BEFORE THE FEDERAL MARITIME COMMISSION

DOCKET NO. 21-05

MCS INDUSTRIES, INC.,

Complainant

v.

COSCO SHIPPING LINES CO., LTD. AND

MSC MEDITERRANEAN SHIPPING COMPANY S.A.,

Respondents

RESPONDENT MEDITERRANEAN SHIPPING COMPANY S.A.'S EXCEPTIONS TO INITIAL DECISION AND MEMORANDUM AND BRIEF IN SUPPORT

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INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to Rule 227 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.227, Respondent MSC Mediterranean Shipping Company SA ("MSC") hereby excepts to the Initial Decision on Default ("Initial Decision") issued by the Chief Administrative Law Judge on January 13, 2023, and files this brief in support of such exceptions. MSC requests oral argument on each of these exceptions pursuant to Rule 241, 46 C.F.R. § 502.241.

The Initial Decision erred in entering a default judgment based on MSC's inability to produce certain discovery without the authorization required by Swiss blocking statutes. There is no Commission precedent for this result, and judicial precedent holds that a default judgment in these circumstances is unfair because companies such as MSC have no choice but to comply with the foreign laws to which they are subject. The Initial Decision disregards the authoritative position of the Swiss government that MSC may only comply with the outstanding discovery requests if further intergovernmental processes are undertaken. This is not a case where U.S. law and Swiss law are in conflict; the Shipping Act itself *requires* further consultations, not default, in these circumstances. Nor is this a case where MSC has displayed bad faith or willful misconduct. MSC has not failed to respond to the discovery order at issue; to the contrary, it has been fully engaged in this case and, through persistent diligence, has identified a productive path forward to address the Swiss law impediments to further production.

The extreme remedy of a default judgment should thus not even have been considered in this case, and the default judgment entered in the Initial Decision is improper on several grounds. First, Complainant's claims are inherently contractual and, thus, excluded from the Commission's jurisdiction by the express terms of the Shipping Act and the parties' arbitration agreement. Second, the remedy provided by the Shipping Act when a foreign blocking statute is raised as a defense to a discovery order is intergovernmental consultations, not a default judgment. *See* 46

U.S.C. § 41108(c)(2). The Initial Decision does not address this statutory procedure, which Complainant itself has termed mandatory. This omission is even starker given that the Swiss government has, at the highest levels, confirmed the procedures that can and must be followed to obtain the discovery, and, contrary to the Initial Decision, no Swiss court ever held that MSC could provide the documents without risk under Swiss criminal law. Third, the default judgment is entirely unsupported by the facts that have been developed in the extensive discovery that has already been exchanged between the parties, which the Initial Decision also does not acknowledge. Specifically, there is no evidence that Complainant ever booked cargo MSC allegedly failed to carry, and no proof that Complainant suffered any damages, much less in the claimed amount.

Complainant's claims depend fundamentally on the allegation that MSC did not properly carry cargo it was obligated to carry under service contracts. The parties in this case have exchanged thousands of pages of discovery, including complete discovery on the core issue in the Original Complaint, on which the discovery at issue is based, as to whether Complainant properly booked or sought to book that cargo to begin with. Complainant limited these initial allegations to 59 FEUs of cargo it alleges MSC did not carry from two ports in China to the U.S. West Coast between May and July 2021. Complainant has, however, identified only four bookings it attempted to make as to this cargo, and even these very few attempted bookings were not timely or properly made. The discovery on which the Initial Decision is based does not concern this core issue, but rather relates predominantly to cargo *unrelated* to Complainant and to other tertiary issues. In addition to its other fundamental defects, the Initial Decision erred as a matter of law in failing to engage in any analysis of the substantial and complete discovery productions on these core issues, in failing to consider the importance of the outstanding discovery to the resolution of the issues, and in failing to meaningfully assess whether a sanction other than default was

appropriate. It also erred in failing to require Complainant to provide any proof of its unsupported damages claims.

As detailed below, the Commission should dismiss this proceeding for lack of jurisdiction. If it determines it has jurisdiction, it should require consultations under 46 U.S.C. § 41108(c)(2) as to the discovery at issue, and that a default is entirely inappropriate.

STATEMENT OF EXCEPTIONS

The following exceptions are supported by the relevant facts set forth in the next section and the legal arguments that follow. Citations are made in those sections to the documents of record by Docket Number, and to transcript pages and exhibit numbers when appropriate.

I. The Initial Decision errs in holding that the Commission has jurisdiction over this action notwithstanding the Shipping Act's prohibition in 46 U.S.C. § 40502(f) on the Commission's exercise of jurisdiction over claims for breach of a service contract.

A. Neither the Initial Decision nor the prior rulings addressing jurisdiction in this proceeding make the assessment required by *Cargo One v. COSCO Containers*, 2000 FMC LEXIS 14, at *31-34 (FMC Oct. 31, 2000), as to whether claims that might adequately state a cause of action under the Shipping Act are nonetheless outside the Commission's jurisdiction as inherently breach of contract claims. The jurisdictional analysis instead incorrectly stopped with the assertion that the Complaint stated Shipping Act claims.

B. The Commission has held that "for [46 U.S.C. § 40502(f)] to have meaning, it must have been intended to preclude the filing of some complaints of Shipping Act violations, and not just breach of contract claims, as such claims would not be actionable before the Commission in any event." *Id.*, at 1644. The Commission has thus held that claims "premised on the obligation to meet one's contract commitments" are "outside its jurisdiction." *Id*. The Initial Decision is directly inconsistent with this precedent.

C. Complainant's claims fall squarely within the jurisdictional prohibition. The unreasonable practices claim in Count I is that MSC allegedly breached its contracts to carry Complainant's cargo for improper purposes. Count II claims that MSC failed to provide service pursuant to filed agreements, the service contracts, because it allegedly breached them. Counts III and IV allege that MSC allegedly discriminated against Complainant in the performance of the contract, and Count V alleges that MSC unlawfully refused to deal with Complainant by refusing to carry cargo it was contractually obligated to carry and by certain acts of contract administration. Jurisdiction over each of these claims is foreclosed by *Cargo One* and other Commission precedent.

II. The exercise of Commission jurisdiction is also inconsistent with the parties' express agreement that "[a]ny disputes arising out of or in connection with" each of their service contracts should be resolved by binding arbitration.

A. This arbitration clause encompasses all of Complainant's claims. Federal appellate precedent establishes that pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1, et seq., noncontractual claims, including claims for violation of a federal statute, fall within this type of broad arbitration clause if they arise out of or are in connection with a contract. The Initial Decision and the prior orders it relies on do not discuss this precedent or the Act.

B. The Initial Decision states that an arbitration agreement cannot divest the Commission of its authority to hear claims of Shipping Act violations. This is true, however, only if the claims do not "arise[e] out of" and are not "in connection with" a contract under which the parties have agreed to arbitrate their disputes.

III. Plaintiff's discrimination and refusal to deal claims also fail to state a claim, and contrary to rulings that allowed this case to go forward cannot form the basis of Commission jurisdiction.

A. The plain language of the Shipping Act, legislative history explaining this language, and Commission precedent all establish that, as to contract carriage as opposed to carriage under a tariff, the Shipping Act does not permit claims of discrimination among shippers. As to service contracts it only recognizes claims of discrimination directed against ports. The primary reform of the Ocean Shipping Reform Act of 1998 was to allow carriers to enter into confidential contracts with shippers containing differing rates and service terms. The Act thus repealed the prohibition against discrimination among shippers with respect to service contracts, retaining it only for carriage under a tariff. All of the carriage here was under service contracts, and as noted above all the claims are squarely based on alleged nonperformance of those contracts.

B. Contrary to the ruling that allowed the discrimination claims to go forward in this case, the fact that alleged discrimination takes place at a particular port or ports is not sufficient to bring it within the very narrow range of discrimination claims against ports that are permitted with respect to contract carriage. The prohibited actions must be clearly targeted at a port or locality. Allowing discrimination claims among service contracts to proceed simply because a port is involved would entirely nullify the central reforms in the 1998 Act, because a U.S. port is involved in every matter under the Commission's jurisdiction.

C. The Shipping Act does not guarantee a shipper the right to enter into a contract, much less a contract with any specific terms, and a refusal to deal allegation requires more than that a request is denied. The Complaint alleges nothing more. In addition, Complainant's transportation manager has admitted, and Complainant's own documents confirm, that Complainant took only half of the contractual space MSC offered it, choosing instead to contract

with other carriers, so the allegation the MSC unreasonably refused to deal or negotiate in good faith to give Complainant the volume of service contracts that it "needed," is contrary to known and incontrovertible fact.

IV. The Initial Decision errs in entering a default for MSC's inability to provide discovery because of the constraints imposed by Swiss blocking statutes, Section 271 and Section 273 of the Swiss Criminal Code.

A. The record establishes without contradiction that Swiss law requires use of the procedures under the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention") in order to comply with Section 271 of the Swiss Criminal Code.

B. To the extent the Initial Decision is based on any uncertainty as to this result, the Shipping Act requires the institution of government-to-government consultations to resolve it. *See* 46 U.S.C. § 41108(c)(2). Complainant itself has termed use of these procedures to be mandatory. The Initial Decision does not discuss or address § 41108(c)(2) or explain why the procedures mandated by that section cannot or should not be used.

