BEFORE THE

FEDERAL MARITIME COMMISSION

DOCKET NO. 23-03

CERTIFIT, INC.

COMPLAINANT

V.

EVERGREEN SHIPPING AGENCY (AMERICA) CORP., AS AGENT FOR EVERGREEN LINE, EVERGREEN GROUP d/b/a EVERGREEN LINE

RESPONDENTS

CERTIFIT, INC.'S REPLY BRIEF TO RESPONDENT'S OPPOSITION BRIEF

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I. INTRODUCTION

Complainant CertiFit, Inc. ("CertiFit" or "Complainant"), by and through its undersigned counsel, hereby files this reply brief, pursuant to 46 C.F.R. § 502.214 and the Scheduling Order dated July, 21, 2023.

According to EGA, CertiFit's claims rely upon "conspiratorial innuendo and half-truths, not evidence." Opp., p. 8. More specifically, EGA contends (1) the Commission lacks personal and subject-matter jurisdiction over the claims asserted and, if this is not the case, (2) CertiFit has failed to provide sufficient evidence supporting EGA's violations of sections of 41104(a)(2), 41104(a)(5), 41104(a)(9), 41104(a)(10), and 41102(c) of Title 46.

As outlined below, CertiFit disputes EGA's characterizations and respectfully submits the following Reply Brief in support of the claims set forth in the Complaint.

II. RESPONSE TO EGA'S PROPOSED FINDINGS OF FACT

CertiFit's Response to EGA's Proposed Findings of Fact is attached separately.

III. ARGUMENT

A. EGA IS SUBJECT FMC'S JURISDICTION AS A COMMON CARRIER OR, ALTERNATIVELY, UNDER AGENCY PRINCIPLES.

EGA's first argument is that it "is not a common carrier, ocean transportation intermediary, or terminal operator. Nor does EGA hold itself out as such, take responsibility for cargo transportation or storage, or make use of ocean-going vessels." Opp., p. 11.

As outlined in its opening brief, CertiFit maintains that EGA is a vessel-operating common carrier because EGA (1) it holds itself out to the general public as providing transportation by water for passengers or cargo between the United States and a foreign country; (2) it assumed responsibility for transporting the passengers or cargo from the port or point of receipt to the port

of destination; and (3) use, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a United States port and a foreign port. *See* 46 U.S.C. §§ 40102(7), (18); 46 C.F.R. § 515.2; CertiFit Br., pp. 23-34. The first element is met based on EGA holding itself out to the general public as a transporter oXXf cargo as evidenced by its website, the fact that it negotiated the terms of the Contract and executed the same, and remained CertiFit's point of contact as the conduct alleged began to transpire. *See id*. at 26. Moreover, EGA was the entity responsible for suspending CertiFit's bookings—which demonstrates its assumption of responsibility over CertiFit's cargo—and, likewise, made the unilateral decision to propose amendments to the 2020 Service Contract that were never requested by CertiFit. *Id*. at 27-28. To be sure, the Commission, in analyzing the elements required under the Act, "considers the totality of [the] circumstances and their 'combined effect'" but this inquiry looks "beyond documentary labels and delves into respondent's conduct regarding [the] shipments at issue…" *Worldwide Relocations — Possible Violations of the Shipping Act*, FMC Docket No. 06-01, Order Approving Initial Decision in Part, Reversing in Part, and Modifying in Part, at 10 (FMC Mar. 15, 2012). The final element, use of a vessel on the high seas, is also present. As discussed in CertiFit's brief, the facts demonstrate that EGA had broad authority to perform the tasks leading up to, and including, the transportation of CertiFit's cargo. *Id*. at 30. CertiFit agreed to ship—and EGA agreed to transport—1,000 TEUs from Taiwan to the United States. *See* CX4-0481. Because the elements are satisfied, EGA was acting as a regulated entity subject to the Commission's jurisdiction.

