

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

CERTIFIT, INC., *Complainant*

v.

EVERGREEN SHIPPING AGENCY (AMERICA) CORP.,
AS AGENT FOR EVERGREEN LINE, EVERGREEN GROUP
D/B/A EVERGREEN LINE, *Respondent*.

DOCKET NO. 23-03

Served: February 06, 2025

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

INITIAL DECISION¹

I. INTRODUCTION

A. Overview

Complainant CertiFit, Inc. (“CertiFit”) commenced this proceeding by filing a complaint alleging Respondent Evergreen Shipping Agency (America) Corp. (“EGA” or “Evergreen America”), as Agent for Evergreen Line, Evergreen Group d/b/a Evergreen Line had violated the Shipping Act of 1984, as amended (“Shipping Act”). CertiFit alleges that Evergreen America agreed to transport 1000 twenty-foot equivalent units (“TEUs”) from Taiwan to inland warehouses in Salt Lake City, Utah, and Memphis, Tennessee, but cancelled bookings or failed to release space on its vessels, which forced CertiFit to purchase space on the spot market at “significantly increased expense;” resold previously contracted space on the spot market or to shippers willing to pay a higher premium; and withheld bookings in order to force CertiFit to sign an amendment to the service contract reducing its Minimum Quantity Commitment (“MQC”) to limit Evergreen America’s liability under the service contract, all in violation of 46 U.S.C. §§ 41102(c) and 41104(a)(2), (5), (9), and (10). Complaint at 3-4; Brief at 7-8.

Evergreen America filed an answer denying the allegations² and raising twenty-four (24) affirmative defenses, including in part: lack of jurisdiction; failure to state a claim under which

¹ This initial decision will become final within 22 days of service of this decision in the absence of exceptions filed by either party or review by the Commission. 46 C.F.R. § 502.708(c).

² Evergreen’s answer consisted of blanket denials, denials of information sufficient to form a belief, and admissions of two (2) paragraphs of the complaint, along with 24 affirmative defenses and two “reservation of rights” paragraphs. None of the responses provided any factual information on which the responses were based.

relief may be granted; lack of liability; damages were caused by acts of third persons; that the service contract at issue contains specific remedies for “Carrier’s failure to meet the annual Minimum Quantity Commitment;” the complaint alleges breach of contract claims rather than Shipping Act violations; EGA’s conduct was “neither unjust or unreasonable;” third parties were responsible for any alleged damages; failure to allege “the essential elements of 46 U.S.C. § 41102(c), 41104(a)(2), 41104(a)(5), 41104(a)(9), and/or 41104(a)(10);” CertiFit breached the contract; the alleged conduct does not constitute a practice within the meaning of § 41102(c); EGA “acted as an agent of a disclosed principal;” and CertiFit failed to mitigate its damages.³ Answer at 1-5.

As elaborated more fully below, none of CertiFit’s claims against EGA are successful because the Commission lacks both subject matter and personal jurisdiction over Respondent. CertiFit entered into a service contract with the carrier, Evergreen Line A Joint Service Agreement (“Evergreen Line” or “ELJSA”), consisting of five carrier lines, which was executed by EGA as the agent on behalf of Evergreen Line. The evidence shows that Evergreen America acted solely as an agent of Evergreen Line, the ocean common carrier, who is not a party to this proceeding. Based on the facts of this proceeding, CertiFit did not establish that Evergreen America is a regulated entity under Sections 41102(c) or 41104(a) of the Shipping Act. Because CertiFit did not establish jurisdiction, the complaint is dismissed.

B. Procedural History

On May 4, 2023, the Commission issued a notice of filing of complaint and assignment, initiating this proceeding. On May 25, 2023, EGA filed an answer to the complaint. On July 21, 2023, a scheduling order issued. On December 1, 2023, Complainant filed its brief, proposed filings of fact, appendix, motion for confidential treatment, and an Errata to its brief.⁴

On December 8, 2023, an order issued denying Complainant’s motion for confidential treatment and ordering Complainant to “resubmit the motion and both confidential and public versions of the Revised Appendix that correctly designates only those portions of its exhibits that are confidential....” Order on Motion for Confidential Treatment at 3. On December 18, 2023, CertiFit filed a revised motion for confidential treatment that includes a table describing the pages of its revised appendices for which it seeks confidential treatment, as well as the revised appendices.

On January 8, 2024, EGA filed its opposition brief, response to proposed findings of fact, proposed findings of fact, and appendix. On January 22, 2024, CertiFit filed its reply brief and

³ Several other affirmative defenses were raised but not pursued in Evergreen’s Opposition.

⁴ The parties’ filings are abbreviated as follows: Complainant’s initial brief (“Brief”), Complainant’s proposed findings of fact (“CPFF”), Respondent’s reply brief (“Opposition”), Respondent’s proposed findings of fact (“RPFF”), Respondent’s response to Complainant’s proposed findings of fact (“RRPFF”), Complainant’s reply brief (“Reply Brief”), and Complainant’s response to Respondent’s proposed findings of fact (“CRPFF”).

response to EGA’s proposed findings of fact. On January 23, 2024, CertiFit filed a revised reply brief to correct an omission that did not change the page numbers or argument.

On May 29, 2024, a Second Order to Correct Filings (“Second Order”) issued, ordering the parties to submit revised filings with citations “to specific exhibits and bates numbers” and to correct other issues. Second Order at 2. EGA’s revised filings were received on May 31, 2024, and CertiFit’s revised response to EGA’s revised proposed findings of fact was received on June 7, 2024. The case is now ripe for decision.

C. Arguments of the Parties

CertiFit asserts that the Commission has jurisdiction over EGA because it is a vessel-operating common carrier; or alternatively, EGA, as agent of its disclosed principal, Evergreen Line Joint Service Agreement, manifested its intent to be bound and/or acted outside the scope of its authority which supports liability under the Shipping Act. Brief at 24-34, Reply Brief at 5-7. CertiFit maintains that EGA’s intent to be bound is demonstrated by EGA’s “decision to suspend CertiFit’s bookings until the proposed amendment—which CertiFit never requested—was executed.” *Id.* at 7. It further contends that the Commission has subject matter jurisdiction over the claims because the allegations involve elements peculiar to the Shipping Act. Reply at 9.