C. The Initial Decision incorrectly considered use of the Hague Evidence Convention procedures to have been precluded by a decision of the Geneva Court of First Instance ("Geneva court" or "TPI"), which a prior order had incorrectly described as a decision of the "Swiss authorities." However, the Swiss government has ruled at the highest level, in a decision of the Federal Department of Justice and Police ("FDJP") signed by the Swiss Minister of Justice, that those procedures can and must be used, making that the official position of the Swiss government.

D. The Initial Decision incorrectly disregarded the decision signed by the Swiss Minister of Justice on the basis that it was a decision of the Swiss Executive Branch, not the judicial

branch, even though the Shipping Act expressly requires government to government consultations when a foreign blocking statute is at issue.

V. The Initial Decision incorrectly applied the law applicable to default judgments and incorrectly imposed a default judgment

A. The Initial Decision incorrectly held that MSC's conduct was willful, when its ability to provide ordered discovery was blocked by a Swiss criminal statute, and MSC has made repeated efforts to resolve the impasse and has provided a way forward.

B. The Initial Decision is inconsistent with the general rule that cases should be decided on the merits rather than by procedural default, and did not properly consider how the case could be decided on the merits based on the extensive discovery MSC has already provided.

C. The Initial Decision did not consider or analyze the importance of the outstanding discovery to the resolution of the issues in the case, or whether a sanction other than default was appropriate, but simply asserted that Complainant "cannot proceed with its case without the discovery."

D. The Initial Decision's cursory analysis of whether sanctions short of default would be effective was inadequate and based on incorrect statements as to what discovery has and has not been provided.

E. The Initial Decision improperly awarded reparations without any proof that Complainant suffered damage or as to the amount of any such damage. It relied on precedent allowing an award based on a liquidated damages provision, but Complainant's claims here were not based on a liquidated damages provision and required proof.

VI. Other "conclusions, findings, or statements" in the Initial Decision objected to.

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.

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.

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 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.

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.

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.

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 confirmed, that MSC is first required to obtain authorization before doing so.

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.

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.

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.

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 warranted given the substantial discovery it had provided.

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.

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 requiring immediate production of documents.

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.

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.

FACTS RELEVANT TO THE EXCEPTIONS

A. The Parties

1. Complainant MCS Industries, Inc. is a corporation existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business at 2280 Newlins Mill Road, Easton, Pennsylvania 18045.

2. Complainant imports into the United States home décor and other similar items manufactured in China.

3. MSC Mediterranean Shipping Company S.A. is a company existing under the laws of Switzerland, with its principal place of business at 12-14 Chemin Rieu, 1208 Geneva, Switzerland.

4. MSC is a vessel operating "ocean common carrier," as that term is defined by 46 U.S.C. § 40102(18), with organization number 001699, that transports goods by sea in container vessels it owns, charters, and operates.

B. The Transactions at Issue

1. Complainant has filed a Complaint and an Amended Complaint is this action. *See* Doc. No. 1 (Complaint), Doc. No. 32 (Motion for Permission to File Verified Amended Complaint), Doc. No. 38 (Amended Complaint). The Discovery Order that led to the Default Order was issued before the Complaint was amended, and only covered transactions in the time period between May and August, 2021. *See* Doc. No. 1, ¶ 40; Doc. No. 27 at 2-3.[1]

[1] The Amended Complaint added similar allegations of noncarriage under an Ocean Carrier Agreement between the parties covering the previous contract year, 2020 (the "2020 OCA"). MSC sought documentary discovery from Complainant in January 2022 concerning these allegations. Complainant has yet to produce any discovery or evidence to support its claims that it properly booked cargo that MSC did not carry.

2. Complainant and MSC entered into an Ocean Carriage Agreement, which is a "service contract," as that term is defined by 46 U.S.C. § 40102(21), effective as of May 1, 2021 (the "2021 OCA"). *See* Doc. No. 1, ¶ 40.

3. 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. *Id.* at ¶ 41.

4. Complainant's central allegation is that MSC improperly refused to provide "more than approximately one-third… of the allotted space" for carriage of Complainant's cargo during the 2021 OCA, between May and July 2021, from China to the United States West Coast. *See* Doc. No. 1, ¶ 42.

5. Complainant agreed early in the discovery period that of the three Chinese ports it initially put at issue, Fuzhou, Tianjin, and Qingdao, MSC had in fact carried all of the cargo that it was contractually obligated to carry from Fuzhou, and limited its claims MSC's alleged failure to carry cargo as contractually agreed from two Chinese ports, Qingdao and Tianjin, between May and August 2021. *See* Master Dep. at 46:12-20 (MCS got "all it wanted" at Fuzhou); *id*. at 47:4-23 (conceding the full allocation of "three or four [FEUs] a month" was carried at Fuzhou.)

6. Complainant has further stated in support of its own damages claim, and its CEO has confirmed at his deposition, that in June 2021 MSC carried 7 of the 15 Foot Equivalent Units ("FEUs") it was allocated at Tianjin and 100 percent of the allocation (12 of 12 FEUs) in July. *Id.* at 52:4-53:12 (conceding Complainant got "7 out of the 15 in June" and "12 out of 12 in July" in Tianjin); *see also* Doc. No. 23 and Doc. No. 26, Exhibit A ("MSC Damage Calculation").

7. The non-carriage Complainant alleged in the Complaint was thus limited to 20 FEUs at the Tianjin port in May and June 2021, and 39 FEUs at the Qingdao port from May

through July 2021. Master Dep. at 41:7-8 (Complainant's CEO concedes that it has been "getting acceptable service" at Qingdao "since [MCS] filed the lawsuit," at the end of July).

8. 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 made for a sailing that had to be cancelled and was rebooked on another vessel. *See* Doc. No. 22, Declaration of Matthew J. Reynolds in Support of Complainant's Motion to Compel Discovery from MSC Mediterranean Shipping Company S.A., Exhibit 8, at pp. 1-3.

9. At the Qingdao port, 80 percent of Complainant's service contract volume during the relevant period was with carriers other than MSC. *See* Schantzenbach Dep., Exhibit 18 (correspondence from Complainant to its booking agent, Expeditors, listing Complainant's contracted carriers and allocations with each). MSC's discovery requests have asked Complainant to provide information confirming whether these other carriers carried or could have carried the cargo it claimed MSC wrongfully refused to carry, but Complainant has refused to provide the information.

10. 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.

11. The 2021 OCA, like the 2020 OCA, contains an express agreement between the parties that "[a]ny disputes arising out of or in connection with" the service contract are to be resolved by binding arbitration. *See* Doc. No. 31 at 12 -13.

C. The Original Complaint for the 2021 Contract Year

1. On July 28, 2021, Complainant filed its Original Complaint, making various allegations of conspiracy and collusion among MSC and other carriers, for instance that they "began taking parallel and strikingly similar actions to prop up ocean carriage pricing," including blank sailings (¶ 4); "engage in a common practice of refusing to perform even under those limited service contracts," (¶ 7); "have changed their practices in parallel and seemingly coordinated fashion" (¶ 11); and have organized into collusive "alliances" that "collectively control over 90 percent of all transpacific trade," (¶16), which give "venue and opportunity to coordinate discriminatory practices..." (¶ 17). *See* Doc. No. 1.

2. The Original Complaint alleged that MSC's purported failures to perform under the 2021 OCA violated the Shipping Act as unreasonable practices (Count 1), a failure to perform pursuant to a filed agreement (Count 2), Discrimination (Counts 3 and 4), and Refusal to Deal (Count 5). *Id*.

3. On August 26, 2021, MSC filed an Answer denying the Original Complaint's allegations and raising numerous defenses. *See* Doc. No. 6. Among other things, MSC noted that any damages Complainant incurred resulted from its own inaction, negligence, or other fault. *Id*. at 17. As noted above, this includes its failure to even seek bookings as to almost all of the cargo it claims MSC refused to carry in willful breach of its contract.

D. The Amended Complaint Adding the 2020 Contract Year

1. 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. *Id.* at ¶¶ 42-44, 47, 51-71, 87-106.

2. The Amended Complaint also sought to expand these allegations to cover alleged noncarriage under the 2020 OCA. *Id.* ¶¶ 22(a), 23-31.

E. The Motion to Dismiss the Amended Complaint and Initiation of Arbitration

1. On December 23, 2021, MSC moved to dismiss the Complaint pursuant to Rules 12, 69 and 70 of the Commission's Rules of Procedure, 46 C.F.R. §§ 502.12, 502.69, and 502.70. *See* Doc. No. 31.

2. 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. *Id.* at 1.

3. On February 4, 2022, the Chief Administrative Law Judge issued an Order granting Complainant's Motion to Amend Complaint and denying Respondent's Motion to Dismiss the Complaint. *See* Doc. No. 37. Complainant then filed its Amended Complaint. *See* Doc. No. 38.

4. On February 14, 2022, MSC commenced arbitration against Complainant pursuant to the Rules of the Society of Maritime Arbitrators, 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.[2] 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.

[2] In addition to liquidated damages under the 2020 OCA and the 2021 OCA, in the arbitration proceeding MSC also seeks to recover liquidated damages under the service contracts with Complainant covering contract years 2017 and 2019, during which Complainant also failed to tender the contracted-for minimum quantity commitments.

F. The Discovery Issue On Which the Default Is Based

1. Before Complainant filed its Amended Complaint, a discovery dispute arose between Complainant and MSC, centered on the parties' divergent views on how to conduct discovery in the case efficiently and effectively.