To the extent warranted, CertiFit also argued in the alternative that EGA, as agent of its disclosed principal Evergreen Line A 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. CertiFit Br., pp. 30-34.

As noted by EGA, "ordinary contract rules as applied under the federal maritime law determine who is a party to a contract, and the federal maritime law embraces agency principles. Opp., p. 9. Although it is true that "an agent for a disclosed principal is not liable to the third party in the event the principal breaches the contract." *Fireman's Fund McGee Marine v. M/V Caroline*, 2004 WL 287663, at *2 (S.D.N.Y. Feb.11, 2004), an agent may be held liable on a contract in place of its principal in three scenarios: (1) it acted outside the scope of its agency, (2) it acted fraudulently, or (3) it clearly manifested its intention to bind itself instead of, or in addition to, its principal. *Ariel Mar. Grp., Inc. v. Zust Bachmeier of Switzerland, Inc.*, 762 F. Supp. 55, 60 (S.D.N.Y. 1991) (citations omitted). In the case at hand, the facts demonstrate that EGA manifested its intention to bind itself instead of, or in addition to, its principal Evergreen Line A Joint Service Agreement ("JSA").

EGA's intent is first demonstrated by the facts put forth by CertiFit in support of EGA's violations of the Shipping Act. Simply put, every act complained of centers on EGA's actions (and inactions) as it relates to the shipment of CertiFit's cargo. *See* Sections C-G, *infra*. Second, EGA, not JSA, made the decision to suspend CertiFit's bookings until the proposed amendment—which CertiFit never requested—was executed. And the same is true with respect to the second amendment in which EGA sought to reduce the MQC agreed upon by the parties. *See* CX4; CX7.

Considering EGA's conduct, it is evident that CertiFit's alternate theory of jurisdiction is also applicable given the facts set forth above.

B. THE COMMISSION HAS SUBJECT MATTER JURISDICTION OVER THE CLAIMS ALLEGED

EGA contends that the Commission lacks subject matter jurisdiction over CertiFit's claims because they "essentially sound solely in breach of contract" and "[t]here is no allegation, let alone evidence, that EVERGREEN failed to honor those contract terms…" Opp., pp. 12, 18. To that end,

Evergreen argues "surely there can be no Shipping Act violation, where there has been no breach of that [2020 Service] Contract," and based on the facts and evidence presented—according to Evergreen—CertiFit is the only party that breached the 2020 Service Contract. Opp., p. 17. As explained below, EGA's invitation to the Commission to follow the narrow "sweeping dicta in *Vinmar*" should be declined and the alleged violations should be addressed on the merits. *Cargo One, Inc. v. Cosco Container Lines Co., Ltd.*, Dkt. No. 99-24, 2000 WL 1648961 (F.M.C. 2000).

Section 40502(f) (formerly section 8(c)[1] under the Shipping Act of 1984) provides: "[u]nless the parties agree otherwise, the exclusive remedy for a breach of a service contract is action in an appropriate court. The contract dispute resolution forum may not be controlled by or in any way affiliated with a controlled carrier or by the government that owns or controls the carrier." 46 U.S.C. § 40502(f)[2]. As EGA points out, the Commission has had the opportunity to interpret the scope of section 8(c) on several occasions. *See generally* "Point II," pp. 12-18. Beginning with *Vinmar Inc. v. China Ocean Shipping Co*., the Commission concluded that "Congress placed the limitation in section 8(c) in order to limit the Commission's jurisdiction to award remedies that would otherwise be available in a breach of contract action if the matter were brought before a court." *Cargo One, Inc. v. Cosco Container Lines Co., Ltd.*, Dkt. No. 99-24, 2000 WL 1648961 (F.M.C. 2000) (citing *Vinmar Inc. v. China Ocean Shipping Co.,* Docket. No. 91-43, 1992 WL 231349 (F.M.C. 1992)). Subsequent cases following the strict interpretation of section 8(c) under *Vinmar*, ultimately lead the Commission to "reconsider[] its decision in *Vinmar* and…articulat[e] a more precise and *less expansive view* of which causes of action seeking reparations are precluded by section 8(c)." *Cargo One, Inc*., 2000 WL 1648961, *13-14 (emphasis

