

**FEDERAL MARITIME COMMISSION**  
**Office of Administrative Law Judges**

MCS INDUSTRIES, INC., *Complainant*

v.

COSCO SHIPPING LINES CO., LTD. AND MSC  
MEDITERRANEAN SHIPPING COMPANY SA, *Respondents*.

**DOCKET NO. 21-05**

Served: January 13, 2023

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

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**INITIAL DECISION ON DEFAULT<sup>1</sup>**

**I. Introduction**

This initial decision on default imposes a default decision against Respondent MSC Mediterranean Shipping Company SA (“MSC Mediterranean Shipping” or “Mediterranean”) for failing to produce discovery, including discovery compelled as early as December 8, 2021.

As detailed below, MSC Mediterranean Shipping has been warned multiple times that if it failed to produce the discovery, a default decision would be issued against it. To expedite the proceeding, on May 4, 2022, the undersigned granted the parties’ proposal to file a letter of request with authorities in Switzerland pursuant to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (“Hague Convention”). On June 29, 2022, the Swiss court denied the request as outside the scope of the Hague Convention. MSC Mediterranean Shipping disagrees with the Swiss court’s decision and continues to refuse to produce the discovery ordered in this proceeding, despite multiple orders to do so.

As explained more fully below, a default decision is issued against MSC Mediterranean Shipping and it is ordered to pay reparations to Complainant MCS Industries, Inc. (“MCS Industries”). This decision does not reach the merits of the claim but rather imposes default as a procedural consequence.

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

## **II. Discussion**

### **A. Procedural History**

This proceeding began on August 3, 2021, when the Commission issued a Notice of Filing of Complaint and Assignment requiring an initial decision to be issued by August 3, 2022, and stating that MCS Industries had filed a complaint alleging that MSC Mediterranean Shipping and COSCO Shipping Lines Co., Ltd. had violated the Shipping Act.

On August 26, 2021, MSC Mediterranean Shipping filed an answer denying the complaint's allegations and raising numerous defenses.

On September 23, 2021, an initial decision approving confidential settlement agreement was issued, resolving the claims against Respondent COSCO Shipping Lines Co., Ltd.

Also on September 23, 2021, a revised scheduling order was issued, adopting the parties' proposed schedule and requiring discovery to be completed by January 27, 2022.

On December 8, 2021, an order was issued granting MCS Industries' motion to compel discovery ("Order Granting Motion to Compel"). On December 21, 2021, another revised scheduling order was issued requiring discovery to be completed by March 22, 2022, and briefing completed by June 1, 2022.

On February 4, 2022, an order on motion to amend complaint and motion to dismiss ("Order Denying Dismissal") was issued and leave was given to accept the filing of the verified amended complaint.

On March 4, 2022, an order on proposed revised schedule and discovery notice was issued which required the parties, in relevant part: to "provide a joint status report addressing the status of discovery, the issues above, and a proposed request for overseas discovery by April 4, 2022" and to continue to exchange discovery in an expeditious fashion. Order on Proposed Revised Schedule and Discovery Notice at 2. On April 4, 2022, the parties filed a joint status report regarding the status of discovery and Swiss discovery issues.

On May 4, 2022, an order granting request for letter of request under Hague Convention was issued, finding that the letter would be "the most appropriate and efficient process" for obtaining discovery, and attaching the letter of request "with minor modifications from the parties' proposal" for MCS Industries to translate and file with the appropriate Swiss authorities. Order Granting Request for Letter of Request under Hague Convention at 1-2.

On July 8, 2022, MCS Industries filed a notice of decision on the letter of request, with French and English translation of the June 29, 2022, Decision of the Judge in the Republic and Canton of Geneva, civil court, which denied the request on the grounds that the proceeding is administrative and therefore does not fall within the scope of application of the Hague Convention. On July 15, 2022, the parties filed a joint status report.

On July 29, 2022, an order was issued requiring MSC Mediterranean Shipping to produce all outstanding discovery by August 29, 2022, including the discovery ordered to be produced in

the order granting motion to compel issued on December 8, 2021. On August 26, 2022, MSC Mediterranean Shipping filed a motion seeking an extension of time and on September 6, 2022, filed a notice of advice of the Swiss Federal Office of Justice. On September 2, 2022, MCS Industries filed an opposition to the motion for an extension of time.

On September 8, 2022, the extension of time was denied and MSC Mediterranean Shipping was ordered to show cause “why a default decision should not be issued against it for failure to produce discovery.” Order Denying Respondent’s Motion for an Extension of Time and Order to Show Cause at 1 (“OTSC”).

On September 22, 2022, MSC Mediterranean Shipping filed its response to the order to show cause (“OTSC Respondent Response”). On October 6, 2022, MCS Industries filed its response to the order to show cause (“OTSC Complainant Response”). On October 14, 2022, MSC Mediterranean Shipping filed a reply (“OTSC Respondent Reply”).

On October 18, 2022, MSC Mediterranean Shipping filed a “Notice of Determination of the Swiss Federal Office of Justice that the Procedures of the Hague Evidence Convention Apply to this Proceeding and Must Be Used” (“Determination Notice”). On October 28, 2022, MCS Industries filed a letter objecting to the unsolicited notice (“Determination Notice Objection”).

On November 8, 2022, MSC Mediterranean Shipping filed a “Notice of Issuance of Formal Decision of the Swiss Federal Department of Justice and Police that the Hague Evidence Convention Procedures Apply to this Proceeding and Must Be Used” (“Decision Notice”) with a French document and English translation of a decision (“Federal Council Decision”) from the “Federal Department of Justice and Police FDJP,” signed by a “Member of the Federal Council.” Complainant did not respond to the November 8, 2022, filings.

The parties have both had the opportunity to respond to the order to show cause and the subsequent notices filed by MSC Mediterranean Shipping. The arguments are summarized below.

## **B. Arguments of the Parties**

MSC Mediterranean Shipping asserts that further consultation with the Swiss authorities, not a default judgment, is the proper course for addressing its good faith belief that discovery compliance would risk criminal sanctions; relevant precedent of the Commission and the federal courts provides no support for entry of a default judgment in the present circumstances; and the Commission lacks jurisdiction over this proceeding and thus there is no jurisdiction to issue a default order sanction. OTSC Respondent Response at 4-30.

MCS Industries argues that MSC Mediterranean Shipping has violated multiple discovery orders, including in its response to the order to show cause; Mediterranean’s conduct triggers all three of the *Webb* conditions, any one of which is sufficient to support a sanction of default judgment; and default is the most appropriate sanction because of the severity of Mediterranean’s misconduct and because a lesser sanction would ultimately reach the same result. OTSC Complainant Response at 3-19.

In its reply, MSC Mediterranean Shipping contends that Complainant previously asserted and now effectively concedes that mandatory consultations under 46 U.S.C. § 41108(c) are required; relevant precedent provides no support for entry of a default judgment; and Complainant does not address MSC Mediterranean Shipping's jurisdictional arguments or attempt to show why they should not be certified. OTSC Respondent Reply at 4-15.

