FEDERAL MARITIME COMMISSION

In Re: Vehicle Carrier Services	Docket Nos. 16-01, 16-07, 16-10, and 16-11

Served: October 21, 2019

BY THE COMMISSION: Michael A. KHOURI, *Chairman*, Rebecca F. DYE, and Louis E. SOLA, *Commissioners*. *Commissioner* MAFFEI concurring in part and dissenting in part.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Before the Commission are four class action complaints alleging that Respondent vessel operating common carriers (VOCCs) violated the Shipping Act by engaging in a decade-long conspiracy to fix rates, reduce fleet capacity, and manipulate market share for transporting new, assembled vehicles aboard vessels specially adapted for that purpose (i.e., roll-on/roll-off (RoRo) vessels). Complainants fall into two groups: shippers or ocean transportation intermediaries (OTIs) who allegedly paid Respondents directly at artificially inflated rates, and consumers or vehicle dealers who allegedly paid the inflated rates indirectly, as they were passed along to them in the cost of buying or leasing a vehicle. Complainants appeal the Administrative Law Judge's (ALJ) Initial Decision dismissing all Complainants' reparations

claims as time-barred and dismissing the indirect purchasers' claims for lack of standing.

The Commission affirms in part and reverses in part the Initial Decision. The Commission affirms the dismissal of the complaints in Docket Nos. 16-07, 16-10 and 16-11 because those Complainants lack standing to sue for reparations under the Commission's direct purchaser rule. The Commission also affirms the dismissal of the claims in Docket No. 16-01, insofar as they seek reparations, as time-barred. The Commission reverses the Initial Decision insofar as it allowed the Docket No. 16-01 claims to proceed as to cease-and-desist relief and dismisses the Docket No. 16-01 claims in their entirety. Because all of the claims are dismissed, the Commission does not reach the question of whether the Commission can or should adjudicate class actions.

II. BACKGROUND

A. Factual Background

Complainants in all four consolidated cases allege that for over a decade Respondents violated the Shipping Act and the Commission's regulations by secretly operating under unfiled agreements to fix rates and prices and reduce fleet capacity for vehicle carrier services (provided by RoRo vessels) to and from U.S. ports. 16-01 Compl. ¶¶ 1-2, 47-57.[1] Complainants are OTIs (Docket No. 16-01), automobile dealers (Docket No. 16-11), a truck wholesaler (Docket No. 16-10), and vehicle purchasers or lessees, i.e. consumers (Docket No. 16-07). I.D. at 3.[2]

[1]Unless otherwise stated, Complainants in each case allege similar core facts and Shipping Act violations so we typically only cite pleadings from one case.

[2] By convention, the Commission cites the decision on appeal as "I.D." and uses the original pagination. The Initial Decision can also be found in the Commission's *Decisions of the Federal Maritime*

All Respondents provide vehicle carrier services to and from United States ports. Numerous VOCCs and their parent companies and subsidiaries are named as Respondents in the Complaints: Nippon Yusen Kabushiki Keisha (NYK); NYK Line (North America), Inc.; Mitsui O.S.K. Lines, Ltd. (Mitsui); Mitsui O.S.K. Bulk Shipping (USA) Inc.; Kawasaki Kisen Keisha, Ltd. ("K" Line); K Line America, Inc.; Wallenius Wilhelmsen Logistics AS (WWL); Wallenius Wilhelmsen Logistics Americas LLC; Hoegh Autoliners Holdings AS; Hoegh Autoliners AS; Hoegh Autoliners, Inc.; EUKOR Car Carriers Inc. (EUKOR); Compania Sud Americana de Vapores S.A. (CSAV); CSAV Agency North America, LLC; World Logistics Service (USA) Inc.; Autotrans AS; Alliance Navigation LLC; and Nissan Motor Car Carrier Co., Ltd. (Nissan).

The Complaints describe RoRo service and its advantages. *See* 16-01 Compl. ¶¶ 20-25. RoRo vessels, Complainants allege, are specially configured to conveniently transport all types of motorized vehicles and equipment ("wheeled freight"). *Id*. ¶¶ 20-25. Shipping wheeled freight aboard RoRo vessels is more economical and practical than containerized shipping. *Id*. ¶ 23. Wheeled freight can simply be driven on and off the vessel and is much less likely to suffer damage during loading, unloading, or shipment. *Id.* Those attributes allegedly make it the preferred mode for transporting new assembled vehicles to and from U.S. ports. *Id*. ¶¶ 24-25.

Respondents' market manipulation efforts succeeded, Complainants allege, and they dominate the vehicle carrier service market and their customers have few good alternatives. *See id.* ¶¶ 26-33. Collectively, Respondents allegedly "account for roughly two-thirds or more of the global capacity" for vehicle carrier services. *Id*. ¶ 27. That market dominance allegedly gave them the leverage to raise rates and manipulate prices with scant risk that their customers would shift their allegiance to other carriers. *Id*. ¶¶ 28-33.

Commission, Second Series. *See In re: Vehicle Carrier Services*, 1 F.M.C.2d 45, 2018 FMC LEXIS 40 (ALJ 2018).

Even when faced with higher rates, Complainants allege, customers were unlikely to shift their business to containerized vessels because of the added complications and risk that the vehicles might be damaged during loading, unloading, or shipment. *Id*. ¶¶ 23-24, 32-33. According to Complainants, steep start-up costs and the arduous process of building a loyal customer base also insulated Respondents from the threat that new competitors might enter the vehicle carrier market and disrupt their scheme through increased competition or lower prices. *Id*. ¶¶ 30-31.

When demand for vehicle carrier service plummeted following the 2008 global financial crisis, Respondents allegedly renewed and expanded their scheme by coordinating efforts to reduce fleet capacity. Id. ¶¶ 54-55. Allegedly, they scrapped RoRo vessels, cancelled orders for new vessels, caused delays by "slowing-steaming," and used similar tactics to artificially reduce supply and increase demand. *Id.*

In September 2012, law enforcement authorities in the United States and abroad conducted what later became known as the "dawn raids" I.D. at 7.; 16-01 Comp. ¶ 65. In these "raids," officials across the globe conducted surprise inspections and searches at the offices of vehicle carriers suspected of engaging in illegal practices. I.D. at 7. These investigations by U.S., Canadian, Japanese and European Union (EU) authorities ultimately led to criminal charges and civil penalties against several Respondents for price fixing, bid rigging, and other anticompetitive practices. 16-01 Compl. ¶¶ 3, 69, 74; 16-07 Compl. ¶¶ 10-12.[3]

[3]The Commission, too, entered into settlements with seven ocean carriers to resolve allegations that they violated 46 U.S.C. § 41102(b) by providing RoRo services under agreements that had not become effective or were never filed with the Commission. Br. for the Fed. Mar. Comm'n and United States as Amici Curiae (Amicus Br.) at 10-11 and n. 7, *In re Vehicle Carrier Servs. Antitrust Litig.*, No. 15-3353 (3d Cir. Nov. 30, 2016).

Initially, several Complainants brought federal antitrust and state law claims against Respondents in federal court for their alleged conspiracy and illegal practices. The cases were consolidated in the United States District Court for the District of New Jersey. *See In re Vehicle Carrier Servs. Antitrust Litig.* (*Antitrust Litig. I*), No. 13-3306, 2015 U.S. Dist. LEXIS 114691 (D.N.J. Aug. 28, 2015).

Respondents moved to dismiss the federal antitrust claims under 46 U.S.C. § 40307(d), which bars Clayton Act claims for conduct prohibited by the Shipping Act. *Id.* at *19-20, *30. Respondents also moved to dismiss the state law claims as preempted by the Shipping Act. *Id.* at *47-67. The district court agreed with both arguments, and, on August 28, 2015, dismissed the Complainants' federal antitrust and state law claims. *Id.* at *67. The Third Circuit affirmed the district court in January 2017. *In re Vehicle Carrier Servs. Antitrust Litig.* (*Antitrust Litig. II*), 846 F.3d 71, 82-88 (3d Cir. 2017). Plaintiffs' petition for panel and en banc rehearing was denied, as was their petition for writ of certiorari to the Supreme Court. *Alban v. Nippon Yusen Kabushiki Kaisha*, 138 S. Ct. 114 (2017).

B. Procedural History

After the district court dismissed the federal antitrust and state law claims, and while the appeal before the Third Circuit was pending, Complainants filed the four class actions now before the Commission:[4]

[4]Soon after the district court decision, and months prior to the filing of the class actions, General Motors LLC (GM) brought reparations claims against three Respondent carriers but settled with them in October 2016. *Gen. Motors LLC v. Nippon Yusen Kabushiki Kaisha*, Docket No. 15-08. The ALJ's Initial Decision approving GM's settlement agreement, 34 S.R.R. 390, 2016 FMC LEXIS 66 (ALJ 2016), became administratively final in November 2016.

1. Docket No. 16-01, *Cargo Agents, Inc., International Transport Management Corp., and RCL Agencies, Inc., on behalf of themselves and all others similarly situated v. Nippon Yusen Kabushiki Kaisha, et al*., filed December 29, 2015 (docketed in January 2016);

2. Docket No. 16-07, *Jill M. Alban, et al. v. Nippon Yusen Kabushiki Kaisha, et al*., filed March 18, 2016;

3. Docket No. 16-10, *Rush Truck Centers of Arizona, Inc., et al v. Nippon Yusen Kabushiki Kaisha, et al*, filed April 21, 2016; and

4. Docket No. 16-11, *Landers Brothers Auto Group, Inc. dba Landers Honda (Jonesboro), et al v. Nippon Yusen Kabushiki Kaisha, et al*, filed April 21. 2016.[5]

The OTI Complainants in Docket No. 16-01 claim that they paid Respondents directly for vehicle carrier service.16-01 Compl. ¶ 1. All other Complainants claim that Respondents' artificially inflated charges were passed along to them. *See* 16-07 Compl. ¶¶ 1-3, 186, 189; 16-10 Compl. ¶¶ 2, 27, 165, 168; 16-11 Compl. ¶¶ 3, 19, 151, 54. All Complainants allege multiple Shipping Act violations. *E.g.*, 16-01 Compl. ¶ 1. Specifically, they claim that

[5] Originally, the consolidated cases included a later-filed fifth case, *Fiat Chrysler Automobiles NV. v. Wallenius Wilhelmsen Logistics AS, et al*., Docket No. 17-09. This case was not a class action. After the ALJ issued its Initial Decision, Fiat settled with or voluntarily dismissed all the respondents in its case. The ALJ's Initial Decisions Approving Confidential Settlements became administratively final on July 2, 2019.

Respondents violated 46 U.S.C. § 40302(a) (filing requirements), § 41102(b)(1) (operating under an agreement not yet effective), § 41102(c) (unreasonable regulations and practices); § 41104(a)(10) (unreasonable refusal to deal), and § 41105 (prohibiting a conference or group of two or more carriers from engaged in specified conduct). *Id*.; 16-07 Compl. ¶ 71.

Respondents filed a consolidated motion to dismiss the Shipping Act claims as time-barred by the three-year statute of limitations and precluded by the direct purchaser rule. Respondents also challenged the request for class action relief as outside the Commission's statutory authority and sought dismissal for failure to state a claim and improper service. Complainants opposed the motion, arguing, among other things, that the "discovery rule" tolled the statute of limitations and that the Commission should not apply direct purchaser rule to their claims.