CertiFit alleges that it entered into a service contract with EGA for the latter “to transport 1000 TEUs from ports in Taiwan to CertiFit’s inland warehouses located in Salt Lake City, Utah and Memphis, Tennessee” but EGA’s unreasonable “practice[s] of accepting bookings and then cancelling” or failing to release space for booking resulted in EGA carrying a fraction of the agreed upon amount of cargo. Brief at 7-8. These practices resulted in CertiFit being forced to seek space accommodations on the spot market at substantially higher rates than those it had negotiated. Brief at 50. In addition, in a guise to reduce its minimum quantity commitment, EGA “proposed an amendment to the 2020 Service Contract indicating that it needed to add the port of Taipei, Taiwan.” CertiFit maintains that the real reason that EGA proposed “the amendment was to reduce Evergreen’s⁵ quantity commitment to 25 TEUs—a 975 TEU reduction from the agreed upon commitment, which would also limit its liability under the 2020 Service Contract.” *Id.* at 8. CertiFit alleges that these and related actions by EGA, violate 46 U.S.C. §§ 41102(c), 41104(a)(2), 41104(a)(5), 41104(a)(9), and 41104(a)(10).

EGA contends that it is not a common carrier, has never held itself out to be one, and is not otherwise operating as a regulated entity, and that Evergreen Line A Joint Service Agreement is the disclosed principal and the entity with whom CertiFit contracted as is evidenced in the subject Service Contract, the Bills of Lading, all of the correspondence, and the EGA website. Opposition at 11-12. EGA further contends that the FMC lacks jurisdiction over CertiFit’s claims, inasmuch as EGA is not a common carrier, marine terminal operator, or ocean transportation intermediary; and CertiFit has failed to establish other required elements of each of the Shipping Act violations alleged. Opposition at 8-27.

⁵ In accord with its argument that Evergreen America is a common carrier, CertiFit refers to “Evergreen” throughout its Brief and Reply, typically not distinguishing between Evergreen America and Evergreen Line.

D. Motion for Confidential Treatment

The parties did not make the Commission privy to any agreement on confidentiality they may have reached prior to engaging in discovery, but CertiFit filed a motion for confidentiality when it submitted its initial brief and resubmitted a revised motion pursuant to the Order on Motion for Confidential Treatment. Respondent did not file a motion for confidentiality.

Commission Rule 502.5(b), requiring parties to justify confidential treatment by motion, states in part:

This motion must identify the specific information in a document for which protection is sought and show good cause by demonstrating that the information is a trade secret or other confidential research, development, or commercial information pursuant to § 502.141(j)(1)(vii). The burden is on the party that wants to protect the information to show good cause for its protection.

46 C.F.R. § 502.5(b). Complainant's revised motion for confidentiality significantly limits the material for which they now request confidential treatment.⁶ For example, only portions of exhibits are now subject to confidentiality, and CertiFit has removed from its confidentiality request information that had already been made public in filings.

However, CertiFit has also requested confidentiality for portions of the service contract for which there is no genuine confidential interest, including the identities of the parties to the contract, stated generally as "Merchant" and "Carrier" (CX13-0795); what records are maintained under the service contract, by what entity, and where (*Id.*), and section 9 of the service contract (CX13-0800); and section 2.1 of the service contract, which states that the carrier's rules tariff apply and that the merchant's cargo will be carried by vessels owned or operated by the carrier (CX13-0796). These portions of the service contract do not reveal trade secrets or "other confidential research, development, or commercial information." § 502.141(j)(1)(vii). Further, CertiFit has not established good cause to redact those portions of the service contract. 46 C.F.R. § 530.4 and 46 U.S.C. § 40502(b) were considered in making this decision to deny confidentiality to these generalized portions of the service contract. Accordingly, CertiFit's Revised Motion for Confidential Treatment seeking confidential treatment of the redacted portion of CX13-0795; section 9 found at CX13-0800; and section 2.1 found at CX13-0796, is denied.

Documents such as CX12 that were filed in a foreign language and not translated as required by Rule 7 were not considered (*see* 46 C.F.R. § 502.7; Scheduling Order at 4).

This decision will strive to minimize reference to rates, terms, and other sensitive commercial information regardless of whether it is in the public domain. However, to the extent

⁶ Only CX bates ranges (corresponding to Complainant's appendix) have been included among Complainant's confidentiality requests. No RX bates numbers (corresponding to Respondent's appendix) have been indicated.

that such omission would impact the readability of the decision and where it has already been made public, such information has been included. For clarity, any data or statement detailed or made explicit in this decision is not confidential.

Accordingly, it is hereby ordered that CertiFit's Revised Motion for Confidential Treatment be **GRANTED IN PART**. To the extent that the redacted portion of CX13-0795, section 9 at CX13-0800, and section 2.1 at CX13-0796 are described above as not being entitled to confidential treatment, the revised motion requesting confidentiality is **DENIED IN PART**.

E. Evidence

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

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

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

II. FINDINGS OF FACT ("FOF")

A. Entities

1. Complainant CertiFit, Inc. is a corporation existing under the laws of the State of Utah with its principal place of business in Salt Lake City, Utah. CPFF ¶ 1.
2. CertiFit is an importer of aftermarket auto parts from Asia, primarily Taiwan. CPFF ¶ 2.
3. Respondent Evergreen Shipping Agency (America) Corp. is a corporation existing under the laws of the State of New Jersey with its principal place of business located in Jersey City, New Jersey. RRPFF ¶ 3.
4. Evergreen America is an agent for Evergreen Line A Joint Service Agreement. RX 2; RX 10.

5. Evergreen Line A Joint Service Agreement (FMC #011982) consists of 1) Evergreen Marine Corp. (Taiwan) Ltd., 2) Evergreen Marine (UK) Limited, 3) Italia Marittima SPA, 4) Evergreen Marine (Hong Kong) Ltd., 5) Evergreen Marine (Singapore) Pte. Ltd. RX 2; RX 10.

B. 2020 Service Contract and Amendments

6. The 2020 service contract at issue, numbered SC82616, was for the shipment of goods by sea from Taiwan to the United States and covered the period from April 27, 2020 to April 30, 2021, calling for a Minimum Quantity Commitment (“MQC”) of 1,000 twenty-foot equivalent units (“TEU’s”). RX 10, 12, 14; CX13-0794, CX13-0796, CX13-0798; *see also* CPFF ¶ 28; RPPFF ¶ 28; CX7-0538 - CX7-0541.

7. The service contract listed as Merchant Name, CertiFit, and listed as Carrier Name:

Evergreen Line
A Joint Service Agreement (FMC #011982)
consisting of
1) Evergreen Marine Corp. (Taiwan) Ltd.
2) Evergreen Marine (UK) Limited
3) Italia Marittima SpA
4) Evergreen Marine (Hong Kong) Ltd.
5) Evergreen Marine (Singapore) Pte. Ltd.

RX 10. The service contract also specified: “This is a service contract . . . between ‘CARRIER’ and ‘MERCHANT’ (or, jointly, ‘PARTIES’).” RX 11; CX13-0795.

