

FEDERAL MARITIME COMMISSION

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**DOCKET NO. 23-08**

**MEDITERRANEAN SHIPPING COMPANY, S.A. – POSSIBLE VIOLATIONS OF THE  
SHIPPING ACT, 46 U.S.C. §§ 41102(c), 40501 and 41104(a)(2)(A)**

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**OPENING BRIEF OF THE  
BUREAU OF ENFORCEMENT, INVESTIGATIONS, AND COMPLIANCE**

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## **I. INTRODUCTION**

This proceeding involves a titan of the U.S. shipping industry, Mediterranean Shipping Company, S.A (MSC or Respondent), and its unreasonable and unjust actions and inactions in violation of the Shipping Act of 1984, as amended (Shipping Act or Act) as follows: (1) MSC's ongoing practice of broadly wielding its definition of "merchant" in its bill of lading to hold underlying third-parties liable for invoiced charges in the absence of such third parties having privity of contract, or any beneficial interest in the cargo, and without consent by those third parties to be bound by the terms of MSC's bill of lading, (2) MSC's practice of incorrectly billing non-operating reefer containers (NORs) as operating reefers, resulting in overcharges to its customers, less free time, and more days of detention, and (3) MSC's failure to publish NOR rates in its U.S. tariff, causing obscurity, uncertainty, and the aforementioned overcharges for the shipping public around MSC's rates and charges.

### **A. Procedural History**

On August 10, 2023, the Federal Maritime Commission (FMC or Commission) initiated this proceeding by issuing an Order of Investigation and Hearing, pursuant to 46 U.S.C. §§ 41102(c), 41032(a), and 46 C.F.R. § 502.63. See Order of Investigation and Hearing (OIH), Docket No. 23-08, Mediterranean Shipping Company, S.A.—Possible Violations of the Shipping Act, 46 U.S.C. §§ 41102(c), 40501 and 41104(a)(2)A (FMC August 10, 2023). The Order directed that the following specific issues be determined:

- 1) whether MSC violated 46 U.S.C. § 41102(c) by failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property by (a) holding parties who have not consented to be bound by its bill of lading or sea waybill liable for detention and demurrage or per diem charges, and (b) misapplying its operating reefer rates to NOR shipments;

- 2) whether MSC violated 46 U.S.C. § 40501 by failing to:
  - (a) publish in its tariff separate detention and demurrage rates for nonoperating reefers for public inspection;
  - (b) publish its tariffs and state each charge under its control and any rules that in any way change, affect or determine any part of the total of its rates or charges;
  - (c) publish the nonoperating reefer rate for public inspection;
- 3) whether MSC violated 46 U.S.C. § 41104(a)(2)(A)<sup>1</sup> by providing transportation in the liner trade that was not in accordance with the rates, charges, classifications, rules, and practices contained in its published tariff;
- 4) whether, in the event violations of the Shipping Act and the Commission's regulations are found, civil penalties should be assessed against MSC and, if so, the amount of the penalties to be assessed; and
- 5) whether, in the event violations of the Shipping Act and the Commission's regulations are found, an appropriate cease and desist order should be issued as authorized by the Shipping Act at 46 U.S.C. § 41304.

The Order named MSC as Respondent. The Commission's Bureau of Enforcement, Investigations, and Compliance (BEIC) was also named a party to this proceeding. OIH at 13. This proceeding was placed before the Commissions' Office of Administrative Law Judges and thereafter assigned to the Honorable Alex Chintella (ALJ). OIH at 13; Order Designating Administrative Law Judge, FMC Docket No. 23-08, Mediterranean Shipping Company, S.A.—Possible Violations of the Shipping Act, 46 U.S.C. § 41102(c), 40501 and 41104(a)(2)A (ALJ

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<sup>1</sup> The Commission ordered an investigation of MSC's actions in contravention of 46 U.S.C. § 41104(a)(2)(A) in the alternative. See OIH at ¶88 ("Even if MSC is found to be in compliance with 46 U.S.C. § 40501(a)(1) . . . .") It is no longer in controversy that throughout 2021, MSC did not publish a separate detention, per diem, or demurrage rate for non-operating reefers. Jt. Stip. Fact at ¶39. Thus, the Office of Enforcement (OE), within the Bureau of Enforcement, Investigations, and Compliance will no longer be pursuing allegations that MSC violated 46 U.S.C. § 41104(a)(2)(A).



August 15, 2023); Initial Order, FMC Docket No. 23-08, Mediterranean Shipping Company, S.A.—Possible Violations of the Shipping Act, 46 U.S.C. §§ 41102(c), 40501 and 41104(a)(2)(A) (ALJ August 15, 2023). The Commission ordered the initial decision of the ALJ to be issued by August 12, 2024. OIH at 13.

The Scheduling Order ended discovery on February 2, 2024, and ordered OE’s brief, proposed findings of fact, and appendix to be filed by April 3, 2024. Scheduling Order, FMC Docket No. 23-08, Mediterranean Shipping Company, S.A.—Possible Violations of the Shipping Act, 46 U.S.C. §§ 41102(c), 40501 and 41104(a)(2)(A) (ALJ October 2, 2023). MSC and OE actively participated in good faith throughout the discovery process. OE now submits its brief, including findings of fact and appendix, pursuant to the Scheduling Order.

## **B. Summary of the Case**

This case is how the largest vessel-operating common-carriers (VOCC) in the world, assisted by its U.S. agent, violated the Shipping Act in pursuit of corporate profit. MSC knowingly and willfully employed unreasonable and unfair practices that did not promote or “ensure an efficient, competitive, and economical transportation system in the ocean commerce of the United States.” 46 U.S.C. § 40101(2). More specifically, MSC developed and employed unlawful practices targeting U.S. logistic chain service providers such as non-vessel operating common carriers, ocean freight forwarders, customs brokers, and truckers.

For years, MSC used its market power and wielded heavy-handed tactics to define standard bill of lading terms such as “merchant” to justify billing nonconsenting and non-contracting third parties detention and demurrage. In this case, MSC invoiced third parties listed as “notify parties” found on its standard bill of lading, regardless of their contractual or beneficial cargo status.

Instead of working to bill the proper party, MSC had a policy of invoicing the notify party, which effectively turned many third parties into its unwilling and nonconsenting billing departments.

Furthermore, in pursuit of higher profits, MSC failed to meet other basic Shipping Act requirements, such as, clearly publishing a non-operating reefer (NOR) rate in its U.S. tariff. For several years, MSC failed to publish NOR detention and demurrage rates and consistently failed to correct the mistake, calling the resulting overcharges a “billing error.” Only when confronted by its customers regarding these overcharges did MSC issue refunds. MSC never proactively undertook any action to return millions of dollars in overcharges.

The following proposed findings of fact establish the background for MSC’s operations, as well as the nature and extent of its activities at the heart of this proceeding. The discussion will address the elements necessary to establish violations pursuant to 46 U.S.C. § 41102(c) and establish a prima facie case against MSC for multiple and ongoing violations of the Shipping Act at 46 U.S.C. §§ 41102(c) and 40501. Along with presenting its prima facie case, OE requests that the ALJ impose significant civil penalties and issue a cease-and-desist order, to deter and mitigate MSC’s violative behaviors.