The ALJ granted Respondents' motion to dismiss in part. I.D. at 2. The ALJ ruled that the claims seeking reparations were time-barred because Complainants had constructive notice of potential Shipping Act claims when authorities conducted the dawn raids in September 2012. *Id*. at 46-48. The ALJ also dismissed the indirect purchasers' reparations claims on standing grounds. *Id*. at 35-38. Although the request for class action relief became moot when the underlying claims were dismissed, the ALJ also provisionally ruled that the Commission does not have class action authority. *Id.* at 26. Finally, the ALJ denied the motion to dismiss with respect to improper service and failure to state a claim without prejudice. *Id*. at 53-55. This left only the Docket No. 16-01 claims for cease and desist relief and the Docket No. 17-09 reparations claims surviving before the ALJ. *Id.* at 39-40, 48-50, the latter of which later settled or were voluntarily dismissed.

Complainants filed a timely appeal challenging the dismissal of their claims and the ALJ's determination that the Commission does not have class action authority. Professors Michael Sant'Ambrogio and Adam Zimmerman filed an amicus brief on the

latter issue. In their opposition, Respondents urged the Commission to affirm the Initial Decision in its entirety.

III. DISCUSSION

Complainants argue that the ALJ erred in finding that: (1) the indirect purchaser Complainants lack standing to sue for reparations under the direct purchaser rule; (2) Complainants' reparation claims are untimely; and (3) the Commission does not have authority to hear a class action. Complainants' Appeal; *see also* I.D. at 2, 26, 38, 40, 50. We affirm the ALJ as to the first two issues in most respects and therefore do not reach the third.

A. Standard of Review

The Commission's rules do not specify a standard for reviewing an ALJ's decision granting a motion to dismiss. *See* 46 C.F.R. § 502.227(b)-(e). The Commission therefore follows the standard applied by the Courts of Appeal and reviews the ALJ's decision de novo. *Maher*, 2015 FMC LEXIS 43, at *12-13; *Kawasaki Kisen Kaisha Ltd. v. The Port Auth. of N.Y. & N.J.*, 33 S.R.R. 746, 753, 2014 FMC LEXIS 36, *19-20 (FMC 2014); *SSA Terminals, LLC v. City of Oakland*, 32 S.R.R. 325, 328, 2011 FMC LEXIS 11, 3 (FMC 2011).

Additionally, because this matter is before the Commission on a motion to dismiss, the Commission reviews it under the standards of Federal Rule of Civil Procedure 12. The Commission's Rules of Practice and Procedure do not provide for motions to dismiss, so the Commission exercises its gap-filling authority under 46 C.F.R. § 502.12 and applies Federal Rule of Civil Procedure 12(b) and the federal caselaw interpreting it. *Cornell v. Princess Cruise Lines, Ltd.*, 33 S.R.R. 614, 620, 2014 FMC LEXIS 17, *17-19 (FMC 2014); *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 126, 136, 2011 FMC LEXIS 12, *30-32 (FMC

2011).[6] As the ALJ correctly noted, the appropriate standard here is that of Rule 12(b)(6). *See* I.D. at 8-9.[7] Under Rule 12(b)(6), the Commission must accept as true all factual allegations in the complaint. *Maher*, 2015 FMC LEXIS 43 at *36. The Commission may also consider documents attached to the complaint, documents incorporated by reference in, or integral, to the complaint, and matters subject to official notice. *Id.* at *2 n.1. The Commission must draw all reasonable inferences from the allegations in the complainant's favor. *Id.* at *36.

B. "Standing" – the Direct Purchaser Rule

Complainants argue that the ALJ erred in finding that the Complainants in Docket Nos. 16-07 (vehicle purchasers or lessees), 16-10 (truck wholesalers), and 16-11 (automobile dealers) lack standing to sue for reparations under the Commission's direct purchaser rule.[8] Complainants' Appeal at ii-iii; I.D. at 23-38. This

[6]Commission Rule 12 provides that: "In proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice." 46 C.F.R. § 502.12.

[7]Although Respondents' "direct purchaser" arguments are couched in terms of "standing," the "direct purchaser rule" is related to antitrust standing, not constitutional or Article III standing (the lack of which is challenged under Fed. R. Civ. P. 12(b)(1)). *See*, *e.g.*, *Hartig Drug Co. v. Senju Pharm. Co.*, 836 F.3d 261, 269-71 (3d Cir. 2016) (distinguishing Article III standing to sue in federal court from "the subsequent question of whether a purchaser has standing to recover" for alleged antitrust violations under the *Illinois Brick* direct purchaser rule). Rule 12(b)(6) standards likewise apply to timeliness challenges. *Maher Terminals, LLC v. The Port Auth. of N.Y. & N.J.*, 2015 FMC LEXIS 43, at *110-11 (FMC 2015).

[8]The ALJ found that the Complainants in Docket No. 16-01 (OTIs) adequately alleged standing and denied Respondents' motion to dismiss on this ground without prejudice. I.D. at 39. Respondents

rule limits recovery of reparations to direct purchasers of transportation services. I.D. at 27. It mirrors the "direct purchaser" rule courts apply in the federal antitrust context. *Id.* at 31-34.

Complainants contend that: (1) Respondents waived the standing argument; (2) Respondents should be judicially estopped from making the standing argument; (3) the ALJ failed to recognize the "developed law of equitable standing;" (4) the Commission should reject a "rigid" direct purchaser rule; and (5) Respondents "cannot show from the face of the complaints that Indirect Purchaser Complainants, as 'shippers,' fail to satisfy the rule." Appeal at ii-iii. None of these arguments are persuasive, and the Commission affirms the ALJ's dismissal of the 16-07, 16-10, and 16-11 complaints for lack of standing.

1. Direct Purchaser Rule

Under Commission caselaw, parties suing for alleged overcharges can only recover reparations if they actually paid the carrier or received an assignment from the direct purchaser. *Gov't. of Guam v. Sea-Land Serv., Inc.*, 29 S.R.R. 894, 902, 2002 FMC LEXIS 16, *4 (ALJ 2002), admin. final, 2002 FMC LEXIS 25 (FMC 2002). The basis for this rule first arose in 1934, when the Commission's predecessor, the United States Shipping Board Bureau, held that the entity that paid the illegal overcharges was the person "directly damaged" by the illegal rates and "[h]is claim accrued at once" and the law "does not inquire into later events." *Oakland Motor Car Co. v. Great Lakes Transit Corp*., 1 U.S.S.B.B. 308, 310-311 (1934). The Shipping Board rejected the argument that "it has not been proved that complainants bore the charges on the shipments involved," as "a showing of payment of the charges by complainants is sufficient." *Id.* at 311.

In reaching this conclusion, the Shipping Board relied on

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did not challenge the denial of their motion on this ground and that finding is not before the Commission on appeal.

Southern Pacific Co. v. Darnell Taenzer Lumber Co., 245 U.S. 531 (1918). There, Darnell sought to recover overcharges from Southern Pacific railroad for transporting its lumber. *Id*. at 533. The Court held that as the party that paid the railroad directly, Darnell could sue for the overcharges. *Id.* at 534-35. The Court rejected the railroad's argument that Darnell should be disqualified because it could pass the alleged overcharges along to its customers. *Id*. The Court explained that the law does not inquire beyond the "first step" of the parties' transaction in arranging for transportation. *Id*. at 534. Just as defendants are not held accountable for the "remote consequences" of their actions, the Court reasoned, they are not excused from liability for harm they proximately caused to the plaintiff. *Id.* at 533-34. Inquiring into further transactions after the point of payment would be legally pointless, the Court reasoned, because parties farther along in the chain of transactions are not in "privity with the carrier" and therefore have no cause of action against the carrier for alleged overcharges. *Id.* at 534.

In the 80 years since the Shipping Board held that a respondent could not rely on a pass-on theory to avoid liability to a complainant for reparations, the Commission has repeatedly found that a complainant cannot rely on a pass-on theory to recover reparations for overcharges. In numerous decisions, the Commission has ruled that only the party who actually paid the carrier (or the valid assignee of the payor) can sue for reparations. *Gov't. of Guam*, 29 S.R.R. at 902, 908-09, 2002 FMC LEXIS 16 at *58-59 (striking consignee's reparations claim because it was not the direct payor or assignee); *Cal. Cartage v. Pac. Mar. Ass'n*, 23 S.R.R. 420, 427 (FMC 1985); *Sanrio, Inc. v. Maersk Line*, 19 S.R.R. 907 (ALJ 1979) (denying consignee's claim for overcharges allegedly passed along to it); *Trane Co. v. South African Marine*, 19 F.M.C. 375, 378 (ALJ 1976); *Carton-Print v. Austasia Container Express*, 17 S.R.R. 571, 575 (ALJ 1977).

Even in applying the direct purchaser rule, the Commission follows strict proof requirements. Complainants can recover only if they introduce evidence that they actually paid the carrier or

received an assignment from someone who did. *Gov't. of Guam*, 29 S.R.R. at 908-09, 2002 FMC LEXIS at *36-42. Incomplete records, mere allegations, or general business practices or relationships are not sufficient proof. *See id.* Consistent with the direct purchaser rule, the Commission's regulations require reparation statements to identify "the person paying charges in the first instance." 46 C.F.R. § 502.252 Ex. No. 1.

The Commission's direct purchaser rule is also consistent with the direct purchaser rule the Supreme Court developed in the antitrust context in *Illinois Brick v. Illinois*, 431 U.S. 720, 726 (1977). In *Illinois Brick*, the Court rejected the State of Illinois's price-fixing claim against a brick manufacturer/distributor for lack of standing. *Id.* at 726-27, 735. The Court cited policy concerns in ruling that indirect purchasers cannot recover damages under § 4 of the Clayton Act. The rule was necessary, the Court explained, to prevent multiple judgments (by various parties in the distribution chain) and to avoid the complex task of accurately and fairly apportioning damages among various parties along the distribution chain. *Id.* at 730-33, 737. While recognizing that "these difficulties and uncertainties will be less substantial in some contexts than in others," the Court refused to create exceptions to the rule for particular types of markets. *Id.* at 743-44. The Court also reiterated concerns, voiced initially in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), that indirect purchasers would be less likely to sue and fulfill the Clayton Act's objective of encouraging private attorneys' general to enforce federal antitrust law. *Id.* at 745-46*; see also Kansas v. UtiliCorp United Inc*., 497 U.S. 199, 217 (1990) (reaffirming that direct purchaser rule strictly applies to antitrust claims while again declining to carve out exceptions for a particular cost/pricing structure); *California v. ARC America Corp*., 490 U.S. 93, 96, 100 (1989).

The Court most recently applied the direct purchaser rule in May 2019, finding that the plaintiffs in that case were direct purchasers and therefore were not barred from suing the defendant under the antitrust laws. *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1519

(2019). The Court described the rule as follows:

> For example, if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator. That is the straightforward rule of *Illinois Brick.*

Id. at 1521. In light of its ruling in favor of the plaintiffs, the Court declined to consider arguments for overruling *Illinois Brick* to allow C to sue A. *Id*. at 1521 n.2.

2. Application of the Direct Purchaser Rule

As the ALJ pointed out, the Complainants in Docket Nos. 16-07, 16-10, and 16-11 did not allege that they directly purchased services from Respondents. Rather, they alleged the opposite. I.D. at 13. The 16-07 Complainants allege that they "are consumers who had no direct contact or interaction with Respondents" and had "no means of obtaining any facts or information concerning any aspect of Respondents' dealings with [Original Equipment Manufacturers] *or other direct purchasers*." 16-07 Compl. ¶¶ 197-98 (emphasis added). The Complainants in Docket No. 16-10 allege that they "indirectly" paid for vehicle transportation service aboard Respondents' RoRo vessels. 16-10 Compl. ¶¶ 27, 55. And the Complainants in Docket No. 16-11 allege that they "indirectly paid Respondents for Vehicle Carrier Services," whereas Respondents' "direct transactional contacts are original equipment manufacturers." 16-11 Compl. ¶¶ 19, 47.