[1] Section 8(c) stated: "…The exclusive remedy for a breach of contract entered into under this subsection shall be an action in an appropriate court, unless that parties agree otherwise." 46 U.S.C. app. § 1707.

added). Without overruling *Vinmar*, the Commission's decision in *Cargo One* outlined a more appropriate test addressing the problems created by subsequent decisions latching onto the "sweeping dicta in *Vinmar*":

> We believe the more appropriate test is whether a complainant's allegations are inherently a breach of contract claim, *or whether they also involve elements peculiar to the Shipping Act*. We find that as a general matter, *allegations essentially comprising contract law claims should be dismissed unless the party alleging the violation successfully rebuts the presumption that the claim is no more than a simple contract breach claim*. In contrast, where the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support such a claim, that the matter is appropriately before the agency.

Cargo One, Inc., 2000 WL 1648961, *14 (emphasis added).

Here, EGA contends that "CERTIFIT's whole case rests on the alleged failure to provide sufficient space pursuant to the Service Contract's MQC provisions." Opp., p. 14. In other words, because EGA's alleged violations of the Shipping Act spring from facts that could also support a breach of contract action, the Commission lacks jurisdiction. But this reasoning leads to the same "anomaly" the Commission confronted in *Cargo One*: "a party to a service contract who <u>has not</u> breached the contract would be subject to Shipping Act claims, while a party who <u>has</u> breached the contract would not be subject to a Shipping Act claim relating to the breach, or perhaps tangentially related to the contract." *Cargo One Inc*., 2000 WL 1648961, *13 (emphasis in original). EGA's narrow interpretation on this issue is not supported by the facts or law.

EGA points to the following facts in support of the Commission not having subject matter jurisdiction over the shipping violations alleged by CertiFit:

1. Evergreen did not breach the 2020 Service Contract;
2. CertiFit failed to avail itself of the remedies provided in the Contract;
3. Evergreen did not act in bad faith; and
4. Evergreen was overcome by supply-chain issues as a result of the Covid-19 pandemic.

Opp., pp. 12-18.

After describing the painstaking negotiations leading up to the execution of the 2020 Service Contract, EGA contends that CertiFit had two contractual remedies to address its failure to meet the MQC it agreed to: (1) subtract the quantity of cargo tendered but not carried on Carrier's vessel from the Minimum Quantity Commitment, or (2) extend the contract term. Opp., pp. 14-16. As described in CertiFit's April 19, 2021 correspondence to EGA, CertiFit stated "[it] is now exercising its right to extend the Agreement for additional sailings under Section 3.2.2." CX7-0583. This correspondence went on to request additional information applicable to the definition of "sailings" as outlined in the formula provided in the 2020 Service Contract; however, this information was never provided. *See id*; *see also* Respondent's Exhibits A-L.

Just eight days after CertiFit elected the additional sailing remedy, EGA provides CertiFit with a proposed amendment reducing the MQC from 1,000 TEUs to 25 TEUs. RX000045-47. Curiously, and considering that EGA received CertiFit's election eight days earlier, it now seeks to reduce the MQC (with an attached termination agreement) which is precisely the opposite of CertiFit's intended course. EGA's Wu and Bennett then send almost simultaneous emails (11:15 a.m. and 12:10 p.m. respectively) warning CertiFit of the importance of agreeing to the reduced MQC "to avoid any liquidated damages" but the facts demonstrate that CertiFit requested bookings far in excess of the MQC. *See* RX000047-48; *see also* CX13-0816-0821. What's more, CertiFit requested information to compute the additional sailings that, again, went unanswered as EGA pursued what meant most at this time—terminating the 2020 Service Contract and having CertiFit execute the proposed amendment reducing the MQC to 25 TEUs. The foregoing facts demonstrate that CertiFit did attempt to avail itself of the contractual remedies, but EGA's unreasonable course of action following the request was nothing more than protecting its own interests—in bad faith. EGA spends significant time addressing the parties' communications following the expiration of

the 2020 Service Contract on April 30, 2021, which CertiFit contends is irrelevant to the issues at hand.