2. Because Complainant's Shipping Act claims are premised on MSC's alleged failure to provide carriage to Complainant's cargo at contracted rates, MSC proposed a sequenced approach of proportionate and relevant discovery, to focus on Complainant's core allegation that MSC improperly refused to carry Complainant's cargo during the period from May to July, 2021 from Tianjin and Qingdao. [3] *See* Doc. No. 23 at 5-6; *see also supra*, paras. 5-8.

3. 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. *Id.* at 11.

4. 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. *Id.* at 71-74.

5. On November 22, 2021, Complainant filed a Motion to Compel Discovery from Respondent. *See* Doc. No. 21. MSC filed a response detailing what the extensive discovery already exchanged between the parties had shown so far, and why its proposal to focus the discovery on what Complaint itself had termed the issues "that go to the heart of the conduct

[3] As noted above, Complainant also named Fuzhou but dropped allegations as to that port.

alleged" would further the just, speedy, and inexpensive determination of the action. *See* Doc. No. 23 at 21, 38, 62, 67, 73, 82.

6. On December 8, 2021, the Chief Administrative Law Judge issued an Order granting Complainant's Motion to Compel Discovery in full, and ordering MSC to produce all discovery requested by Complainant. *See* Doc. No. 27. The parties were directed to file a status report by December 20, 2021 setting forth a new schedule for the case in light of her order. *Id.* at 13.

G. The Order to Compel Triggered the Swiss Blocking Statute

1. 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. *See* Doc. No. 28.

2. 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. *Id*.

H. The Chief Administrative Law Judge Orders Use of the Hague Procedures to Address the Swiss Blocking Statute

1. On March 4, 2022, after receiving MSC's submission as to the Swiss law issues, the Chief Administrative Law Judge ordered that the parties provide a joint status report addressing the status of discovery, the Swiss law issues, and a proposed request for overseas discovery by April 4, 2022. *See* Doc. No. 42.

2. Complainant and MSC filed a Joint Status Report on April 4, 2022, that included a proposed Letter of Request pursuant to the Hague Convention as the Judge had ordered. *See* Doc. No. 43.

3. Complainant stated in the April 4, 2022 Joint Status Report that the Chief Administrative Law Judge should invoke the "mandatory process set forth in 46 U.S.C. § 41108(c)(2)" for use when a carrier "has alleged that information or documents located in a foreign country cannot be produced because of the laws of that country." *Id*. at 6.

4. MSC stated in response that it believed the Swiss would accept use of the Hague Convention procedures, thus making it unnecessary to resort to the consultation process if those procedures were used successfully. *Id.* at 8.

5. On May 4, 2022, the Chief Administrative Law Judge issued an Order Granting Request for Letter of Request Under Hague Convention, concluding "[i]t appears that a Letter of Request under the Hague Convention is the most appropriate and efficient process for obtaining the needed information," and authorizing the parties "to utilize the Hague Convention in seeking discovery in this case in order to comply with Swiss law." *See* Doc. No. 44. She further granted

the request for a Letter of Request under the Hague Convention, and directed Complainant to translate and serve it. *Id.*

I. Complainant's Submission of the Letter of Request and the Resulting TPI Decision

1. Complainant served the Letter of Request on the Geneva court of First Instance ("TPI") nearly four weeks later, on May 31, 2022, and on the Swiss Federal Office of Justice ("FOJ") on June 1, 2022. *See* Doc. No. 45, Joint Status Report dated June 3, 2022, at 1.

2. 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.

3. MSC, following the advice of Swiss counsel, had advised that the Letter of Request should 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.

4. On June 29, 2022, the TPI issued a Decision denying the May 4, 2022 Letter of Request pursuant to the Hague Convention, on the ground that it was sought in connection with "an administrative proceeding directed by an administrative judge connected with the United States Federal Maritime Commission" and thus "does not relate to a civil or commercial case and thus does not fall within the scope of application of [the Hague Convention]." *See* Doc No. 48 at 3.

5. On July 8, 2022, Complainant filed a Notice informing the Chief Administrative Law Judge of the TPI Decision, attaching a copy with a translation. *See* Doc. No. 47.

6. The TPI Decision did not rule that MSC could provide any of the ordered documents without facing criminal exposure facing MSC under the Swiss blocking statute. It ruled, based on the incomplete information provided to it, that it could not assist through the use of the Hague Procedures because it did not understand the Commission proceeding to be a "civil or commercial case." *Id*. at 8. The ruling thus did not address or resolve the impossible position in which MSC found itself -- that it was subject to an order to provide documents that would place it in criminal jeopardy if it complied.

7. On July 15, 2022, the parties filed a Joint Status Report addressing the TPI Decision. *See* Doc. No. 48.

8. Complainant did not ask that the Chief Administrative Law Judge issue an immediate Order compelling the production of the subject discovery in light of the TPI decision. Rather, Complainant reiterated its request that the 46 U.S.C. § 41108(c)(2) consultation procedure be used. *Id.* at 2.

9. MSC agreed with Complainant that further intergovernmental processes must be pursued in order to resolve the criminal jeopardy that remained from compliance with the order to compel. MSC also detailed directly applicable and binding precedent of the U.S. Supreme Court, which had not been brought to the TPI's attention in the application, demonstrating that the TPI was mistaken in considering a private Commission reparations proceeding not to be a "civil or commercial case" to which the Hague Procedures for judicial assistance apply. *Id.* at 3-7.

10. MSC further stated that it had no objection to use of the 46 U.S.C. § 41108(c) consultation procedures to address the impasse, but again submitted that it would be more efficient to simply re-serve the request for assistance via the Hague Procedures. *Id.* at 3-8. MSC and its Swiss counsel firmly believed that a Letter of Request properly supported under U.S. law and the

factors considered on the issue by the Swiss under the Hague Convention would be acted on favorably to resolve the impasse.

J. The Order Requiring Production of Discovery

1. On July 29, 2022, the Chief Administrative Law Judge, contrary to the requests of both parties, issued an Order Requiring Production of Discovery. *See* Doc. No. 50.

2. Despite the advice of Swiss Counsel that the Swiss Blocking Statute applied to the ordered discovery and required the use of the Hague Procedures, the July 29 Order suggested that this constraint did not exist because "[t]his proceeding is very different from a non-party providing Swiss banking documents to American prosecutors building a potential criminal case"; "[t]his proceeding is not a criminal prosecution and the Commission cannot impose criminal penalties;" and "the Swiss authorities have reviewed the request and determined that it is outside the scope of the Hague Evidence Convention." *Id.* at 3.

3. The July 29 Order called for immediate production of the subject discovery, even though neither Complainant nor MSC had asked for such a ruling. *Id.* at 4.

4. The July 29 Order referred to the TPI decision as the position of the "Swiss authorities," even though it did not represent the position of the Swiss authority primarily responsible for determining the position of the Swiss government on Hague Convention issues, the FOJ, which is part of the FDJP. *Id.* at 1 and 3.

5. The July 29 Order also suggested that the TPI decision was the final and correct position of the "Swiss authorities," even though MSC had provided a cogent argument that it was mistaken, and a clear path to obtain a correct ruling from the Swiss government on the issue. *Id.* The July 29 Order did not address or acknowledge that the basis of the TPI Decision was directly contrary to U.S. law regarding the nature of the Commission proceeding.

K. MSC's Continuing Efforts to Eliminate the Criminal Exposure, Culminating in a Decision of the Swiss Minister of Justice that the Hague Procedures are Available and Should Be Used

1. On August 15, 2022, the parties filed a Joint Status Report pursuant to the Chief Administrative Law Judge's July 29, 2022 Order. *See* Doc. No. 51. In this report, MSC noted again that the TPI Order did not resolve its legal jeopardy under Swiss law. In particular, the July 29 Order pointed to the fact that the ordered discovery was not part of a criminal investigation or proceedings, but as Swiss counsel explained the risk comes from the production itself and is not eliminated because the underlying proceeding is not criminal. *Id*. at 4-5. To the contrary, the Hague Procedures that are required to avoid this risk apply only to "civil or commercial" proceedings.

2. MSC advised the Chief Administrative Law Judge and the Complainant that its Swiss counsel had contacted the FOJ in Bern in order to obtain confirmation that the TPI Decision was mistaken on the point and that the position of the Swiss authorities was that Hague Procedures were in fact available and must be used. *Id.* at 5. MSC further committed to revert immediately upon receiving advice from the FOJ, and to consult with Complainant as to how best to move forward in accordance with that advice. *Id.*

3. Neither the Chief Administrative Law Judge nor the Complainant suggested that in contacting the FOJ in Bern MSC or its Swiss counsel were engaged in improper *ex parte* contacts. The purpose and the content of the contacts was disclosed to all -- MSC believed that use of the Hague Procedures was necessary to allow it to comply with Swiss law, and that advice or a ruling from the FOJ was the quickest and most effective way to allow those procedures to be used.

4. On August 25, 2022, MSC filed a Motion for an Extension of Time, updating the Chief Administrative Law Judge and the Complainant that MSC was continuing to attempt to obtain prompt advice from the FOJ, and that its Swiss counsel had contacted the International Mutual Legal Assistance Division of the FOJ to stress the urgency of the matter. *See* Doc. No. 52.

The extension was sought because, despite these efforts, a reply to MSC's request remained pending. *Id.* at 2. Again, neither the Chief Administrative Law Judge nor the Complainant suggested that MSC or its Swiss counsel were engaged in an improper *ex parte* contact.