MSC Mediterranean Shipping filed two notices after the order to show cause briefing was complete. The October 18, 2022, Determination Notice states that MSC Mediterranean Shipping requested that the Swiss Federal Department of Justice and Police (FDJP) waive enforcement of Article 271 of the Criminal Code and that the Federal Office of Justice in Bern denied the authorization, finding that a letter of request under the Hague Convention could be resubmitted. Determination Notice at 1-2.

MCS Industries filed a Determination Notice Objection on October 28, 2022, stating:

If anything, MSC's continued efforts with this Submission to relitigate (without appealing) previously decided issues in this case merely serve to reinforce its apparent disregard for, or even contempt of, the Presiding Officer's decisions and, indeed, the FMC's jurisdiction over it. The Submission can and should be disregarded as addressing issues that are already decided and/or moot. Even if considered, nothing in the Submission alters the fact that, for the reasons detailed in Complainant's October 6 response to the Presiding Officer's Order, default judgment against MSC is the appropriate remedy in this case.

Determination Notice Objection at 2.

In the November 8, 2022, Decision Notice, MSC Mediterranean Shipping asserts that "a default judgment remains inappropriate," the proper way forward is to refile the request for mutual legal assistance in an improved form, and attaches the Federal Council Decision, which MSC Mediterranean Shipping says is from the executive branch of Switzerland. Decision Notice at 2-3. MCS Industries did not respond to this second notice.

### **C. Prior Relevant Orders**

A number of prior orders have been issued regarding discovery in this proceeding. Relevant portions of those orders are summarized and quoted below.

#### **1. Motion to Compel**

This discovery dispute stems from a December 8, 2021, order granting MCS Industries' motion to compel. The parties' arguments in the motion to compel and opposition were organized by fourteen general topics. Rulings on each of the fourteen topics are quoted below. The Order Granting Motion to Compel was not appealed.

##### **a. General Objections**

MSC Mediterranean Shipping cannot limit its discovery to what it believes are the core issues in this proceeding nor can it require MCS Industries to produce

evidence that claims are valid before producing discovery. Commission's Rules permit discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense" and the allegations in the complaint extend beyond the specific bookings and attempted bookings identified. 46 C.F.R. § 502.141(e)(1); Complaint at 11-12. While parties cannot go on fishing expeditions and seek irrelevant discovery, they are not required to provide evidence or legal authority for every discovery request, especially when that request is narrowly tailored to conduct between the parties, between California and two ports in China, over a four-month timeframe.

MSC Mediterranean Shipping's general objections are not persuasive and the approach to discovery proposed by MSC Mediterranean Shipping will only delay the proceeding. Accordingly, MSC Mediterranean Shipping is hereby **ORDERED** to respond to relevant discovery requests.

Order Granting Motion to Compel at 4-5.

**b. Identifying Individuals with Knowledge**

MCS Industries is entitled to discover information relevant to the pending claims and MSC Mediterranean Shipping, the other party in the proceeding, is the preferred entity to provide that information. Respondent merely refers generally to the parties' respective document productions. While a responding party may answer an interrogatory by producing business records, Respondent must "specify[] the records that must be reviewed, in sufficient detail to enable [Complainant] to locate and identify them as readily as [Respondent] could." 46 CFR § 502.145(d)(1).

Accordingly, MSC Mediterranean Shipping is hereby **ORDERED** to: (1) identify all individuals with knowledge of facts relevant to the claims and defenses in this matter, (2) identify with specificity any and all documents that Respondent relied upon in responding to these Interrogatories, and (3) identify with specificity each document that Respondent contends is responsive to each of Complainant's Interrogatories.

Order Granting Motion to Compel at 5.

**c. Communications Concerning Complainant**

As discussed above, MSC Mediterranean Shipping cannot limit its discovery to what it believes should be the core issue in this proceeding. MSC Mediterranean Shipping improperly limited its production to only documents concerning "bookings and attempted bookings" which excludes relevant documents. Accordingly, MSC Mediterranean Shipping is hereby **ORDERED** to produce all documents and communications responsive to Requests 5 through 7, subject to the time and geographic limitations proposed by Complainant.

Order Granting Motion to Compel at 5-6.

**d. Attempts to Book Cargo Pursuant to the Service Contract**

One of the claims alleged by MCS Industries is a violation of section 41102(c), which requires a showing that the “claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis.” 46 C.F.R. §545.4. Thus, MSC Mediterranean Shipping’s practices are at issue, not just the actions taken on specific bookings. Moreover, it may be necessary to understand MSC Mediterranean Shipping’s actions in a context beyond specific, documented requests for bookings. Accordingly, MSC Mediterranean Shipping is hereby **ORDERED** to produce all documents and communications responsive to Requests 8 through 10 and 13 and Interrogatory 8, with the limitations of time and geography proposed by Complainant.

Order Granting Motion to Compel at 6-7.

**e. Successful Carriage of MCS Cargo**

The Commission’s Rules permit discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense.” 46 C.F.R. § 502.141(e)(1). To understand why there were problems with some bookings it is relevant to understand successful bookings. While parties cannot go on fishing expeditions and seek irrelevant discovery, they are not required to provide evidence or legal authority for every discovery request, especially when that request is narrowly tailored to conduct between the parties, between California and two ports in China, over a four-month timeframe.

Accordingly, it is hereby **ORDERED** that MSC Mediterranean Shipping produce all documents and communications responsive to Requests 10 and 11, with the limitations of time, geography, and scope proposed by MCS Industries.

Order Granting Motion to Compel at 7-8.

**f. Force Majeure**

MSC Mediterranean Shipping admits that it limited its response to notices to the market of sailings from Tianjin and Qingdao that could not be undertaken due to port congestion or other factors outside MSC’s control. The discovery questions ask about notifications of force majeure. If MSC Mediterranean Shipping wants to raise force majeure as a defense, it needs to provide relevant discovery. The timeframe requested, from January 1, 2020, through the present is reasonable and whether such claims were raised against other shippers is relevant. Accordingly MSC Mediterranean Shipping is hereby **ORDERED** to produce all documents and communications responsive to Requests 14 and 15, and to answer Interrogatories 9 (from January 1, 2020, to the present) and 10.

Order Granting Motion to Compel at 8.

**g. Sailings That Did Not Occur and Alternative Sailings**

It appears that MSC Mediterranean Shipping has provided information regarding *what* sailings were voided or cancelled but has not produced the documents and communications that would show *why* sailings were voided or cancelled. There are many factors impacting the current disruptions and it is relevant for MCS Industries to discover which factors impacted MSC Mediterranean Shipping. Accordingly, MSC Mediterranean Shipping is hereby **ORDERED** to produce all documents and communications responsive to Requests 23 and 24, with the limitations of time and geography proposed by Complainant.