Accepting these allegations as true, the 16-07, 16-10, and 16-11 Complainants cannot recover reparations under the Commission's longstanding direct purchaser rule. *See, e.g., Gov't. of Guam,* 29 S.R.R. at 902, 908-09, 2002 FMC LEXIS 16 at *58-59, *Cohen v. GMC* (*In re New Motor Vehicles Canadian Exp. Antitrust Litig.*), 533 F.3d 1, 2 (1st Cir. 2008) (automobile lessees lacked standing to sue car manufacturers and leasing companies for

antitrust violations in preventing cheaper Canadian cars from entering the U.S. market because plaintiffs were not the direct purchasers); *Warren Gen. Hosp. v. Amgen Inc.*,, 643 F.3d 77, 91 (3d Cir. 2011); *McCarthy v. Recordex*, 80 F.3d 842, 852 (3d Cir. 2011*); Link v. Mercedes-Benz of N. Am., Inc.*, 788 F.2d 918, 929-33 (3d Cir. 1986) (customers of dealerships who alleged that Mercedes-Benz had forced its dealers to purchase parts for repairing vehicle at fixed prices were indirect purchasers of Mercedes-Benz parts).

3. Waiver

To counter the straightforward application of the direct purchaser rule, the Complainants first argue that "[g]iven Respondents' prior arguments in the federal courts, Respondents have waived any right to argue that Indirect Purchaser Complainants lack standing before the Commission." Appeal at 14. In response, Respondents argue that: (a) "standing" cannot be waived; and (b) there was no waiver because they expressly reserved their "standing" argument when arguing before federal courts. Resp. Reply at 25-36.

Regardless of whether the "direct purchaser rule" is waivable, Respondents did not waive it in this case.[9] Waiver is the

[9]Federal courts appear split on whether "antitrust standing" is subject to waiver. *Reazin v. Blue Cross & Blue Shield, Inc.*, 899 F.2d 951, 961 (10th Cir. 1990); *compare Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1055 n.4 (9th Cir. 1999) (stating that the issue of antitrust standing can be raised at any time); *with Hammes v. AAMCO Transmissions*, 44 F.3d 774, (7th Cir. 1994) (Posner, J.) ("[D]espite the suggestive terminology, 'antitrust standing' is not a jurisdictional requirement and is therefore waivable."); *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 154 (9th Cir. 1988) (Norris, et al., dissenting) ("Antitrust standing is not a jurisdictional prerequisite and thus is subject to waiver."). Given that the direct purchaser rule is not synonymous with subject matter jurisdiction, *supra* note 10, the Shipping Act does not mention the

voluntary relinquishment or abandonment, either express or implied, of a "legal right or advantage." *Mawakana v. Bd. of Trs*., 113 F. Supp. 3d 340 (D.D.C. 2015) (quoting Black's Law Dictionary (10th ed. 2014)). Waiver requires both "knowledge of the existing right and the intention of forgoing it" based on "firm facts." *Id.* Intent to waive can be demonstrated by an express statement to that effect or through conduct that can only reasonably be interpreted as consistent with relinquishing a known right or advantage. *The Port Auth. of New York & New Jersey v. New York Shipping Ass'n*, 22 S.R.R. 1329, 1346 (ALJ 1984), adopted as modified, 23 S.R.R. 21 (FMC 1985).

Complainants argue that Respondents waived their direct purchaser rule "standing" defense because, before the district court, Respondents asserted that "[a]ny person can file a complaint before the FMC and obtain reparations for injuries caused by violations of the Act." Appeal at 16; *id*., Ex. C at 16. But that general statement is not an express waiver, nor is it only consistent with waiver. In context, Respondents were explaining their view that Congress intended to put all issues involving ocean freight before one administrative body and that the Shipping Act established an administrative complaint procedure in lieu of private antitrust actions. *Id.*, Ex. C. at 16. As the ALJ noted, Respondents' statement was not "about whether Respondents believe that all of these particular Complainants would ultimately be entitled to reparations." I.D. at 31.

Complainants also contend that Respondents waived standing in their brief before the Third Circuit, where Respondents: (a) pointed out that district court stated "putative class members can seek relief before the [Commission]," and (b) asserted that the Shipping Act provides a clear private remedy for operating under an

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rule, and the Commission cases cited by Respondents do not involve waiver or the direct purchaser rule, the Commission declines to treat the direct purchaser rule as "jurisdictional," and assumes it is subject to waiver.

agreement that has not become effective or for other violations of the Shipping Act. Appeal at 15-16; *id*., Ex. D at 9, 20. But neither of the statements have anything to do with the direct purchaser rule or "antitrust standing" or any of the issues that Complainants insist were waived. The context is important--the issue there was whether the Shipping Act preempted state law causes of action, not the applicability of the direct purchaser rule before the Commission.

Complainants further argue that Respondents waived the direct purchaser rule defense based on statements that Respondents made at oral argument before the Third Circuit. Appeal at 14-15; *id*., Ex. B. According to Complainants, Respondents told the court that Congress created a place where Complainants could go – an action for reparations before the Commission. Appeal at 14. This statement was made, however, in the context of Respondents arguing that allowing state law claims to proceed would conflict with the specific forum and remedies created in the Shipping Act. *Id*., Ex. B at 41. Respondents did not imply that every complainant could successfully bring a reparations claim. *See* I.D. at 31.

Moreover, Complainants emphasize that Respondents told the Third Circuit that they were "not going to suggest that [the FMC] lack[s] the authority to adjudicate disputes of the type alleged in the complaint." Appeal at 15, *id.*, Ex. B at 31. But as the ALJ pointed out, Complainants ignore Respondents' full statement, which reserved the "standing" argument. I.D. at 31. Specifically:

> The Court: Are you going to suggest the FMC lacks the authority to adjudicate the dispute? You may have other grounds, but are you going to make a claim?
>
> Mr. Nelson: No, we're not going to suggest that they lack the authority to adjudicate disputes of the type alleged in the complaint. *We may challenge standing* and we have some other claims below here in District Court, challenging whether the named plaintiffs are

> appropriate, whether there's any injury. So we have other defenses, but that will not be one of them.

Appeal, Ex. B. at 31 (emphasis added). Counsel's reference to "disputes of the type alleged in the complaint" concerned allegations that Respondents violated the Sherman Act, 15 U.S.C. § 1, by conspiring to fix and manipulate prices and fleet capacity.

Complainants now argue that, by stating that Respondents would not challenge the Commission's "authority," Respondents necessarily waived the "standing" defense. Appeal at 15. According to Complainants, "standing" is part of the Commission's authority. *Id*. But the quotation Complainants rely on about standing being part of "authority" deals with Article III standing, not the antitrust standing of the direct purchaser rule. As noted above, direct purchaser standing goes to the merits of the claim, not subject matter jurisdiction to adjudicate the claim. *Hartig*, 836 F.3d at 270-71.

In sum, Respondents clearly conveyed that while they would not challenge the Commission's authority generally to adjudicate alleged Shipping Act violations, they reserved the right to challenge Complainants' right to pursue those claims, whether for lack of standing, failure to show compensable injury, or other grounds specific to Complainants or their claims. Respondents therefore did not waive or abandon their right to challenge Complainants' direct purchaser standing or raise other defenses to Shipping Act claims now before the Commission.

4. Judicial Estoppel

In addition to waiver, Complainants argue that judicial estoppel precludes Respondents from arguing that the indirect purchaser Complainants lack standing. Appeal at 17-18; *see also* I.D. at 28-31. Judicial estoppel "precludes a party from asserting a position in one legal proceeding which is contrary to a position that it has already asserted in another." *James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist.*, 1997 FMC LEXIS

20, at *42 (FMC 1997) (quoting *Patriot Cinemas, Inc. v. Gen. Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987)); *see also id.* at *43 ("The rule is that a party may not take inconsistent positions before different tribunals."); *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp*., 337 F.3d 314, 319 (3d Cir. 2003) (holding that parties cannot litigate under one theory then switch to "an incompatible theory" when it suits their interests) (citation omitted). Judicial estoppel protects the integrity of the judicial system by preventing parties from switching sides on an issue after a court adopts their position. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir. 1988).

Because estoppel is an extraordinary remedy, it only applies when it is necessary to prevent a miscarriage of justice. *Montrose Med. Group Participating Sav. Plan v. Bulger*, 243 F.3d 773, 779-80, 784 (3d Cir. 2001). Courts typically consider several factors in deciding whether judicial estopped applies, including whether: (1) the current and former positions are "irreconcilably inconsistent;" (2) the party acted in bad faith which implicates tribunal's integrity or authority; and (3) blocking the party from changing positions will remedy the "affront to the [tribunal's] authority or integrity." *Id.*

Complainants argue that "Respondents' about-face arguments cry out for the application of judicial estoppel." Appeal at 17. Complainants assert that Respondents' argument that the indirect purchasers lack standing is inconsistent with their statement before the Third Circuit that they were not going to suggest that the Commission lacks authority to hear the claims. *Id.* They further argue that the federal courts "believed sending the matter to the Commission would not bar Complainants from relief," thus showing that the federal courts were misled. *Id.* at 18. And Complainants assert that Respondents' "gamesmanship" is manifestly unfair, because Respondents convinced the courts that the state-law claims were preempted and now attempt to also prevent Complainants from demonstrating before the Commission that they have been harmed from admitted criminal conduct. *Id.*

Complainants have not established judicial estoppel. As noted above, Respondents' direct purchaser standing argument is not inconsistent with their arguments before the Third Circuit or the assurances they provided at oral argument. Before the federal courts, they argued for dismissal based on 46 U.S.C. § 40307 and preemption of the state law claims. They have not changed those positions before the Commission. Instead, they are now arguing that certain complainants lack direct purchaser standing–a different argument altogether. Complainants' interpretation of Respondents' earlier stance is overly broad.

Respondents did not in bad faith mislead the Commission or the courts about their intent to challenge standing or raise other defenses to Complainants' Shipping Act claims. While both the district court and Third Circuit believed that Complainants' claims belonged before the Commission, the courts were not acting under the misapprehension that Complainants would face no other obstacles to recovery. That is clear from the remarks of one appellate judge who heard Plaintiffs' argument before the Third Circuit Court of Appeals. Appeal Ex. B at 31 ("Are you going to suggest the FMC lacks the authority to adjudicate the dispute? *You may have other grounds*, but are you going to make a claim?") (emphasis added). Nor did Respondents impugn the federal court's or Commission's integrity or threaten either's authority. Respondents did not take unfair advantage of the Commission or courts and are not judicially estopped from challenging the indirect purchasers' standing to pursue claims for reparations.

5. Equitable Standing

Complainants also argue that the direct purchaser rule conflicts with the "developed law of equitable standing." Appeal at 19. This section of their appeal encompasses several arguments. First, they attempt to distinguish *Gov't of Guam*. *Id.* at 19-20. Then they argue that *Gov't of Guam* conflicts with the law of "standing," that is, it conflicts with the language in the Shipping Act that allows

"any person" to file a complaint. *Id.* at 20. Complainants also maintain that the "remedial nature" of the Shipping Act should trump the "direct purchaser" rule. *Id*. at 21. Finally, they imply that the ALJ erred by conflating the "direct purchaser rule" with the notion of actual injury and policy concerns about class actions. *Id*. at 18. None of these arguments are persuasive.

