U.S. law and jurisdiction and invoke foreign laws to avoid the consequences of its actions. It was Respondent's own decision not to produce relevant discovery voluntarily that started the chain of events resulting in the Decision.

[66] Dkt. 57 at 10–12.

[67] Dkt. 64 at 19.

RESPONSES TO RESPONDENT'S CLAIMED "FACTS RELEVANT TO THE EXCEPTIONS"

Complainant respectfully submits that the procedural history of this case is clear from the filings and orders on the docket, which speak for themselves, and that Respondent's 15-page purported statement of "FACTS RELEVANT TO THE EXCEPTIONS" is neither called for by 46 C.F.R. § 502.227 nor appropriate given the procedural posture of this case, which did not proceed past initial discovery due to Respondent's refusals to comply with its discovery obligations. Accordingly, Complainant rejects and denies Respondent's purported "FACTS RELEVANT TO THE EXCEPTIONS" to the extent they are inconsistent with the procedural history reflected on the docket of this case. Complainant also addresses more specifically below several particularly egregious mischaracterizations and omissions therein.

Respondent's Purported "Facts"[68]	**Complainant's Response**
"Under the 2021 OCA, Complainant committed to tender a certain minimum quantity of cargo for shipment by MSC via oceangoing vessels from China to the United States at agreed prices."	Under the Shipping Act and the regulations promulgated thereunder, service contracts such as those at issue in this case must contain, as essential terms, not only "the minimum volume" of cargo to be shipped by the shipper, but also the corresponding "service commitments" of the carrier with respect to such volume of cargo. 46 U.S.C. § 40502(c)(4) & (7); *accord* 46 C.F.R. § 530.8(b)(4) & (5).
"Discovery exchanged among the parties has identified only four bookings at Qingdao (one a purported renewal of the first booking) from May through July 2021 that Complainant had allegedly properly made but the cargo was not carried by MSC. One of those bookings had been made under the wrong contract, one (which purported to revive it) had never been received, one was made too late, and one was	Mediterranean's characterizations of the reasons why the bookings discussed therein were not carried by Mediterranean cite only to Mediterranean's own *ipse dixit* statements in correspondence between counsel,[69] are disputed by Complainant, have never been determined by the Presiding Officer, and miss the point of Complainant's claims, which

[68] Dkt. 65 at 12–26.

[69] *See* Dkt. 22 Ex. 8 at 1–3.

Respondent's Purported "Facts"[68]	**Complainant's Response**
made for a sailing that had to be cancelled and was rebooked on another vessel."	address Respondent's alleged practice of failing to provide contracted space to shippers.
"Complainant has not alleged any problems in carriage of its cargo by MSC's vessels after July 2021, and discovery in this proceeding has not disclosed any."	Complainant has never suggested or conceded that it did not suffer additional damages from Mediterranean's conduct during the rest of the 2021–2022 shipping year, which was still ongoing at the time the Amended Complaint was drafted (and at the time it was deemed filed). Complainant expressly reserves all rights with respect to its potential claims in connection with all time periods other than those addressed in the Amended Complaint.
"On December 23, 2021, Complainant filed a Motion for Permission to File Verified Amended Complaint against MSC. *See* Doc. No. 32. In its proposed Amended Complaint, Complainant dropped all the conspiracy and collusion allegations against MSC, and changed its theory of the case to claim that MSC was breaching the 2021 OCA with the primary intent of forcing Complainant to pay a peak season surcharge."	Complainant's Amended Complaint did not change its theory, but instead supplemented the claims of its initial complaint with additional allegations based on documents produced in discovery concerning Respondent's practices with respect to space allocation during the 2020–2021 shipping year and improperly seeking to predicate previously contracted space allocation on the payment of peak season surcharges.[70]
"MSC's Motion to Dismiss noted that by expressly abandoning Complainant's earlier conspiracy and collusion allegations, the Amended Complaint now inarguably raised, at most, breach of contract claims over which the Commission does not have jurisdiction."	Respondent mischaracterizes Complainant's streamlining of the allegations in its Amended Complaint as "abandoning" its "earlier conspiracy and collusion allegations".[71] Complainant simply determined (correctly) that its prior allegations were unnecessary to support the Shipping Act causes of action in the Amended Complaint. None of Complainant's causes of action in the initial Complaint or the Amended Complaint relies on a finding of collusion or conspiracy between ocean carriers.
"On February 14, 2022, MSC commenced arbitration against Complainant pursuant to the Rules of the Society of Maritime Arbitrators,	Complainant has denied liability in the retaliatory arbitration initiated by Mediterranean and has asserted counterclaims

[70] *See, e.g.*, Dkt. 38 ¶¶ 23–31, 39–47, 50–89.