While it may be true, as EGA asserts, that "the possibility of such [MQC] shortfalls was foreseen with particularity and directly addressed in the contract," what was not foreseeable—or addressed in the contract—was EGA and Evergreen's underhanded conduct throughout the term of the 2020 Service Contract. Beginning in August 2020, and throughout the end of the term, CertiFit consistently maintained that (1) Evergreen is actively thwarting CertiFit's compliance with the MQC by continually refusing tendered containers; (2) Evergreen will only accept tendered containers if CertiFit pays a substantial surcharge in excess of $1,000 per container; and (3) Evergreen, consistent with its prior conduct in 2018, intends to suddenly ship a backlog of tendered containers late in the Agreement term resulting in a windfall of detention and demurrage charges. CX7-0558, CX7-0582-0584. Considering, that these practices were occurring in 2018, save for the demands for increased rates which was specific to the pandemic, it is difficult to argue that EGA's actions—which tangentially relate to the 2020 Service Contract—are fully outside the jurisdiction of the Commission. In the end, it was Evergreen that failed to meet the agreed upon MQC and then attempted to bait and switch CertiFit into signing a termination agreement and amendment which would diminish any possibility of obtaining additional sailings as provided for in the Contract. This conduct, matched with oral demands for increased rates, unsolicited port amendments, and the undeniable failure to perform provide a sufficient basis for the Commission's jurisdiction.

C. EGA'S SERVICES WERE NOT IN ACCORDANCE WITH THE TERMS OF THE 2020 SERVICE CONTRACT IN VIOLATION OF 46 U.S.C. § 41104(a)(2)(A)

EGA argues that CertiFit has failed to present facts that Evergreen provided services in the liner trade "not in accordance with the rates, charges, classifications, rules, and practices contained

in a tariff published or a service contract entered into under…this title." 46 U.S.C. § 41104(a)(2); Opp., p. 18.

As set forth above, CertiFit maintains that EGA is a regulated entity subject to the Shipping Act and the Commission's 'jurisdiction. *See* § III, A, *supra.*

The facts set forth by CertiFit in support of EGA violating 46 U.S.C. § 41104(a)(2)(A) include (1) EGA demanding $1,000 surcharge to ship CertiFit's containers and (2) the general rate increase circulated by EGA on or about October 15, 2020. CX7-0543, CX7-0558. As noted in CertiFit's response to Respondent's PFF 25, CertiFit, upon further review, does not have any evidence that the GRI was applied after being circulated. As such, CertiFit withdraws this argument.

With respect to EGA's demands for surcharges in excess of $1,000 to ship CertiFit's cargo, it is undisputed that CertiFit identified this conduct in its August 13, 2020 correspondence to Evergreen. *See* CX7-0543-0544. While CertiFit does not have direct evidence of these demands, which is to be expected given the circumstances, CertiFit believes that the evidence provided supports the Commission's ability "to draw inferences from certain facts when direct evidence is not available." *Waterman S.S. Corp. v. Gen. Foundries, Inc*., FMC Docket No. 93-15, 26 S.R.R. 1173, 1180 (ALJ Dec. 9, 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994). If so, these demands support the Commission finding that EGA violated Section 41104(a)(2)(A) by providing service in the liner trade that is not in accordance with the rates and charges contained in the 2020 Service Contract. *See* CX4.