## **II. PROPOSED FINDINGS OF FACT**

Pursuant to Rule 214(c)(2), 46 C.F.R. § 502.214(c)(2), OE submits the following proposed findings of fact (PFF) together with corresponding references to exhibit numbers and attachments. OE requests that these be adopted by the ALJ and incorporated as the basis for his Initial Decision.

## A. Proposed Findings with Respect to Background on MSC

- BEIC PFF1. MSC is a vessel-operating common carrier (VOCC) as defined by 46 U.S.C. § 40102(7). Answer Resp't MSC Mediterranean Shipping Co., S.A. (MSC Answer) at ¶1; Jt. Stip. Fact at ¶1, 2; see also Order of Investigation and Hearing, Docket No. 23-08, Mediterranean Shipping Company, S.A.—Possible Violations of the Shipping Act, 46 U.S.C. §§ 41102(c), 40501, and 41104(a)(2)(A) (OIH) at ¶1.
- BEIC PFF2. MSC is a common carrier that is privately owned and organized under the laws of Switzerland with its principal place of business at 12-14, Chemin Rieu, Geneva, Switzerland 1208. MSC Answer at ¶2; Jt. Stip. Fact at ¶3; see also OIH at ¶2.
- BEIC PFF3. MSC's agent in the United States is Mediterranean Shipping Company (USA), Inc. with a principal place of business at 420 5th Avenue, 8th floor, New York, NY 10018-2702. MSC Answer at ¶3; Jt. Stip. Fact at ¶4; see also OIH at ¶3.
- BEIC PFF4. MSC is a global container shipping company with a large customer base in the U.S. shipping industry that has more than 800 vessels, on 300 routes, in 520 ports of call, in over 150 countries. MSC CARGO DIVISION, <https://www.msc.com/en/about-us/msc-group> (last visited Apr. 3, 2024); Tasova V.S. at ¶5–6.
- BEIC PFF5. In 2021, MSC imported 17.2% of U.S. imports; in 2022, MSC imported 18% of U.S. imports; and in 2023, MSC imported 14.8% of U.S. imports. OE Ex. 40 at BEIC 258; OE Ex. 41 at BEIC 264; OE Ex. 42 at BEIC 270; see also DESCARTES DATAMYNE, <https://www.datamyne.com/> (last visited Apr. 3, 2024).
- BEIC PFF6. In 2021, MSC exported 13.9% of U.S. exports; in 2022, MSC exported 14.2% of U.S. exports, and in 2023 MSC exported 15% of U.S. exports. OE Ex. 43 at BEIC 275; OE Ex. 44 at BEIC 281; OE Ex. 45 at BEIC 287; see also DESCARTES DATAMYNE, <https://www.datamyne.com/> (last visited Apr. 3, 2024).
- BEIC PFF7. MSC is estimated to be the largest shipping company in the world and a dominant presence in the U.S. market with estimated earnings to be at \$27 billion from June 2021–2022. Tasova V.S. at ¶6–7; see REPORT: MSC'S VALUE MAKES APONTES THE WEALTHIEST FAMILY IN SWITZERLAND, THE MARITIME EXECUTIVE, <https://maritime-executive.com/article/report-msc-s-value-makes-apontes-the-wealthiest-family-in-switzerland#:~:text=Report%3A%20MSC's%20Value%20Makes%20Apontes%20the%20Wealthiest%20Family%20in%20Switzerland,->

SCA%20file%20image&text=Mediterranean%20Shipping%20Company%20is%20famously,with%20no%20shortage%20of%20billionaires, October 17, 2022 (last visited Apr. 3, 2024); Lori Ann LaRocco, MSC, WORLD'S BIGGEST SHIPPING COMPANY AND U.S.-CHINA TRADE BELLWETHER, IS BETTING ON A REBOUND FOR GLOBAL ECONOMY, CNBC, <https://www.cnbc.com/2023/03/01/worlds-biggest-shipping-firm-isnt-talking-like-a-recession-is-coming.html#:~:text=State%20of%20Freight-,MSC%2C%20world's%20biggest%20shipping%20company%20and%20U.S.%2DChina%20trade%20bellwether,a%20rebound%20for%20global%20economy&text=MSC%2C%20the%20world's%20largest%20container,the%20second%20half%20of%202023>, March 1, 2023 (last visited Apr. 3, 2024).

BEIC PFF8. MSC has been a party to the Maersk/MSK Vessel Agreement, which is often referred to as the “2M Alliance,” since 2015. Resp’t MSC Mediterranean Shipping Company, SA’s Reply to the Office of Enforcement’s First Req. for Admis. (MSC Reply to OE 1st RFA) at ¶2.

BEIC PFF9. MSC is currently a party to the 2M Alliance. Id.

BEIC PFF10. The 2M Alliance will terminate in January 2025. Id.

BEIC PFF11.  MSC0000777  
; see also  
MSC0000773  
MSC0000774  
, MSC0000775.

BEIC PFF12. MSC publishes its tariffs with Descartes Systems Group Inc. at <https://rates.descartes.com>. MSC Answer at ¶6; Jt. Stip. Fact at ¶5; see also OIH at ¶6.

BEIC PFF13. On at least four occasions, between approximately 1989 and 2006, MSC was the subject of several enforcement actions that were resolved through the Commission’s informal compromise procedures. See OE Exs. 48–51.

BEIC PFF14. According to the Commission’s 28<sup>th</sup> Annual Report for Fiscal Year 1989, MSC is reported to have paid a compromised civil penalty to the Commission in the amount of \$50,000. See OE Ex. 48 at BEIC 000299.

BEIC PFF15. In 1999, MSC executed a compromise agreement and paid a civil penalty in the amount of \$360,000 to resolve alleged violations of

sections 10(b)(1), 10(b)(2), and 10(b)(4) of the Shipping Act. This compromise agreement and civil penalty are reflected in the Commission’s press release NR 99-11, issued on May 6, 1999. See OE Ex. 49 at BEIC 000300–301.

BEIC PFF16. In 2001, MSC executed a compromise agreement and paid a civil penalty in the amount of \$500,000 to resolve alleged violations of sections 10(b)(1) and 10(b)(2) of the Shipping Act. This compromise agreement and civil penalty are reflected in the Commission’s press release NR 01-12, issued on November 29, 2001. See OE Ex. 50 at BEIC 000302–303.

BEIC PFF17. In 2006, MSC executed a compromise agreement and paid a civil penalty in the amount of \$280,000 to resolve alleged violations of sections 10(b)(1) and 10(b)(2)(A) of the Shipping Act. This compromise agreement and civil penalty are reflected in the Commission’s press release NR 06-06, issued on November 30, 2006. See OE Ex. 51 at BEIC 000304–305.