Order Granting Motion to Compel at 8-9.

**h. Course of Conduct**

The Commission's Rules permit discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense" and the allegations in the complaint extend beyond the specific bookings and attempted bookings identified. 46 C.F.R. § 502.141(e)(1); Complaint at 11-12. While parties cannot go on fishing expeditions and seek irrelevant discovery, they are not required to provide evidence or legal authority for every discovery request, especially when that request is narrowly tailored to conduct between the parties, between California and two ports in China, over a four-month timeframe. Accordingly, it is hereby **ORDERED** that MSC Mediterranean Shipping answer the discovery requests, as limited by the proposals from Complainant.

Order Granting Motion to Compel at 9-10.

**i. Identify Potential Witnesses**

As with other discovery, it appears that MSC Mediterranean Shipping limited its discovery responses to a narrow set of people involved with particular bookings. However, MCS Industries' claim goes beyond these particular bookings to MSC Mediterranean Shipping's practices and MCS Industries is entitled to discovery regarding those practices. Accordingly, it is hereby **ORDERED** that MSC Mediterranean Shipping respond to these MCS Discovery Requests sufficiently to identify these individuals as requested

Order Granting Motion to Compel at 10.

**j. Capacity, Cost, and Allocation of Cargo on Respondent's Vessels**

MCS Industries offered to limit these requests geographically and has requested additional information about how this information is stored so that it can be obtained in the least burdensome manner. The requests are relevant to MCS Industries' claims and the parties have a protective order in place for confidential material disclosed. Accordingly, MSC Mediterranean Shipping is hereby

**ORDERED** to respond to Requests 20 through 22 and 25 and Interrogatories 18 and 19, subject to the limitations proposed by Complainant.

Order Granting Motion to Compel at 10-11.

**k. Unbooked Space on Relevant Sailings**

MCS Industries' request is narrowly tailored to sailings from the ports at issue during the relevant time frame. This request is relevant to MCS Industries' claims and the parties should work together to ensure that the information is provided in the least burdensome manner. Accordingly, it is hereby **ORDERED** that MSC Mediterranean Shipping answer Requests 17 through 19 in full.

Order Granting Motion to Compel at 11.

**l. Relevant Financial Data and Ownership Information**

MCS Industries requests information from January 1, 2019, and the effect of any force majeure event and ownership from January 1, 2020, and acknowledges that the responses would likely be confidential and protected under the protective order. MSC Mediterranean Shipping's argument that the relationship between parties such as handling and booking agents is already known by MCS Industries and also would be highly prejudicial if disclosed, seems contradictory. As has been previously discussed, MCS Industries is entitled to discovery regarding its claims. The requests are relevant to MCS Industries' claims and MSC Mediterranean Shipping's defenses. Accordingly, it is hereby **ORDERED** that MSC Mediterranean Shipping answer Requests 31 through 35 and Interrogatories 13 and 14 in full.

Order Granting Motion to Compel at 11-12.

**m. Document Retention Policies**

Discovery of document retention policies does not require Complainant to establish a document retention problem and the request is relevant. Accordingly, it is hereby **ORDERED** that MSC Mediterranean Shipping produce the documents sought in Requests 36 and 37.

Order Granting Motion to Compel at 12.

**n. Other Allegations of Shipping Act Violations**

MSC Mediterranean Shipping has responded to these requests for the time period of January 1, 2020, to the present, a time period proposed by MCS Industries in their motion. Accordingly, it is hereby **ORDERED** that MSC Mediterranean Shipping respond to Request 39 and Interrogatory 15 from January 1, 2020, to the present.

Order Granting Motion to Compel at 12.



## 2. Order Requiring Production of Discovery

As discussed above, with only minor changes from the parties' proposal, a letter of request was sent to Switzerland to ensure that discovery in this proceeding did not contravene Swiss legal requirements. On July 15, 2022, the parties filed a joint status report stating that the request was denied by the Swiss court on the grounds that it did not fall within the scope of application of the Hague Convention.

On July 29, 2022, an order was issued requiring production of discovery, which stated:

In the joint status report, Complainant asserts that the Department of State should be contacted to request assistance to obtain discovery and Respondent asserts that a new letter of request should be submitted to a different office in Switzerland. July 15, 2022, Joint Status Report. However, the Swiss authorities are in the best position to determine whether their involvement is needed and they have indicated that it is not as the requested discovery is outside the scope of the Hague Convention. Other courts have come to a similar conclusion.

The party seeking to pursue discovery through the Hague Evidence Convention bears the burden of demonstrating that proceeding in that manner is necessary and appropriate. *Luminati Networks v. Code200*, 2021 U.S. Dist. LEXIS 128634, at \*10 (E.D. Tex. 2021). A party seeking an order to apply Hague Convention procedures in lieu of the procedures set forth in the Federal Rules of Civil Procedure must demonstrate that a specific foreign law "actually bars the production or testimony at issue." *Alfadda v. Fenn*, 149 F.R.D. 28, 34 (S.D.N.Y. 1993). "In order to meet that burden, the party resisting discovery must provide the Court with information of sufficient particularity and specificity to allow the Court to determine whether the discovery sought is indeed prohibited by foreign law." *Id.* The Supreme Court has held "that the Hague Convention did not deprive the District Court of the jurisdiction it otherwise possessed to order a foreign national party before it to produce evidence physically located within a signatory nation." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct. for S. Dist.*, 482 U.S. 522, 539-40 (1987).

Here, Respondent asserts that Swiss Article 271 of the Swiss Criminal Code ("SCC") blocks the production of the documents at issue. Jan. 10, 2022, Joint Status Report; February 25, 2022, Respondent's Notice and Update; April 4, 2022, Joint Status Report; July 15, 2022, Joint Status Report. Respondent's Swiss attorney in his February 25, 2022 memorandum asserts that Swiss authorities disagree with the Supreme Court's finding that the Hague procedures are optional; discusses Article 271 to conclude that to "avoid any risk of violating Article 271 SCC, the Swiss party requested to provide evidence must use Swiss-approved procedures before producing documents located in Switzerland to a foreign authority;" and opines that a letter of request under the Hague Convention is the most appropriate way to obtain the discovery. February 25, 2022, Memo on Swiss Law at 4-5.

The Court’s ultimate task “is not to definitively determine what Swiss law is, but rather to decide whether the risk of prosecution under Article 271 is so great” as to warrant a protective order. *Microsoft Corp. v. Weidmann Elec. Tech., Inc.*, 2016 U.S. Dist. LEXIS 170325, \*34 n.14 (D. Vt. 2016). In *EFG Bank AG v. AXA Equitable Life Ins. Co.*, the federal district court denied a protective order for EFG documents located in Switzerland, finding that EFG failed “to demonstrate with sufficient particularity and specificity that the discovery sought is prohibited by Swiss law,” specifically Article 271. 2018 U.S. Dist. LEXIS 67521, \*4-5 (S.D.N.Y. 2018). The court cited a number of Swiss cases that found that Article 271 did not apply where there was no threat of criminal sanction.