D. EGA ENGAGED IN UNFAIR AND UNDULY DISCRIMINATORY PRACTICES IN VIOLATION OF 46 U.S.C. § 41104(a)(5)

As set forth above, EGA is a regulated entity subject to the Shipping Act and the Commission's 'jurisdiction. *See* § III, A, *supra.*

EGA characterizes the proposed amendment adding the Port of Taipei as an olive branch to help ease CertiFit's frustrations of enduring eight months of reprehensible conduct by Evergreen. *See* Opp., pp. 19-20. Conversely, CertiFit contends that EGA's sudden and unsolicited attempt to relegate the port pairings agreed upon constitute an "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" because the proposed amendment's ultimate effect was to preclude cargo being accepted from the Taiwanese ports of Keelung, Taoyun, and Kaoshiung. 46 U.S.C. § 41104(a)(5).

Relying on Mr. Bennett's sworn declaration, EGA describes—without any supporting evidence—that CertiFit faced "persistent equipment shortages at Keelung/Taoyun" and EGA sought to "address the problem of insufficient booking[s] from Kaoshiung" by adding the Port of Taipei. Opp., p. 20 (citing Bennett Decl. at ¶ 16). But EGA fails to address one of the key communications sent by EGA's Kenneth Wu: "All bookings held up at this time due to the contract has yet to be confirmed and filed to add Taipei." CX7-0586. As discussed in CertiFit's brief, and in direct contradiction to EGA's opposition arguments, all bookings were "held up" until CertiFit executed the proposed amendment which "impose[d] an unreasonable disadvantage on all shipments from a specific nation or region of a nation"—in this case, the ports of Keelung, Taoyun, and Kaoshiung. CertiFit Br., pp. 37-38 (citing *OJC Commerce, LLC v. Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft A/S & Co. KG and Hamburg Sud North America, Inc.*, FMC Docket No. 21-11, Order on Respondents' Motions to Partially Dismiss and for a Protective Order and Complainant's Motion for Expedited Relief (ALJ Aug. 31, 2022) (citing S. Rep. 61, 105th Cong., 1st Sess., p. 28 (1997)).

EGA engaged in a discriminatory practice by precluding CertiFit and its suppliers from tendering cargo at the ports of Keelung, Taoyun, and Kaoshiung under the guise of providing

"some relief" to CertiFit. Opp., p. 20. The port pairs identified in the 2020 Service Contract were chosen by CertiFit based on the location of its suppliers and those decisions were readily apparent to EGA (*e.g.*, the Port of Taipei is located in northern Taiwan and CertiFit's suppliers are located in and around southern Taiwan). Despite this, EGA halted CertiFit's bookings—which were already sporadic at best—until the amendment adding the Port of Taipei was added. While it is true that EGA eventually shipped additional containers as requested by CertiFit, it is undisputed that EGA "impose[d] an unreasonable disadvantage on all shipments from [the Taiwanese ports of Keelung, Taoyun, and Kaoshiung." OJC Commerce, LLC, FMC Docket No. 21-11 (ALJ Aug. 31, 2022).

E. EGA'S CONDUCT DEMONSTRATES IT GAVE UNDUE OR UNREASONABLE PREFERENCE OR ADVANTAGE TO OTHER SHIPPERS IN VIOLATION OF 46 U.S.C. § 41104(a)(9)

EGA disputes its conduct violated 46 U.S.C. § 41104(a)(9) which provides that a common carrier may not "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." CertiFit maintains that EGA is a common carrier subject to the Shipping Act and the Commission's jurisdiction. *See* § III, A, *supra.*

As explained above, EGA's conduct in withholding confirmation of CertiFit's booking requests until the Port of Taipei was added constitutes both an unreasonable preference and an undue prejudice or disadvantage to the ports agreed upon in the 2020 Service Contract in violation of 46 U.S.C. § 41104(a)(9).