Starting with *Gov't of Guam*, the distinctions Complainants point out between that case and this one do not suggest that the direct purchaser rule is inapplicable in this case. According to Complainants, in that case, the "Commission rejected a party's attempt to take one position before the federal courts and a later, conflicting position before the Commission." *Id.* at 19. The ALJ in *Gov't of Guam* indeed noted that the complainants' argument before the Commission blatantly conflicted with their earlier argument that "reparations may be awarded only to shippers who have *personally* paid unreasonable rates." *Gov't of Guam*, 29 S.R.R. at 902-903, 2002 FMC LEXIS 16 at *58-59. But the ALJ's holding in *Gov't of Guam* does not rest on the complainants' about-face, rather it was reason to discount complainants' new argument, which was not only inconsistent with, but conflicted with "the established case law" on the direct purchaser rule. *Id*. at 902, 2002 FMC LEXIS 16 at *58-59.

Similarly, while the ALJ in *Gov't of Guam* pointed out that the complainants there had stipulated that they had passed on the shipping costs and had not suffered economic harm, and that respondent's rates were not unlawful, *id*. at 901, the ALJ did not cite those facts in explaining the direct purchaser rule, which turns on who incurred the overcharge in the first instance. *Id.* at 902. Moreover, Complainants' singular focus on *Gov't of Guam* ignores that the Commission has applied its direct purchaser rule in other cases. *See, e.g.*, *Sanrio*, 19 S.R.R. at 908 ("There are other cases in which the Commission or its predecessors have followed the principle that reparation awards in overcharge-type cases go to persons who paid the freight initially under the *Darnell-Taenzer* principle that the cause of action accrued at the time the person paid

the charges.").

As for the statutory principle that "any person" may file a complaint,[10] and the "remedial nature of the Shipping Act," Appeal at 20-21, the Commission's direct purchaser rule has coexisted with both for decades, and neither present any reason to deviate from our established precedent. As to the "any person," argument in particular, even when that language was present in the statute, the Commission noted that "[w]hile any person may file a complaint under Section 22 of the Act alleging a violation of the Act," the "law is that the person who paid the freight to the carrier has standing to recover reparation for injury." *Sanrio*, 19 S.R.R. at 906. And, as noted above, the Commission has consistently interpreted § 41301(a) as requiring complainants to establish that they have "paid the freight or succeeded to the claim in a valid fashion such as by assignment," consistent with the direct purchaser rule. *California Cartage Co.*, 23 S.R.R. at 427; *Trane Co.*, 19 F.M.C. at 378 n.9; *Carton-Print,* 17 S.R.R. at 581; *3M v. Hapag Lloyd*, 20 S.R.R. 1020, 1021 n.3 (FMC 1981).

The Commission's interpretation of § 41301(a) is consistent with the federal courts' interpretation of markedly similar language in 15 U.S.C. § 15. Section 4 of the Clayton Act provides that "any person injured by a violation of the antitrust laws" can sue for treble damages and other relief. *Id.* Notwithstanding this inclusive language, the direct purchaser rules applies to Clayton Act claims and allows only those who qualify under it to sue for damages. *See, e.g.*, *California v. ARC America Corp.*, 490 U.S. at 96; *Utilicorp*, 497 U.S. at 203-04; *Warren Gen. Hosp.*, 643 F.3d at 84.

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[10]Although the statute currently states that "a person" may file a Shipping Act complaint rather than "any person," 46 U.S.C. § 410301(a), the Commission has interpreted this to mean, consistent with the 1916 Act, that "broad filings of complaints" are permitted. *Adenariwo v. BDP Int'l*, 33 S.R.R. 503, 505 2013 FMC LEXIS 49, at *4 n.8 (Settlement Officer 2013).

Finally, Complainants emphasize that they are seeking to recover for their own injuries, not someone else's, and that the ALJ's analysis of the direct purchaser rule "is really a discussion of the policy concerns regarding adjudication of claims by persons who suffered actual injury on a representative (class) basis." Appeal at 18; *see also id*. at 13, 20. Complainants are right that the Initial Decision commingled the concepts notions of "actual injury" and class actions with the direct purchaser rule. I.D. at 37. But this is not grounds for reversing the ALJ's ruling on the indirect purchasers' lack of standing. Although Complainants alleged that they suffered injury due to Respondents' conduct, the direct purchaser rule does not depend on the presence or absence of "actual injury" to Complainants. *See Sanrio*, 19 S.R.R. at 908. Rather, the direct purchaser rule says that the only injury that is eligible for recovery is that incurred by the direct purchasers. *Cf. Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc*., 424 F.3d 363, 366 n.2 (3d Cir. 2005) (*Illinois Brick* determined that direct purchasers are the only parties 'injured' in a manner that permits them to recover damages."). In other words, even if the Commission accepts that the 16-07, 16-10, and 16-11 Complainants were seeking to recover their own actual injuries, that does not cure their lack of standing under the direct purchaser rule.

6. Rejection of the Direct Purchaser Rule

Complainants additionally argue that the Commission should reject a "rigid" direct purchaser rule "in light of modern realities in the shipping industry" and to protect Complainants who are injured by "blatant" violations of the Shipping Act. Appeal at 21. But Complainants do not specify what these "modern realities are." *See id*. Rather, they argue that application of the rule in this case leads to "manifestly unjust" results because "Indirect Purchaser Complainants, who bore the costs of Respondents' violations of the Shipping Act and suffered actual injury would be barred from recovery while Respondents would be granted an unjust windfall," which would "cut to the core of the Commission's ability to police the industry it regulates and to encourage competition." *Id*. at 21.

Complainants have not, however, shown how they are any different than any other indirect purchaser barred from recovery by the direct purchaser rule. The rule will always result in indirect purchasers being unable to recover. *See Illinois Brick*, 431 U.S. at 746 ("It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations."). Nor is it clear how the direct purchaser hampers the Commission's ability to police the shipping industry – the direct purchaser rule applies to complaints for reparations, not Commission enforcement actions. And the Commission entered compromise agreements with several of the Respondents.[11] Moreover, Complainant has not justified tying application of the direct purchaser rule to the unrelated notion of how "blatant" the offense was or how "culpable" the respondent is.

Complainants also argue that the rationales underlying *Illinois Brick* do not apply here because: (a) the risk of duplicative recovery is slight because the claims of the groups do not overlap; (b) shipping records demonstrate that the majority of the

[11]Complainants claim that denying indirect purchasers the ability to present their claims would be particularly galling when "many of the Respondents successfully convinced the Department of Justice (DOJ) to forego any claim for reparations in sentencing the Respondents because their victims could be compensated through the class actions now before the Commission." Appeal at 22. But the plea agreement they cite says only that "in light of the civil [antitrust] cases filed against the defendant, which potentially provide for a recovery of a multiple of actual damages, the recommended sentence does not include a restitution order for the offense charged in the Information." Appeal, Ex. E at 7. In other words, no one guaranteed the Respondents could succeed before the Commission. Nor does the DOJ's understanding of remedies and exclusions impact whether the Commission should ignore its own precedent.

transactions involved full and immediate pass-on of total shipping costs to the dealers or consumers and the Commission can modify damages accordingly, and (c) very few of the car manufacturers brought claims in federal court or before the Commission. Appeal at 23.

But the facts of this case present a classic *Illinois Brick* fact pattern and the rationales under the doctrine are at full force. As an initial matter, bright-line nature of the direct purchaser rule "means that there is no reason to ask whether the rationales of *Illinois Brick* 'apply with equal force' in every individual case." *Apple*, 139 S. Ct. at 1524 (quoting *Utilicorp*, 497 U.S. at 216). *Illinois Brick* and the cases that followed it are concerned about three potential repercussions of allowing indirect purchasers to sue antitrust violators: (1) the risk of duplicative recovery (by both direct and indirect purchasers); (2) the "evidentiary complexities and uncertainties involved in ascertaining the portion of the overcharge that the direct purchasers had passed on to the various levels of indirect purchasers;" *Howard Hess*, 424 F.3d at 369-70; and (3) the need for effective enforcement of antitrust law. *Illinois Brick*, at 733-34.

Here, there is a risk of duplicative recovery if the Commission rules that the vehicle manufacturers, OTIs, automobile dealers, vehicle purchasers, and lessees can all sue Respondents for reparations. Complainants' claim that the "risk of duplicative recovery is slight because the claims of the various groups generally do not overlap" rings hollow. Appeal at 23. At least two vehicle manufacturers have sued, and settled claims, for reparations. In any event, the number of direct purchasers (in this case the vehicle manufacturers) who actually sue is beside the point. There is a real risk of duplicative recoveries by manufacturers and intermediaries and end consumers in the distribution chain (if the Commission adopted Complainants' position and allowed indirect purchasers to sue). *See Warren Gen. Hosp.*, 643 F.3d at 92. Various complainants all seeking to recover an overcharge that was passed down a distribution chain is the type of multiple liability the direct purchaser

rule was designed to prevent. *Cf. Apple*, 139 S. Ct. at 1524-25 ("This [*Apple*] is not a case where multiple parties at different levels of a distribution chain are trying to all recover the same passed-through overcharge initially levied by the manufacturer at the top of the chain.").

Moreover, determining reparations could easily involve complicated calculations. Disentangling overcharges actually passed along to each entity in the distribution chain for purchased and leased vehicles would undoubtedly be a labor-intensive and costly process for the parties and the Commission. *See Illinois Brick*, 431 U.S. at 743-45. The Complainants underestimate the potential "evidentiary complexities and uncertainties" inherent in examining what would likely be thousands of transactional documents and data to understand first, the amount of overcharges attributable to Respondents' Shipping Act violations, and second what amount or percentage of the overcharge was passed along to each Complainant (or group of Complainants) in the distribution chain. *See* Appeal at 23-24.

Complainants assert that shipping records will show that "the majority of these transactions and shipments" involved "an immediate and full pass-on of total shipping costs." *Id.* at 23. Complainants do not cite any authority for this sweeping assertion, and even if it is accurate, it ignores the forensic work that would still have to be done by the parties and the Commission to sort and analyze the payments and charges shown in the transactional documents and data and determine the exact overcharges attributable to Shipping Act violations that were passed along to the dealers, vehicle purchasers, and lessees. For indirect purchasers (like the truck or automobile dealers) who were intermediaries in the distribution chain, the Commission would also have to determine how much of the overcharges they recouped by passing them along to their buyer. *Cf. Apple*, 139 S. Ct. at 1531 (Gorsuch, J., dissenting) ("[I]f we are really inclined to overrule *Illinois Brick*, doesn't that mean we must do the same to *Hanover Shoe*? If the proximate cause line is no longer to be drawn at the first injured party, how far down

the causal chain can a plaintiff be and still recoup damages? Must all potential claimants to the single monopoly rent be gathered in a single lawsuit as necessary parties (and if not, why not)?").

Figuring all of this out would likely be an enormously complex and likely paper-or data-intensive undertaking – which was exactly the concern identified in *Illinois Brick* and *UtiliCorp. Illinois Brick*, 431 U.S. at 730-32, 737 (a bright-line rule is necessary to prevent multiple recoveries (by both direct and indirect purchasers and to avoid the complexity and difficulty of apportioning damages); *Utilicorp*, 497 U.S. at 210. It would also be inconsistent with the fact that direct purchaser status is not determined based on which party sustained the harm. *Warren Gen. Hosp.*, 643 F.3d at 92. In fact, the Supreme Court's rationale in *Hanover Shoe* and *Illinois Brick* "manifests the Court's intent to avoid linking direct purchaser status to injury calculations and determinations." *Id.* Moreover, Commission rules do not provide for the apportionment of reparations between direct purchasers and indirect purchasers but focus on the former. 46 C.F.R. § 502.252.