Significantly, however, decisions of the Swiss Federal Department of Justice and Police (“FDJP”) — an administrative, non-judicial body — indicate that Swiss law does not preclude the *voluntary* production of documents by a private party and that “voluntary” is defined broadly to include the production of discovery so long as the party faces only procedural consequences rather than criminal sanctions for its failure to produce.

*EFG Bank*, 2018 U.S. Dist. LEXIS 67521, \*5 (emphasis in original). The court noted:

Conspicuously, EFG fails to identify a single case in which a party was found to have violated Article 271 by disclosing its own documents absent a court order threatening criminal sanctions. That is presumably because no such case exists. Indeed, EFG’s own expert on Swiss law concedes that no court has held that production by a party in the circumstances presented here violates Article 271.

*Id.*, at \*7-8 (footnote omitted). Similarly, another district court recently declined to pursue discovery under the Hague Convention or to issue a letter of request, finding that “although Article 271 might be implicated if the responding party was threatened with criminal sanctions for failure to comply with a discovery order, the statute does not preclude voluntary disclosure in compliance with a civil discovery order if the consequence for noncompliance is procedural only.” *Belparts Grp., N.V. v. Belimo Automation AG*, 2022 U.S. Dist. LEXIS 75450, at \*15 (D. Ct. 2022).

In Respondent’s Swiss counsels’ April 4, 2022, Second Memorandum on Swiss Law, they acknowledge that: “It is true that in practice, there are not many prosecutions based on Article 271. This is mainly because it is a norm of behavior.” April 4, 2022, Memo on Swiss Law at 4. The memo further asserts that the four-year old *EFG Bank* case “does not and cannot capture more recent evolution of the case law that clearly supports a strengthening of the sensitivity to Article 271 violations.” *Id.* Moreover, Respondent’s Swiss counsel states that there was a criminal prosecution of a Swiss asset manager for providing data to

American prosecutors on American clients of the asset manager, concluding that the Swiss Supreme Court “specifically noted that the collection and transmission on Swiss territory of *evidence that falls within the scope of international judiciary assistance* is a breach of Article 271.” *Id.* (emphasis added).

Commission Rule 150(b) outlines the procedural consequences of failing to provide discovery in Commission proceedings:

**(b) Failure to comply with order compelling disclosures or discovery.** If a party or a party’s officer or authorized representative fails or refuses to obey an order requiring it to make disclosures or to respond to discovery requests, the presiding officer upon his or her own initiative or upon motion of a party may make such orders in regard to the failure or refusal as are just. A motion must include a certification that the moving party has conferred in good faith or attempted to confer with the disobedient party in an effort to obtain compliance without the necessity of a motion. An order of the presiding officer may:

- (1) Direct that the matters included in the order or any other designated facts must be taken to be established for the purposes of the action as the party making the motion claims;
- (2) Prohibit the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; or
- (3) Strike pleadings in whole or in part; staying further proceedings until the order is obeyed; or dismissing the action or proceeding or any party thereto, or rendering a decision by default against the disobedient party.

46 C.F.R. 502.150(b).

This proceeding is very different from a non-party providing Swiss banking documents to American prosecutors building a potential criminal case. This proceeding is not a criminal prosecution and the Commission cannot impose criminal penalties. The discovery sought is in relation to shipments from specific ports in China and Indonesia to the United States over a limited timeframe. Evidence is sought by a private party, Complainant MCS Industries, from a private party, Respondent MSC Mediterranean Shipping. Because MSC Mediterranean Shipping is a party, it has been able to negotiate an appropriate protective order. Moreover, the penalty for non-production of discovery is not criminal. Most critically, the Swiss authorities have reviewed the request and determined that it is outside the scope of the Hague Evidence Convention. Therefore, Respondent has not established that any additional actions need to be taken under the Hague convention.

Respondent MSC Mediterranean Shipping is alleged to be one of the largest container lines in the world. It has voluntarily chosen to conduct business in American ports and is regulated by the Federal Maritime Commission. Respondent has opposed providing relevant discovery which was ordered in the order granting motion to compel. It has delayed the proceeding by insisting that Swiss law prohibits discovery disclosure. But, parties appearing before the Commission are entitled to relevant evidence needed to prosecute their cases. Failure to provide discovery may result in procedural sanctions, from an inference that the discovery would have been adverse to Respondent's interests to a decision on default. *See Kawasaki Kisen Kaisha, Ltd v. The Port Authority of New York and New Jersey*, Docket 11-12, 2014 FMC LEXIS 36, at \*14-18 (Order Affirming Dismissal of Complaint for Complainant's failure to provide discovery) (FMC Nov. 20, 2014) *Jamteck Int'l Shipping, Inc. - Possible Violations of the Comm'n's Regulations at 46 C.F.R. Part 515*, Docket No. 07-09, 2009 FMC LEXIS 42, \*6-7 (ALJ July 27, 2009) (Admin. final on August 31, 2009) (referencing order that an inference adverse to Respondents be drawn as a consequence of Respondents' failure to respond to discovery).

Order Requiring Production of Discovery at 1-4.

### **3. Order to Show Cause**

On September 8, 2022, an order denied MSC Mediterranean Shipping's motion for an extension of time and ordered that by September 22, 2022, MSC Mediterranean Shipping either provide the required discovery or show cause why default judgment should not be entered against it.

As explained below, MSC Mediterranean Shipping's motion seeking an extension of time is denied and it is ordered to show cause why a default decision should not be issued against it for failure to produce discovery. COSCO was previously dismissed due to a settlement.

MSC Mediterranean Shipping requested an extension to obtain advice from the Federal Office of Justice in Switzerland and propose a path forward, stating that it "cannot comply" with the July 29, 2022, order requiring production of documents and "that the July 1 ruling of the Geneva Court of First Instance is in error." Motion at 1-2. Complainant asserts that Respondent's failure to comply with its discovery obligations are a crisis of Respondent's own making; Respondent's motion should be denied as both substantively meritless and procedurally inappropriate; and, procedural sanctions are an appropriate remedy for Respondent's noncompliance. Opposition at 1-6.

Essentially, Respondent continues to argue despite rulings to the contrary in this proceeding and in the Republic and Canton of Geneva Court of First Instance, that due to Swiss legal requirements it cannot produce the discovery ordered in the December 8, 2021, motion to compel and the July 29, 2022, order requiring

production of discovery, and that the Swiss court's decision that their intervention is not necessary was in error. Motion at 1-5.

The notice filed by MSC Mediterranean Shipping argues that it contacted the Federal Office of Justice in Switzerland to confirm that the ruling of the Geneva Court of First Instance was in error and the "advice from the Federal Office of Justice directly supports MSC's proposal that the request for judicial assistance should be resubmitted in order to obtain a correct assessment that the procedures are available." Notice at 1. However, it is clear that this "advice" from the Federal Office of Justice in Switzerland merely identifies the process for resubmitting a request and the factors that may be taken into account, without any discussion of the merits of this proceeding. Notice, Exhibit B.