Citing *OJ Commerce*, EGA asserts that "this Section [46 U.S.C. § 41104(a)(9)] has no bearing on alleged discrimination toward a particular shipper, as opposed to a port," however, EGA's conduct clearly demonstrates it gave undue preference to the Port of Taipei to the detriment

of the Taiwanese ports of Keelung, Taoyun, and Kaoshiung. Opp., p. 21. Similarly, EGA's mid-contract decision to push the proposed amendment on CertiFit "imposed a prejudice or disadvantage regarding use or avoidance of any port to the detriment of [] [CertiFit]" because it demanded that CertiFit add the Port of Taipei—thus avoiding the ports agreed upon—which damaged CertiFit. *MSRF, Inc. v. HMM Co. Ltd*., Docket No. 22-20, 2023 WL 8242695, *25 (F.M.C. Nov. 22, 2023); *see also* CX1-CX3, CX8 (CertiFit's damages calculations).

As alleged in the Complaint, CertiFit "repeatedly advised Respondent of its needs concerning cargo to be shipped from the ports identified in the 2020 Service Contract." Compl. ¶ 35; CX6-0510; *see also* CX4-0486 (outlining port pairings). Despite hundreds of booking requests over the last half of the term of the 2020 Service Contract, the evidence demonstrates that EGA was focused solely on maximizing profits while simultaneously proposing unsolicited amendments it could later point to as "negotiations" or attempts to provide "some relief" to CertiFit. *See generally,* Respondent's PFF. Despite EGA's façade, the facts at hand show that EGA "held up" booking confirmations until CertiFit agreed to add a port that was of no use to it in violation of 46 U.S.C. § 41104(a)(9).

F. EGA UNREASONABLY REFUSED TO DEAL OR NEGOTIATE WITH CERTIFIT IN VIOLATION 46 U.S.C. § 41104(a)(10).

EGA disputes CertiFit's claims that it violated Section 41104(a)(10) of Title 46, which provides "[a] common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not…unreasonably refuse to deal or negotiate, including with respect to vessel space accommodations by an ocean common carrier." As set forth above, EGA is a regulated entity subject to the Shipping Act and the Commission's jurisdiction. *See* § III, A, *supra.*

In its opposition, EGA relies on the following facts:

- Evergreen timely responded to all of CertiFit's correspondence;

- Evergreen consistently advised that the lack of capacity was due solely to supply-chain issues beyond its control;
- CertiFit's cargo was never "held up" or "held back" in order to "coax" CertiFit to accept the proposed amendment;
- The proposed reduction in the MQC was designed to allow CertiFit to avoid liquidated damages;
- Eevergreen never requested a rate increase nor "sold CertiFit space on the spot market."; and
- Evergreen always "worked in good faith to negotiate solutions with CertiFit."

Opp., pp. 23-24.

Taking EGA's arguments in order, it is arguably true that EGA timely responded to CertiFit's correspondence over the course of the 2020 Service Contract, however, the substance of those exchanges is also relevant to CertiFit's claims under this Section. For instance, on August 19, 2020, Mr. Bennett provided a response to CertiFit's first demand letter that was sent just six days prior. CX7-0543-0544, RX000023-24. As previously discussed, CertiFit's August 13th demand addressed EGA's continued refusal to allocate space—which Mr. Bennett appears to concede was available for the "first months of the contract period." Bennett Decl. ¶¶ 11-13. In fact, after speaking with management in Taipei, Mr. Bennett confirms that EGA "can commit to 5-8 FEU per week," yet he also lays the groundwork for a future reduction in the agreed upon MQC of 1,000 TEUs. *See id.* ("We 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").[3] Mr. Bennett similarly brushes off CertiFit's claims that EGA employees were demanding rate increases, stating "despite the fact that the market rate has significantly increased over the last few months, we are not asking

[3] While it is true that this remedy is provided for in the 2020 Service Contract, it is telling that Evergreen is referencing it with approximately eight months remaining in the term. Considering that CertiFit attempted to book well above the MQC, it is evident that Evergreen intended to rely on this provision, in conjunction with the pandemic, to pursue more profitable shippers.

CertiFit to increase the contracted rates." *Id*. Unfortunately, EGA's demands for additional money were not made in writing and Mr. Bennett's commitment to 5-8 FEU per week was not realized in the subsequent months. *See* CX10, CX12.