8. Section 2.1 of the service contract states: “Cargo covered by this Contract shall be carried by vessels owned, chartered, managed or operated by the Carrier [Evergreen Line] under the provisions of the Carrier’s Bill of Lading and the Rules and Regulations of the pertinent Tariff(s) of General Applicability.” RX 12; CX13-0796.
9. The service contract included signature lines for a representative from CertiFit, Vyron Ostler, and for a representative from “Evergreen Shipping Agency (America) Corp. As Agent for Evergreen Line,” Deputy Junior Vice President, Tom Chen. RX 10; CX13-0794; CX7-0541; *see also* CPFF ¶ 23; RPPFF ¶ 23.
10. No fully executed 2020 service contract was put into evidence by the parties, but CertiFit indicated its confirmation by email, and both parties agree that this service contract covered the period from April 27, 2020 to April 30, 2021 and called for a Minimum Quantity Commitment of 1,000 TEU’s. CX7-0540 - CX7-0541; CX7-0582; RPPFF ¶ 4; CRPFF ¶ 4; RX 2, RX 12.
11. Section 3.1 of the service contract states:

3.1 The Carrier and Merchant agree that in light of the fact that the volume and timing of cargo tendered hereunder for particular sailings is in the control of the Merchant, who cannot specify with certainty the amount of cargo which it will

tender on any given date, and by virtue of the fact that the Carrier has a finite amount of space on its vessels in which to carry the Merchant's cargo as well as cargo carried pursuant to Service Contracts entered into with other Merchants in the trade, some flexibility is needed by the Carrier with respect to its service commitment to the Merchant hereunder. Accordingly, the parties hereto agree that in the event that the Merchant is unable to secure space on any particular vessel of the Carrier . . . then, upon the Merchant's written request submitted within seven (7) working days of such occurrence . . . the Merchant may elect one of the following options:

3.2.1 The Carrier will subtract the quantity of cargo tendered but not carried on Carrier's vessel from the Minimum Quantity Commitment. However, any such reduction of Minimum Quantity Commitment shall not exceed the quantity counted on a pro rata basis. Such pro rata basis shall be defined as the Minimum Quantity Commitment divided by the Carrier's total sailings from all ports of loading named in Article 4 (cumulatively) during the term of the Contract, or,

3.2.2 *If the Merchant does not elect to reconcile the shortage by reducing the Minimum Quantity Commitment set forth in Article 5, pursuant to subparagraph 3.2.1 above, then such shortage will be reconciled upon expiration of the Contract by extending the term of the Contract pursuant to the following formula:*

$$\frac{\text{No. of TEUS (FEUS if applicable) deductible pursuant to Clause 3.2.1}}{\text{The pro rata basis (as defined in Clause 3.2.1)}} = \text{Maximum Number of Additional Sailings}$$

Notwithstanding the above formula, *in no event shall the extension exceed ten (10) consecutive sailings*. The extension of the term of this Contract pursuant to this Section must be filed in writing on or before the expiration date with the FMC as per 46 C.F.R. 530.8.

RX 13-14 (emphasis added); CX13-0797 - CX13-0798 (emphasis added).

12. Section 8.1 of the service contract provides a liquidated damages clause. RX 16; CX13-0800.
13. Section 8.2 of the service contract provides: that if the Carrier does not fulfill its service commitment, the Merchant may elect between a reduction of the MQC or an extension of the contract under certain additional limitations and terms. RX 16; CX13-0800.
14. In or around January 2021, an amendment to the service contract was discussed, but no January amendment was signed by the parties. RPF 13-14; CRPF 13-14.

15. On January 8, 2021, an Evergreen America employee emailed CertiFit offering a contract amendment that would add Taipei as an origin shipment option. CX7-0581; RX 38.
16. The January 2021 proposed amendment (numbered “SC82616-1”) offered an additional port but did not change the MQC, and the proposed amendment contained the same rate as the existing ports for shipments to Salt Lake City. RX 30-31, RX 38.
17. On January 14, 2021, an Evergreen America employee emailed CertiFit, writing “Happy Friday! All bookings held up at this time due to the contract has yet to be confirmed and filed to add Taipei. Please push Donnell or Vyron to do so soonest.” CX7-0586; *see also* CPFF ¶ 62; RPPFF ¶ 62.
18. There is no evidence that between January 2021 when the amendment to add a port was offered, and April 2021 when the service contract expired, that CertiFit’s bookings were improperly “held” to force a contract amendment or for any other reason.
19. The January 2021 amendment was not signed by CertiFit. RX 5; RPPF ¶ 14; CRPFF ¶ 14.
20. An amendment to the service contract was also discussed in mid to late April 2021. *See, e.g.*, CX7-0582 - CX7-0583; RX 45; RX 47-48; RX 65.
21. The April 2021 proposed amendment was also numbered “SC82616-1,” because the January amendment had not ultimately been accepted. CX5-0491; RX 50; *compare* CX5-0491- CX5-0495 (showing an amendment date of April 30, 2021) *with* RX 30 and RX 34 (showing an amendment date of January 1, 2021).
22. The April proposed amendment listed a reduced MQC and did not add the Taipei port. CX5-0492, CX5-0497; *see also* RX 51, RX 58. Evergreen America explained that it was offering the reduced MQC so that CertiFit would not be responsible for liquidated damages under the service agreement, when the contract terminated on April 30, 2021. RX 47; RX 12; RX 5-6; RPPF 15.
23. In a letter to Evergreen dated April 19, 2021, CertiFit indicated that it wished to implement section 3.2.2. of the service contract, such that Evergreen would extend the contract by an additional number of sailings to better satisfy the MQC, writing:

Evergreen has only shipped 157 40-foot high cube containers for CertiFit during the Agreement term, for a total of 353.25 TEUs. Therefore, Evergreen owes CertiFit 646.75 TEUs to satisfy its Service Commitment. . . . We note that Section 3.2.2. contains a formula for calculating the maximum number of additional ‘sailings’ that Evergreen must provide to meet its Service Commitment, with a maximum of ten. We also note that ‘sailings’ is not defined anywhere in the Agreement Looking at upcoming schedules of Evergreen’s sailings, we estimate three to five applicable sailings per month. Even at five sailings per month (sixty during the Agreement term), the number of additional sailings owed exceeds 10, and virtually any reasonable method of calculation will likely

be 10+ because Evergreen failed to meet its Service Commitment by an incredible 646.75 TEUs.

CX7-0582 - CX7-0584.