The question of whether Swiss assistance with discovery is required has been answered by the undersigned Administrative Law Judge and by the Court of First Instance in Geneva. MSC Mediterranean Shipping's position did not prevail and now it must produce discovery or face procedural consequences. Relitigation of the same issue will not be permitted and has only delayed this proceeding. Therefore, the motion seeking an extension is denied.

As Respondent was advised previously, pursuant to Commission Rule 150(b), if a party "fails or refuses to obey an order requiring it to make disclosures or to respond to discovery requests, the presiding officer upon his or her own initiative or upon motion of a party may make such orders in regard to the failure or refusal as are just," including "rendering a decision by default against the disobedient party." 46 C.F.R. 502.150(b).

In multiple filings, MSC Mediterranean Shipping has indicated that it will not produce the discovery that it has been repeatedly ordered to produce. Complainant asserts that "Respondent cannot accept the benefits of shipping cargo to and from U.S. ports while shirking its legal and regulatory obligations before the Commission" and that it would request a decision on default. Opposition at 6. Given MSC Mediterranean Shipping's statements that it will not produce the required discovery, it is appropriate to determine whether a default decision is an appropriate remedy. Accordingly, MSC Mediterranean Shipping is ordered to show cause why a default decision should not be issued against it.

The amended complaint seeks an FMC investigation; a finding of violations of the Shipping Act; a cease and desist order; and an order requiring MSC Mediterranean Shipping to pay an unspecified amount of reparations to Complainant. An FMC investigation cannot be ordered through a formal proceeding. However, the other requested remedies may be ordered. In their response to MSC Mediterranean Shipping's filing, Complainant should identify the dollar amount of reparations that they are seeking. MSC Mediterranean Shipping may file a reply to Complainant's arguments.

The merits of the proceeding and remedy are not at issue and should not be addressed in these filings—the question is only whether a default decision or other procedural consequence is appropriate for MSC Mediterranean Shipping’s failure to produce discovery. If MSC Mediterranean Shipping provides the discovery, the issue will be moot and the case can proceed to a resolution on the merits. The parties may also choose to settle the proceeding and if so, should submit a motion requesting approval of the settlement with a copy of the settlement agreement.

Order Denying Respondent’s Motion for an Extension of Time and Order to Show Cause at 1-2.

### **III. Analysis**

#### **A. Standard**

As the parties have been advised, Commission Rule 150(b) outlines the procedural consequences of failure to provide discovery in Commission proceedings, including directing that certain matters be taken as established, prohibiting certain claims or defenses, striking pleadings, staying proceedings, or rendering a decision by default. 46 C.F.R. § 502.150(b).

Commission rules have long permitted dismissal of a proceeding as a sanction for failure to comply with discovery orders. The current rules state that “[i]f a party or a party’s officer or authorized representative fails or refuses to obey an order requiring it to make disclosures or to respond to discovery requests, the presiding officer upon his or her own initiative or upon motion of a party may make such orders in regard to the failure or refusal as are just.” 46 C.F.R. § 502.150(b) (previously 46 C.F.R. § 502.210(a) and § 502.210(b)). As a sanction for failure to comply with discovery orders, a presiding officer may issue an order “dismissing the action or proceeding or any party thereto, or rendering a decision by default against the disobedient party.” 46 C.F.R. § 502.150(b)(3).

The “Commission has upheld dismissal orders under Rule 210(b) [now Rule 150(b)] when complainants fail to respond to discovery orders and the conduct is willful and deliberate.” *Kawasaki Kisen Kaisha, Ltd v. The Port Authority of New York and New Jersey*, Docket 11-12, 2014 FMC LEXIS 36, at \*17 (FMC Nov. 20, 2014) (Order Affirming Dismissal of Complaint for failure to provide discovery); *see also Interpool, Ltd. v. Pac. Westbound Conf.*, 22 F.M.C. 762 at 764,<sup>2</sup> 19 S.R.R. 1719 (FMC May 15, 1980) (affirming dismissal of proceeding for willful and deliberate failure to respond to discovery).

#### **B. Jurisdiction**

MSC Mediterranean Shipping asserts that the Commission lacks jurisdiction over this proceeding, arguing that exercising jurisdiction over this proceeding is inconsistent with Commission precedent; that the matter is in binding arbitration; and that the issue of jurisdiction should be certified to the Commission for determination. OTSC Respondent Response at 26-30.

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<sup>2</sup> Available, with other F.M.C. decisions, at [www.fmc.gov/wp-content/uploads/2019/04/vol22.pdf](http://www.fmc.gov/wp-content/uploads/2019/04/vol22.pdf).

MCS Industries states:

In contempt of the Presiding Officer's explicit instructions, Mediterranean's Response strays far beyond the bounds of the Order to Show Cause, devoting fully half its considerable length to arguing that the Commission "lacks jurisdiction over this proceeding to begin with" and that there is no prejudice to Complainant from not receiving the discovery at issue despite the Presiding Officer's clear findings to the contrary over nine months ago in the Order Granting Motion to Compel.

OTSC Complainant Response at 6.

The issue of jurisdiction was adjudicated in the February 4, 2022, Order Denying Dismissal, which was not appealed. That order specifically addressed arbitration and *Cargo One, Inc. v. Cosco Container Lines Co. Ltd*, 28 S.R.R. 1635, 1645, 2000 FMC Lexis 14 (FMC Oct. 31, 2000), stating:

Relying on the principles stated in *Cargo One*, the Commission has held that jurisdiction over a complaint alleging violations of the Shipping Act exists even though a proceeding in another forum may have resolved some issues between the parties. For instance, prior to filing its complaint with the Commission, one complainant had sought and obtained an arbitration award of several hundred thousand dollars against the Commission respondent. The complainant filed a complaint with the Commission alleging Shipping Act violations and seeking another million dollars. The Commission reversed the order of the administrative law judge dismissing the complaint and remanded for further proceedings on the Shipping Act claims set forth in the complaint. The Commission held that the fact that the service contract between the parties required arbitration:

does not outweigh the Commission's duty to protect the public by ensuring that service contracts are implemented in accordance with the Shipping Act. . . . To preclude Anchor from proceeding with its complaint solely because a private arbitrator previously issued a ruling would be inconsistent with our statutory mandate to hear such complaints.

*Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 998 (FMC 2006).

Order Denying Dismissal at 6.

Regarding jurisdiction, the Order Denying Dismissal concluded:

Thus, the Commission has an obligation to determine whether an entity has violated the Shipping Act, even when the facts alleged may give rise to both breach of contract claims and Shipping Act claims. Allegations in the amended complaint extend beyond allegations of breach of the service contract to allege

practices that violate the Shipping Act, such as failing to maintain or provide booking reports, systematically preferring higher-priced cargo, and coercing surcharges. Establishing a violation of section 41102(c) requires a showing that the claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis. It does not require that the acts involved be concerted, collusive, or parallel actions. Additionally, the way that damages are calculated does not determine whether or not the Commission has jurisdiction over a claim. The Commission has an obligation to determine the reasonableness of practices by regulated entities that are alleged to violate the Shipping Act.