CertiFit's correspondence dated November 12, 2020 and April 19, 2021 outlined the same grievances: (1) EGA is actively thwarting CertiFit's compliance with the MQC by continually refusing tendered containers; (2) EGA will only accept tendered containers if CertiFit pays a substantial surcharge in excess of $1,000 per container; and (3) EGA, consistent with its prior conduct in 2018, intends to suddenly ship a backlog of tendered containers late in the Agreement term resulting in a windfall of detention and demurrage charges. CX7-0558, CX7-0582-0584. In response to CertiFit's November 12th letter, Mr. Bennett responds two weeks later emphasizing no increase in rate has been requested by EGA, and the "market capacity and demand have not changed." CX7-0580.

By January 2021, CertiFit was becoming increasingly aggravated by EGA's continued unreasonable conduct as described in its various correspondence. It was at this time that a sudden flurry of emails from Kenneth Wu repeatedly asking CertiFit employees to "push" management to sign a proposed amendment adding the Port of Taipei—a request that CertiFit never asked for due to logistical challenges associated with this port. CX7-0585-588. Despite EGA's contention to the contrary, Mr. Wu explicitly states on January 14, 2021—six days after the unsolicited amendment was proposed to CertiFit—that "[a]ll bookings held up at this time due to the contract has yet to be confirmed and filed to add Taipei." CX7-0588. In other words, Mr. Wu acknowledged that CertiFit's booking requests were being held hostage in order to "coax" CertiFit into signing an agreement that would presumably make it appear that EGA was trying remedy its prior conduct; albeit, by proposing a port it likely knew had no benefit to CertiFit based location in Taiwan.

EGA's second unsolicited proposal involved the reduction of the MQC—an issue that was top of mind for EGA in its response to CertiFit's August 13, 2020 correspondence. RX000027. From CertiFit's perspective, EGA's offer to reduce the MQC in August 2020 and again in April 2021, was confounding because "CertiFit would not have committed to use Evergreen to ship 1000 TEUs if that amount was not needed." CX7-0583. CertiFit clearly requested bookings well above the MQC agreed upon, but EGA was presumably hedging that CertiFit would simply elect for the reduction near the end of the term of the 2020 Service Contract. CX13-0816-0821. And that was precisely what CertiFit did as the final days of the term came to a close. On April 19, 2021, CertiFit notified EGA that it was "exercising its right to extend the Agreement for additional sailings under Section 3.2.2." CX7-0583. In this correspondence, CertiFit requested additional information from EGA in order to determine the additional number of "sailings" it was entitled to due to the formula contained in the Contract not providing a clear answer. *See id*. Despite this request, which was made eight days prior to the Second Amendment being proposed on April 28, 2021, EGA sends several emails stating "it is imperative to confirm [the termination notice] for filing once received to avoid any liquidation." RX000048. Similarly, Mr. Bennett cautions CertiFit that "it is very important that the amendment to reduce the MQC is approved from your end to avoid any liquidated damages." RX000047. But EGA wasn't simply seeking a contractual amendment—they also wanted CertiFit to execute a termination agreement which would extinguish CertiFit's right to additional sailings under the 2020 Service Contract. RX000045. What's more, EGA second proposal, which was received by CertiFit on April 29, 2021, failed to provide any of the additional information that was requested in CertiFit's April 19th correspondence.

As demonstrated above, EGA's course of conduct over the term of the 2020 Service Contract was underhanded at best and certainly not made in good faith as the term ended. CertiFit

was effectively "shut out" by EGA and CertiFit's ultimate decision to pursue additional sailings under the contract was met with a flurry of emails attempting to have CertiFit execute a termination agreement that would diminish its rights. Moreover, EGA's demand for increased rates—although not supported by documentation—is consistent throughout CertiFit's correspondence to EGA. Above all, there is no dispute that Mr. Wu's decision to "hold up" CertiFit's booking requests until the Port of Taipei was added, is perhaps the best example of what CertiFit faced during the 2020-2021 shipping year.