5. 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. *Id.*

6. On September 8, 2022, the Chief Administrative Law Judge issued an Order Denying MSC's Motion for Extension of Time and Order to Show Cause, stating that she would not give any weight to the FOJ's position because it was inconclusive, and ordering MSC to show cause why a default decision should not be issued against it for failure to produce discovery. *See* Doc. No. 55. This Order did not suggest that MSC's contacts with the FOJ were improper *ex parte* contacts.

L. MSC's Request For a Waiver of Article 271 to Allow Compliance

1. In its continuing efforts to address the Swiss law impediments to providing additional discovery, MSC requested that the Swiss Federal Department of Justice and Police ("FDJP") authorize MSC to proceed to comply with the Chief Administrative Law Judge Order to compel discovery, notwithstanding the provisions of the Swiss law blocking the discovery. The FOJ in Bern prepares for the FDJP decisions on authorizations to comply with a foreign order.

2. On September 22, 2022, MSC filed its Response to the Order to Show Cause. *See* Doc. No. 56. The Response described MSC's ongoing efforts to obtain a waiver from the FDJP. *Id.* at 4-7.

3. On October 6, 2022 Complainant filed its Response to MSC's filing. Complainant urged the Chief Administrative Law Judge to disregard any advice that had been or might be received from the FDJP, but did not suggest that MSC or its Swiss counsel were engaged in an improper *ex parte* contact. *See* Doc. No. 57.

4. On October 14, 2022, MSC filed its reply, again noting that it was seeking a waiver from the FDJP and that it was urging the FDJP to act promptly on the request. *See* Doc. No. 58.

5. 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 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. *Id.*

6. On October 28, 2022 the Office of the Administrative Law Judges communicated to the parties via email an inquiry by the Chief Administrative Law Judge as to whether Complainant would comment on the FDJP decision. Complainant again urged the Chief Administrative Law Judge to disregard any advice that had been or might be received from the FDJP, and again did not suggest that MSC or its Swiss counsel had engaged in an improper *ex parte* contact. *See* Doc. No. 60.

7. 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. *Id.*

M. The Initial Decision

1. On January 13, 2023, the Chief Administrative Law Judge issued an Initial Decision against MSC for failure to produce the subject discovery. *See* Doc. No. 64.

2. The Initial Decision, in addition to rejecting the other arguments against default that MSC had presented in its Response to the Order to Show Cause, gave no weight to the decision of the FDJP, signed by the Swiss Minister of Justice (i.e. at the highest possible level in the Swiss government), that the Hague Procedures were available in this proceeding and are required to be followed to assure compliance with Article 271 of the Swiss Criminal Code. *Id.* at 17.

3. The Initial Decision continued to consider the matter to have been resolved by the TPI Decision, even though that Decision did not address the problem of MSC's exposure to criminal sanctions under the Swiss Blocking Statute, and even though its conclusion had been rejected by the FDJP, representing the official position of the Swiss government. The Initial Decision also suggested for the first time that the FDJP decision was the result of improper *ex parte* contacts, and suggested further that it was improper for MSC to have sought advice from the Swiss Executive Branch, even though MSC had consistently disclosed its efforts to obtain the necessary clarification from the relevant Swiss authorities. *Id.*

4. The Initial Decision did not discuss or address the statutory consultation process required under the Shipping Act.

5. The Initial Decision did not discuss any alternative sanctions short of default.

6. The Initial Decision did not require Claimant to provide any proof as to reparations, instead awarding Complainant reparations based solely on the allegations in Complainant's Amended Complaint. *Id.* at 22-23.

7. 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. *See* Doc. No. 38.

8. 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. *Id.* and Doc. No. 57.

9. The Initial Decision supports the award of reparations by citing to Commission decisional law referencing liquidated damages, even though liquidated damages are not available in this proceeding. *See* Doc. No. 64 at 22.

LEGAL ARGUMENT SUPPORTING EXCEPTIONS

I. THE COMMISSION LACKS JURISDICTION OVER THIS ACTION AND THUS JURISDICTION TO ENTER A DEFAULT OR AWARD REPARATIONS

Subject matter jurisdiction must be considered at all stages of a proceeding, and "the party asserting jurisdiction bears the burden of proof if the opposing party raises lack of subject matter jurisdiction." *Marine Transport Logistics, Inc. v. CMA-CGM (America) LLC*, 2019 FMC LEXIS 109, at *3 (ALJ Oct. 8, 2019); *Arbaugh v. Y H Corp.*, 546 U.S. 500, 506-07 (2006)(subject matter jurisdiction may be raised "at any stage in the litigation," and the objection that a complaint fails to state a claim upon which relief can granted can be made "up to, but not beyond, trial on the merits.").

A. Complainant's Claims Are Inherently Contractual In Nature And Jurisdiction Over Them Is Accordingly Barred By 46 U.S.C. § 40502(f).

46 U.S.C. § 40502(f) provides that "[u]nless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court." The parties here have not agreed otherwise; to the contrary, they have expressly agreed to arbitration of "[a]ny disputes arising out of or in connection with" their service contracts. In applying this jurisdictional limitation, the Commission examines "whether a complainant's allegations are inherently a breach of contract, or whether they also involve elements peculiar to the Shipping Act and thus rebut the presumption that the claim is no more than a simple contract breach claim." *Cargo One*, 2000 FMC LEXIS 14, at *32; *see also Western Overseas Trade and Dev. Corp. v. ANERA*, 1994 FMC LEXIS 17, at *7 (FMC Feb. 24, 1994) (barring claims "couched in terms of alleged violations of the 1984 Act" that are "really breach of contract claims").

The Complaint's initial suggestions of concerted, collusive, and parallel activity among carriers could have been construed to alleged conduct beyond a simple breach of contract, *see*, *e.g.*, Doc. No. 1, ¶¶ 4-7, 11, 15-17, the Amended Complaint makes clear that it is based solely on the parties' contractual relationship. Complainant has described its claims as alleging that MSC engaged in "a course of unjust and unreasonable conduct in which [MSC] failed to provide the agreed space for Complainant's cargo on [MSC]'s ships and unreasonably refused to deal or negotiate with Complainant in that connection, in violation of the Shipping Act." Doc. No. 23 (Motion to Compel), at 14.

Complainant's own description confirms the action is inherently contractual. Count II of the Amended Complaint expressly pleads MSC's supposed failure to operate in accordance with

filed agreements, namely its service contracts, and is thus on its face a breach of contract claim.[4] The unreasonable practices claim in Count I is based on allegations that MSC had a "practice" of unreasonably failing to comply with its contractual obligations for the supposed purpose of coercing Peak Season Surcharge payments under the contract, and to allow it to carry higher priced cargo.[5] The discrimination claims in Counts III and IV allege that the breaches of contract did not exist for other shippers and Count V, the refusal to deal claim, alleges supposed failures in contract negotiation and administration.[6] *See* pp. 35-39, *infra*. None of these counts state a claim under the Shipping Act. All of these claims depend fundamentally on allegations of breach of contract, and are thus outside the Commission's jurisdiction. *See Cargo One, supra; Global Link Logistics, Inc. v. Hapag-Lloyd AG*, 2014 FMC LEXIS 11, at *55 (ALJ April 17, 2014)(claims alleging a "failure to address the MQC shortfall under the service contract" and other contract administration issues, are "inherently contract claims reserved for the arbitrator and are not within the Commission's jurisdiction to decide.").

The Initial Decision did not analyze whether Complainant's claims were inherently contractual, but simply recited the truism that conduct that might be a breach of a service contract can also be a violation of the Shipping Act. *See* Initial Decision at 15-16 (referring to allegations of "practices that violate the Shipping Act, such as failing to maintain or provide booking reports, systematically preferring higher-priced cargo, and coercing surcharges."). But this is the

[4] *See* Doc. No. 32 at ¶¶ 109-110.

[5] *See id.* at ¶ 9 (describing the peak season surcharges as an effort by MSC to allegedly "condition its compliance with its contractual service commitments on extracting additional payments from Complainant."); ¶ 42 (alleging a supposed "practice of demanding a premium as a precondition to performing its contractual obligations."); ¶52 ("scheme to condition MSC's performance under the Service Contracts upon Complainant's agreement to pay PSS"); ¶ 104 (same).

[6] *See id.* at ¶¶ 111-114.

beginning of the inquiry, not the end of it. Allegations can state a Shipping Act claim but be outside the Commission's jurisdiction if they are inherently contractual. As stated in *Cargo One*, "[f]or section 8(c) [now § 40502(f)] to have meaning, it must have been intended to preclude the filing of some complaints of Shipping Act violations, and not just breach of contract claims, as such claims would not be actionable before the Commission in any event." 2000 FMC LEXIS 14, at *32.

The service contracts are not merely background or incidental to Complainant's allegations of an unfair practice; they are fundamental to the claim that MSC has a supposed practice of not complying with its contracts unless some condition is met. MSC is accused of "coercing surcharges" by otherwise refusing to perform its contractual obligation, *see* n.2, *supra*, and "preferring higher priced cargo" by allegedly not carrying cargo at lower contract rates. These are claims directly "premised on the obligation to meet one's contract commitments" and expressly barred by *Cargo One*. *See Cargo One*, 2000 FMC LEXIS 14, at *33 (dismissals on that ground).