**B. Proposed Findings with Respect to MSC’s Use of its Merchant Clause**

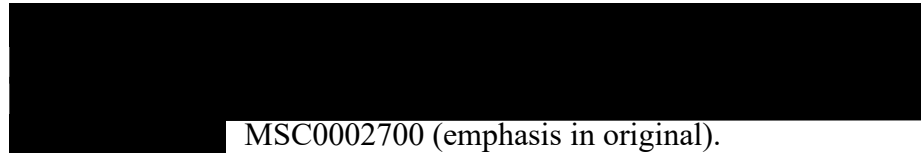
BEIC PFF18. MSC’s non-negotiable sea waybill defines the term “Merchant” to include “the Shipper, Consignee, holder of this Sea Waybill, the receiver of the Goods and any Person owing, entitled to or claiming the possession of the Goods or of this Sea Waybill or anyone acting on behalf of this Person.” Jt. Stip. Fact at ¶7; OE Ex. 25 at BEIC 000099; MSC Answer at ¶7; see also OIH at ¶7.

BEIC PFF19. MSC’s bill of lading attempts to hold, “[e]very Person defined as ‘Merchant’ [ ] jointly and severally liable towards [MSC] for all the various undertakings, responsibilities, and liabilities of the Merchant under or in connection with this Bill of Lading and to pay the Freight due under it . . . .” OE Ex. 25 at BEIC 0000100.

BEIC PFF20. MSC’s bill of lading has not changed from January 2018 to present day. Jt. Stip. Fact at ¶6.

BEIC PFF21. MSC’s tariff makes the Merchant responsible for payment of demurrage, detention, and per diem. Id. at ¶11.

BEIC PFF22.

 MSC0002700 (emphasis in original).

BEIC PFF23. But [REDACTED] MSC0002700; see generally MSC0002699–0002705.

BEIC PFF24. Elsewhere, MSC has [REDACTED] MSC0000033.

BEIC PFF25. The [REDACTED] Id.

BEIC PFF26. The [REDACTED] Id.

BEIC PFF27. The [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Id. (emphasis added).

BEIC PFF28. MSC uses the term, “invoice party” interchangeably with the notify party of a bill of lading. MSC0003975; MSC0001033.

BEIC PFF29. In practice, it is MSC’s policy to invoice the notify party. See MSC0002953 (“Our policy is to always bill the Notify party since they are who we send arrival notices to (kind of like per diem gets billed to the trucker since they pull the box.)”); MSC0003975 (“Per policy we can only invoice the ‘invoice company’ listed on the bill of lading. In this case, it is Welke.”); MSC0002697 (“Invoice company is autaset based on whom the invoice company is on the bill of lading for the ocean freight.”); MSC0004574 (“We invoice these to the invoice

company because a lot of times when we invoice to the [consignee], or another party, they don't pay then our freight cashier team has to try and collect these. So by procedure, we are forced to send these invoices to the invoice company listed on the [bill of lading].”).

BEIC PFF30.

In consideration of this practice, an MSC employee wrote:

When Notify is different than consignee some clients refuse to pay so we bill [consignee] directly at time of Billing . . . . This can be a lot of manual work and not realistic to review all invoices/clients in this way.

In general, we have been running into many issues where the notify party on the [bill of lading] is also the invoice company who will be billed for rail detention and those Notify parties are claiming they do not have responsibility for those charges as they are not the [consignee]. At that point due to age of invoices we have trouble to rebill those charges to [consignee] without their acceptance to pay....We do think this is something that needs to be looked at more in depth in terms of who is the party we need to be billing from legal standpoint but also if there is any way to make these changes without large changes from how [port of loading] is manifesting [bills of lading] invoice [companies].

MSC0001032 (emphasis added).

BEIC PFF31.

MSC's policy is to require written confirmation any time the party receiving an invoice is changed. MSC Answer at ¶15; see also OIH at ¶15.

BEIC PFF32.

MSC's policy is not to remove charges from any account until the new recipient of the invoices has confirmed that it agrees to be billed for those charges. MSC Answer at ¶16; see also OIH at ¶16.

BEIC PFF33.

MSC's policy regarding non-payment of invoices is that:

If a detention and/or demurrage invoice is not paid by a customer, a reminder is issued to the customer ten days following the guarantee date. If necessary, an additional reminder is sent to the customer five days later. Two weeks after the second reminder is sent, if the invoice remains unpaid, the matter is sent to a third-party collection agency. Thereafter, a customer may be denied future service due to non-payment of invoices.

If a per diem invoice is not paid, MSC's policy varies depending on whether the motor carrier remains in business, the amount of the invoice, and whether the motor carrier has been shut out under the UIIA. If the motor carrier has been shut out from the UIIA for more than 60 days, is in business, and has accrued charges in excess of \$250, the matter would be sent to a third-party collection agency.

MSC Mediterranean Shipping Company, S.A.'s Resp. Office of Enforcement's Third Interrogs. at ¶40.

BEIC PFF34.

However,



MSC000004.

1. Proposed findings with respect to notify party V. Alexander & Co., Inc.

BEIC PFF35.

V. Alexander & Co., Inc. (V. Alexander) is a licensed and bonded Ocean Freight Forwarder, FMC Org. No. 005312. MSC Answer at ¶17; see also OIH at ¶17.

BEIC PFF36.

V. Alexander provides customs services and is a trade consultant. Tasova V.S. at ¶10.

BEIC PFF37.

V. Alexander was the notify party in the corresponding bills of lading found in Attachment A of the OIH. Jt. Stip. Fact at ¶13.



- BEIC PFF38. V. Alexander was neither the shipper nor the consignee in the corresponding bills of lading found in Attachment A of the OIH. Id. at ¶14.
- BEIC PFF39. MSC Invoice No. 190000057911R is a \$660 detention charge to V. Alexander referencing MSC bill of lading No. MSCUJX768383. OE Ex. 1 at BEIC 000003.
- BEIC PFF40. MSC Invoice No. 190000057911R is dated February 12, 2018. OE Ex. 1 at BEIC 000003.
- BEIC PFF41. MSC Invoice No. 190000058539R is a \$165 detention charge to V. Alexander referencing MSC bill of lading No. MSCUJX768383. OE Ex. 1 at BEIC 000004.
- BEIC PFF42. MSC Invoice No. 190000058539R is dated February 12, 2018. OE Ex. 1 at BEIC 000004.
- BEIC PFF43. MSC Invoice No. 190000058338R is a \$1,215 detention charge to V. Alexander referencing MSC bill of lading No. MSCUJX764689. OE Ex. 2 at BEIC 000007.
- BEIC PFF44. MSC Invoice No. 190000058338R is dated February 12, 2018. OE Ex. 2 at BEIC 000007.
- BEIC PFF45. MSC Invoice No. 190000060568R is a \$165 detention charge to V. Alexander referencing MSC bill of lading No. MSCUJX802356. OE Ex. 3 at BEIC000010.
- BEIC PFF46. MSC Invoice No. 190000060568R is dated April 11, 2018. OE Ex. 3 at BEIC000010.
- BEIC PFF47. MSC Invoice No. 190000061236R is a \$165 detention charge to V. Alexander referencing MSC bill of lading No. MSCUJX809211. OE Ex. 4 at BEIC000013.
- BEIC PFF48. MSC Invoice No. 190000061236R is dated May 2, 2018. OE Ex. 4 at BEIC000013.
- BEIC PFF49. MSC Invoice No. 190000067404R is a \$165 detention charge to V. Alexander referencing MSC bill of lading No. MSCUJX963315. OE Ex. 5 at BEIC000015.
- BEIC PFF50. MSC Invoice No. 190000067404R is dated August 16, 2018. OE Ex. 5 at BEIC000015.