G. EGA FAILED TO ESTABLISH JUST AND REASONABLE PRACTICES WITH RESPECT TO THE HANDLIG AND DELIVERY OF CARGO IN VIOLATION OF 46 U.S.C. § 41102(c)

The final violation of the Shipping Act alleged by CertiFit is that EGA "fail[ed] to establish, observe, and enforce just and reasonable regulations and practices to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). In short, EGA contends that CertiFit has failed to satisfy the elements required under this Section as it has only "alleged a solitary inability to meet MQC in the course of a single service contract…[which] is woefully inadequate, indeed, and should not be deemed normal, customary, and continuous within the meaning of Subpart (c). Opp., p. 27.

As an initial matter, CertiFit maintains that EGA is a regulated entity subject to the Commission's jurisdiction. *See* § III, A, *supra.*

As set forth in CertiFit's brief, the acts and omissions relevant to this analysis center around EGA's systematic and continuous practice of agreeing to provide contracted space and then refusing that space when higher prices are available. This is not a one-off as EGA suggests; rather, CertiFit has experienced this systematic practice during the 2018-2019 shipping year—when the pandemic was not available as a blanket justification—as well as during the 2020-2021 shipping

year. *See* CX7-0530-0531; CX13-0816-0821. And there is no dispute that EGA's practice relates to the receiving, handling, storing, or delivering of property. Entering into service contracts for the transportation of cargo at agreed upon rates and failing to accept tendered cargo in order to sell that contracted space at a premium undoubtedly relates to the movement of cargo in ocean shipping. Likewise, there is no dispute that EGA's conduct is unreasonable and affects the broader shipping public. *Whitman v. Chicago, R.I. & P.R. Co*., 66 F. Supp. 1014, 1017, (N.D. Tex. 1946). The Commission has noted that the reasonableness of a carrier's conduct focuses on whether the practice is "tailored to meet its intended purpose" and whether it is "fit and appropriate to the end in view." *Distrib. Servs. Ltd. v. Trans-Pac. Freight Conf. of Japan & Its Member Lines*, 24 S.R.R. 714, 1988 WL 340659, at *7 (FMC Jan 6, 1988). Here, EGA's intended purpose was to pilfer contracted space—space that was repeatedly requested hundreds of times—in order to obtain higher prices. This unreasonable practice occurred in 2018 and remained present in 2021. In consequence, and without doubt as a proximate cause of EGA's unreasonable practices, CertiFit incurred significant costs that it otherwise would not have had to pay in order to obtain carriage from other carriers at an increased cost.

IV. CONCLUSION

Based on the foregoing, CertiFit respectfully requests the Commission find EGA in violation of the cited provisions of the Shipping Act, award reparations in the amount of $329,809.00, attorneys' fees and costs, and such other relief the Commission deems just proper.

Respectfully Submitted
CHRISTENSEN & JENSEN, P.C.

Sean B. Leonard

Barry G. Scholl
Sean B. Leonard
Counsel for Complainant
Certifit, Inc.
Utah Bar No. 16638
sean.leonard@chrisjen.com
257 E. 200 S. Ste. 1100
Salt Lake City, UT 84111
Tel. 801-323-5000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of January, 2024, the foregoing Reply Brief and CertiFit's Responses to EGA's Proposed Findings of Facts was served via electronic mail on:

Federal Maritime Commission
Office of the Secretary
Secretary@fmc.gov

Federal Maritime Commissions
The Honorable Aurora Holley
Administrative Law Judge
Presiding Administrative Law Judge
judges@fmc.gov

Edward A. Keane
Telephone: 212-385-1422
Email: ekeane@mahoneykeane.com
Mahoney & Keane, LLP
40 Worth Street, Suite 602
New York, New York 10013

Garth S. Wolfson
Telephone: 212-385-1422
Email: gwoflson@mahoneykeane.com
Mahoney & Keane, LLP
40 Worth Street, Suite 602
New York, New York 10013