Nor is this a case in which the service contract between Complainant and MSC is merely referenced in the Complaint. *See id.* at *5 (noting Complainant's argument that its claims "only incidentally are couched in the context of a service contract"). MSC is not arguing that simply because it has a contractual relationship with Complainant there might not also be a Shipping Act claim arising out of that relationship. Here, the claim that MSC did not comply with its contractual commitments is absolutely fundamental to Complainant's claims, and inherent in each of them. Complainant's Shipping Act claims cannot be maintained absent the allegation that MSC did not fulfill its contractual commitments. Allowing the claims to go forward in this posture would read 46 C.F.R. § 40502(f) entirely out of the Act.

The inherently contractual nature of Complainant's claims is further supported by the fact that its reparations claim is calculated as the difference between (a) the rates MSC alleges it would have paid had contractually allocated space been provided and (b) the higher rates it allegedly had to pay in the spot market when that contractually allocated space was not provided. This is the classic measure of damages for a breach of contract, further reinforcing that the unreasonable practices claim is in reality a contract claim. *See* Restatement (Second) of Contracts § 347 (stating that "[c]ontract damages are ordinarily based on the injured party's expectation interest"); *id.* at § 344(a) (defining "expectation interest" as the "interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed"). While this factor is not dispositive under Commission precedent, it confirms the other indications that the claims are inherently contractual and outside the Commission's jurisdiction.

Finally, this case is unlike those in which the Commission has held that a Complainant successfully rebutted "the presumption that the claim is no more than a simple contract breach claim." *See Cargo One*, 2000 FMC LEXIS 14, at *32. Those cases either held that conduct beyond a simple allegation of breach could also independently serve as the basis for a Shipping Act violation, or sought to invalidate the exercise of a contract provision as unreasonable. *See, e.g., Tractors and Farm Equipment Limited v. Cosmos Shipping Co., Inc.*, 1992 FMC LEXIS 86, at *36-37, 42 (ALJ Nov. 23, 1992) (complaint included allegations of improperly preparing shipping documents and altering bills of lading with false information); *Greatway Logistics Group, LLC v. Ocean Network Express PTE, Ltd.* 2021 FMC LEXIS 107, at *1, 6 (ALJ July 16, 2021)(independent claims related to "actions undertaken . . . to collect certain freight, demurrage, and storage charges from a non-party" to the contract). Here, by contrast, the breach of contract itself is fundamental to the claims. *See also Global Link Logistics*, 2014 FMC LEXIS 11, at *55

("failure to address the MQC shortfall under the service contract" and other contract administration issues, are "inherently contract claims reserved for the arbitrator and are not within the Commission's jurisdiction to decide."); *DNB Exports LLC, and AFI Elektromekanik Ve Elektronik San. TIC. Ltd. STI v. Barsan Global Lojistiks Ve Gumruk Musavirligi A.S., Barsan Int'l, Inc., and Impexia, Inc.*, 2011 FMC LEXIS 26, at *12 (ALJ July 7, 2011) (same). Complainant does not allege improper preparation and falsification of shipping documents as in *Tractors and Farm Equipment* or require interpretation of demurrage and detention practices for adherence to Shipping Act requirement as in *Greatway*. The claims are simply a breach of contract claim "couched in terms of alleged violations of the 1984 Act," which, as held in *Western Overseas Trade and Dev. Corp.* is outside the Commission's jurisdiction.

B. Complainant's Claims Are Separately Barred By The Federal Arbitration Act As The Parties Agreed To Arbitration As The Exclusive Forum For "[A]ny Disputes Arising Out Of Or In Connection With" Each Of Their Service Contracts

The Commission's exercise of jurisdiction over matters that the parties agreed in their contracts to commit to arbitration is also inconsistent with the "federal policy favoring the liberal enforcement of arbitration clauses," which "applies with particular force in international disputes." *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.,* 369 F.3d 645, 654 (2d Cir. 2004). *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004) held that antitrust claims that depended on a showing of breach of contract must be arbitrated pursuant a clause that was, like the clause in the contracts at issue in this proceeding, broad in its language. *Id*. at 172 (noting that arbitration clauses the courts have considered to be "broad" include a clause requiring arbitration of "'[a]ny dispute, controversy or claim arising under or in connection with') the agreement). Arbitration was ordered in that case despite the strong federal policies expressed

in the antitrust laws; indeed the claims in that case arose out of a price fixing conspiracy that the Justice Department prosecuted criminally.

Recognizing and giving force to an arbitration clause as required under the Federal Arbitration Act thus in no way suggests that Shipping Act claims that may overlap with contractual claims are unimportant; it merely requires that these claims be considered in the proper forum. *See Mehler v. Terminix Int'l Co.,*205 F.3d 44, 50 (2d Cir. 2000) ("[I]t is clear that we have not limited arbitration claims to those that constitute a breach of the terms of the contract at issue."); *Genesco, Inc. v. T. Kakiuchi Co.,*815 F.2d 840, 846 (2d Cir. 1987) ("In determining whether a particular claim falls within the scope of the parties' arbitration agreement, we focus on the factual allegations in the complaint rather than the legal causes of action asserted. If the allegations underlying the claims 'touch matters' covered by the parties' sales agreements, then those claims must be arbitrated, whatever the legal labels attached to them.")(citation omitted).

Stolt-Nielson required arbitration of antitrust claims arising out of the parties' contractual relationship even though the plaintiff in that case contended that it was damaged by a "conspiracy which was formed *independently* of the specific contractual relations between the parties." *Stolt-Nielsen,* 387 F.3d at 175. The plaintiff "could not have suffered these damages if it had not entered into the . . . contracts," and therefore the claims were arbitrable. That is exactly the case here, where Complainant's allegations all depend on allegations of breach of contract.

Finally, where claims are asserted to be subject to arbitration, any ambiguity must resolved in favor of arbitration. *See Hartford Acc. and Indem. v. Swiss Reinsurance*, 246 F.3d 219, 227 (2d Cir. 2001); *AT&T Technologies, Inc. v. CWA*, 475 U.S. 643, 650 (1986)("[W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that [a]n order to arbitrate the particular [claim] should not be denied unless it may be said with *positive*

assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.").

Although all of this precedent was cited in the briefing that led to the Initial Decision, that Decision does not address it. Rather, it cites Commission precedent referring to the Commission's "statutory mandate" to hear Shipping Act complaints. *See* Doc. No. 64 at 15 (quoting *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda*., 2006 FMC LEXIS 19, at *22, 998 (FMC May 10, 2006)). But this statutory mandate is not absolute. Just as a federal court's jurisdiction over federal antitrust claims yields to the Federal Arbitration Act when those claims arise out of or are in connection with a valid arbitration agreement, so too may parties agree to arbitrate contractual claims that carry with them Shipping Act claims.

C. Complainant Fails To State A Claim In Any Event

In addition to the jurisdictional bar, a default judgement is not proper if no claim has been properly stated. Moreover, "only a complaint that states a plausible claim for relief survives a motion to dismiss," and determining whether a complaint states a plausible claim for relief is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009).

The implausibility of Complainant's claims is confirmed by the fundamental incompatibility of its two basic theories. Complainant has alleged that MSC breached its contracts in order to force Complainant into the spot market or, alternatively, to coerce Complainant to pay peak season surcharges. Under the terms of the service agreements, MSC cannot impose a peak season surcharge unless both parties agree to it, and the contract may be terminated on 30 days' notice if one is proposed and not agreed to. *See* 2021 OCA § 5.4. If MSC wanted to force Complainant out of the contract it could have simply terminated the agreement after the surcharge was not agreed to. There would have been no need for the elaborate "scheme" Complainant

hypothesizes. And given the differential between spot and contract princes at the time referenced in the Amended Complaint, that strategy would have been far more remunerative than "coercing" a surcharge.

The discrimination claims in Counts III and IV are also barred by the express language of the Shipping Act. For service pursuant to a service contract, the plain language of § 41104(a)(5) prohibits discriminatory practices *only* "in the matter of rates or charges with respect to any port," and the plain language of § 41104(a)(9) prohibits "any undue or unreasonable preference or advantage" or "any undue or unreasonable prejudice or disadvantage" *only* "with respect to any port." These limitations to ports only, and not to shippers, in the scope of the discrimination and preference prohibitions with respect to service contracts were a key part of the deregulatory reforms enacted by the Ocean Shipping Reform Act of 1998, Pub. L. 105-258 ("OSRA"). Claims of discrimination among shippers can, post-OSRA, be pursued only for carriage under a tariff, and not for carriage under a service contract. *Compare* 46 U.S.C. §§ 41104(a)(4) and (8)(prohibiting discrimination and unreasonable preference or disadvantage generally) *with* 46 U.S.C. §§ 41104(a)(5) and (9)(prohibiting discrimination and unreasonable preference or disadvantage only as to ports under service contracts).