Order Denying Dismissal at 6.

MSC Mediterranean Shipping continues to argue that the Commission does not have jurisdiction because the claims are inherently breach of contract claims that should be resolved by arbitration. OTSC Respondent Response at 26-30. In addition, it argues that because MCS Industries has recently asked the arbitration panel to stay the arbitration, Complainant's counsel has conceded that its claims are contractual claims. OTSC Respondent Response at 28.

As discussed in the Order Denying Dismissal, the Commission has stated:

The arbitration clause in the parties' service contract does not outweigh the Commission's duty to protect the public by ensuring that service contracts are implemented in accordance with the Shipping Act. Although service contracts are between private parties, the Commission regulates the content as well as the conduct under the contracts. The regulation of service contracts is akin to the regulation of agreements, because the Commission is the regulatory body charged with administering the Shipping Act and, therefore, must ensure that service contracts and agreements are filed and implemented pursuant to the statutory requirements and Commission regulations. To preclude Anchor from proceeding with its complaint solely because a private arbitrator previously issued a ruling would be inconsistent with our statutory mandate to hear such complaints.

*Anchor Shipping*, 30 S.R.R. at 998, 2006 FMC LEXIS 19, at \*21-22.

The arbitration provision in the service contract and any request by MCS Industries to stay arbitration does not divest the Commission of jurisdiction over alleged violations of the Shipping Act. Moreover, the question of whether the Commission has jurisdiction over this complaint has already been adjudicated. Respondent may not now seek to relitigate the order finding that the Commission has jurisdiction. Therefore, the finding that the Commission has jurisdiction is reaffirmed on the same basis as in the February 4, 2022, Order Denying Dismissal.

If MSC Mediterranean Shipping wanted the issue of jurisdiction reviewed by the Commission, it should have requested review of the February 4, 2022, Order Denying Dismissal, not refused to provide discovery. The request for certification reiterates arguments previously rejected and is not timely. Therefore the request for certification is hereby **DENIED**.



### **C. Status of Discovery**

MSC Mediterranean Shipping argues that default judgements are disfavored in favor of the policy to decide cases on their merits, it has not acted in bad faith, and there is no actual prejudice to Complainant. OTSC Respondent Response at 7-26.

MCS Industries argues that MSC Mediterranean Shipping has violated multiple discovery orders, including in its response to the order to show cause, and had failed to appeal any of the orders to which it objects. OTSC Complainant Response at 3-7.

Default judgements are disfavored and a last resort, which is why MSC Mediterranean Shipping was provided multiple opportunities to cure their discovery deficiencies. Indeed, to expedite the proceeding, on May 4, 2022, the undersigned agreed to issue a letter of request under the Hague Convention, which the Swiss court responded to on June 29, 2022, finding that this proceeding does not fall within the scope of application of the convention. MSC Mediterranean Shipping refused to follow the rulings of the undersigned Judge or the Swiss Judge and instead filed an *ex parte* request with the executive branch.

As explained in the July 29, 2022, Order Requiring Production of Discovery, the Supreme Court has held “that the Hague Convention did not deprive the District Court of the jurisdiction it otherwise possessed to order a foreign national party before it to produce evidence physically located within a signatory nation.” *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct. for S. Dist.*, 482 U.S. 522, 539-40 (1987). A party seeking an order to apply Hague Convention procedures in lieu of the procedures set forth in the Federal Rules of Civil Procedure must demonstrate that a specific foreign law “actually bars the production or testimony at issue.” *Alfadda v. Fenn*, 149 F.R.D. 28, 34 (S.D.N.Y. 1993). “In order to meet that burden, the party resisting discovery must provide the Court with information of sufficient particularity and specificity to allow the Court to determine whether the discovery sought is indeed prohibited by foreign law.” *Id.*

MSC Mediterranean Shipping is alleged to be one of the largest container lines in the world. It has voluntarily chosen to conduct business in United States ports and is regulated by the Federal Maritime Commission. It has not met its burden to show that the discovery sought is prohibited by foreign law and the undersigned is not required to resolve a conflict between the judicial and executive branches in Switzerland. Moreover, the *ex parte* ruling from the Federal Council does not overrule the judicial finding, but rather denies the request for authorization and states that the request for mutual assistance may be refiled with the court. Federal Council Decision at 3-4.

This proceeding is at an impasse as MCS Industries cannot proceed with its case without the discovery and MSC Mediterranean Shipping has refused to provide the discovery despite multiple orders to do so. Therefore, the remaining issue is whether the issuance of a default decision is the appropriate remedy.

### **D. Default Factors**

Both parties refer to the factors identified in *Webb v. District of Columbia*.

In *Shea v. Donohoe Construction Company*, 254 U.S. App. D.C. 175, 795 F.2d 1071 (D.C. Cir. 1986), we set forth three basic justifications that support the use of dismissal or default judgment as a sanction for misconduct. First, the court may decide that the errant party's behavior has severely hampered the other party's ability to present his case--in other words, that the other party "has been so prejudiced by the misconduct that it would be unfair to require him to proceed further in the case." Second, the court may take account of the prejudice caused to the judicial system when the party's misconduct has put "an intolerable burden on a district court by requiring the court to modify its own docket and operations in order to accommodate the delay." And finally, the court may consider the need "to sanction conduct that is disrespectful to the court and to deter similar misconduct in the future." A sanction imposed pursuant to any of these considerations must be based on findings supported by the record.

*Webb v. District of Columbia*, 146 F.3d 964, 971 (D.C. Cir. 1999) (citations omitted). Although only one of the *Webb* factors is needed to support a default judgement as a sanction for misconduct, here, all three factors are present.

### **1. Prejudice to Party**

MSC Mediterranean Shipping argues that: "Substantial discovery has already been exchanged among the parties on the core issues of the case" and discusses "the relationship of the discovery already provided to the issues in the case" to demonstrate that there is no potential prejudice from nonproduction that justifies default. OTSC Respondent Response at 12-13.

MCS Industries contends that the "Order Granting Motion to Compel contained over a dozen individual orders requiring Mediterranean to respond to well over a dozen discovery requests. Each of those orders came with a finding that Complainant was entitled to the requested discovery because it was relevant to Complainant's well-pled claims" and that "Mediterranean has not answered any of Complainant's first set of interrogatories or produced any additional documents in response to that Order, leaving both that Order and the more recent Order Requiring Production entirely unfulfilled." OTSC Complainant Response at 8-9.