[71] Dkt. 65 at 15.

Respondent's Purported "Facts"[68]	**Complainant's Response**
Inc., in line with the dispute resolution clauses of the 2020 OCA and the 2021 OCA, to recover liquidated damages for Complainant's failure to tender the contracted-for minimum quantity commitments. Arbitration was ripe at that stage because the Commission would continue to assert jurisdiction over Complainant's claims over which it was now clear it had no jurisdiction, and because a complete contract year had been put at issue."	for Mediterranean's own breaches of its contractual service commitments to Complainant, which are now pending before the arbitral panel.
"MSC provided all of the responsive, non-privileged documents it was able to find upon a reasonable search as to whether carriage of Complainant's cargo from the ports at issue was requested and undertaken during this time period, and, if the cargo was not carried, why not. *Id*. at 4. MSC further identified the persons most directly involved in these issues, and offered the two witnesses Complainant noticed for deposition as to these issues on the dates Complainant noticed them."	Respondent waived its ability to argue the sufficiency of its partial initial discovery production by failing to timely appeal the Order Granting Motion to Compel, which is now a final order of the Commission and no longer subject to review. Respondent's suggestion that it "provided all of the responsive, non-privileged documents it was able to find upon a reasonable search" is disputed by Complainant and belied by the Presiding Officer's Order Granting Motion to Compel.[72] Respondent also twice refused to produce a corporate designee in response to notices of deposition without proposing any alternative dates for such a deposition.[73]
"MSC objected to providing Complainant with other overbroad discovery, peripheral at best to the issues in the case, including highly sensitive information regarding MSC's corporate structure and financial performance."	Respondent waived its ability to argue the appropriateness and relevance of Complainant's discovery requests by failing to timely appeal the Order Granting Motion to Compel, which is now a final order of the Commission and no longer subject to review. Mediterranean's characterization of Complainant's discovery requests as "overbroad" and "peripheral at best" is also disputed by Complainant and belied by the Presiding Officer's Order Granting Motion to Compel.[74]

[72] Dkt. 27 at 4–12.

[73] Dkt. 41 at 2.

[74] Dkt. 27 at 4–12.

Respondent's Purported "Facts"[68]	**Complainant's Response**
"In the December 20, 2021 Status Report, MSC advised the Chief Administrative Law Judge that, because the December 8, 2021 Order compelled discovery through the order of a governmental body, it brought into play Article 271 of the Swiss Criminal Code, rendering the ordered production of discovery by MSC impossible without risking criminal exposure."	Respondent waived its ability to argue the applicability of Article 271 of the Swiss Criminal Code to this case by failing to timely appeal the Order Requiring Production, which is now a final order of the Commission and no longer subject to review. As detailed in Complainant's portion of the parties' April 4, 2022 Joint Status Report,[75] and as decided by the Presiding Officer in the Order Requiring Production,[76] as a matter of U.S. federal law, this case, a civil administrative proceeding in which the only penalties for non-compliance are non-criminal in nature, does not implicate Article 271.
"On February 25, 2022, MSC filed a Notice and Update on Joint Status report that included the legal opinion it had obtained from Swiss counsel. *See* Doc. No. 40. Swiss counsel confirmed that compliance with the December 8, 2021 Order would require a request from the Commission to the relevant Swiss authority to comply with Article 271. *Id.* at 1. Swiss counsel further advised that the procedures for the requests required under Swiss law are well established and effective, and that the procedure is invoked regularly, including in very high profile and significant matters. *Id.* at 2.4. Swiss counsel also explained that the Hague Evidence Convention procedures were necessary in this case, because MSC would otherwise be placed in an impossible position where production could subject it to criminal exposure under Swiss law. *Id.* Accordingly, MSC requested that the Commission initiate the inter-governmental processes necessary to proceed under existing mutual legal assistance processes between the United States and Switzerland."	Respondent's February 25, 2022 Notice and Update on Joint Status Report and the Swiss legal opinion that it attached *nowhere* mentioned or proposed that the Presiding Officer proceed pursuant to 46 U.S.C. § 41108(c)(2), as Respondent purports to do now in its Exceptions. To the contrary, Respondent's Swiss counsel stated that "[f]rom a Swiss legal perspective, the Hague Convention is *exclusively* applicable among Contracting States as regards the taking of evidence", and *not* merely "an 'option'" because such an interpretation "deprives Switzerland of the *exclusive* use of the Hague Convention for document requests from the United States."[77] Respondent may not now raise arguments, issues, or defenses that it failed to raise prior to the Decision. *See, e.g.*, *Shipco Transport Inc. v. JEM Logistics, Inc.*, FMC Dkt. No. 12-06, 2013 WL 9808695, at *3 (FMC Aug. 21, 2013) (affirming an initial decision on default where the respondent failed to raise a defense in a timely fashion and instead "first raised the defense after the Initial