- BEIC PFF51. MSC Invoice No. 190000067405R is a \$165 detention charge to V. Alexander referencing MSC bill of lading No. MSCUJX962887. OE Ex. 6 at BEIC000017.
- BEIC PFF52. MSC Invoice No. 190000067405R is dated August 16, 2018. OE Ex. 6 at BEIC000017.
- BEIC PFF53. MSC Invoice No. 190000071814R is a \$495 detention charge to V. Alexander referencing MSC bill of lading No. MEDUJP120135. OE Ex. 7 at BEIC000020.
- BEIC PFF54. MSC Invoice No. 190000071814R is dated December 6, 2018. OE Ex. 7 at BEIC000020.
- BEIC PFF55. On March 10, 2021, MSC sent V. Alexander an e-mail requesting payment of outstanding charges in the amount of \$6,544.40. OE Ex. 8 at BEIC 000028; see also MSC Answer at ¶22 (admitting that, “From March 2021 through July 2021, MSC billed and attempted to collect from V. Alexander detention . . .”).
- BEIC PFF56. On March 11, 2021, V. Alexander responded to MSC’s request for payment and listed invoice numbers that “should be billed direct to the consignee.” OE Ex. 8 at BEIC 000027 (including the aforementioned Invoice Nos.: 190000057911R; 190000058539R; 190000058338R; 190000060568R; 190000061236R; 190000067404R; 190000067405R; and 190000071814R (hereinafter “MSC Invoices to V. Alexander”).
- BEIC PFF57. V. Alexander requested MSC “rebill to the correct party and confirm when complete.” Id.
- BEIC PFF58. On March 12, 2021, MSC responded to V. Alexander:
- Please note we bill to notify party as you are the on [sic] being notified of arrival. If cnee [sic] is to pay we need their confirmation in writing that they accept these invoices. Until we receive their written acceptance we would not be able to remove [sic] from your account.
- Id. at BEIC 000026.
- BEIC PFF59. On the same day, V. Alexander responded to MSC:
- We are neither the shipper or consignee on the BOL and only handle the clearance for these accounts. The charges should go directly to them and I have included our lawyer if you have further questions or continue to persist these charges belong on our account.

Id. at BEIC 000025.

BEIC PFF60. The attorney representing V. Alexander then responded to MSC:

Mr. Ristau, the Notify Party is not a merchant on the bill of lading: it is not a party to the contract of affreightment. The request of MSC that V. Alexander be shown as Notify Party was not made by the latter, which had no part in the formation of your contract with the merchant(s). As a result, it has no obligation to pay for any services performed under the contract between you and your merchant customers. If you really would like to collect your money, you should direct your bills to someone who owes you the sums.

Id. at BEIC 000024–25.

BEIC PFF61. On April 6, 2021, MSC requested an update from V. Alexander about when payment would be processed. OE Ex. 8 at BEIC 000023; see also MSC Answer at ¶22 (admitting that, “From March 2021 through July 2021, MSC billed and attempted to collect from V. Alexander detention . . . .”).

BEIC PFF62. On April 27, 2021, MSC emailed the consignee in MSC bills of lading Nos.: MSCUJX768383; MSCUJX768383; MSCUJX764689; MSCUJX802356; MSCUJX809211; MSCUJX963315; MSCUJX962887; and MEDUJP120135 (hereinafter “Consignee Company A”) about the MSC Invoices to V. Alexander. OE Ex. 9 at BEIC 000033.

BEIC PFF63. On May 4, 2021, Consignee Company A asked MSC to provide invoice copies. Id.

BEIC PFF64. On the same day, MSC provided the invoices and asked Consignee Company A to “confirm if [they] will pay attached invoices or if [they] will need them re-invoiced directly to [the V. Alexander Consignee] to be paid.” Id. at BEIC 000032.

BEIC PFF65. On May 19, 2021, MSC sent V. Alexander an e-mail requesting payment of outstanding charges in the amount of \$30,559.40. OE Ex. 8 at BEIC 000022.

BEIC PFF66. On May 20, 2021, MSC asked Consignee Company A to confirm if [they] will pay the invoices. OE Ex. 9 at BEIC 000032.

BEIC PFF67. That same day, V. Alexander asked for help from another MSC employee—a District Sales Manager. MSC0002954–55.

- BEIC PFF68. The District Sales Manager routed the question to another MSC employee—an Inside Sales Manager, describing to them that:
- The rail detention invoices are being sent to V Alexander who is the notify party but these shipped under [Consignee Company A] so these should be for [Consignee Company A's] account. Invoices are attached and then the reply from Robert stating that [Consignee Company A] has to agree to pay the charges before they can rebill them. But V Alexander should have never been billed in the first place.
- MSC0002953 (emphasis added).
- BEIC PFF69. On May 21, 2021, the Inside Sales Manager responded that, “[MSC’s] policy is to always bill the Notify party since they are who we send arrival notices to (kind of like per diem gets billed to the trucker since they pull the box).” MSC0002953.
- BEIC PFF70. On May 21, 2021, the Consignee Company A responded that the e-mail had been referred to another employee and that they would contact MSC with more information as soon as possible. OE Ex. 9 at BEIC 000031.
- BEIC PFF71. On June 2nd and 22nd of 2021, MSC asked Consignee Company A for an update. Id. at BEIC 000030.
- BEIC PFF72. On July 14, 2021, V. Alexander requested its statement from MSC. OE Ex. 10 at BEIC 000038.
- BEIC PFF73. On July 15, 2021, MSC provided the statement to V. Alexander. Id.; see also MSC Answer at ¶22 (admitting that, “From March 2021 through July 2021, MSC billed and attempted to collect from V. Alexander detention . . .”).
- BEIC PFF74. On the same day, V. Alexander responded to MSC, “[I]ooks like we still have the issue with invoices billed to V. Alexander that should have gone to the consignee. Per legal, we are not responsible for these charges . . .”. OE Ex. 10 at BEIC 000037.
- BEIC PFF75. On July 19, 2021, MSC responded to V. Alexander, “I can’t remove those from your account until [Consignee Company A] confirms they will pay them.” Id.
- BEIC PFF76. Also on July 19, 2021, MSC asked Consignee Company A to confirm if MSC could reinvoice the invoices to Consignee Company A. MSC0001062, OE Ex. 9 at BEIC 000030; see also OE Ex. 10 at BEIC 000035 (MSC relaying to V. Alexander that they re-sent the invoices to Consignee Company A for confirmation.).