Here, the dispute is not about a specific piece of evidence in Switzerland, but rather, the order to compel identified over a dozen different categories of information that needed to be disclosed. Order Granting Motion to Compel at 4-13. As has been previously found, Complainant is entitled to this discovery which is relevant to the claims it raised and necessary to establish the elements of the alleged Shipping Act violations. "MSC Mediterranean Shipping cannot limit its discovery to what it believes are the core issues in this proceeding nor can it require MCS Industries to produce evidence that claims are valid before producing discovery." *Id.* at 5. Throughout this proceeding, MSC Mediterranean Shipping has attempted to limit the scope of the claims and discovery to preclude review of its practices. However, it is in part these very practices that the Commission needs to review to determine whether there is a Shipping Act violation. Moreover, if MSC Mediterranean Shipping objected to the rulings in the Order Granting Motion to Compel, it could have sought to appeal that order at that time. Its attempt to relitigate the relevance of the discovery ordered is not timely and not persuasive.

The discovery compelled applied to broad categories of information and would likely have led to additional discovery requests. For example, the questions regarding identifying individuals with knowledge, communications concerning Complainant, and identifying potential witnesses may have led to depositions and additional evidence. Denial of the discovery compelled significantly limited MCS Industries' ability to discover information relevant to its claims and the defenses. Therefore, a lesser sanction such as directing that certain matters be taken as established, prohibiting certain claims or defenses, or striking pleadings would not be effective to remedy the failure to provide such broad discovery. Due to the prejudice to MCS Industries from nonproduction, default is the appropriate sanction.

MSC Mediterranean Shipping's failure to provide discovery, even after the Swiss court ruled on the letter of request in June 29, 2022, significantly delayed this proceeding. This delay further prejudices MCS Industries, which has requested sanctions on a number of occasions. *See, e.g.*, February 28, 2022, joint status report; April 4, 2022, joint status report; September 2, 2022, opposition to motion for extension of time. Indeed, "prejudice resulting from unreasonable delay may be presumed as a matter of law." *Peart v. City of New York*, 992 F.2d 458, 462 (2d Cir. 1993). Over time, witness memories may recede and it may be more difficult to obtain relevant evidence. Moreover, the amended complaint, in part, extended the timeframe at issue, and alleged that the violations were "continuous and ongoing." Amended Complaint at 20, 22, 23. It is therefore reasonable to find that the delays due to Respondent's intransigence exacerbates Complainant's injury. Thus, the delay further prejudices MCS Industries and is an additional basis to find that default is the appropriate sanction.

## **2. Prejudice to Judicial System**

MSC Mediterranean Shipping argues that "the facts present here do not bear any resemblance to those in which a default judgment has been entered to protect a court's docket" and "there is no trial date set, nor any other dates, and there are viable alternatives to resolve the issues in a manner that would allow discovery to move forward." OTSC Respondent Response at 25.

MCS Industries asserts that default is justified because of delay and burden created by MSC Mediterranean Shipping's disregard for its discovery obligations and discovery orders, stating that "Mediterranean's discovery misconduct has dominated this case, occasioning multiple delays and rounds of unnecessary filings—all of which have imposed burdens both on Complainant, a much smaller entity than Mediterranean, and on the Presiding Officer's own docket." OTSC Complainant Response at 10.

The Commission has stated that: "Agencies must protect their integrity and assure the orderly conduct of business in order to maintain their effectiveness. Adherence to agency procedure is necessary to maintain the agency's integrity and to ensure the orderly conduct of agency business in a manner protective of the rights of all parties." *Interpool*, 22 F.M.C. at 767. In *Interpool*, the Commission found that dismissal was "the only appropriate sanction under these circumstances" where the Complainant failed to respond or object to discovery and that conduct was willful and deliberate. *Id.* at 768.

There have been multiple deadlines set in this proceeding, which have not been met due to MSC Mediterranean Shipping's failure to provide discovery. Those deadlines include:

- In the Notice of Filing of Complaint and Assignment, issued August 3, 2021, the Commission required an initial decision to be issued by August 3, 2022.
- The September 23, 2021, scheduling order which adopted the parties' proposed schedule, required discovery to be completed by January 27, 2022.
- The December 21, 2021, revised scheduling order indicated that the "extension proposed by the parties is excessive," and granted the parties "three months to complete all remaining discovery" setting a date of March 22, 2022, for close of discovery and June 1, 2022, for all briefs to be filed.
- The March 4, 2022, order on proposed revised schedule and discovery notice ordered the parties to "continue to exchange discovery in an expeditious fashion."
- The July 29, 2022, order requiring production of discovery denied "MSC Mediterranean Shipping's request to resubmit a request to Swiss authorities for assistance with discovery" and ordered MSC Mediterranean Shipping "to provide any outstanding discovery by August 29, 2022, including the discovery ordered to be produced in the Order Granting Motion to Compel."
- The September 8, 2022, order denying Respondent's motion for an extension of time and order to show cause ordered "that by September 22, 2022, MSC Mediterranean Shipping either provide the required discovery or show cause why default judgment should not be entered against it."

The failure to meet these deadlines has disrupted the orderly conduct of agency business and burdened the Commission's docket, requiring multiple revisions of the schedule to accommodate the delays. The delays caused by the failure to produce discovery have prejudiced MCS Industries, the Commission, and the shipping public. Despite multiple clear warnings that failure to produce discovery could lead to a default judgement, MSC Mediterranean Shipping has continued to assert that it will not produce the discovery ordered. Accordingly, default is appropriate.

### **3. Deterrence**

MSC Mediterranean Shipping argues it has not acted in bad faith, there is no willful misconduct, and that it "continues to work in good faith to try to resolve the impasse created by the Geneva court ruling." OTSC Respondent Response at 2, 9-10.

MCS Industries asserts that default is justified by "Mediterranean's disregard for the jurisdiction of the FMC, the Presiding Officer's Orders, and the requirements of the FMC's Rules [which] fulfills the third *Webb* justification, regarding the need to deter conduct disrespecting the tribunal." OTSC Complainant Response at 12. MCS Industries further states that "Mediterranean and other non-U.S. ocean common carriers, which collectively dominate the

market for global transoceanic shipping, could employ the same tactics to thwart discovery that Mediterranean has employed in this case.” OTSC Complainant Response at 13.

The Commission addressed the importance of deterrence, quoting the Supreme Court and stating:

“[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.”

*Interpool*, 22 F.M.C. at 766 (quoting *NHL v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976)).

MSC Mediterranean Shipping has not provided a narrow list of documents or witnesses located in Switzerland that it claims are protected. Rather, it asserts that that it “has provided substantial discovery on the core issues in the case” and it “has made substantial document productions, only a subset of discovery items remain outstanding, and those items could be addressed without recourse to a default judgment.” OTSC Respondent Response at 10; OTSC Respondent Reply at 13. It is not clear whether the refusal to provide discovery is in fact because information is located in Switzerland or whether MSC Mediterranean Shipping is refusing to provide the discovery because it disagrees with the findings related to the Commission’s jurisdiction and scope of these proceedings.