24. The parties continued to discuss a possible amendment to the agreement in the end of April, for example, an Evergreen America employee emailed CertiFit on April 28, 2021, writing:

As Ken mentioned, it is very important that the amendment to reduce the MQC is approved from your end to avoid any liquidated damages. We understand your concerns about the number of containers we have provided you this past year. All I can say is every shipping company was extremely challenged to satisfy their customers needs this year. We did our best, which may not be good enough for you, to supply space for all of our customers and the result is we weren't able to provide enough for many of them. As a result, we are able to reduce the MQC through the amendment and termination process We would like to continue doing business in the future but in the meantime it is very important for CertiFit to approve the amendment/termination.

RX 47.

25. CertiFit emailed Evergreen on April 29, 2021, stating:

CertiFit significantly exceeded the MQC, booking containers equal to more than 123% of the MQC, so any shortage of actual container shipments is completely Evergreen's fault, in violation of its Service Commitment. Evergreen clearly failed to meet its Service Commitment, because it only shipped approximately 28% of the containers CertiFit properly booked! Therefore, no reduction in the MQC is necessary since CertiFit obviously exceeded it, and no liquidated damages are possible. In order to correct Evergreen's violation of the contract, CertiFit is willing to accept the other remedy provided in the contract, which requires Evergreen to extend the contract by an additional number of sailings (not to exceed 10) in order to better satisfy its Service Commitment.

RX 65.

26. An Evergreen America employee also emailed CertiFit on April 29, 2021, writing "Please find the attached service contract for your review." RX 45.
27. No amendment was, however, signed by the parties prior to the expiration of the service contract. RPPF ¶ 17; CRPPF ¶ 17.
28. Less than 400 TEUs were carried by Evergreen Line under the 2020 service contract. RPPF ¶ 15 (asserting that Evergreen carried 365 TEUs); RX 78 (CertiFit letter

contending Evergreen failed to meet its 1000 TEU commitment “by an astonishing 646.75 TEUs”).

29. The parties continued to negotiate in May and June 2021, past the expiration of the service contract, regarding TEU volumes and pricing for additional shipments. *See, e.g.*, RX68-69; RX 71-72; RX 74-79. However, no new agreement was reached, and CertiFit ultimately initiated this proceeding. Complaint at 1-12; *see also* RPPF ¶ 22; CRPPF ¶ 22.

C. Agency Status of Evergreen America

30. The 2020 service contract executed by the parties specified Evergreen America’s status as agent for Evergreen Line on pages 1 and 7 of the agreement. RX 10 and CX13-0794 (noting below the Evergreen signature line, “Evergreen Shipping Agency (America) Corp. As Agent for Evergreen Line,”), RX 16 and CX13-080 (noting that the carrier’s records (Evergreen Line’s) would be available at “Evergreen Shipping Agency (America) Corp. as agent for Evergreen Line.”).
31. Email communications sent to CertiFit by Evergreen America employees regularly noted that Evergreen America was an agent for Evergreen Line. *See, e.g.*, RX 23-24 (August 19, 2020 email); RX 26 (November 24, 2021, email); RX 45 (April 29, 2021 email); RX 47 (April 28, 2021 email); RX 48 (April 28, 2021 email); RX 68 (May 21, 2021 email); RX 68-69 (May 19, 2021 email); RX 74 (June 21, 2021 email); RX 76-77 (June 2, 2021 email); CX7-0535 - CX7-0536 (April 2, 2020 email); CX7-0539 - CX7-0540 (April 27, 2020 email).
32. For example, the April 10, 2020 email to CertiFit, describing Evergreen’s 1000 TEU offer for the 2020 service contract was sent by an Evergreen America employee, with a signature line indicating “Evergreen Shipping Agency (America) Corporation (Los Angeles) as agents for: Evergreen Line.” CX7-0538 - CX7-0539.
33. On August 19, 2020, an Evergreen America employee emailed CertiFit, describing challenges Evergreen was facing related to the pandemic, and noting:

During the contracting process with Certifit and many of our customers, we made every effort to understand the needs of our customers in the upcoming 2020-2021 shipping season. As expected, very few companies knew exactly what to expect and as you mentioned the import volumes were relatively inconsistent as Q2 began. However, that changed dramatically as May rolled on into June and up until the present where we are experiencing extremely high volume demand which is outstripping capacity. . . .

[W]e appreciate Certifit awarding Evergreen a contract for 1000 TEU which equates to just under 10 FEU per week. Although Certifit started out slowly due to the Pandemic, understandably so, Certifit’s request for bookings have resumed. . . . Unfortunately, for Evergreen as I mentioned the demand is greater than the supply and we are finding it very difficult to satisfy any of our customers 100%.

We spoke with our management in Taipei regarding the future needs of CertiFit and at this point in time we are able to support CertiFit with approximately 5-8 FEU per week. It is possible that in some weeks we may be able to support with more space but we can commit to the 5-8 FEU. We do understand this may result in a shortfall in the service contract MQC of 1000 TEU and as stated in the contract we will reduce the MQC for those TEU that you wished to ship with Evergreen but were not able to due to space constraints.

RX 23-24 (noting in sender's signature line "Evergreen Shipping Agency (America) Corp. (Los Angeles Office) as agents for Evergreen Line").

34. On November 24, 2020, an Evergreen America employee emailed CertiFit, writing:

We receive another letter from you dated November 12th essentially stating very similar complaints as the previous letter you sent. My response below to the previous letter still applies as the market capacity and demand have not changed at all. In fact, it has become much worse since August as Evergreen, as well as many carriers, have faced an extreme shortage of equipment available in many far east locations. We are taking actions to try and reposition empty equipment to Asia as quickly as possible but the bottom line is that the demand for equipment in Asia has made it very difficult to satisfy any importers needs 100%.

We will continue to do our best to service you at the agreed upon rate level and extra free time that was originally signed in the service contract. To be clear, we have not required or requested CertiFit to take any rate increases since the inception of the current service contract.

RX 26 (noting in sender's signature line "Evergreen Shipping Agency (America) Corp. (Los Angeles Office) as agents for Evergreen Line").

35. On April 28, 2021, just prior to the end of the 2020 service contract, an Evergreen America employee emailed CertiFit regarding an amendment to reduce the MQC, writing:

[I]t is very important that the amendment to reduce the MQC is approved from your end to avoid any liquidated damages. . . . [W]e are able to reduce the MQC through the amendment and termination process.

RX 47 (noting in sender's signature line "Evergreen Shipping Agency (America) Corp. (Los Angeles Office) as agents for Evergreen Line"); *see also* RX 45 (sending a draft service contract and noting in sender's signature line "Evergreen Shipping Agency (America) Corporation (Los Angeles) as agents for Evergreen Line.")