- BEIC PFF77. On the same day, V. Alexander responded to MSC, “I am not understanding why you can’t remove them from our account when they never should have been billed to us in the first place. Why would V. Alexander be responsible for these items ever?” OE Ex. 10 at BEIC 000036.
- BEIC PFF78. MSC responded to V. Alexander, “You are the 1<sup>st</sup> notify party on the shipment. That is who we bill for rail detention charges.” Id.
- BEIC PFF79. V. Alexander responded to MSC:
- As a disclosed principal, V. Alexander is not a party to nor bound by MSC’s bill of lading contracts with the actual merchant and never consented to be. Therefore, V. Alexander is not responsible for these charges. Per Federal Law, MSC will need to bill the Merchant for these charges and stop harassing V. Alexander.
- Id.
- BEIC PFF80. MSC responded to V. Alexander, “I can only remove once I have the acceptance form [sic] [Consignee Company A] for these invoices. I have resent [sic] to them today. Once I have their confirmation they will be removed.” Id. at BEIC 000035.
- BEIC PFF81. V. Alexander responded to MSC:
- Please understand, V. Alexander, by law, is not responsible for these charges, we have not accepted responsibility for these charges, and we will not pay these charges. If MSC chooses to leave these on our account until an actual party to the transaction agrees to accept them, that is your poor accounting practice and we will continue to dispute and advise that these need to be removed from our statement in order for MSC to rectify their violation of GAAP rules and federal law.
- Id.
- BEIC PFF82. Finally, MSC responded to V. Alexander, “[t]hese will remain until we have resolution. Please clear the rest of the outstanding [sic] your dispute is already noted on these invoices.” OE Ex. 10 at BEIC 000035; see also MSC Answer at ¶27.

BEIC PFF83. On July 20, 2021, Consignee Company A internally escalated the MSC Invoices to V. Alexander re-invoicing issue and MSC asked to confirm re-invoicing the MSC Invoices to V. Alexander to Consignee Company A. MSC0001061–62.

BEIC PFF84. On July 22, 2021, Consignee Company A responded to MSC:

Again, these invoices are from 2018. [Consignee Company A] requires that invoices are received within 45 days of occurrence or they are voided and this is stated in our contract.

These invoices will need to be settled by MSC.

I have added our account rep [ ], as she is familiar with our contract.

MSC 0001061.

BEIC PFF85. MSC internally escalated the issue, writing:

I have these 8 invoices currently billed to 1st notify V Alexander from 2018 but they are refusing to pay and are "threatening" legal action if not removed. I have reached out for acceptance to cnee but they have refused to accept per attached that they were not billed within 45 days per contract. Can you confirm how I we can proceed? Or if these should be move to uncollectible?

MSC0001059–60.

BEIC PFF86. In response, MSC wrote, "Please cancel the invoices." MSC 0001059.

BEIC PFF87. After July 19, 2021, V. Alexander stated that they had just noticed that the rail detention charges were dropped in the next billing statement from MSC. Tasova V.S at ¶14.

2. Proposed findings with respect to notify party John S. Connor, Inc.

BEIC PFF88. John S. Connor, Inc. (J. Connor) is a licensed, tariffed, and bonded non-vessel operating common carrier and ocean freight forwarder, FMC Org. No. 00674. MSC Answer at ¶29.

BEIC PFF89. J. Connor provides customs brokerage and compliance services. Tasova V.S. at ¶17.

BEIC PFF90. J. Connor was the notify party in the corresponding bills of lading found in Attachment A of the OIH. Jt. Stip. Fact at ¶13.

- BEIC PFF91. J. Connor was neither the shipper nor the consignee in the corresponding bills of lading found in Attachment A of the OIH. Id. at ¶14.
- BEIC PFF92. MSC Invoice No. 100000098316R is a \$330 detention charge to J. Connor referencing MSC bill of lading No. MEDUL8508615. OE Ex. 11 at BEIC 000041.
- BEIC PFF93. MSC Invoice No. 100000098316R is dated October 2, 2020. OE Ex. Id.
- BEIC PFF94. MSC Invoice No. 100000098319R is a \$660 detention charge to J. Connor referencing MSC bill of lading No. MEDUL8510991. OE Ex. 12 at BEIC 000047.
- BEIC PFF95. MSC Invoice No. 100000098319R is dated October 2, 2020. OE Ex. Id.
- BEIC PFF96. MSC Invoice No. 100000098317R is a \$330 detention charge to J. Connor referencing MSC bill of lading No. MEDUL8499021. OE Ex. 13 at 000053.
- BEIC PFF97. MSC Invoice No. 100000098317R is dated October 2, 2020. Id.
- BEIC PFF98. MSC Invoice No. 100000098318R is a \$660 detention charge to J. Connor referencing MSC bill of lading No. MEDUL8510827. OE Ex. 14 at 000059.
- BEIC PFF99. MSC Invoice No. 100000098318R is dated October 2, 2020. Id.
- BEIC PFF100. MSC Invoice No. 100000101476R is a \$330 detention charge to J. Connor referencing MSC bill of lading No. MEDUL8510827. OE Ex. 15 at BEIC 000066.
- BEIC PFF101. MSC Invoice No. 100000101476R is dated November 12, 2020. Id.
- BEIC PFF102. On April 20, 2021, MSC sent J. Connor an email requesting payment of outstanding charges in the amount of \$32,125. MSC0001048.
- BEIC PFF103. On April 29, 2021, Invoice Nos.: 100000098316R; 100000098319R; 100000098317R; and 100000098318R were paid. MSC0001035.
- BEIC PFF104. On May 14, 2021, in an email regarding MSC Invoice Nos.: 100000098316R; 100000098319R; 100000098317R; 100000098318R; and 100000101476R (hereinafter “MSC Invoices to J. Connor”), J. Connor provided:

Ocean carrier will bill us the container detention charges because we are a Notify on the B/L. We are the Notify

Party only for the sole purpose of receiving arrival info to clear Customs. We don't move the freight. We don't organize the delivery. Thus, we have zero control over the incurring of detention, but they threaten our freight account if we don't pay, and we have to waste resources essentially being their collection agency or we take the hit.

OE Ex. 16 at BEIC 000071; see also MSC Answer at ¶37–38.

BEIC PFF105. On May 25, 2021, Invoice No. 100000101476R was paid. MSC0001035.

3. Proposed findings with respect to notify party Welke Customs Brokers USA, Inc.

BEIC PFF106. Welke Customs Brokers USA, Inc. (Welke) is a licensed customs brokerage firm that provides customs clearance, consulting, and cargo insurance services. Tasova V.S. at ¶22.

BEIC PFF107. On March 11, 2020, MSC sent Welke an e-mail requesting payment of outstanding charges in the amount of \$9,269. MSC0004831.

BEIC PFF108. On the same day, Welke emailed the shipper of the containers (hereinafter “Shipper C”), and asked them to “contact MSC Argentina and arrange payment.” Id.

BEIC PFF109. Shipper C responded that they had paid those expenses. MSC0004830.