OSRA's legislative history confirms this deregulatory limitation of the prohibitions of former Sections 10(b)(5) and 10(b)(9) of the 1984 Shipping Act, now 46 U.S.C. §§ 41104(a)(5) and (9), to protect only ports, and not shippers, from unjust discrimination and undue or unreasonable preference, advantage, prejudice, or disadvantage as a result of common carrier service contracts. *See Global Link Logistics,* 2014 FMC LEXIS 11, at *3-4 ("The Act permits a common carrier to charge different rates to similarly situated shippers in service contracts"); *id*.,

at *59-63 (discussing the legislative and regulatory history). As explained in the Senate report accompanying the final bill:

> [t]he Committee intends the application of these prohibitions to a locality to be limited to circumstances in which the prohibited actions are *clearly targeted at a locality, not to circumstances where the actions are targeted at a particular shipper or ocean transportation intermediary which happens to be associated with that locality."*

S. Rep. No. 61, 105th Cong., 1st Sess., at 28 (1998)(emphasis added). The lead sponsor of the bill in the Senate confirmed the point during the Senate floor consideration:

> The most significant benefit of S. 414 is that it will provide shippers and common carriers with greater choice and flexibility in entering into contractual relationships for ocean transportation and intermodal services. It accomplishes this through seven specific changes to the Shipping Act of 1984. . . It eliminates the requirement that similarly situated shippers be given the same service contract rates and service conditions. *It eliminates the current restrictions on individual common carriers engaging in discriminatory, preferential, or advantageous treatment of shippers*…

144 Cong. Rec. 6109, 6124 (April 21, 1998)(statement of Sen. Hutchinson)(emphasis added).

The Amended Complaint asserts an unfair disadvantage "with respect to the ports for which MCS contracted with Respondent," *See* Doc. No. 38 ¶¶ 19-20, but these allegations merely parrot the language of the statute, which is not enough. *Maher Terminals, LLC v. Port Auth. of N.Y & N.J.*, 2015 FMC LEXIS 43, at *58 (FMC Dec. 18, 2015) (affirming dismissal of a refusal to deal claim was "an insufficient formulaic recitation of the elements of a § 41106(3) claim"); *DIRECTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 854 (9th Cir. 2007) (allegations "parrot[ing] the language" of the relevant statute were "not well-pleaded facts" but simply "legal conclusions"). Complainant does not allege or provide any facts in support of any allegation that of discrimination directed at ports, but merely alleges that it was disadvantaged as a shipper at certain (non - U.S.) ports. *See* Doc. No. 34 at 14 (stating that "Respondent undertook a practice of failing to provide contracted

space allocations to Respondent [sic, should be Complainant], 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."). *See also* Doc. No. 32 (Proposed Amended Compl. at ¶ 90) (alleging the MSC engaged in unlawful discrimination "in connection with" multiple ports, not directed at multiple ports). Nor is there any reason to conclude that Congress intended to deregulate contract carriage as to U.S. shippers, but nonetheless to protect Chinese ports from discrimination.

The Amended Complaint also fails to state a refusal to deal claim. The allegation that MSC refused to deal by refusing to carry Complainant's cargo and as to various matters of contract administration simply state breaches of contract outside the Commission's jurisdiction. The Amended Complaint also alleges that MSC did not contract for the minimum cargo quantity Complainant "needed," *see* Doc. No. 38 at ¶ 7, but the Shipping Act does not guarantee the right to enter into a contract to begin with, much less a contract with any specific terms. *See New Orleans Stevedoring Company v. Port of New Orleans*, 2001 FMC LEXIS 25, at *15-16 ((ALJ June 27, 2001)), *adopted* 2002 FMC LEXIS 24, at *12-13, 1071 (FMC June 28, 2002), *aff'd mem.*, 80 Fed. App'x 681 (D.C. Cir. 2003). "A refusal to deal allegation requires more than that a request is denied." *Maher Terminals, LLC v. Port Authority of New York and New Jersey*, 2015 FMC LEXIS 1, at *62 (FMC Jan. 30, 2015). See *MAVL Capital Inc. v. Marine Transport Logistics, Inc*., 2020 FMC LEXIS 216, at *12-13 (FMC Oct. 29, 2020) (Commission affirmance of dismissal of unsupported refusal to deal claim). And here of course MSC did enter into two contracts with Complainant. *See Chilean Nitrate Sales Corp. v. San Diego Unified Port District*, 1988 FMC LEXIS 43, at *4 (FMC April 29, 1988)(dismissing unsupported refusal to deal claim and holding

that the Commission did not have to address whether the refusal to deal or negotiate was unreasonable if here was no refusal).[7]

Finally, while there is no need to look past the Amended Complaint itself to reject the refusal to deal claim, the incontrovertible testimony of Complainant's own transportation manager confirms that MSC offered Complainant a contract of 1400 TEUs for 2021, that Complainant awarded MSC only 660 TEUs, and that MSC itself then worked that award up to 728 TEUs. *See* Doc. No. 31 at 10-11. Accordingly, there is no basis to suggest that MSC was not negotiating in good faith. Permitting a refusal to deal claim to proceed under these circumstances would make every service contract involving a U.S. port entirely provisional based on the later whims of a party that wishes it had made a different decision.

II. CONSULTATION UNDER 41108(C)(2), NOT DEFAULT, IS THE PROPER COURSE FOR RESOLVING THE DISCOVERY ISSUE THAT UNDERLAY THE INITIAL DECISION

There is no dispute in the evidence of record that, under Swiss law, use of the procedures under the Hague Evidence Convention is required for compliance with Section 271 of the Swiss Criminal Code. MSC has provided several opinions of Swiss counsel to that effect, and the conclusion has been confirmed at the highest levels of the Swiss government. When such a "blocking statute" is raised in response to an order compelling discovery, the Shipping Act requires government-to-government consultations. *See* 46 U.S.C. § 41108(c)(2). Indeed, Complainant itself has repeatedly submitted that these consultation procedures are the mandatory and proper avenue for addressing the discovery issue underpinning the Initial Decision. *See*, e.g., Doc. No. 43 at 6 (MSC's "invocation of Swiss law in defense of its failure to comply with the December 8

[7] The Original Complaint attempted to buttress the claim with allegations that MSC had conspired or acted in parallel with others to refuse to deal, *see* Doc. No. 1, ¶ 7, but the Amended Complaint drops any allegation of conspiracy or concerted action.

Order necessarily implicates Section 41108(c)(2), which *requires* the Commission to 'immediately notify the Secretary of State of the failure to comply and of the allegation relating to foreign laws' so that 'the Secretary of State shall promptly consult with the government of the nation within which the information or documents are alleged to be located for the purpose of assisting the Commission in obtaining the information or documents.'") (emphasis in original).

The Initial Decision does not discuss or address § 41108(c)(2), explain why the procedures mandated thereunder cannot or should not be used, or acknowledge that Complainant explicitly stated that use of the § 41108(c)(2) consultation process was required, including after the Geneva TPI decision. *See* Doc. No. 48 at 2. Nor has Complainant argued or demonstrated that any delay resulting from the mandatory Consultation procedures would be prejudicial, provided it is not forced to take depositions before documentary discovery is substantially completed, as MSC has agreed. *Id.*

MSC has consistently asserted, supported by opinions of its Swiss counsel, respected legal academics, and now the Swiss government itself, that it would risk criminal sanctions if it complied with the outstanding discovery order without use of the procedures under Hague Evidence Convention or some other authorization from the Swiss authorities. The Chief Administrative Law Judge ordered initiation of those procedures in May 2022. *See* Doc. No. 44 at 1. MSC recommended that the Letter of Request to do so be sent to the court in Geneva through the Swiss FOJ, which acts as the official center of legal expertise for mutual legal assistance matters in Switzerland, in order to guard against a potential misstep. *See* Doc. No. 43 at 13. Complainant instead first directed an inadequately supported application to the TPI, which denied it on the erroneous ground that this proceeding is not a "civil or commercial case." *See* Doc. No. 47 at 8.

The TPI decision was unexpected by the parties and directly contrary to well-settled U.S. law that Commission proceedings are essentially equivalent to civil proceedings in federal court. *See Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002). Swiss counsel advised MSC that the Decision was also contrary to the prevailing view of the Swiss FOJ. Accordingly, MSC proposed in the joint July 15 Status Report that the quickest and most efficient way forward would be to seek advice of the Swiss FOJ as to resubmission of the request. *See* Doc. No. 48 at 3-8. If, unlike the first request, the re-submitted request were supported by appropriate detail regarding the nature of the proceeding and with reference to directly applicable and binding precedent of the U.S. Supreme Court confirming the Commission adjudicative proceedings are for all relevant purposes equivalent to civil judicial proceedings, *see South Carolina State Ports Authority*, 535 U.S. at 759 ("the similarities between FMC proceedings and civil litigation are overwhelming."). MSC's Swiss counsel was confident it would be granted.

Neither party requested in response to the TPI Decision the immediate issuance of an order requiring production of the discovery, notwithstanding the Swiss law issues that MSC and its Swiss counsel had identified. MSC believed (and still does), that resubmission under the Hague procedures would lead to a prompter resolution, but did not oppose Complainant's request for use of the statutory consultation procedures, and also submitted that two procedures could be undertaken simultaneously, to resolve the conflict. *Id*.

Neither the July 29 Order requiring immediate production of the discovery, nor the September 8 Order denying MSC's motion for an extension of time to confirm the applicability of the Hague procedures, not the Order to Show Cause referenced the statute or explained why consultation under its provisions would be fruitless. *See* Doc. Nos. 50 & 55. Instead, they stated that "the question of whether Swiss assistance with discovery is required has been answered by

the undersigned Administrative Law Judge and by the Court of First Instance in Geneva." *See* Doc. No 50, at 2. The only change in circumstance since the Chief Administrative Law Judge's May 4 Order Granting Request for Letter of Request Under Hague Convention was the TPI Decision, but advice from the FDJP and the Swiss Minister of Justice, the parties with whom consultations under § 41108(c)(2) would almost certainly be made, has now confirmed was inaccurate. There is no basis in the record to contradict this authoritative determination of Swiss law.