[75] Dkt. 43 at 3–4.

[76] Dkt. 50 at 1–3.

[77] Dkt. 40 at Mem. ¶¶ 21–22 (emphasis added).

Respondent's Purported "Facts"[68]	**Complainant's Response**
	Decision had been issued and did not provide evidentiary support of his claim").
"The Letter of Request was prepared by Complainant's counsel. MSC was not copied on the filing and did not receive a copy of the filing until June 2, 2022, when it requested one after being informed that it had been filed (nearly one month after the Chief Administrative Law Judge's May 4, 2022 Order). Complainant's request was not supported by the appropriate detail regarding the nature of Commission proceedings and failed to cite directly applicable U.S. law equating Commission proceedings with civil judicial proceedings."	Respondent's counsel participated in the preparation of the letter of request (the "Letter of Request") under the Hague Evidence Convention that was ultimately executed by the Presiding Officer, and were included on the undersigned counsel's April 4, 2022 email filing with the Secretary of the Commission not only the parties' April 4, 2022 Joint Status Report, but also the parties' proposed Letter of Request, all of the documents that would be attached to that Letter of Request upon issuance by the Presiding Officer—notably including Complainant's second set of interrogatories and third set of requests for production of documents and electronically stored information to Respondent—as well as a second memorandum on Swiss law prepared by Respondent's Swiss counsel.[78] Despite the fact that it was *Respondent* that had advocated for use of the Hague Evidence Convention instead of the 46 U.S.C. § 41108(c)(2) consultation process, Respondent's counsel did *not* suggest at that time, as they do now, that the jointly prepared Letter of Request lacked "the appropriate detail regarding the nature of Commission proceedings" or that it "failed to cite directly applicable U.S. law equating Commission proceedings with civil judicial proceedings."[79] Here again, Respondent may not now raise arguments, issues, or defenses that it failed to raise prior to the Decision. *See Shipco Transport Inc.*, 2013 WL 9808695, at *3.
"MSC, following the advice of Swiss counsel, had advised that the Letter of Request should	Respondent waived its ability to argue issues relating to the mechanics of the failed Hague

[78] Despite the fact that all of these materials were filed via the same email, only the parties' April 4, 2022 Joint Status Report appears on the electronic docket of this case. Accordingly, a copy of the filing email and its full set of attachments is filed herewith as **Exhibit 1** for the Commission's reference.

[79] Dkt. 65 at 19.