BEIC PFF110. On March 25, 2020, Welke emailed MSC:

Good morning,

Welke has an agreement with [Shipper C] to secure the release of the import cargo from Customs custody and provide MSC Port Everglades proof of [Customs and Border Protection] clearance and delivery order to the consignee of the containers. Once we issue those documents, we have completed our services. We are not responsible for coordinating the pick up by a domestic carrier of the containers for delivery since the ocean [bill of lading] terms of service included delivery to the consignee door.

We have advised MSC on more than one occasion that Welke is not responsible for charges that are associated with driver waiting time or any other costs associated with the delivery of containers to the consignee location. We



have no beneficial interest the [sic] cargo nor are we a party to the shipping terms of the bill of lading.

Please refer to emails below regarding these charges where [Shipper C] agreed to remit payment to MSC in Argentina. Please remove these charges from our account . . . and address this matter with your office in Buenos Aires.

Again, Welke has no obligation to pay these charges.

MSC0004829.

BEIC PFF111. Welke added, “[a]s an additional point, Welke did not request MSC establish an account or provide extended payment terms. This appears to be an arbitrary action on the part of MSC to create an accounts receivable for balance sheet and payment purposes.” Id.

BEIC PFF112. On March 26, 2020, at 2:53 PM, MSC internally routed Welke’s message and added, “per our customer Welke is not responsibility [sic] for this outstanding; so we need your help to see who authorized those charges that were added in those [original bills of lading].” MSC0004577.

BEIC PFF113. At 3:57 PM, MSC further discussed the issue and asked a coworker to “advise who [would] satisfy the below outstanding charges on [the] account.” Id.

BEIC PFF114. On March 27, 2020, at 10:16 AM, the MSC coworker responded:

First of all these costs should be invoiced to [Shipper C instead of] Welke. But could you clarify what costs refer to? Is [sic] about demurrage/detention or trucking waiting time? Could you re-send me the each invoice [sic]? Also [please] clarify is costs has been paid or just invoiced.. [sic]

But first I would like to check when costs appears and who took the decision to invoiced [sic] to Welke Take in account for some [bills of lading] shipper paid [detention/demurrage] locally . . . .”

MSC0004576.

BEIC PFF115. At 10:44 AM, MSC responded, “[t]hese were invoice [sic] to the invoice company on the [bill of lading].” MSC0004575.

BEIC PFF116. Then at 2:48 PM, another MSC employee clarified that:

[MSC] invoice[s] these to the invoice company because a lot of times when we invoice to the [consignee], or another party, they don't pay then our freight cashier team has to try and collect these. So by procedure, we are forced to send these invoices to the invoice company listed on the [bill of lading]. Hope these clears up why we always send them to the invoice company.

MSC0004574.

BEIC PFF117. On April 8, 2020, MSC sent Welke an e-mail requesting payment of outstanding charges in the amount of \$675. MSC0004290.

BEIC PFF118. On April 22, 2020, MSC sent Welke an e-mail requesting payment of outstanding charges in the amount of \$675. MSC0004285.

BEIC PFF119. On May 6, 2020, MSC sent Welke an e-mail requesting payment of outstanding charges in the amount of \$3,411.50 (\$675 for charges 31–60 days overdue and \$2,736.50 for charges 1–30 days overdue). MSC0004295.

BEIC PFF120. On June 18, 2020, MSC sent Welke an e-mail requesting payment of outstanding charges in the amount of \$4,596.91 (\$675 for charges 91–180 days overdue, \$2,271.91 for charges 61–90 days overdue, \$1,425 for charges 31–60 days overdue, and \$225 for charges 1–30 days overdue). MSC0004323.

BEIC PFF121. On June 29, 2020, Shipper C emailed Welke:

As you know, I was working on solve [sic] these issue with MSC in order to cancel the extra expenses generated by our customer [ ]. Regarding the invoices billed to Welke, I asked them to cancel and bill new invoices to [Shipper C], they confirmed me [sic] they can't do this because were [sic] sent to their legal department.

So, I need to ask you [sic] issue an invoice to [Shipper C] for these expenses, we will pay to Welke, and then you can cancel this overdue with MSC. The detail is in the e-mail below.

Please let me know if you are agreed.

OE Ex. 24 at BEIC 000087.

BEIC PFF122. The referenced email, dated June 25, 2020 (hereinafter “June 25 e-mail”), included a MSC employee internally emailing another employee:

Good day, all below shipments were sent to legal for no payment, so there is nothing we can do now [sic]  
Furthermore we have below more multistep and drop and pick unpaid and if apyment [sic] not received this week  
Will be sent to legal too ... we also requested to equipment to stop the multistep for this account  
As they do not pay and any new shipment will cost them a lot more in dem & det that will need payment in full  
To be released

Id. at BEIC 000088

BEIC PFF123. The June 25 e-mail referenced five MSC bills of lading: MEDUBA338947 (BOL 8947); MEDUBA354803 (BOL 4803); MEDUBA355438 (BOL 5438); MEDUBA361949 (BOL 1949); MEDUBA376731 (BOL 6731). Id.

BEIC PFF124. In response to the June 25 e-mail, a MSC employee internally addressed another MSC employee that the “invoice changed to [Consignee Company C] did not go through” and to “please send Final Notice to both Welke and [Consignee Company C] Also please send to Pamela to change all invoices to [Consignee Company C] the [consignee]. MSC0004508.

BEIC PFF125. On June 26, 2020—and in the same thread as the June 25 e-mail—an MSC employee internally wrote, “[w]e can not [sic] collect anything from Welke because they already replied to us that they do not have any responsibility for those shipments.” Id.

BEIC PFF126. On the same day, a MSC employee responded, “[b]e sure Pamela change all invoices to [Consignee Company C].” Id.

BEIC PFF127. Then on June 30, 2020, Welke agreed to pay MSC the \$4,596.91 associated with BOL 4803, BOL 5438, BOL 1949, and BOL 6731 for Shipper C. OE Ex. 24 at BEIC 000087.

BEIC PFF128. On July 7, 2020, Welke attempted to pay the \$4,596.91 bill for Shipper C and wrote:

Further to our telephone conversation, I have been informed by associates with MSC that the outstanding Welke

[accounts receivable] items . . . totaling \$4596.91 have been sent to your legal department. These charges are not for our account and we have had several communications with MSC regarding this issue.

We have collected the outstanding balance from [Shipper C] and will remit same on their behalf. I need to know who this payment is to be made to and if other than MSC, I will need an invoice for the charges. The charges in question are a result in driver waiting time for unloading at the consignee location.

Further, as I stated, Welke is a customs broker contracted by [Shipper C] to arrange for the customs clearance for import cargo arriving in the U.S. We are the named notify party on the [bill of lading] for arrival information only. We are not the shipper or the consignee and have no beneficial interest in the cargo shipped on any [bill of lading] for [Shipper C] as the Shipper. We require our account be cancelled and an explanation from your legal group as to why MSC insists we are responsible for these charges and under what authority you would create a financial obligation for Welke Customs Brokers when we are not a party to these transactions.

Id. at BEIC 000083.

BEIC PFF129. On July 8, 2020, Welke paid MSC the \$4,596.91 associated BOL 4803, BOL 5438, BOL 1949, and BOL 6731 for Shipper C. OE Ex. 23 at BEIC 000082.