Aside from the task of sorting and analyzing the data, the final calculations still may not accurately reflect the actual monetary impact on the various parties in the distribution chain. That was the Supreme Court's related concern in *Illinois Brick* and *UtiliCorp*, that "market forces make it exceedingly difficult to accurately determine the monetary impact on "different purchasers and sellers in an economic system." *Warren Gen. Hosp.*, 643 F.3d at 93. "The principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and out-put decisions in the real economic world rather than an economist's hypothetical model, and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." *Illinois Brick*, 431 U.S. at 731-32 (internal citations and quotation marks omitted).

As for need for effective enforcement of the law, as noted

above, nothing about the direct purchaser rule precludes the Commission from enforcing the Shipping Act. And here, direct purchasers such as GM and Fiat have brought claims, as have alleged direct purchasers like the 16-01 Complainants.

As a further reason to abandon the direct purchaser rule, Complainants point out that a majority of states have repealed the direct purchaser rule by statute or judicial decision. Appeal at 23. But these state-specific decisions do not justify modifying or reversing the Commission's own caselaw especially given that the Supreme Court declined to overrule *Illinois Brick* in *Apple* (though it explained that it could find for plaintiffs without addressing that issue). *Apple*, 139 S. Ct. at 1521 n.2.

Complainants' arguments and the particulars of this case provide no basis for overruling decades of Commission precedent. As the Supreme Court recently emphasized, "[o]verruling precedent is never a small matter," and "any departure from the doctrine [of stare decisis] demands 'special justification' – something more than 'an argument that the precedent was wrongly decided.'" *Kisor v. Wilkie*, 2019 U.S. LEXIS 4397, *42-43 (June 26, 2019). Here, Complainants have not shown that *Gov't of Guam* was wrongly decided, let alone established a "special justification" for overruling it.

7. Shipper Status

The 16-07, 16-10, and 16-11 Complainants further assert that the Commission should decline to dismiss their claims because many of them might qualify as "shippers" under the definitions in the Shipping Act and Commission regulations. Appeal at 24. Complainants do not, however, cite any support for the proposition that a shipper who is not a direct purchaser has standing under the direct purchaser rule. Qualifying as a shipper does not confer standing—shippers must still be direct purchasers to sue for reparations. The same holds true for cargo owners—cargo owners have standing to sue only if they directly paid the carrier or OTI who

allegedly violated the Shipping Act. *See Gov't. of Guam*, 29 S.R.R. at 908-09, 2002 FMC LEXIS 16 at *54-59. As Respondents point out, the Commission has rejected under the direct purchaser rule the claims of shippers and those who could be deemed shippers (consignees) under the Shipping Act when they were not direct purchasers. See *Sanrio*, 19 S.R.R. at 907 (consignee); *see also id.* (citing *Carton-Print*, 17 S.R.R. at 581)**.**

C. Statute of Limitations

The ALJ dismissed the 16-01 Complainants' claims as to reparations as untimely under the Commission's statute of limitations. *See* I.D. at 38-39, 40, 50.[12] The ALJ allowed these claims to proceed, however, insofar as cease-and-desist relief was sought. *Id.* at 50, 56.

Complainants challenge the ALJ's ruling on procedural grounds and as legally unsupportable. They first argue that the ALJ improperly relied on and weighed evidence extrinsic to the complaints. Second, Complainants contend that, even if one considers the extrinsic evidence, the allegations and evidence do not show that the September 2012 "dawn raids" triggered the limitations period. Appeal at 31-30. Third, Complainants assert that filing antitrust suits in federal court tolled the statute of limitations until at least May 2013. *Id.* at 27-30.

Respondents counter that the Commission may consider matters outside the complaint in ruling on a motion to dismiss, and

[12] The ALJ could not rule out the possibility that as OTIs, the 16-01 Complainants may have purchased transportation services directly from Respondents, and thus the ALJ did not dismiss the 16-01 claims for lack of standing. *See id.* The ALJ also determined that all claims were time barred. Because the 16-07, 16-10, and 16-11 claims fail for lack of standing, the Commission need not address their timeliness, though they would be untimely for the same reasons the 16-10 claims are.

that "reasonably diligent complainants 'should have known' of potential Shipping Act claims no later than September 6, 2012, when widespread news publications reported on the 'dawn raids' of respondents' offices and the accompanying global antitrust investigations." Resp. Reply at 47-48. They also argue that the Shipping Act's statute of limitations is jurisdictional and not subject to class action tolling, which is inapplicable in any event. *Id.* at 37.

The ALJ correctly found that the 16-01 Complainants' claims accrued in September 2012, rendering the claims untimely, and that the statute of limitations is not subject to class action tolling or other forms of tolling. The ALJ erred, however, in allowing the claims to proceed as to cease-and-desist relief. The Commission affirms the ALJ's dismissal of the 16-01 claims as to reparations, reverses the ALJ as to cease-and-desist relief, and dismisses the 16-01 claims in their entirety.

1. Matters Outside the Complaint

Complainants first assert that the ALJ improperly weighed the allegations in the Complaints against extrinsic evidence at the motion to dismiss stage. Appeal at 31. They argue that a time bar must be apparent from the face of the Complaints, and here, the Complaints alleged that Complainants and class members "did not know, and with reasonable diligence could not have known, that they had claims against Respondents until May 2013 at the earliest." Appeal at 31-32. According to Complainants, these allegations are factual, not conclusory, must be taken as true, and can be tested on a motion for summary judgment. *Id.* at 32. Complainants maintain that the ALJ pointed to no factual allegations in the Complainants that unequivocally establish that the claims are time barred. *Id.* In contrast, Respondents argue that nothing precluded the ALJ from considering matters subject to official notice, such as widespread media reports. Resp. Reply at 47.

The ALJ did not improperly consider "extrinsic evidence" when relying on articles about the "dawn raids," nor did the ALJ

impermissibly weigh evidence at the motion to dismiss stage. Although the Commission has stated that for a claim to be dismissed on timeliness grounds at a motion to dismiss stage one looks to the face of the complaint, *Maher*, 2015 FMC LEXIS 43 at *110-*111; *Streak Products v. UTi*, 32 S.R.R. 1959, 1966 (ALJ 2013); the Commission has not limited its analysis solely to the complaint. In *Maher*, the Commission held that the standards of Rule 12(b)(6) apply to a motion to dismiss based on a statute of limitations. *Maher*, 2015 FMC LEXIS 43 at *111. Under those standards, the Commission may consider not only the complaint, but also "documents attached to the complaint, documents incorporated by reference in, or integral to, the complaint, and matter subject to official notice." *Id.* at 2 n.1. Moreover, in rejecting the statute of limitations argument in *Maher*, the Commission considered the complaint and these other materials. *Id*. at *111 ("The Port Authority has not met its burden of proving that Counts I and VIII are time-barred based on the face of the complaint *and other facts properly considered by the Commission*.") (emphasis added).

Here, the ALJ implicitly and properly took official notice of five news articles about the September 6, 2012, dawn raids of vehicle carriers, and Complainants do not argue on appeal that these articles were not the proper subject of official notice. I.D. at 46. "Official notice may be taken of such matters as might be judicially noticed by the courts, or of technical or scientific facts within the general knowledge of the Commission." 46 C.F.R.§ 502.226(a). This includes news articles for the purpose of establishing what information was in the public realm at the relevant time. I.D. at 46; *Sandza v. Barclays Bank PLC*, 151 F. Supp. 3d 94, 113 (D.D.C. 2015); *Benak v. Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 401 n.15 (3d Cir. 2006); *Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991); *Hourani v. Psybersolutions*, LLC, 164 F. Supp. 3d 128, 136 (D.D.C. 2016); *In re Lorazepam & Clorazepate Antitrust Litig*., No. 03-1650, 2004 U.S. Dist. LEXIS 32268, at *22-23 n.3 (D.D.C. May 18, 2004); *Stevens Shipping & Terminal Co. v. S.C. State Ports Auth.*, 23 S.R.R. 267, 299 n.25 (ALJ 1985).

Nor did the ALJ improperly weigh conflicting evidence. Focusing on the 16-01 Complaint, Complainants are correct that there are no allegations that on their face establish that the claims were untimely. The 16-01 Complainants allege that they "did not discover and could not have discovered the alleged contract, conspiracy, or combination at an earlier date by the exercise of reasonable diligence." 16-01 Compl. ¶ 95. Similarly, they allege that "[n]one of the facts or information available to Complainants and members of the Class, if investigated with reasonable diligence, would have led to the discovery of hard facts clearly demonstrating the existence and effects of the conspiracy alleged in this Complaint during the Class period." *Id.* ¶ 97.

But these are not all factual allegations that the Commission must accept. The only factual allegation is that Complainants did not discover the alleged conspiracy at an "earlier date." Whether or not they *could have* discovered the alleged conspiracy with the exercise of reasonable diligence is a legal question, not a factual one, and the Commission need not accept allegations as to legal conclusions as true. *Maher*, 2015 FMC LEXIS 43 at *36; *Cornell*, 33 S.R.R. at 620-621 (citations omitted). That is, the ALJ did not weigh conflicting evidence and find that Complainants actually knew sufficient facts to have a claim in September 2012, nor did the ALJ weigh the news articles against the factual allegations and find that Complainants were aware of the dawn raids. Rather, the ALJ found that there was sufficient information available that Complainants could have discovered their claim, a legal determination. I.D. at 47.

2. Shipping Act Statute of Limitations

Turning to the statute of limitations itself, Complainants suing for reparations must file their complaint within 3 years of the date their cause of action accrued. 46 U.S.C. § 41301(a) ("If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation."); 46 C.F.R. § 502.62(a)(4)(iii) ("A complaint seeking reparation must be filed within three years after

the claim accrues. Notification to the Commission that a complaint may or will be filed for the recovery of reparations will not constitute a filing within the applicable statutory period.").