Although MSC Mediterranean Shipping initially requested the letter of request and proposed language for it, MSC Mediterranean Shipping has refused to follow the findings of the Swiss court and instead engaged with Switzerland’s executive branch, which did not overrule the Swiss court but rather indicated that a letter of request could be refiled. This suggests that MSC Mediterranean Shipping will not follow rulings of the courts in Switzerland unless those rulings are in its favor. The refusal to abide by the decisions of the Swiss Judge and the undersigned Judge, even after multiple warnings that such refusal could result in a default decision, are therefore willful and deliberate. *See Kawasaki Kisen Kaisha*, 2014 FMC LEXIS 36, at \*17.

Given that MSC Mediterranean Shipping has voluntarily chosen to conduct business in United States ports and is regulated by the Federal Maritime Commission, it must abide by Commission orders. And, where appropriate, the undersigned is willing to comply with relevant Hague Convention requirements. However, parties are expected to follow the rulings issued in response to those requests and regulated entities cannot be allowed to hide evidence overseas. MSC Mediterranean Shipping’s repeated failure to comply with multiple orders issued in this proceeding, even though it had an opportunity to seek review of the orders and failed to do so, and its failure to abide by the determination of the Swiss court, even though the parties requested a ruling from that court, undermines its position that it acted in good faith. MSC Mediterranean Shipping’s refusal to follow judicial orders prevented this proceeding from moving forward on the merits of the case and does not reflect a respect for the judicial process. This type of conduct cannot be permitted in Commission adjudications.

Moreover, the violations alleged in the amended complaint are of national significance, for example, that one of the largest container lines in the world “sought to take advantage of

unprecedented high pricing by forcing shippers with service contracts, like Complainant, to resort to spot market purchases” by the “practice of systematically failing to meet its quantity commitments to Complainant between certain ports.” Amended Complaint at 1-2. Resolution of these allegations would provide clarity and guidance in the marketplace and benefit not just these parties, but also the shipping public.

MSC Mediterranean Shipping is a party in a number of other proceedings at the Commission and therefore resolution of this issue is necessary to deter similar conduct from MSC Mediterranean Shipping or other parties in Commission proceedings. Therefore, default is the appropriate remedy.

### **E. Remedy**

MCS Industries seeks reparations for actual damages it incurred in the amount of \$480,719 for the 2020-2021 shipping year, plus \$463,936 for the first three months of the 2021-2022 shipping year. Complainant thus seeks a total of \$944,655 in reparations, plus interest, pursuant to 46 U.S.C. Section 41305(a). OTSC Complainant Response at 19.

MSC Mediterranean Shipping asserts that MCS Industries must prove its damages and argues that there can be no default on the issue of damages because the discovery sought does not relate to that issue. OTSC Respondent Reply at 14-15.

The “general rule when respondents have defaulted is to base findings for complainants on the well-pleaded allegations in their complaints and to award money damages for specified liquidated amounts requiring little or no calculations.” *Go/Dan Industries, Inc. v. Eastern Mediterranean Shipping Corp.*, 1998 FMC LEXIS 5, \*5-6 (ALJ Dec. 10, 1998) (Adm. final Jan. 27, 1999); *see also Shipco Transport Inc. v. Jem Logistics, Inc.*, 2013 FMC LEXIS 34, \*2 (FMC Aug. 21, 2013).

The order to show cause clearly stated that the “merits of the proceeding and remedy are not at issue and should not be addressed in these filings” and indeed, without the evidence MCS Industries is entitled to, the merits cannot be reached at this stage. Order Denying Respondent’s Motion for an Extension of Time and Order to Show Cause at 2. Respondent will not be allowed to pick and choose which elements of the merits of this case it wishes to litigate. Therefore, it is necessary and appropriate to utilize the well-pleaded allegations in the amended complaint to determine reparations. Moreover, the Commission’s default rule specifically permits submission of additional information regarding reparations, stating: “The presiding officer may require additional information or clarification when needed to issue a decision on default, including a determination of the amount of reparations or civil penalties where applicable.” 46 C.F.R. § 502.65(c).

Regarding damages, the amended complaint states:

119. During the term of the 2020 Service Contract, Respondent’s misconduct alleged herein caused Respondent to carry only 1101 of the 1400 contracted TEUs, forcing Complainant to secure 299 TEUs on the relevant lanes via the spot market or from other carriers at significantly increased prices. In total,

Respondent paid at least \$400,000 more for carriage of those TEUs than the rates set forth in the 2020 Service Contract.

120. During the first three months of the 2021 Service Contract, prior to the filing of the Verified Complaint in this action, Respondent's misconduct caused Respondent to carry the equivalent of only 59 of the 182 contracted TEUs, forcing Complainant to secure at least 123 TEUs on the relevant lanes via the spot market or from other carriers at significantly increased prices. In total, Respondent paid at least \$400,000 more for carriage of those TEUs than the rates set forth in the 2021 Service Contract.

Amended Complaint at 24.

MCS Industries asserts that it "is seeking reparations equaling amounts in excess of its service contract rates with Mediterranean that Complainant had to spend on 'spot market' purchases of ocean carriage in order to ship cargo between port pairs covered by its service contracts with Mediterranean that should have been carried by Mediterranean at service contract rates." OTSC Complainant Response at 19.

MCS Industries seeks \$480,719 for the 2020-2021 shipping year plus \$463,936 for the first three months of the 2021-2022 shipping year, amounting to a total of \$944,655 in reparations. The amount of reparations sought by MCS Industries is consistent with the request in the amended complaint and is the type of damages appropriate for the claimed violation of the Shipping Act. Because no findings are made on the merits, a cease and desist order is not issued. Accordingly, MCS Industries is awarded a total of \$944,655 in reparations. Interest shall be computed from the last day for which reparations are sought, July 31, 2021.

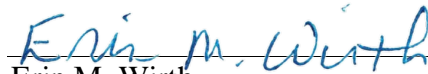
MCS Industries also notes that it has incurred a total of \$651,304.73 in attorney fees, costs, and expenses through September 30, 2022, and that the "burden of attorney fees on Complainant has been exacerbated by Mediterranean's discovery misconduct." OTSC Complainant Response at 19. Commission Rule 254 states that "to recover attorney fees, the prevailing party must file a petition within 30 days after a decision becomes final." 46 C.F.R. § 502.254(c). Therefore, the request for attorney's fees is premature at this point and denied.

#### **IV. Order**

Upon consideration of the parties' arguments, the record herein, and for the reasons stated above, it is hereby

**ORDERED** that a default decision with prejudice be entered against MSC Mediterranean Shipping because of its willful and deliberate failure to provide discovery. It is

**FURTHER ORDERED** that MSC Mediterranean Shipping pay a total of \$944,655, plus interest from July 31, 2021, in reparations to MCS Industries.

  
Erin M. Wirth  
Chief Administrative Law Judge