*a. Welke was not liable to pay for MSC BOL4803*

BEIC PFF130. BOL 8947 lists Welke as the notify party. OE Ex. 18 at BEIC 000074.

BEIC PFF131. BOL 8947 lists Shipper C as the shipper. Id.

BEIC PFF132. BOL 8947 lists Consignee Company C as the consignee. Id.

BEIC PFF133. On March 18, 2020, Shipper C notified MSC via email that BOL 8947 was arriving and then asked if MSC had contacted Consignee Company C to coordinate delivery because Shipper C “need[s] to have a schedule of this to inform to [their] Sales Dept.” MSC0001289.

BEIC PFF134. On March 18 and March 19, 2020, DHC Trucking Inc. (DHC) emailed Consignee Company C about an appointment for the containers listed on BOL 8947. MSC0004267–73.

- BEIC PFF135. DHC carbon copied Shipper C and MSC on the emails. Id.
- BEIC PFF136. On March 19, 2020, Consignee Company C responded to DHC. MSC0004266.
- BEIC PFF137. On March 20, 2020, Consignee Company C provided a delivery address to DHC, with Shipper C and MSC carbon copied on the emails. MSC0004259–61.
- BEIC PFF138. MSC then emailed Welke to confirm the delivery address because it differed from the address provided in the delivery order. MSC0004258.
- BEIC PFF139. Welke then emailed Consignee Company C and Shipper C to confirm the address. MSC0004257.
- BEIC PFF140. A representative from Consignee Company C then confirmed that the address was correct. MSC0004256–57.
- BEIC PFF141. On March 24, 2020, in the same email chain but without Welke, DHC notified Consignee Company C and Shipper C that late pickup fees would apply to “any containers that do not make it back to the port due to appointments past 9am or waiting time going past 10am.” MSC0004254.
- BEIC PFF142. On March 26, 2020, MSC emailed Consignee Company C and Shipper C an invoice for a late pickup fee. MSC0004253–54.
- BEIC PFF143. On March 27, 2020, Shipper C emailed Welke, “[p]lease see attached invoice and emails below. Is Welke taking responsibility for these charges?” MSC0004253.
- BEIC PFF144. Welke responded to Shipper C, “[w]e absolutely are not responsible for these charges as they are not related to the customs processing. We have nothing to do with the arranging and finalization of deliveries. Please pay these fees direct to MSC when possible.” MSC0004252.
- BEIC PFF145. Shipper C then emailed MSC, Consignee Company C, and Welke “[t]hese are being invoiced to Welke but no one from Welke was copied on the original email.. [sic] Who are they supposed to be invoiced to? Also, I need a detailed explanation of what the charges are for.” MSC0004252.
- BEIC PFF146. MSC responded to Shipper C, Consignee Company C, and Welke, “[t]he charges are for Waiting time and late pickup, Late pickup occurs when the appointment is to [sic] late and the container will not make it to the port the same day, this results in a late pickup which covers the

additional trip to the truckers yard as well as overnight yard fees and security.” MSC0004251.

BEIC PFF147. An invoice for [REDACTED] was then billed to Welke. MSC0003603.

*b. Welke was not liable to pay for MSC BOL 4803*

BEIC PFF148. BOL 4803 lists Welke as the notify party. OE Ex. 19 at BEIC 000078.

BEIC PFF149. BOL 4803 lists Shipper C as the shipper. Id.

BEIC PFF150. BOL 4803 lists Consignee Company C as the consignee. Id.

BEIC PFF151. On April 27, 2020, at 3:36 PM, MSC emailed Welke:

Good day

Be advised that subject cntr [sic] is at the warehouse since 8am this morning for delivery.

Warehouse offloaded only part of the cargo and stopped to offloading asking the driver to stop.

**Drop and pick \$957 will apply – please approve**

Driver waiting time since 9am will apply as well. **\$125/hr until driver will leave**

Please also contact asap your warehouse and ask the reason why they stopped.

According to our motor carrier, they have a feeling of weak floor and having issues driving thru [sic] with the forklift.

They will have to hire labor in order to manually offload the rest of the cargo.

Urgently advise.

MSC0001542.

BEIC PFF152. At 3:39 PM, Welke emailed MSC and Shipper C, “[I]ncluding our client as we do not have authority to advise on this matter. [Shipper C], please read below and advise [MSC] the next steps you’d like to take.” MSC0001541.

- BEIC PFF153. At 16:57—time zone unknown—MSC emailed Shipper C and Welke, “[a]ny words? Driver is running out of hours. Please advise if is ok to drop the cntr. [sic].” MSC0001540.
- BEIC PFF154. At 4:39 PM, Shipper C emailed MSC, “[t]he container has to drop and pick up. Please provide us a solution to unload the goods and delivery to our customer by truck.” MSC0001540. Welke was not carbon copied on the email. Id.
- BEIC PFF155. MSC and Shipper C proceeded to discuss the logistics and price of the driver’s waiting time and the container’s additional pick up and drop off without Welke. MSC0001535–1540.
- BEIC PFF156. MSC and Shipper C agreed to additional fees including \$957 for an additional pick up and drop off and \$492 for an additional stopover. MSC0001539, MSC0001603.
- BEIC PFF157. An invoice for [REDACTED] was then billed to Welke. MSC0002046.

*c. Welke was not liable to pay for MSC BOL 5438*

- BEIC PFF158. BOL 5438 lists Welke as the notify party. OE Ex. 20 at 000079.
- BEIC PFF159. BOL 5438 lists Shipper C as the shipper. Id.
- BEIC PFF160. BOL 5438 lists Consignee Company C as the consignee. Id.
- BEIC PFF161. On April 23, 2020, DHC emailed Consignee Company C and Shipper C that Container GLDU7732792 (Container 2792) within BOL 5438 was ready at the port. MSC0001298. Welke was carbon copied. Id.
- BEIC PFF162. Consignee Company C and DHC coordinated a pickup for April 28, 2020. MSC0001296–98.
- BEIC PFF163. On April 28, 2020 at 11:45 AM, DHC emailed Consignee Company C, Shipper C, and Welke, “[p]lease noted [sic] the charges for waiting time as per below information : From : 9:15 am to 11:40 am Total time 2:25 hrs. Free time 1 hr. Billable 1:25 hrs. Please send to us the revised [delivery order].” MSC0001293.

BEIC PFF164. At 16:43—time zone unknown—MSC sent an email to DHC, Consignee Company C, Shipper C, and Welke attaching the proof of delivery and invoice. MSC0001292.

BEIC PFF165. On April 29, 2020, at 7:29 AM, Shipper C emailed MSC, “[t]his invoice should be pay [sic] by [Consignee Company C], so please cancel it to Welke and rebill.” MSC0001291–92.

BEIC PFF166. At 12:06 PM, Consignee Company C emailed Shipper C, MSC, and Welke:

I didn’t hire MSC to do anything for me, we contracted [Shipper C] on a DDP program which means that they deliver it to me. I also don’t care about MSC’s policy on 1 hour of Detention time when STANDARD BUSINESS PRACTICE for any trucking company is 2 hours.