36. On June 21, 2021, in discussions about a possible new contract, an Evergreen America employee emailed CertiFit, writing:

Regarding question 1 and 2, as explained in our previous response on June 3, there are many unforeseen and uncertain causes beyond Evergreen's control which can affect the container shipping supply chain, including, but not limited to, vessel delays, port congestion, equipment supply, railroad operation/ limitations as well as all Force Majeure conditions set out in our service contract. We will use our best effort to satisfy CertiFit's demand to reach the goal of 6x40'HQ/week (consist of mixed USMFS/USSLC, depends of operational availability). However, we cannot absolutely guarantee it for the reasons we explained above.

RX 74 (noting in sender's signature line "Evergreen Shipping Agency (America) Corporation (Los Angeles) as agents for: Evergreen Line").

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Controlling Authority

The Shipping Act regulates certain entities including ocean common carriers and ocean transportation intermediaries who are involved in the international transportation of cargo. 46 U.S.C. § 40102. These statutory definitions are also reflected in the Commission's regulations at 46 C.F.R. § 515.2. For purposes of this proceeding, the following definitions are considered:

A "common carrier" is a person that –

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

46 U.S.C. § 40102 (7).

The term "ocean common carrier" means a vessel-operating common carrier. 46 U.S.C. § 40102 (18).

There are no allegations that EGA is an ocean freight forwarder ("OFF"), a non-vessel-operating common carrier ("NVOCC"), or a marine terminal operator ("MTO"), so it is not necessary to include those definitions.

B. Burden of Proof

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

C. Discussion

Subject matter jurisdiction is established when a “person” files a complaint alleging a respondent violated the Shipping Act. 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has subject matter jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Docket No. 02-04, 2006 WL 2007808, at *10 (FMC May 10, 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co., Ltd.*, Docket No. 99-24, 2000 WL 1648961, at *15 (FMC Oct. 31, 2000). Less frequently challenged, in personam (personal) jurisdiction must also be established for the Commission to act on a complainant’s allegations. Here, CertiFit fails to demonstrate that EGA is an entity over which the Commission has jurisdiction.

CertiFit asserts that Evergreen America is a vessel-operating common carrier (“VOCC”), a regulated entity. CertiFit did not argue that Evergreen America is an NVOCC, which is a type of ocean transportation intermediary, or an MTO, which are also regulated entities under Section 41102(c) of the Shipping Act (Section 41104 (a) applies to common carriers only). Evergreen America maintains generally that it is not an NVOCC or a marine terminal operator, and the evidence does not support that it is either entity. Rather, the evidence establishes that Evergreen America is an agent of Evergreen Line.

During the period covered by the Complaint’s allegations, Section 41102(c) stated that a “common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” 46 U.S.C. § 41102(c).

The elements that must be established to prove a Section 41102(c) claim were specified by the Commission on December 17, 2018, as follows:

46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:

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

- (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
- (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
- (d) The practice or regulation is unjust or unreasonable; and
- (e) The practice or regulation is the proximate cause of the claimed loss.

Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018); 46 C.F.R. § 545.4.

As discussed below, CertiFit has not carried its burden of demonstrating that EGA is an ocean common carrier subject to the jurisdiction of the Commission. Therefore, there is no need to address whether the acts or omissions are occurring on a normal, customary, and continuous basis, nor is there a need to address whether the practice or regulation is the proximate cause of the claimed loss.

Similarly, Section 41104(a) claims require that CertiFit establish that EGA is a common carrier within the meaning of the Shipping Act to prove a violation. During the period covered by the Complaint's allegations, Section 41104(a) stated:

- (a) In general. – A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not – ...
 - (2) provide service in the liner trade that is – (A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under Chapter 405 of this title, unless excepted or exempted under section 40103 or 40501(a)(2) of this title;...
 - (5) for service pursuant to a service contract, engage in any unfair or unjustly discriminatory practice against any commodity group or type of shipment or in the matter of rates or charges with respect to any port;...
 - (9) for service pursuant to a service contract, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any port;...
 - (10) unreasonably refuse to deal or negotiate.

46 U.S.C. 41104(a).

1. Vessel-Operating Common Carrier

CertiFit alleges that “[a]t all relevant times hereto, Evergreen Shipping Agency (America) Corp. is a disclosed agent⁷ for the Evergreen Group and its constituent corporations. Respondent is a vessel-operating ‘ocean common carrier’ as that term is defined by 46 U.S.C. § 40102 (9).”⁸ Complaint at 5. CertiFit goes on to allege that the Commission has “personal jurisdiction over Respondent as an ‘ocean common carriers [sic]’ as set forth in 46 U.S.C. § 40102(18), that has entered into ‘service contracts,’ as that term is defined by 46 U.S.C. § 40102(21), with Complainant.” *Id.* CertiFit reiterates this assertion in its Brief:

For purposes of 46 U.S.C. §§ 41102(c), 41104(a)(2)(A), 41104(a)(5), 41104(a)(9), and 41104(a)(10), the Commission has jurisdiction over Evergreen because it is an ocean common carrier—*i.e.*, a “vessel-operating common carrier.”

Brief at 25.

CertiFit also reiterates in its Reply that EGA is a vessel-operating common carrier stating that “[t]he final element, use of a vessel on the high seas, is also present,” but it does not provide any evidence to support that statement. Reply at 6 (citing to CX4-0481 which shows the “Carrier Name: Evergreen Line” and “Account Name: CertiFit”). Evergreen America denies that it is a vessel-operating common carrier. Opposition at 11.

Addressing the first argument CertiFit makes, that Evergreen America is a VOCC, it acknowledges that to establish that Evergreen America is an ocean common carrier, it must demonstrate that EGA:

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

Brief at 25; 46 U.S.C. § 40102(7).

⁷ This identification of Evergreen America will be discussed further in CertiFit’s alternative argument.

⁸ It appears that CertiFit intended to cite to 46 U.S.C. § 40102(7), which defines a common carrier. 46 U.S.C. § 40102(9) defines a “controlled carrier” and CertiFit does not set forth any facts or make any arguments regarding controlled carrier status.

While the evidence does not support finding that Evergreen America is a VOCC, CertiFit’s arguments are addressed separately, by element, below.

a. Holds Itself Out to Provide Transportation by Water

First, Certifit asserts that the EGA website demonstrates that EGA holds itself out to the general public as a transporter of cargo. Brief at 26. CertiFit describes the website in its briefing – but Certifit did not introduce into evidence any proof of what the website stated, either on November 29, 2023 (when CertiFit indicates that it “last visited”), or at the time of the alleged conduct in 2020 to 2021. Accordingly, what the website may have stated at the time of the shipments at issue is unknown. Regardless, even if the website as of the time of the conduct alleged showed what CertiFit alleges—that it included “a ‘Do Business’ menu listing sailing schedules, links to book shipments via email or its website, and cargo tracking”—that does not establish that EGA held out itself, as opposed to ELJSA, as providing transportation of cargo by water. Brief at 26.