In general, a claim accrues, and the statute of limitations begins to run, when the respondent commits an act that injures the complainant's business. *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 32 S.R.R. 1185, 1191, 2013 FMC LEXIS 5, *12 (FMC 2013) (quoting *Zenith Radio Corp. v. Hazeltine Research Inc*., 401 U.S. 321,338 (1971)). But the Commission has interpreted claim accrual to be when a complainant knew or should have known of facts giving rise to a cause of action. *Maher*, 32 S.R.R. at 1193, 2013 FMC LEXIS 5 at *17-18 ("We agree that claim accrual occurs when a complainant knew or should have known that it had a cause of action as opposed to a *prima facie* case."); *Inlet Fish Prod., Inc. v. Sea-Land Serv., Inc*., 29 S.R.R. 306, 314 (FMC 2001); (characterizing the rule as that "a cause of action accrues when a party knew or should have known that it had a claim"); *see also Momenian v. Davidson*, 878 F.3d 381, 388 (D.C. Cir. 2017); *Hardin v. Jackson*, 625 F.3d 739, 743 (D.C. Cir. 2010) ("'[A] cause of action accrues when the injured party discovers—or in the exercise of due diligence should have discovered—that it has been injured'") (quoting *Nat'l Treasury Emps. Union v. FLRA*, 392 F.3d 498, 501 (D.C. 2004)). In other words, a cause of action accrues when the complainant has either "actual notice of the cause of action or is deemed to be on inquiry notice." *C.B. Harris & Co., Inc. v. Wells Fargo & Co.*, 113 F. Supp. 3d 166 (D.D.C. July 6, 2015).[13]

[13]Although the Initial Decision referred to the discovery rule as "tolling" the statute of limitations, it is better viewed as a method of determining claim accrual as opposed to a way to toll a statute of limitations that has already run. *See, e.g.*, *Inlet Fish*, 29 S.R.R. at 313, 315. Accrual of a claim is different from the tolling of a statute of limitation. *Cf. Cada v. Baxter Healthcare Corp.*, 902 F.2d 446, 450 (7th Cir. 1990) ("Tolling doctrines stop the statute of limitations from running even if the accrual date as passed"); *Ellul v. Congregation of Christian Bros.*, 774 F.3d 791, 801 (2d Cir. 2014)

Respondents bear the burden of proving that a claim is untimely, and, as noted above, on a motion to dismiss the scope of the Commission's inquiry is limited. *Maher*, 2015 FMC LEXIS 43 at *110; *Campbell v. Grand Trunk W.R R. Co*., 238 F.3d 772, 775 (6th Cir. 2001). If a respondent meets its burden, the burden shifts to the complainant to establish that an exception to the statute of limitations applies and renders the claims timely. *Maher Terminal*, 32 S.R.R. 1192; *Inlet Fish*, 29 S.R.R. at 314; *Campbell*, 238 F.3d at 775.

Here, the ALJ found that the public reporting about September 6, 2012, raids on Respondents was sufficient to allow the Complainants to have discovered with the exercise of due diligence that they had Shipping Act claims more than three years before the 16-01 Complaint was filed in on December 29, 2015. I.D. at 47. Complainants argue that the news articles about the "dawn raids" on September 6, 2012, are an insufficient basis for dismissing their claims. They argue that "the mere existence of investigations has little probative value in the pleading context because the outcome of those investigations cannot be predicted and because the fact that a government enforcer seeks information from a company does not imply that company's participation in a conspiracy." Appeal at 33 (citing cases). They further contend that additional factual investigation and economic analysis was necessary as of September 2012. *Id.* at 34. According to Complainants, application of the discovery rule is highly fact specific and limitations questions should be resolved after development of a full factual record. *Id*. Complainants also assert that "[I]f the Commission accepts the ALJ's standard, that every time any investigation is announced any

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("The distinction is that the diligence-discovery rule delays the date of accrual where the plaintiff 'is blamelessly ignorant of the existence or cause of his injury,' while the doctrine of equitable tolling applies after the claim has already accrued, suspending the statute of limitations to 'prevent unfairness to a diligent plaintiff.'" (internal citations omitted).

person who may have been injured by the actions under investigation must rush to file any claim they might have (depending what the investigation ultimately uncovers), the Commission's docket would be flooded." *Id.*

Respondents counter that under the discovery rule, a complainant need not have actual knowledge of a cause of action; rather the question is when a party objectively was on inquiry notice. Resp. Reply at 48. Respondents further argue that Complainants do nothing to rebut the ALJ's conclusion that they could have discovered their claim with reasonable diligence. Respondents also assert that complainants had all the information they needed to bring antitrust claims in federal court long before the Commission's statute of limitations expired:

> For strategic reasons, complainants chose not to use those alleged facts to bring Shipping Act claims and ignored respondents' – and the U.S. District Court's – admonitions that the claims were in the wrong forum. They intentionally chose what they perceived as more attractive claims and a more attractive forum, and allowed the Shipping Act limitations period slip through their hands.

Resp. Reply at 48-49.

The ALJ did not err in applying the discovery rule here to find the claims accrued in early September 2012. The critical question is when Complainants "knew or with reasonable diligence should have known" they had a claim against Respondents based on their alleged conspiracy. *Inlet Fish.,* 29 S.R.R. at 314. Their claim accrued when Complainants discovered or "with due diligence should have discovered" they had a claim against Respondents for an injury to their business. *Inlet Fish*, 29 S.R.R. at 314 (citing *In Connors v. Hallmark & Son Coal Co*., 935 F.2d 336, 342 (D.C. Cir. 1991)). "The statute of limitations begins to run on the first date that the injured party possesses sufficient critical facts to put him on

notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress." *Loughlin v. United States*, 230 F. Supp. 2d 26, 40 (D.D.C. 2002). (quoting *Zeleznik v. United States*, 770 F.2d 20, 23 (3d Cir. 1985)); *McIntyre*, 367 F.3d at 52 (duty of inquiry charges plaintiff with knowledge of what diligent inquiry would have revealed); *Litif v. United States*, 670 F.3d 39, 44 (1st Cir. 2012) (plaintiff is charged with actual knowledge and "what a reasonable person, once fairly prompted to investigate, would have discovered by diligent investigation").

The news reports about the September 2012 raids, published on September 6 or 7, 2012, specifically referred to suspicions of illegal price-fixing on a global scale in the vehicle carrier market. As the ALJ described in the Initial Decision, news articles about the September 6, 2012, dawn raids describe the coordinated investigation by several countries into suspected illegal price-fixing scheme. I.D. at 47. The ALJ described five articles in the record specifically linking the raids to suspected price-fixing and anticompetitive practices by vehicle carriers. *Id.* A report from Reuters addressed the coordinated efforts of Japanese, European Union (EU) and U.S. authorities in conducting "unannounced inspections of several maritime shipping companies" suspected of operating a cartel for vehicle carrier service. *Id*. As the ALJ also noted, a U.S. Department of Justice's (DOJ) spokesperson confirmed that DOJ's Antirust Division was "'investigating the possibility of anticompetitive practices involving the ocean shipping of cars, trucks, construction equipment and other products.'" *Id.(citation omitted).* Articles likewise referred specifically to raids on Japan's top three shipping companies suspected of violating antitrust law in shipping vehicles. *Id.* Although the articles mentioned potential antitrust violations, rather than Shipping Act claims, the alleged price-fixing and other anticompetitive conduct is the same type of conduct the 16-01 Complainants allege state Shipping Act violations. 16-01 Complainant ¶¶ 112-121.

The well-publicized information about raids based on suspected illegal price-fixing and other anticompetitive conduct

provided notice and triggered an obligation on the part of the 16-01 Complainants to make further inquiries. *See Donahue v. United States*, 634 F.3d at 625-27 (news reports triggered a duty "undertake a diligent investigation"); *McIntyre v United States*, 367 F.3d 38, 59 (1st Cir. 2004). These Complainants are ocean transportation intermediaries who allege that they directly purchased services from Respondents. I.D. at 3;16-01 Compl. ¶ 4. Moreover, all three named complainants are either currently licensed by the Commission (International Transport Management Corp. and RCL Agencies, Inc.) or were previously licensed by the Commission (Cargo Agents).[14] So they cannot claim to be a stranger to the Federal Maritime Commission or the Shipping Act.

In other words, as of as late as September 7, 2012, the 16-01 Complainants, all of whom were licensed OTIs, were on constructive notice that several nations' competition authorities were investigating many of the Respondents for engaging in price-fixing and cartel activities. This was much more than a simple government inquiry or routine investigation. *See* I.D. at 46-48. And the news articles clearly conveyed as much in describing a coordinated investigation on a global scale based on suspected price-fixing and an illegal cartel operating in the vehicle carrier service market. *Id.* The ALJ correctly determined that this was enough to put Complainants on notice that they may have been overcharged for vehicle carrier services due to potentially illegal conduct by Respondents.

Importantly, Complainants did not allege and do not argue on appeal that they were unaware of the dawn raids in September 2012. Rather, they alleged that statute of limitations did not begin to run until they had the "hard facts necessary to be fully aware of the conspiracy alleged herein and its negative effects on their businesses." 16-01 Compl. ¶ 101. On appeal, Complainants argue that the articles announcing the dawn raid are not enough because

[14] The Commission takes official notice from its files of the licensing status of the 16-01 Complainants.

"[a]dditional factual investigation – coupled with economic analysis – was necessary at that point." Appeal at 34. But the lack of "hard facts" and the need for investigation does not prevent the statute of limitation from starting. "[T]he discovery rule . . . provides that the statute of limitations begins when the plaintiff discovers, or with due diligence should have discovered, the injury supporting the legal claim." *Kifafi v. Hilton Hotels Ret. Plan*, 701 F.3d 718, 729 (D.C. Cir. 2012). Complainants' "awareness of the harm itself—and not [their] full appreciation of the impact of the injury—[is what] matters for purposes of the discovery rule." *Lattisaw v. District of Columbia*, 118 F. Supp. 3d 142, 157 (D.D.C. 2015).[15]

Further, as the ALJ pointed out that "[i]f Complainants had sufficient information to file the federal class actions in June of 2014, within *two* years of the dawn raids, then they had sufficient

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15 New Jersey state court reached a similar conclusion in a recent unpublished decision. *Mercedes-Benz USA, LLC v. Nippon Yusen Kabushiki Kaisha*, No. BER-L-6325-18, slip. op. at 15 (N.J. Super. Ct. Mar. 1, 2019). The court found that Mercedes-Benz's state law antitrust claims against many of the Respondents here were barred by New Jersey's four-year statute of limitations. The court found that plaintiff "would have or should have known that it may have been injured by Defendants on September 6, 2012, the date of the highly-publicized dawn raids of Defendants' offices, and high-profile investigations by antitrust authorities around the world." *Id.* at 16 ("Many news reports were widely circulated internationally, and were detailed and specific, identifying Defendants by name and highlighting that the government investigations concerned alleged price fixing and other alleged anticompetitive conduct by Defendants.") The court also noted that as a significant automotive equipment manufacturer, the plaintiff has close, substantial involvement in the vehicle carrier services market on a day-to-day basis. *Id*. at 15.

We do not rely on the state court decision but merely note that its finding on constructive notice is consistent with ours.

information to file the Shipping Act complaints within *three* years of the dawn raids." I.D. at 48. Complainants have yet to respond to this argument. Rather, they insist that they could not have known they were injured until May 2013, when the first indirect purchaser class action was filed in federal court. Appeal at 32. But they do not explain how the filing of a federal court complaint relates to claim accrual.[16]

Moreover, while the ALJ found that the allegations in Complainants' previous federal court complainants were not admissions that they knew of the dawn raids and investigations as of September 6, 2012, I.D. at 46, those allegations are potentially relevant to what the Complainants should have known. That is, two of the three 16-01 Complainants alleged in federal court that "[b]efore September 6, 2012, when the global investigation of Defendants' misconduct was first publicly reported, a reasonable person under the circumstances . . . would not have been alerted to begin to investigate the legitimacy of Defendant's prices for Vehicle Carrier Services before that time." Resp. App. at RA0027. They further alleged in court that "Defendants' agreements, understandings, or conspiracies were kept secret until September 6, 2012" and that "[n]one of the facts or information available to Plaintiffs and members of the Class, if investigated with reasonable diligence, would have led to the discovery of the conspiracy alleged in this Complaint prior to September 6, 2012." *Id.*

In addition to arguing unpersuasively that they could not have known enough to have a claim in September 2012, and that they did not know enough to have a claim until 2013, Complainants aver that the existence of investigations has little probative value "in the pleading context," citing three cases. Appeal at 33-34. But, as

[16] The relevant date for the 16-01 Complainants would be August 9, 2013, when the first direct purchaser class action was filed. 16-01 Compl. ¶ 102. But the Complainants do not explain how it is that their Shipping Act cause of action did not accrue until the filing of a federal court cause of action based on the same conduct.