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be directed in the first instance to the FOJ, which has special expertise in dealing with such requests. Complainant sent the request to the TPI first which due to the Federal structure of Switzerland prevented the FOJ from intervening and guiding the TPI."	Evidence Convention Letter of Request in this case by failing to timely appeal the Order Requiring Production, which is now a final order of the Commission and no longer subject to review. Moreover, in sending the Letter of Request directly to the Swiss Court, and sending a copy to the FOJ, Complainant's counsel was following the express instructions in the Swiss Federal Office of Justice's ("FOJ") written "Guidelines" for "International Judicial Assistance in Civil Matters", which provide that "[t]he request for judicial assistance *is sent* to the Central Authority of the state addressed (the receiving authority)" and note that, as an alternative, "[s]uch applications *may*, however, be lodged with the FOJ, which will transfer them to the competent central cantonal authority."[80]
"On September 6, 2022, MSC filed a Notice of Advice of the Swiss Federal Office of Justice, notifying the Chief Administrative Law Judge and the Complainant that the FOJ had issued the advice MSC had requested, and attaching the advice along with a translation. See Doc. No. 54. MSC further detailed that the FOJ's advice directly supported MSC's proposal that the request for judicial assistance should be resubmitted to the FOJ in order to obtain a correct assessment that the Hague Procedures are available, and stated that a formal ruling would be forthcoming."	Respondent's continuing efforts with respect to the Swiss FOJ, which yielded an opinion that stated little more than the truism that another Letter of Request could be submitted, were unnecessary and irrelevant because the Presiding Officer had already determined that no further Hague Evidence Convention processes were necessary in this case.[81]
"On October 18, 2022, MSC notified the Chief Administrative Law Judge that the FOJ had rejected the request for a waiver on the ground that "authorization under Article 271 of the Criminal Code cannot be granted in view of the fact that mutual legal assistance route is open;" and that providing discovery pursuant to the	Again, Respondent's continuing efforts with respect to the FDJP, which yielded an opinion that an authorization under Article 271 of the Swiss Criminal Code cannot be granted because the Hague Evidence Convention route remained, were unnecessary and irrelevant because the Presiding Officer had already

[80] FOJ Guidelines at 21, *available at* https://www.rhf.admin.ch/dam/rhf/en/data/zivilrecht/wegleitungen/wegleitung-zivilsachen-e.pdf.download.pdf/wegleitung-zivilsachen-e.pdf. A copy is filed herewith as **Exhibit 2**.

[81] Dkt. 50 at 3.

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order is "an act of taking of evidence in a civil and commercial matter" and "must therefore be made in accordance with the rules of the 1970 Hague Convention." See Doc. No. 59. The FDJP advised that it was preparing a formal decision explaining these conclusions more fully. MSC stated it would provide a copy of the FDJP's formal decision immediately upon its receipt."	determined that no further Hague Evidence Convention processes were necessary in this case.[82]
"On November 7, 2022, the FDJP issued its decision, signed by the Swiss Minister of Justice. MSC received it the following day, November 8, 2022, and immediately notified the Chief Administrative Law Judge of the decision and provided a copy with a translation. See Doc. Nos. 61-63. MSC explained that the FDJP's decision presented the proper way forward, and that a default judgment against it remained inappropriate for this reason and the other reasons detailed in the MSC's Response to the Order to Show Cause and Reply."	Once again, Respondent's continuing efforts in procuring a formal opinion of the FDJP consistent with its prior opinion expressed by email were unnecessary and irrelevant because the Presiding Officer had already determined that no further Hague Evidence Convention processes were necessary in this case.[83]
"The reparations claimed in the Amended Complaint combine figures for both the 2020 and the 2021 contract year, not just the 2021 contract year that was the source of the discovery subject to the default decision."	Although the Presiding Officer's Order Granting Motion to Compel was issued before Complainant filed its Amended Complaint extending its claims to the 2020–2021 shipping year, the Letter of Request issued by the Presiding Officer implicated Complainant's discovery requests relating to *both* the early months of the 2021–2022 shipping year *and* the 2020–2021 shipping year,[84] as did her Order Requiring Production, which Respondent did not appeal, and which is now a final order of the Commission and no longer subject to review.[85] Accordingly, the Decision properly awarded reparations in connection

[82] *Id.*

[83] *Id.*

[84] Dkt. 44 at 5–6.

[85] Dkt. 50 at 4.

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	with the full time period covered by the Amended Complaint's claims.
"The reparations claimed by Complainant in the Amended Complaint are wholly unsupported, and the claimed amounts submitted in response to the Order to Show Cause do not match the amounts claimed in the Amended Complaint."	The Amended Complaint alleged damages of "at least $400,000" in connection with the 2020–2021 shipping year and "at least $400,000" in connection with May through July 2021.[86] Complainant's response to the Presiding Officer's Order to Show Cause simply provided more exact numbers: $480,719 for the 2020–2021 shipping year and $463,936 for May through July 2021, for a total of $944,655 in claimed reparations.[87]

[86] Dkt. 38 ¶¶ 31, 38.

[87] Dkt. 57 at 19.

Certificate of Service

I hereby certify that I have this day served the foregoing document and the exhibits filed herewith upon Respondent MSC Mediterranean Shipping Company SA by emailing copies of those documents to its counsel of record listed below:

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Dated: February 28, 2023

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