Moreover, EGA made it known that it was acting as an agent for a disclosed principal, ELJSA. In *Crocus Investments, LLC v. Marine Transport Logistics, Inc.*, the ALJ held that one respondent, Solovyev, did not act as an NVOCC, explaining: “Because Solovyev made it known that he was acting as an agent for the disclosed NVOCC principal MTL, Solovyev did not hold himself or RFG out to the public to provide transportation and did not assume responsibility for Complainants’ boats.” *Crocus Investments, LLC v. Marine Transport Logistics, Inc.*, Docket No. 15-04, 2016 WL 3457752, at *16 (ALJ June 17, 2016). Assertions that a website providing links for sailing schedules and booking shipments, without more information, is not sufficient to establish that Evergreen America held *itself* out as providing transportation by water in 2020-2021 or to override the fact that EGA made it known that it was acting as an agent of a disclosed principal.

The other conduct to which Certifit points as evidence of EGA holding itself out to the public as transporting cargo by water includes that EGA “negotiated its contract rates and terms with CertiFit directly, executed and filed the 2020 Shipping Contract, and provided superficial responses to CertiFit’s repeated concerns.” Brief at 27-28. To the extent that these actions could be relevant to determining that EGA was holding itself out as providing transportation of cargo by water, it disclosed its status “as agent for Evergreen Line” throughout these interactions and communications with Certifit. FOF 30-36. As for Certifit’s assertion that EGA was “directly involved” in “the decision to hold all Certifit’s bookings hostage,” it is unclear how this would relate to holding out. Brief at 28; FOF 18. Accordingly, CertiFit has not established that EGA held itself out as providing transportation of cargo by water.

b. Assumes Responsibility

CertiFit states that “Evergreen demonstrated its ability to cancel and book shipments requested by CertiFit, which necessarily involved choosing the vessels used to transport the accepted cargo consistent with sailing schedules established by Evergreen.” Brief at 28 (citing to CX4-0486). However, the evidence cited by CertiFit does not support that statement. The lack of evidence showing such ability to book and cancel shipments is in contrast to *CMI Distribution, Inc. v. Service By Air, Inc.*, where the record included shipping documents that, while containing

some ambiguity, “nonetheless showed that SBA ‘was listed either as shipper, consignee, notify party, the entity to be billed for the charges, or the entity to contact for their delivery.’” *CMI Distribution, Inc. v. Service By Air, Inc.*, Docket No. 17-05, 3 F.M.C.2d 83, 91, 2021 WL 3367603, at *9 (July 26, 2021) (citing to *CMI Distribution, Inc. v. Service By Air, Inc.* Docket No. 17-05, 2019 WL 4734318, at *13 (ALJ May 24, 2019)). Moreover, the ALJ in *CMI Distribution, Inc.* had other evidence on which to rely to find that respondent SBA assumed responsibility for the transportation, including that it issued its own bills of lading to complainant CMI. There are no similar shipping documents or relevant bills of lading here. The exhibit page to which CertiFit cites as evidence that EGA assumes “responsibility for the transportation of CertiFit’s cargo from the port of receipt to the port of destination” is a service agreement rate page that does not name either CertiFit or Evergreen America or Evergreen Line. CX4-0486. While CertiFit includes a number of bills of lading in its production, none of these indicate that they were issued by EGA to CertiFit.⁹

Accordingly, CertiFit has not carried its burden to establish this element by a preponderance of the evidence.

c. Uses a Vessel Operating on the High Seas

CertiFit’s evidence that EGA uses a vessel operating on the high seas is premised on the same evidence found lacking above. Contrary to CertiFit’s assertion that “it is undisputed that when Evergreen did carry CertiFit’s cargo, it was carried by a vessel operated by Evergreen between Taiwan and the United States,” no evidence shows that Evergreen America itself used a vessel to transport cargo. Brief at 30. Rather, section 2.1 of the service contract states that “Cargo covered by this Contract shall be carried by vessels owned, chartered, managed or operated by the Carrier,” which is identified as Evergreen Line. FOF 7, 8. Accordingly, CertiFit does not prove by a preponderance of the evidence that Evergreen America used a vessel to operate on the high seas.

2. Agent of a Disclosed Principal

In both its initial brief and again in its reply brief, CertiFit makes an alternative argument that if EGA is not a VOCC, it is “an agent of a disclosed principal (Evergreen Line Joint Service Agreement)” and is “liable in place of the principal due to Evergreen exceeding its intention to bind itself instead of, or in addition to, its principal and/or exceeding the scope of its authority.” Brief at 31; *also see* Reply at 6-10. While the Complaint identifies Evergreen Shipping Agency (America) Corp., As Agent for Evergreen Line, Evergreen Group d/b/a as Evergreen Line as the

⁹ EGA asserts that “Of the 133 total NVO house bills of lading disclosed by CERTIFIT, 30 bills of lading (covering 31 Containers) show carriage by EVERGREEN vessels. *See*, RX 7-8. However, all of them were under Ocean Alliance partners contracts (CMA/COSCO). *Id.* None of them were under EVERGREEN contract.” RPPF ¶ 26; Opposition at 17-18. CertiFit does not counter this assertion with citations to evidence, instead, responding in part that “the referenced bills of lading speak for themselves.” CRPF ¶ 26. Yet, there is nothing on the face of the bills of lading cited to by CertiFit connecting these documents to the service contract at issue; and CertiFit also does not otherwise establish a connection between the documents provided and the service contract at issue.

Respondent in the caption of this matter, it conflates “a disclosed agent” with “an agent of a disclosed principal” and misstates agency principles. *Compare* Complaint at 5, ¶ 13 (“Evergreen Shipping Agency (America) Corp. is a disclosed agent for the Evergreen Group and its constituent corporations...”)¹⁰ with Brief at 30 (“...CertiFit’s argument in the alternative is that Evergreen—as an agent of a disclosed principal (Evergreen Line Joint Service Agreement...)”). No evidence was provided regarding the types of entities comprising Evergreen Group or any “constituent corporations,” or of Evergreen America’s status as agent of those non-party entities.