Respondents point out, the plaintiffs in those cases pointed to investigations or subpoenas to argue that they had stated plausible claims for relief; "[n]one of those cases involve a statute of limitations issue, nor did any address the more relevant question of whether notice of a governmental investigation suffices to place a party on inquiry notice of a potential cause of action." Resp. Reply at 49 n.52.

Complainants argue that statute of limitations issues often are not amenable to early dismissal because discovery may be required to flesh out pertinent facts. Appeal at 43. But this is not true of this case. Here, the relevant facts are known and largely undisputed: On September 6 and September 7, 2012, multiple news outlets, including trade publications (Journal of Commerce) and a wire service (Reuters) announced coordinated, multinational investigations into alleged cartel price fixing in the market for shipping vehicles. It is not unreasonable to conclude that Commission-licensed ocean transportation intermediaries who allegedly directly contracted with the purported cartel members for those very services were on inquiry notice that they might have a Shipping Act claim.

Further, contrary to Complainant's argument, the "ALJ's standard" for claim accrual does not mean that potential complainants have to "rush" to the Commission, flooding the docket, when "any investigation" is announced. Appeal at 34. This was not "any investigation." It was a multi-national focused inquiry. Nor does the Commission's holding require a complainant to rush out and immediately file a reparations claims. Rather, potential complainants have *three years* from the accrual date to file a Shipping Act complaint with the Commission.

The 16-01 Complainants' were on notice of potential Shipping Act claims by early September 2012 when authorities' suspicions about Respondents engaging in illegal practices became public knowledge. Despite that knowledge, Complainants waited more than three years to bring their claims before the Commission-

-taking them outside the Shipping Act's statute of limitations.

3. Tolling of the Statute of Limitations

In addition, to dispute the ALJ's finding as to claim accrual, Complainants argue that the Shipping Act statute of limitations was tolled under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974) by the filing of the federal antitrust actions in 2013. Appeal at 28-30. [17] The ALJ found *American Pipe*, or "class action," tolling inapplicable because "[n]o party suggests that Congress or the Shipping Act have authorized such tolling in Commission proceedings," and "*American Pipe* tolling does not apply to this situation where the previously filed claims were filed in different courts, alleged different causes of action, and sought different remedies." I.D. at 44.

On appeal, Complainants do not cite any error in the ALJ's analysis. Rather, they reiterate that *American Pipe* tolling applies. Appeal at 29. Complainants argue that under *American Pipe*, or "class action tolling," their antitrust suits in federal court, first filed on May 24, 2013, which are based on the same facts as their Shipping Act allegations, tolled the statute of limitations. Complainants do not say so expressly, but they appear to be arguing that their Shipping Act complaints should "relate back" to this May 24, 2013, date, which is less than three years after September 2012. In other words, if *American Pipe* applies, they would be entitled to an earlier filing date that would render their Shipping Act complaints timely. Respondents argue that the Shipping Act's statute of limitations is jurisdictional and not subject to tolling and that "*American Pipe*" and its progeny do not toll different causes of action under different statutes, with different remedies, and in

[17]The Complainants focus on May 2013 because that is when the first indirect purchaser antitrust class action was filed in federal court. With respect to the Docket No. 16-01 Complainants, the relevant date is August 9, 2013, when the first direct purchaser class action was filed. 16-01 Compl. ¶ 102.

different forums." Resp. Reply at 38.

Regardless of whether the Commission's statute of limitations is properly deemed jurisdictional or not subject to tolling,[18] Complainants' arguments fail because they have not established that class action tolling or other doctrines apply to toll the statute of limitations in this case. Class action tolling suspends the statute of limitations on class members' individual claims, so those claims are not time-barred if a class action does not proceed as such. *American Pipe*, 414 U.S. at 550-51. *American Pipe* established that filing a class action "tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." 414 U.S. at 553. *Crown, Cork & Seal Co. v. Parker* extended class action tolling to separate suits brought by individuals

[18]The Commission has long treated its statute of limitations as jurisdictional. *See, e.g.*, *W. Overseas Trade & Dev. Corp. v. ANERA*, 26 S.R.R. 874, 885 (FMC 1993) ("The Commission has consistently held that [the] statute of limitation contained in section 22 of the Shipping Act, 1916 ('1916 Act') is jurisdictional and cannot be waived."); *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 604 (FMB 1959) ("Implicit in complaint's argument is the assumption that the parties may agree to waive or postpone the running of the statute. This cannot be done since the expiration of the time limit not only bars the remedy but also extinguishes the right, thereby nullifying the jurisdiction of the Board over the claims.") (internal citations omitted). This is in tension with the general rule that statutes of limitations are not jurisdictional and typically may be equitably tolled. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008); *Holland v. Florida*, 560 U.S. 631, 645-46 (2010); *Day v. McDonough*, 547 U.S. 198, 205 (2006). And it is not clear that the Commission's statute of limitations would qualify as a "jurisdictional" statute of limitations based on its text, context, and relevant historical treatment. *Menominee Indian Tribe of Wis. V. United States*, 614 F.3d 519, 524 (D.C. Cir. 2010).

after class action efforts failed. 462 U.S. 345, 350-51 (1983).

Class action tolling suspends the statute of limitations on class members' individual claims until there is a ruling denying or revoking class certification. *American Pipe*, 414 U.S. at 553. The rule ensures that class members are not unfairly deprived of an opportunity for individual relief for claims litigated as part of the class action because the limitations period expired while the class action was pending. *Id.* at 553-54; *Barryman-Turner v. District of Columbia*, 115 F. Supp. 3d 126, 131-34 (D.D.C. 2015). It also protects the courts from multiple individual lawsuits filed as insurance against the possibility that class action relief may be denied. *American Pipe,* 414 U.S. at 551.

Two restrictions on class action tolling are pertinent here. First, class action tolling only suspends the limitations period for claims asserted in the original class action. *Johnson v. Railway Express Agency, Inc*., 421 U.S. 454, 467 (1975). It does not suspend the limitations period for new or different causes of action not before the court in the class action. *Id.* The subsequently filed case must assert "exactly the same cause of action" as the earlier class action that tolled the limitations period. *Id*.; *Weston v. AmeriBank*, 265 F.3d 366, 368-69 (6th Cir. 2001) (citing *Crown, Cork,* 462 U.S. at 354 (Powell, J., concurring)); *Zarecor v. Morgan Keegan & Co. Inc.*, 801 F.3d 882, 887-89 (8th Cir. 2015); *In re Bear Stearns Cos., Inc. Secs., Derivative, & ERISA Litig*., 995 F. Supp. 2d 291, 303 (S.D.N.Y. 2014); *Raie v. Cheminova, Inc.*, 336 F.3d 1278, 1282-83 (11th Cir. 2003) (per curiam) (holding that class action asserting product liability claims did not toll statute of limitations for subsequent wrongful death action).

Second, class action tolling only applies to individual claims – it does not stop the limitations period from running on successive class actions. *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1809-11 (2018). Before the Supreme Court's 2018 ruling in *China Agritech*, federal courts differed on whether tolling might apply to successive class actions. But the consensus now appears that *China*

Agritech settled that issue when the Court ruled that "*American Pipe* does not permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action." *Id.* at 1806. The Court explained that the federal rules "do not offer . . . a reason to permit plaintiffs to exhume failed class actions by filing new, untimely class claims." *Id*. at 1811. The Court's ruling in *China Agritech* makes clear that litigants cannot rely on class action tolling to bring successive class actions. *See Blake v. JP Morgan Chase Bank N.A.*, 927 F.3d 701, 708-10 (3d Cir. 2019);*Painters & Allied Trades Dist. Council 82 Health Care Fund v. Forest Pharms., Inc*., 915 F.3d 1, 16-17 (1st Cir. 2019); *Weitzner v. Sanofi Pasteur Inc*., 909 F.3d 604, 609-10 (3d Cir. 2018).

These restrictions render class action tolling inapplicable to revive the untimely16-01 Complaint. The Shipping Act claims that Complainants allege before the Commission are not the same as the Sherman/Clayton Act and state law antitrust claims the plaintiffs asserted in the antitrust litigation, despite them relying on the same alleged facts. Here, Complainants allege that Respondents: (1) operated as common carriers under secret, unfiled agreements prohibited by 46 U.S.C. §§ 40301-40302; (2) failed to establish and follow "just and reasonable regulations and practices" for "receiving, handling, storing, or delivering property" as required by 46 U.S.C. § 41102(c); (3) "unreasonably refused to deal or negotiate as required by 46 U.S.C. § 41104(10); and (4) engaged in anticompetitive practices prohibited by 46 U.S.C. § 41105. None of these claims match the Sherman/Clayton Act or state law claims asserted in the antitrust litigation. *See Antitrust Litig. II*, 846 F.3d at 78; *In re Copper Antitrust Litigation*, 436 F.3d 782 (7th Cir. 2006) (state and federal antitrust claims not the same for *American Pipe* tolling purposes). That alone precludes Complainants from relying on class action tolling to make their Shipping Act claims timely.

In addition, Complainants are not individual litigants trying to preserve their claims for relief after class certification was denied. Rather, they are trying to relate their class actions back to previous class actions. Not only does *American Pipe* not on its face apply,

but, as noted above, courts have rejected this sort of stacking. *See Blake*, 927 F.3d at 708-10.

Rather than address these issues, Complainants assert that class action tolling is consistent with "sound administrative practice" under the gap-filling provision of 46 C.F.R. § 502.12. Appeal at 28-29. They also argue that class action tolling is consistent with the Commission's limitations precedent, the Federal Rules of Civil Procedure, and the interests of economy and efficiency. *Id*. at 29. But this is beside the point: even if the Commission adopted class action tolling under *American Pipe* as consistent with sound administrative practice, Complainants would not be eligible.

Simply put, despite referring to *American Pipe*, Complainants are not really asking the Commission to apply class action tolling and have not shown that it applies. Rather, they are essentially asking the Commission to create a new form of tolling that is similar to, and broader than, *American Pipe*, and that is specific to the facts of this case. Complainants have not, however, justified this request. Complainants have not shown that the class action tolling that they ask for would rescue their claims, let alone justify adopting a new type of tolling specific to the facts of this case.

Further, Complainants' appeal to equitable considerations does not change the result. Although Complainants do not argue that they are entitled to equitable tolling of the statute of limitations, the tenor of their arguments focuses on the alleged unfairness of allowing Respondents' to evade financial responsibility for allegedly egregious conduct. Equitable tolling only applies if party can show that: (1) it diligently pursued its rights; and (2) extraordinary circumstance beyond its control stood in the way of timely filing.[19] *Menominee Indian Tribe v. United States*, 136 S. Ct

[19] Equitable tolling hinges on the filing party's conduct. *Plummer v. Warren*, 463 F. App'x 501, 504 (6th Cir. 2012). In that respect, it

750, 752 (2016) (citing *Holland*, 560 U.S. at 649). Equitable tolling is granted sparingly and only if the court finds that its "carefully circumscribed" criteria apply. *Norman v. United States*, 467 F.3d 773, 776 (D.C. Cir. 2006); *Ata v. Scutt*, 662 F.3d 736, 741 (6th Cir. 2011). The doctrine applies to those "rare instances" where "due to circumstances external to the party's own conduct" enforcing the limitations period would be unconscionable and result in "gross injustice." *Whiteside v. United States*, 775 F.3d 180, 184 (4th Cir. 2014) (en banc) (internal quotation marks omitted).