Although MSC believes there is no basis in the record to doubt that submission of a Letter of Request would allow compliance with the discovery order on which the Initial Decision on Default is based, if there were any doubt the consultation procedure required under § 41108(c)(2) would be the proper way to resolve it. By the same token, to the extent the Chief Administrative Law Judge was reluctant to resolve what she viewed as a dispute between the executive and judicial branches of the Swiss government, the consultation process would surely resolve such dispute, were the Swiss to agree there was such a dispute to begin with.

In sum, the imposition of a default judgment against MSC on the basis of its inability that it cannot produce the ordered discovery under Swiss law, without undertaking the consultations prescribed by Section 41108(c)(2), is contrary to the statute, which expressly provides for consultations, not a default remedy, in that circumstance.

III. THE INITIAL DECISION ON DEFAULT DID NOT PROPERLY APPLY THE LAW APPLICABLE TO DEFAULT JUDGMENTS

The precedent of the Commission and federal courts confirms that entry of a default judgment is a drastic sanction that undercuts the desired goal of deciding cases on their merits and is permissible only if there are no available alternatives. *See, e.g, Tak Consulting Eng'rs v. Bustani*, Docket No. 98-13, 28 S.R.R. 581, 583 (ALJ Oct. 1, 1998)("The reluctance to decide by default judgments is consistent with the underlying philosophy [that] agencies prefer to decide cases

based on evidence rather than on defaults and technicalities"); *Webb v. District of Columbia,* 146 F.3d 964, 971 (D.C. Cir. 1999)("because disposition of cases on the merits is generally favored, we have said that a default judgment must be a 'sanction of last resort . . .'")(*quoting Shea v. Donohoe Construction Co.*, 795 F.2d 1071, 1075 (D.C. Cir. 1986)). The standard for entering a default judgment has been stated as follows: "a district court may use its inherent power to enter a default judgment only if it finds, first, by clear and convincing evidence—a preponderance is not sufficient—that the abusive behavior occurred; and second, that a lesser sanction would not sufficiently punish and deter the abusive conduct while allowing a full and fair trial on the merits." *Shepherd v. American Broadcasting Companies,* 62 F.3d 1469, 1471–1472 (D.C. Cir.1995).

The Initial Decision cites to the "three basic justifications [to] support the use of dismissal or default judgment as a sanction for misconduct" set out in *Webb*. Initial Decision at 17-18 (citing and quoting *Webb,* 146 F.3d at 971). First, prejudice to the opposing party—whether the conduct "has severely hampered the other party's ability to present [her] case." *Id.* at 971. Second, prejudice to the court—whether the conduct has placed an "an intolerable burden" on the tribunal in the form of delay or other accommodation. *Id.* (quoting *Shea*, 795 F.2d at 1075). Third, the bad faith or contumacious nature of the conduct—whether conduct is such that the severe sanction of dismissal or default is necessary to deter such conduct in the future. *See id*. (citing *Shea*, 795 F.2d at 1077). None of these considerations justify the extreme sanction of default in this case.

A. The Initial Decision Failed To Consider How The Case Could Be Decided On The Merits Based On The Substantial Discovery Already Provided And Failed To Assess The Importance Of The Outstanding Discovery To The Resolution Of The Case.

The Initial Decision failed to undertake any meaningful analysis of the discovery at issue necessary to support a finding of "actual prejudice" to Complainant. *See Shea*, 795 F.2d at 1075. To the contrary, the Initial Decision, like the Order to Show Cause, proceeds on the mistaken

premise that a detailed analysis of the discovery already provided or the importance of the outstanding discovery to the claims and defenses at issue in this case would be tantamount to "rearguing the merits" or "litigating the relevance of the discovery ordered." *See* Doc. No. 55 at 2; Doc. No. 64 at 18. This is clear error. The "clear and convincing" standard set out in *Webb* requires a detailed analysis sufficient to show that the failure to produce the discovery at issue so "severely hampers" Complainant, "it would be unfair to require [it] to proceed further with its case." *Webb,* 146 F.3d at 971.

The Initial Decision misapprehends *Webb* and the related precedent by basing its finding of actual prejudice on fact that MSC failed to comply with the order to compel the production of relevant evidence. This framing necessarily fails because the "failure to comply with order compelling disclosures or discovery," 46 C.F.R. § 502.150(b), is a predicate for any discovery sanction. More is required. In considering a default judgment the question is not whether the information sought appears reasonably calculated to lead to admissible evidence, but rather is there a "clear and convincing" demonstration that the outstanding discovery is essential to the claims at issue. *See Bradshaw v. Vilsack*, 286 F.R.D. 133, 141 (D.D.C. 2012)(denial of default judgment in the absence of specific, factually supported allegations of prejudice); *cf. Dubicz v. Commonwealth Edison Co*., 377 F.3d 787, 792-93 (7th Cir. 2004)(declining to find prejudice where "case for prejudice is stated…only in the most conclusory terms" and no "particular witnesses or documents are identified.").

As an initial matter, the Initial Decision fails to acknowledge that MSC has already produced thousands of pages of responsive, non-privileged documents, including all information regarding the carriage or non-carriage of Complainant's cargo. Complainant has provided no basis

to suggest that this production, on the very issues it has characterized as the "heart" of its case, is incomplete.

The discussion of the outstanding discovery is also deficient. The Initial Decision addresses the issue in two paragraphs "in the most conclusory terms," referring generally to "different categories of information that needed to be disclosed." Initial Decision at 18. No analysis is undertaken to assess whether the information has already been produced through discovery not subject to the motion to compel or whether any of the outstanding categories of information are essential to the claims at issue. As detailed MSC's response to the Order to Show Cause for many of the "categories" referenced, MSC has already produced what it believes to be all responsive, non-privileged documents. Other categories of information were mooted by the amended complaint that was filed after the motion to show cause, and many of the categories relate to information on administrative matters of such tangential relevance, for example MSC's document retention and insurance coverage policies, that no possible finding of prejudice could be based on MSC's inability to produce this information. *See* Doc. No. 56 at 13-24; Doc. No. 58 at 10-13.

The only category of information for which MSC has not produced substantial discovery is with respect to information on cargo capacity, costs and carriage or non-carriage of cargo *unrelated* to Complainant. As above, the Initial Decision makes no attempt to show that MSC's failure to produce this information will "severely hamper" Complainant's ability to present its claims. Nor could such a showing be made. Complainant's Shipping Act claims are all premised on MSC's alleged failure to provide carriage to Complainant's cargo at its contracted rates. Issues of absolute capacity, allocation of cargo space unrelated to Complainant's cargo, and the confidential rates paid by third parties are, at best, of only tangential importance to Complainant's

claims and defenses. If Complainant timely and properly booked its cargo under the OCA, MSC had an obligation to carry it at the contracted rates unless that obligation was excused. This is true whether the vessel is full or empty and regardless of the prices charged or the MQC promised to any other shipper. If Complainant failed to timely and properly book its cargo, as the substantial discovery already exchanged has established, then MSC had no duty to carry it and there can be no breach of contract and no derivative Shipping Act violation. Again, this is true regardless of whether the vessels were full or empty and regardless of MSC's interactions with shippers other than Complainant.

The Initial Decision's conclusory analysis not only fails to meet the standards required in *Webb* to find actual prejudice, it is unsupported by the record evidence. The Initial Decision states that Complainant is prejudiced because the outstanding discovery precludes Complainant from identifying "individuals with knowledge" and "potential witnesses" for depositions. *See* Initial Decision at 19. This is incorrect. As MSC explained in its response to the Order to Show Cause, all individuals with "substantive knowledge" concerning the matters at issue in this case were identified in the parties initial disclosures exchanged in September 2021; the completeness of the initial disclosures was confirmed by MSC's initial and supplemental document productions in November 2021. *See* Doc. No. 56 at 20-21; Doc. No. 58 at 12. Additionally, MSC offered the persons most directly involved in the matters at issue for depositions on the dates Complainant noticed them in October 2021. *See* Doc. No. 23 at 11.

B. The Initial Decision's Cursory Analysis Of Whether Sanctions Short Of Default Would Be Effective Was Inadequate And Based On Incorrect Statements As To What Discovery Had And Had Not Been Provided.

For the reasons stated immediately above, because the Initial Decision did not thoroughly assess the discovery already produced by the parties or the importance of the outstanding discovery to Complainant's case, the finding that no lesser sanction could have served as an effective remedy

likewise fails to meet the "clear and convincing evidence" standard required. *Shepherd,* 62 F.3d at 1471–1472.

C. The Initial Decision's Finding That Complainant Is Prejudiced By Any Delay Caused By Further Consultations Is Contrary To Complainant's Stated Position That Further Consultations Are Required By Statute; There Is No "Continuous And Ongoing" Harm.

No default judgment can be based on a finding that Complainant would suffer actual prejudice by delay caused by further procedures and consultations with the Swiss government to allow MSC to collect and produce additional discovery. To the contrary, Complainant has consistently maintained throughout the course of this proceeding that the statutory consultative procedures under 46 U.S.C. § 41108(c) are mandatory.