Regarding CertiFit’s alternative argument in the initial brief that acknowledges that EGA is the agent of ELJSA, the disclosed principal, CertiFit raises for the first time in its brief—in a footnote—that “[i]f permitted, CertiFit would amend its complaint adding Evergreen Line Joint Service Agreement as a respondent.” Brief at 30, n 4. At no time did CertiFit move to file an amended complaint to add ELJSA and ELJSA has not had an opportunity to respond or participate in this proceeding, as they were not a party.¹⁰ Accordingly, it is necessary to examine the evidence regarding Evergreen America’s agency status and whether it shows that Evergreen America is liable to CertiFit because it manifested an intent to be bound in place of ELJSA, the principal, or because it exceeded the authority assigned it by ELJSA.

a. Agency Status

CertiFit acknowledges that “[i]n a typical agency relationship ‘an agent who enters into a contract with a third party on behalf of a disclosed principal ‘is not a party to the contract unless the agent and the third party agree otherwise.’”” Brief at 31 (citations omitted). It further states that “‘an agent for a disclosed principal is not liable to the third party in the event the principal breaches the contract.’” *Id.* (citing *Fireman’s Fund McGee Marine v. M/V Caroline*, 2004 WL 287663 at *2 (S.D.N.Y. Feb. 11, 2004)).

As also discussed in the parallel context of an agent acting for an NVOCC: “An agent providing NVOCC services on behalf of a disclosed NVOCC principal possesses neither of those two defining characteristics of an NVOCC. An agent acting on behalf of a disclosed NVOCC principal does not hold itself out to the general public to provide transportation because it holds out only in the name of the NVOCC, subject to that NVOCC’s control.” *Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC*, Docket No. 14-04, 2014 WL 5824274, at *8 (ALJ Nov. 6, 2014) (citing *Landstar Express America, Inc. v. FMC*, 569 F.3d 493, 497 (D.C. Cir. 2009)). Thus in *Landstar*, the D.C. Circuit held that “an agent of an NVOCC by definition is not a ‘common carrier,’ and thus not an “NVOCC” as described in the Act.” *Landstar*, 569 F.3d at 498.

¹⁰ If CertiFit had raised a motion to amend either simultaneous with the filing of its initial brief or immediately after discovery closed, it still may have been denied due to undue delay. *See, Seafair USA LLC v. Sterling Container Line Ltd. and Atlantic Forwarding Ltd.*, Docket No. 22-34, 2023 WL 4418617, at *2 (ALJ July 6, 2023). In any event, it did not raise such a motion. *See* Initial Order at 4 (“Any request for action by the Commission or presiding officer must be made by motion, not by letter or email request of as part of a joint status report.”). Just as a request for action raised in a letter, email, or joint status report is not sufficient, it is similarly insufficient to raise a request to add an additional respondent in a footnote of a brief filed after discovery has been concluded.

The evidence shows that Evergreen America clearly disclosed its status as an agent for Evergreen Line both in the service contract and in communications between the parties. The 2020 service contract executed by the parties specified Evergreen America's status as agent for Evergreen Line on pages 1 and 7 of the agreement. FOF 30. Email communications sent to CertiFit by Evergreen America employees also regularly noted that Evergreen America is an agent for Evergreen Line. FOF 31. For example, the April 10, 2020, email to CertiFit, describing the offer to transport 1000 TEU under the 2020 service contract, was sent by an Evergreen America employee, with a signature line indicating "Evergreen Shipping Agency (America) Corporation (Los Angeles) as agents for: Evergreen Line." FOF 32. In other key communications as well, from responding to CertiFit's concerns, to discussing possible contract amendments, to discussing a new contract, Evergreen America made apparent that it was acting "as agents for Evergreen Line." FOF 31, 33-36.

In *OJ Commerce v. Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft A/S & C., KG and Hamburg Sud North American, Inc.*, Docket No. 21-11, 2023 WL 3969857 (ALJ, June 7, 2023) ("*OJ Commerce*"), Chief Administrative Law Judge Wirth denied the allegations regarding an agent (HSNA) of a disclosed principal (HSDG) and found that the agent's actions were within the scope of its authority and were attributable to the principal. The ALJ found:

The evidence further shows that the 2020-21 service contract names OJC and HSDG, identified as carrier, "c/o" HSNA as parties. CX 119. The contract has signature lines for OJC President Jacob Weiss and two employees of HSNA. RX 120. HSNA employees were integral to the conduct at issue here. Although the contract does not explicitly identify HSNA as the agent of HSDG, the evidence establishes that HSDG was the "carrier;" HSNA was holding out HSDG to provide transportation by water of cargo between the United States and foreign countries; HSDG assumed responsibility for the transportation; and HSDG vessels were operating on the high seas. Therefore, the actions of HSNA employees discussed herein are found to be within the scope of their authority as agent for HSDG and attributable to HSDG.

Based on the facts in this proceeding, HSNA is not a regulated entity under this section as an "other person" with whom HSDG operated. Moreover, here, HSNA was acting as an agent of a disclosed principal, and such agents are typically not liable for the acts of their principal. 12 Williston on Contracts § 35:34 (4th ed.); *Landstar Express America, Inc. v. FMC*, 569 F.3d 493, 497 (D.C. Cir. 2009). Accordingly, OJC has not established that HSNA is an entity regulated by section 41104(a)(10). Therefore, the allegations against HSNA are denied.

OJ Commerce, at * 23 (*aff'd* 2024 WL 4034610, at *1 n.2 (FMC Aug. 27, 2024) ("The ALJ denied all claims against HSNA because it found HSNA not to be a common carrier, instead HSNA was acting as a disclosed agent on behalf of HSDG. I.D. at 37. Neither side challenged this conclusion, and no evidence suggests it should be reviewed."). Here, the 2020 service agreement specifies that "[t]his is a service contract...between 'CARRIER' and 'MERCHANT' (or jointly, 'Parties'). FOF 7. Unlike the agent in *OJ Commerce*, EGA is clearly identified in the 2020 service agreement "as Agent for Evergreen Line." FOF 9, 30. Based on the totality of the evidence, Evergreen America is an agent of a disclosed principal, Evergreen Line.

Yet CertiFit maintains that EGA is liable in this instance because it exceeded the scope of its authority and/or EGA clearly manifested its intention to bind itself instead of, or in addition to, its principal. These arguments are discussed separately below, but they frequently overlap.

b. Exceed Scope of Authority

The Commission has stated that whether agents act in the scope of their authority or within their apparent authority is fact-specific; in the below Petition for a Declaratory Order, it is discussed in terms of liability of a principal for acts of the agent:

A principal may be liable for the acts of its agents if the agent is acting within the scope of employment or when acting with apparent authority. However, there are actions by an agent for which a principal would not be held liable. Such a determination is necessarily fact-specific and imposes an additional burden on a shipper to attempt to make that determination prior to entering into a transaction with the agent....