Complainants cannot show that they diligently pursued their Shipping Act claims, which alone forecloses the 16-01 Complainants from relying on equitable tolling. They had constructive notice of potential Shipping Act claims by September 2012 from widely published news accounts of the raids. And to the extent that they were confused about where to assert their claims or which claims to pursue, they were on notice of the potential statutory bar to their antitrust claims by January 2015 when the parties briefed the motions to dismiss filed in the district court action.[20] Despite signals that their antitrust claims were in jeopardy of being dismissed as legally barred, they waited another 12 months before filing with the Commission. Given these further delays, the 16-01 Complainants would not meet the "diligent pursuit" element of equitable tolling. *See generally Brookens v. Acosta*, 297 F. Supp. 3d 40, 50 (D.D.C. 2018) (plaintiff claiming confusion over which forum to file in did not diligently pursue his rights).[21]

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differs from fraudulent concealment and equitable estoppel—both of which depend on actions taken by the respondents. *See id.*

20 By January 25, 2015, the parties had fully briefed motions to dismiss on which Respondents ultimately prevailed. *Antitrust Litig.*, 2015 U.S. Dist. LEXIS 114691, *28. The district court heard oral argument on the motions to dismiss on July 23, 2015, and supplemental briefing on the preemption issue followed.

[21]In contrast, soon after the district court dismissed the antitrust claims on August 28, 2015, and months prior to the filing of the class actions, General Motors LLC (GM) brought reparations claims

Complainants would also fail the "extraordinary circumstance" requirement. Extraordinary circumstances require an "external obstacle" beyond complainants' control that blocked their path and caused the delay. *Menominee*, 136 S. Ct. at 659. Whatever obstacle allegedly blocked the way, it cannot be the result of complainants' "own misunderstanding of the law or tactical mistakes in litigation." *Menominee*, 764 F.3d 51, 58 (D.C. Cir. 2014) (citing *Holland*, 560 U.S. at 651). Tactical litigation errors or misunderstanding applicable law are per se "insufficient to toll the statute of limitations." *Menominee*, 764 F.3d at 58; *Brookens*, 297 F. Supp. 3d at 50. For example, mistakenly relying on a putative class action as tolling the limitations period is not a circumstance beyond complainants' control that can justify equitable tolling. *Menominee*, 136 S. Ct. at 659.

D. Cease-and-Desist Relief

Despite finding the 16-01 claims time-barred as to reparations, the ALJ allowed "the claim for a cease and desist order for named parties" to proceed." I.D. at 56. As the ALJ noted, the Shipping Act's three-year statute of limitations does not apply to complainants seeking non-reparation orders, such as an order to cease-and-desist. *Maher*, 32 S.R.R. at 1190 ("The language of the Act is clear that the three-year statute of limitations applies only to claims for reparations."); *Inlet Fish*, 29 S.R.R. at 313.

The Commission reverses the Initial Decision in this regard because Complainants do not allege that Respondents continued to violate the Shipping Act after 2012, nor do they allege that Respondents are likely to resume violating their alleged unlawful conduct. "[I]mposition of a cease and desist order normally requires a showing that unlawful conduct is ongoing or likely to resume."

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against three Respondent carriers but settled with them in October 2016. Gen. Motors LLC v. Nippon Yusen Kabushiki Kaisha, Docket No. 15-08 (complaint filed Sept. 2, 2015).

Maher, 32 S.R.R. at 1190 n.8. Here, the ALJ found that "[t]he 2016 Complainants do not contend that the violations went beyond 2012, identifying the proposed class period as February 1997 to as late as December 31, 2012." I.D. at 48. That Complainants mentioned a cease-and-desist order in their prayer for relief in their complaint is insufficient to make up for the absence of any allegations of ongoing unlawful conduct, especially when Complainants themselves characterize their case as one for reparations. 16-01 Compl. ¶ 1 (noting that they bring their complaint "to recover reparations and the costs of suit, including reasonable attorneys' fees). As a consequence of the Commission's partial reversal of the Initial Decision as to statute of limitations, the 16-01 claims are dismissed in their entirety.

E. Class Action Authority

The Complainants brought their cases as class actions, and Respondents' challenged whether the Commission could and should hear class actions. The ALJ conditionally declined to permit the cases to proceed on a class basis. I.D. at 26. Complainants appeal that ruling.[22]

The parties' arguments for and against the Commission exercising class action authority raise complex issues of first impression. Because all claims have been dismissed, the Commission need not address these issues and declines to do so.

[22]Two law professors filed an amicus brief in support of Complainants, arguing that: (a) "Congress generally grants non-Article III courts broad discretion to adopt their own procedures;" (b) "Non-Article III courts use their statutory authority to aggregate claims and cases in a variety of ways;" and (c) "aggregation is an indispensable tool for improving the efficiency, consistency, and fairness of adjudication." Amicus Br. at 3, 6, 16.

IV. CONCLUSION

THEREFORE IT IS ORDERED, That the Initial Decision's dismissal of the Docket No. 16-07, Docket No. 16-10, and Docket No. 16-11 Complainants with prejudice for lack of standing under the direct purchaser rule is affirmed.

IT IS FURTHER ORDERED, That the Initial Decision's dismissal of the Docket No. 16-01 Complaint as to reparations as untimely is affirmed.

IT IS FURTHER ORDERED, That the Initial Decision is reversed insofar as it allowed the Docket No. 16-01 claims to proceed for a cease-and-desist order, and those claims are dismissed in their entirety with prejudice.

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

Rachel E. Dickon
Secretary

Commissioner Maffei, concurring in part and dissenting in part:

I concur with the majority in affirming the dismissal of the Docket No. 16-07, Docket No. 16-10, and Docket No. 16-11 Complainants with prejudice, and dissent from the majority in dismissing the Docket No. 16-01 claims in their entirety and discontinuing the proceeding.

I. Standing

I concur with the majority's decision to affirm the ALJ's motion to dismiss the indirect purchaser claims in Docket Nos. 16-07, 16-10, and 16-11 claims for lack of standing. The end-payor, truck center, and auto dealer Complainants in this case admit they are indirect purchasers. *See Complainants' Appeal from the Initial Decision Granting in Part and Denying in Part and Denying in Part Respondents' Motion to Dismiss and Supplemental Motion to Dismiss*, July 30, 2018, at 5 (Appeal). However, they make reasonable arguments concerning the modern realities of the shipping industry in attempting to justify their ability to pursue a remedy at the Federal Maritime Commission notwithstanding the Commission's long-standing precedent and analogous precedents. *See id.* at 21-24; Majority Opinion at 11-13 (discussing Commission precedent on the direct purchaser rule). As the Complainants note, in the shipping industry, it is customary for the total shipping cost to be fully passed downstream to indirect purchasers, and shipping records would illustrate the pass-through of the costs. Appeal at 23. Although the majority makes valid points that determining the actual overcharges that were passed along to each entity in the distribution chain would be complicated, and that this complicated process is a precise concern that instructed the creation of the direct purchaser rule in *Illinois Brick,* I acknowledge that the indirect purchasers may have suffered an actual injury that will go unremedied in this case. Majority Opinion at 25-26; *accord Illinois Brick v. Illinois*, 431 U.S. 720 (1977).

That said, I do believe it would be inappropriate for the Commission to overrule existing Commission and Supreme Court precedent based on the particulars of this case. Indeed, since federal antitrust decisions establish such clear precedent that only direct purchasers have standing to seek reparations for claims of damages, it may require statutory changes to address the issue in order to ensure that such injuries can be remedied in future cases.

Therefore, I must, regrettably, concur with the majority's decision to affirm the ALJ's dismissal of the Docket Nos. 16-07, 16-10, and 16-11 Complainants with prejudice for lack of standing under the direct purchaser rule.

II. Statute of Limitations

I dissent from the majority's decision to dismiss the claims of the remaining Complainants in Docket No. 16-01. The majority opinion dismisses too easily an important question in this case: is the statute of limitations established in § 41301(a) jurisdictional or is it subject to waiver? As the majority notes, Commission precedent has generally treated the statute of limitations as a jurisdictional requirement not subject to waiver or tolling, but it is not clear that it should be so treated based on text, context, and relevant historical treatment. *See* Majority Opinion at 41 n. 18. In my view, this case presents an opportunity for the Commission to reevaluate whether its precedent determining the statute of limitations is jurisdictional is still applicable.[23]

The majority concludes that it is not necessary to reach a resolution regarding the jurisdictional question because the

[23]Additionally, this issue was raised in the Respondents reply in support of their motion to dismiss and was raised again in response to the Complainant's appeal, but because the ALJ did not directly address the issue, the Complainants have never had the opportunity to respond in briefs. Dismissing the case without allowing the Complainants this opportunity is problematic.

Complainant's would not prevail under either *American Pipe* or "class action tolling," or equitable tolling under federal court precedent, but it does not consider prior Commission dicta regarding tolling, which tends to indicate the statute of limitations should be tolled in this case. In *Military Sealift Command, Dep't of the Navy v. Matson Navigation Co.*, the Commission indicated that the running of the statute of limitations period could be tolled pending the disposition of related proceedings if the purpose of the statute of limitations was not defeated. *See Mil. Sealift Command, Dep't of the Navy v. Matson Navigation Co.*, 21 S.R.R. 459, 1982 FMC LEXIS 29, at *7, 10-11 (FMC 1982).

The stated purpose of statutes of limitations in *Military Sealift* "is to prevent stale claims of which the defendant had no prior notice and the facts and merits of which become less susceptible of determination due to the fading of memories and loss of records and evidence." *Id.* at *8. In this case, like in *Military Sealift*, the claims of the Complainants are not stale, and the Respondents have been aware of the claims since the original court case was filed. Moreover, there is minimal risk of loss of records and evidence, because this case was filed shortly after the corresponding court case was dismissed and it was clear from the Third Circuit's ruling that the case should be brought before the Commission. *See Antitrust Litig. II*, 846 F.3d at 77-78.

The majority overlooks the Commission's prior statements rejecting "rigid theories" concerning the statute of limitations in favor of considering "the facts of a particular case in light of the purposes of the statute of limitations." *Mil. Sealift, 21 S.R.R.* at *7. In light of these statements, it is premature to dismiss this case at this juncture. Because the claims in this case could possibly be eligible for tolling under the approach suggested in *Military Sealift*, the Commission should address the jurisdictional question and whether this case meets the requirements.

For these reasons, I dissent from the majority's decision to dismiss the Docket No. 16-01 claims in their entirety.

III. Class Action Authority

Finally, this case brings up a challenging issue for the Commission which remains unaddressed by the majority: does the Commission have jurisdiction over class action suits involving alleged violations of the Shipping Act? On this matter, I concur with the ALJ's conclusion that the Commission's general enabling statute and existing regulations do not explicitly authorize class action suits. I.D. at 26. However, given that the Third Circuit implied the Commission would be the proper venue for the Complainants' claims when dismissing their federal and state court claims, it seems an open question whether the Commission must allow such class action suits given that it seems there is no other venue for them. *Antitrust Litig. II*, 846 F.3d at 77-78. Again, the guidance of Congress may be required to determine where similarly situated plaintiffs should bring their class action claims, so that injuries that occur against class action litigants may be adjudicated on their merits.

IV. Conclusion

It is regrettable that the merits of this case will not be considered by the Commission. I hope that this case brings to light some areas of the Shipping Act and the Commission's jurisprudence that are ripe for clarification so that future parties do not find themselves in the unfortunate position of not having a venue for their potentially valid complaints.