The Initial Decision also errs in stating that any delay caused by further consultations is prejudicial to Complainant because the alleged violations are "continuous and ongoing." Initial Decision at 19. This rationale is contradicted by the more accurate description of the dispute as "narrowly tailored to conduct between the parties, between California and two ports in China, over a four-month timeframe." *Id*., at 5 (quoting Order Granting Motion to Compel at 4-5). This rationale also mischaracterizes the nature of the amended complaint, which reached back in time to incorporate the 2020 contract year, not to address "continuous and ongoing" violations. In fact, Complainant has conceded that there were no issues beyond July 2021, and is claiming only reparations for past conduct. These considerations also rebut any presumption of prejudice resulting from the delay as a matter of law. *See Wash. Metro. Area Transit Comm'n v. Reliable Limousine Serv., LLC*, 776 F.3d 1, 6-7 (D.C. Cir. 2015)("delay that merely prolongs litigation is not a sufficient basis for establishing prejudice.").

D. The Initial Decision Erred In Granting A Default Against MSC For Delay Caused By The Mandatory Statutory Process.

MSC also cannot be equitably sanctioned for prejudice to the system because of delays and burdens caused by the statutory consultation procedures under 46 U.S.C. § 41108(c)(2). Appellate courts have repeatedly held that default sanctions constitute an abuse of discretion where, as here, a party's failure to comply was not the party's fault. *See e.g., Flaks v. Koegel*, 504 F.2d 702, 709 (2nd Cir. 1974 (overturning dismissal as abuse of discretion and stating "Rule 37 should not be construed to authorize dismissal . . . when it has been established that the failure to comply has been due to inability, and not to willfulness, bad faith, or any fault" (citations omitted)). Frustration with the confusion created by the incorrect decision of the Geneva court is not a sufficient basis to impose the most extreme sanction on MSC. This is particularly true where, as here, MSC has been actively engaged in the case, is unable to comply with the order to compel without authorization from the Swiss authorities, and has been working diligently to identify viable alternatives to expeditiously resolve the Swiss law issues to allow for a decision on the merits.

E. The Initial Decision Erred In Holding MSC Engaged In Bad Faith Or Willful Misconduct And The Deterrence Rationale Incorrectly Assumes MSC, Or Other Parties, Could Choose Not To Comply With Applicable Foreign Laws.

Commission and federal court precedent uniformly demonstrate that default judgment is an appropriate remedy only in the most extreme cases "on the spectrum of discovery misconduct," involving a complete failure to participate or a willful disobedience evidenced by the lack of any "plausible excuse for [the] failure to participate in discovery," and a "history of self-directed discovery misconduct." *Reliable Limousine Serv., LLC*, 776 F.3d at 6 (citing *NHL v. Metro. Hockey Club - 427 U.S.* 639, 643 (1976)(approving default judgment where litigant exhibited "flagrant bad faith" and "callous disregard" of discovery obligations); *GO/DAN Industries, Inc. v. Eastern Mediterranean Shipping Corp.*, FMC Docket No. 98-24, 1998 FMC

LEXIS 5, at *7 (ALJ Dec. 10, 1998) (default where Respondent entirely failed to participate in the proceedings). These authorities confirm that the facts in this case do not come close to justifying the "draconian" penalty of a default judgment. Again, MSC has been actively engaged in the case, has produced substantial discovery, and has been working diligently to identify viable alternatives to expeditiously resolve the Swiss law issues to allow for a decision on the merits.

Precedent most relevant to the facts in this case – inability to comply with a discovery order due to a foreign blocking statute – confirms that the Initial Decision erred in entering default judgment. *See Cine Forty–Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1066-68 (2d Cir. 1979)(distinguishing circumstances where a party "makes good faith efforts to comply, and is thwarted by circumstances beyond his control for example, a foreign criminal statute prohibiting disclosure of the documents at issue" and concluding that "an order dismissing the complaint would deprive the party of a property interest without due process of law."); *Societe Internationale Pour Participations Industrielles Et Commerciales v. Rogers*, 357 U.S. 197, 212 (1958)("[i]t is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign.").

As noted above, the finding that MSC has "refus[ed] to abide by the decisions of the Swiss Judge" and that such "refusal" is "therefore willful and deliberate," Initial Decision at 21, is incorrect. The Geneva did not order MSC to do anything. It also did not address, much less resolve, the risk of potential criminal sanction if MSC attempted to comply with the Order to Compel without first obtaining the necessary approvals in Switzerland.

The conclusion that default against MSC in this case is justified as a means to deter MSC and other parties from engaging in similar conduct in future Commission proceedings likewise

follows from the misconception that MSC or any similarly situated party has a choice not to comply with foreign blocking statutes to which they are subject. That is precisely why federal courts have held that it would be "unfair and irrational" to penalize a party for a "nonculpable failure to meet the terms of a discovery order," noting that such a sanction would be "gratuitous," because "if the party is unable to obey there can be no effective deterrence, general or specific." *Cine Forty–Second St. Theatre Corp.*, 602 F.2d at 1066 (citing *Societe Internationale*, 357 U.S. at 212).

IV. THE INITIAL DECISION ERRED IN AWARDING REPARATIONS WITHOUT ANY PROOF COMPLAINANT ACTUALLY SUFFERED DAMAGE OR ANY PROOF AS TO THE PROOF AS TO THE AMOUNT OF DAMAGES

The Initial Decision improperly awarded reparations without any proof that Complainant suffered damage or any proof as to the amount of any such damage. This is clear error. While a default judgment "establishes a defendant's liability, the court is required to make an independent determination of the sum to be awarded unless the amount of damages is certain." *Serrano v. Chicken-Out Inc.*, 209 F. Supp. 3d 179, 187 (D.D.C. 2016)(quoting *Int'l Painters & Allied Trades Indus. Pension Fund v. R.W. Amrine Drywall Co., Inc., 239 F. Supp. 2d 26, 30 (D.D.C. 2002)*; *Fanning v. Permanent Solution Indus., Inc.,* 257 F.R.D. 4, 7 (D.D.C. 2009)("plaintiff must prove its entitlement to the amount of monetary damages requested" using "detailed affidavits or documentary evidence").

The Initial Decision cites to the Commission rule addressing the use of "additional information" to enable a "determination of the amount of reparations," 46 C.F.R. § 502.65(c), but then makes no attempt to make an "independent determination" of the amount of damages to which Complainant is entitled, and fails to include a request for detailed affidavits and other documentary evidence to support the award. Instead, the Initial Decision cites to inapposite Commission precedent allowing an award of damages based on liquidated damages or other sum certain

amounts. Complainant's claims are not based on a liquidated damages or other sum certain amount; therefore, Complainant must prove its damages under the general rule.

The Initial Decision also states that is "necessary and appropriate to utilize the well-pleaded allegations in the amended complaint to determine reparations," Initial Decision at 22, but cites no authority for this proposition and MSC is aware of none. Commission and federal court precedent state the opposite, that "the well pleaded factual allegations in the Complaint, except those relating to damages, are taken as true. *See CMI Distribution, Inc. v. Service By Air, Inc*, 2019 FMC LEXIS 120 (ALJ May 24, 2019)(engaging in a detailed review of shipments at issue to determine damages); *Law Office G.A. Lambert & Assocs. V. Davidoff*, 306 F.R.D. 12 (D.D.C. 2014)(Plaintiff's failure to provide sufficient proof denies the court a basis to award damages).

The award of damages on the basis of Complainant's verified complaint must be rejected for more pragmatic reasons. First, the reparations claimed in the amended complaint and awarded in the Initial Decision combine damages claimed for both the 2020-2021 and 2021-2022 contract years, however, the discovery issues subject to the motion to compel and the order to show cause relate only to the 2021-2022 contract year. No order regarding discovery related to the 2020-2021 contract year has ever been entered, so there is no possible basis for including the $480,719 in alleged damages for the 2020-2021 contract year on the basis that MSC is in default of such an order. Second, the amounts that Complainant submitted in its response to the Order to Show Cause do not match the already unsupported amounts stated in the Amended Complaint. The Initial Decision states without discussion or explanation that the amounts are "consistent with the request in the amended complaint," and suggests it is enough to simply find that the amount "is the type of damages appropriate for the claimed violation of the Shipping Act." Initial Decision at 23.

The Initial Decision makes no inquiry into why Complainant is estimating the amounts of what it claims to be actual damages, as opposed to offering evidentiary proof. Nor does the Initial Decision make any inquiry into why the damages claimed in Complainant's response the Order to Show Cause were approximately 20 percent greater than the damages claimed in the verified complaint. This fact alone demonstrate this is not a case where "the amount of damages is certain," *Serrano*, 209 F. Supp. 3d at 187; therefore, Complainant must prove up its damages. MSC requested that Complainant produce evidence showing what steps it took to book cargo it claims MSC improperly refused to carry, what costs it allegedly incurred to book this cargo with another carrier, and what efforts it took to mitigate its damages (e.g., booking under service contract rates with any of the other carriers that carried the majority of Complainant's cargo rather than spot market rates). Complainant has objected and refused to provide information in response to MSC's discovery requests asking for this information. In contrast, as detailed above MSC believes it has provided complete discovery on this point that shows Complainant did not timely book this cargo to begin with.

V. CONCLUSION

For the reasons stated above and in MSC's prior submissions in response to the Order to Show Cause, there is no basis for entry of default judgment. The Commission should dismiss this action for lack of jurisdiction or, alternatively, require that available procedures and consultations be pursued with the Swiss government to resolve the legal issues presented under Swiss law and allow this matter to be decided on the merits.

Respectfully submitted,

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Dated: February 6, 2023

CERTIFICATE OF SERVICE

I certify that, on February 6, 2023, a true and current copy of the foregoing Motion for Extension of Time was served via electronic mail on the following:

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