In The Matter of The Lawfulness of Unlicensed Persons Acting as Agents for Licensed Ocean Transportation Intermediaries, Docket No. 06-08, 2008 WL 1840502 at *11 (FMC Feb. 15, 2008).

Turning to the facts relied on by CertiFit to prove that EGA exceeded its authority—that “Evergreen was the entity that negotiated the 2020 Service Contract, executed it, and filed it with the Commission” and “CertiFit did not have any interactions with JSA, and it is Evergreen’s conduct that CertiFit contends violated the Shipping Act as an ocean common carrier”—these do not meet its burden of proving by a preponderance of the evidence that EGA exceeded its authority. Brief at 32. *See OJ Commerce*, 2023 WL 3969857 at *23 (where HSNA employees signed the contract that identified HSDG as the carrier, and HSNA was not “explicitly” identified “as the agent of HSDG,” but “the evidence establishe[d] that HSDG was the ‘carrier;’ HSNA was holding out HSDG to provide transportation by water of cargo [internationally], HSDG assumed responsibility for the transportation; and HSDG vessels were operation on the high seas” the agent and its employees were “found to be within the scope of their authority....”).

EGA’s actions in managing the service contract were also consistent with EGA acting as agent for Evergreen Line. For example, in April 2021, EGA offered to amend the service contract (just prior to the contract’s April 30, 2021 end date), in order to reflect a lower MQC. FOF 20-22. Respondent explained that the lower MQC was to ensure that Certifit would not be liable for liquidated damages under the contract. FOF 22. This conduct—offering amendments to the service contract—is consistent with the activities performed by an agent, and was consistent with what ought to have been expected consistent with the service contract language. FOF 12; FOF 13.

CertiFit’s allegation that EGA exceeded its authority by making a “unilateral decision to hold CertiFit’s bookings until it signed [an] amendment” based on an email exchange with an EGA employee, is not supported by the evidence. Brief at 32; FOF 18. First, in the context of the proposed amendment, the email does not appear to say what CertiFit alleges. *Id.* The amendment which was offered in January 2021 during the original duration of the service contract, offered an additional port but did not change the MQC and contained the same rate as the existing ports for

shipment to Salt Lake City. FOF 15-16. CertiFit did not sign the amendment, and a new port was not added. FOF 14-15, 19. There is no evidence that between January 2021 when the amendment to add a port was offered, and April 2021 when the service contract expired, that CertiFit's bookings were improperly "held" based on a unilateral decision by EGA to force a contract amendment on CertiFit, or for any other reason. FOF 18. Rather, EGA's explanation is credible that "due to persistent equipment shortages at [one port], it was thought Taipei might be added (at the same rate), so that more CERTIFIT cargo might be booked. It was just an attempt to address the problem of insufficient booking from [the port] since the approval of the Taipei port would have allowed for more bookings." RX 5; *see also* FOF 33 (referencing "extremely high volume demand which is outstripping capacity"); FOF 34 (referencing an extreme shortage of equipment available in many far east locations).

c. Manifest Intent to Be Bound

CertiFit relies on *Ariel Maritime Group, Inc. v. Zust Bachmeier of Switzerland, Inc.*, 762 F. Supp. 55, 60 (SDNY 1991), a breach of contract case brought by a carrier (Ariel) against an agent (Zust) for a disclosed principal, a shipper (Fringhian). The court found that Ariel did not allege or introduce "any evidence that Zust acted outside the scope of its agency or acted fraudulently;" and it "failed to offer credible proof that Zust made verbal guarantees" that it would pay ocean freight charges. *Id.* The court also found that Ariel did not prove that 3 written telexes guaranteed payment to Ariel or:

demonstrated an intent to be bound by the contract between Ariel and Fringhian or to substitute or superadd itself for the liability of Fringhian. Zust was not the owner or ultimate consignee of the containers or the goods therein, nor did it have any interest in the good themselves. We therefore find that Zust was acting properly as an agent for a disclosed principal at all times during the transaction in question.

Id.

Similarly, EGA explicitly held itself out as an agent of Evergreen Line and identified Evergreen Line as the carrier in the service contract. FOF 4, 20. The Service Contract at 2.1 states that

Cargo covered by this Contract shall be carried by vessels owned, chartered, managed or operated by the Carrier [Evergreen Line] under the provisions of the Carrier's Bill of Lading and the Rules and Regulations of the pertinent Tariff(s) of General Applicability.

FOF 8 (emphasis added).

As was stated in *Edaf Antillas*: "It is true that '[c]ommon law principles of agency apply to maritime contracts,' and that '[w]hen an agent makes a contract for a disclosed principal, it becomes neither a party to the contract nor liable for the performance of the contract.'" 2014 WL 5824274, at *8 (citations omitted); *see also Hotel Constructors, Inc. v. Seagrave*, 99 F.R.D. 591, 592 (1983) ("An agent is not liable on a contract he signs for a fully disclosed principal unless he clearly manifests his intention to bind himself instead of, or in addition to his principal."). Here, there is simply no indication that EGA sought to bind itself to the service contract in any way

other than as an agent for Evergreen Line; indeed, EGA repeatedly made explicit that it was acting as an agent for Evergreen Line, the carrier. *See, e.g.*, FOF 7-9, 30, 32.

As has been explained above in the overlapping discussions of agency, the service contract and communications between the parties are clear that Evergreen America is an agent for Evergreen Line, and the evidence does not support finding that Evergreen America engaged in conduct manifesting an intent to be bound in place of Evergreen Line. Thus, CertiFit has neither established that EGA manifested an intent to be bound to the service agreement in its individual capacity, nor that it acted as anything other than an agent of Evergreen Line.

Accordingly, CertiFit has not established by a preponderance of the evidence that Evergreen America is an ocean common carrier or that it is liable because it exceeded its authority as an agent of Evergreen Line, or manifested an intent to be bound. Rather, the evidence establishes that Evergreen America is an agent of Evergreen Line, which was not named as a party in this proceeding.


IV. ORDER

Upon consideration of the record herein, the arguments of the parties, the findings and conclusions set forth above, and the determination that Evergreen Shipping Agency (America) Corp., as Agent for Evergreen Line, Evergreen Group d/b/a Evergreen Line did not violate the Shipping Act, it is hereby

ORDERED that Complainant CertiFit, Inc.'s Revised Motion for Confidential Treatment be **GRANTED IN PART** and **DENIED IN PART**. It is

FURTHER ORDERED that CertiFit's Complaint against Evergreen America be **DENIED**. It is

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



Linda S. Harris Crovella
Administrative Law Judge