You can try to bill [Consignee Company C] directly but I’m not authorizing a dime to anyone but [Shipper C].

MSC 0001291.

BEIC PFF167. At 12:35 PM, MSC emailed Shipper C, DHC, Consignee Company C, and Welke that, “[p]er policy [MSC] can only invoice the ‘Invoice company’ listed on the [bill of lading]. In this case, it is Welke.” MSC0003975.

BEIC PFF168. An invoice for [REDACTED] was then billed to Welke. MSC0001436.

*d. Welke was not liable to pay for MSC BOL 1949*

BEIC PFF169. BOL 1949 lists Welke as the notify party. OE Ex. 21 at BEIC 000080.

BEIC PFF170. BOL 1949 lists Shipper C as the shipper. Id.

BEIC PFF171. BOL 1949 lists Consignee Company C as the consignee. Id.

BEIC PFF172. On May 14, 2020, MSC emailed Welke with the subject, “[BOL 1949] // Containers: MEDU7350596 and MSCU8448678,” saying:

See below driver detention on subject containers and advise approval of below charges when you are able. Once approved, a revised [arrival notice] will be sent acting as the invoice. [Proof of delivery] is attached, let me know if you have any questions or concerns.



MSCU8448678:11-1:30

1.5 hours = \$187.50

MEDU7350596 : 8:30 arrival, 9 start, 5pm departure

6 hours and drop fee \$100 = \$850

Admin fee per [bill of lading] = \$100

Total charges for both containers = \$1,137.50

MSC0006524 (emphasis added).

BEIC PFF173. On May 27, 2020, at 3:50 PM, MSC emailed Welke again: “[a]s the below are valid charges that need to be paid out to the carrier, and no dispute has been received, we need to add the charges to the [arrival notice]. A revised copy will be sent.” MSC0006523.

BEIC PFF174. At 7:54 PM, Welke responded, “[w]e have forwarded this to our client. We are simply the broker and do not have the authority to approve such charges. I have also included them on this email should you like to speak to them directly regarding these charges.” Id.

BEIC PFF175. On June 22, 2020, MSC emailed Welke a revised arrival notice due to changing “Collect Charges” and “Chassis Number.” MSC0005523.

BEIC PFF176. The attached arrival notice charged 100.00 USD for an “Administrative Fee” and 1037.50 USD for “Driver Waiting.” MSC0005525.

BEIC PFF177. Then, an invoice for [REDACTED] was then billed to Welke. MSC0004330.

*e. Welke was not liable to pay for MSC BOL 6731*

BEIC PFF178. BOL 6731 lists Welke as the notify party. OE Ex. 22 at BEIC 00081, MSC0001133.

BEIC PFF179. BOL 6731 lists Shipper C as the Shipper. Id.

BEIC PFF180. BOL 6731 lists Consignee Company C as the consignee. Id.

BEIC PFF181. On May 20, 2020, Welke emailed MSC and Shipper C about BOL 6731’s release. MSC0003412.

BEIC PFF182. Separately, on June 2, 2020, MSC had negotiated and discussed freight rates with Shipper C and internally noted that it had created an exception with Shipper C to apply March rates for BOL 6731. MSC0003013.

- BEIC PFF183. From June 4 through June 10, 2020, Consignee Company C and DHC then negotiated a time to pick up and then deliver the containers in BOL 6731. MSC0003401–11.
- BEIC PFF184. On June 10, 2020, DHC emailed MSC a signed bill of lading, which included a waiting time of two hours, amounting to one billable hour for a container under BOL 6731. MSC0001343.
- BEIC PFF185. Then an invoice for [REDACTED] was billed to Welke. MSC0004331.

### C. Proposed Findings with Respect to MSC’s Billing of Non-Operating Reefers

- BEIC PFF186. A dry cargo container—also known as a dry container, dry freight container, or dry van container—is a shipping container designed for the carriage of goods other than liquids. It is the most widely used shipping container and used mainly for general cargo—it is typically made from steel, is fully enclosed, and is loaded and discharged through a set of full height rear doors. PETER BRODIE, *DICTIONARY OF SHIPPING TERMS* 99–100 (Informa Law from Routledge 6th ed. 2013).
- BEIC PFF187. A reefer container or refrigerated container (reefer) is an insulated shipping container used for the carriage of goods requiring refrigeration in transit—it is fitted with a refrigeration unit which is connected to the carrying ship’s electrical power supply. *Id.* at 208.
- BEIC PFF188. Reefers require enhanced handling and care, which includes the plugging and unplugging of the units, daily monitoring, electricity, pre-trip inspections for the units and generator, fuel for the generators, and other care. MSC Reply to OE 1st RFA at ¶36.
- BEIC PFF189. NORs are reefers that do not require such enhanced care and are instead used as dry containers. MSC Reply to OE 1st RFA at ¶37; MSC Answer at ¶59; OE Ex. 30 at BEIC 000140.
- BEIC PFF190. [REDACTED] MSC0000006.
- BEIC PFF191. [REDACTED] *Id.*
- BEIC PFF192. [REDACTED] *Id.*

- BEIC PFF193. On January 26, 2022, the FMC received a complaint that MSC was charging NORs the same detention and demurrage rates as operating reefers. OE Ex. 30 at BEIC 000135.
- BEIC PFF194. Included in the complaint was an email dated January 26, 2022, from East West Container Line, Inc. asking MSC to revise the detention and demurrage charge because the container was a NOR. Id. at BEIC 000137.
- BEIC PFF195. MSC replied to East West Container Line, Inc., “[p]lease note that the charges are correct. The reefer rates apply to the box itself regardless of whether the reefer was non-operating or active.” Id. at BEIC 000135–36.
- BEIC PFF196. When asked to clarify, MSC responded that, “[d]ry containers are boxes that do not have refrigeration capabilities. All Reefers encompasses [sic] both operating and non-operating reefer units.” Id. at BEIC 000134.
- BEIC PFF197. During an audit on February 8, 2022, the Commission asked MSC to “provide any other justification or reasoning for charging additional demurrage or detention for NOR containers beyond regular dry cargo equipment.” OE Ex. 31 at BEIC 000140.
- BEIC PFF198. MSC responded on March 9, 2022:
- Demurrage and Detention (“D&D”) rates for NOR units are by default the rates applied to DRY units. Therefore MSC USA does not apply the same D&D rates to NOR and REEFER units, except in random billing mistakes which are corrected.
- This default policy of applying DRY D&D rates to NOR units is not at the moment explicitly laid down in M SC’s tariff, but it is our intention to modify our tariff entry to make this more plain.
- Id.
- BEIC PFF199. The Commission also asked MSC to detail when it “mitigates or waives demurrage or detention for NOR containers to regular dry or some other rate.” Id.
- BEIC PFF200. MSC responded, “[i]n instances where a billing error causes a NOR unit to be mis-rated as a REEFER unit for demurrage and detention, MSC

USA will correct and refund/ credit the billed amounts as soon as the mistake becomes known.” Id.

BEIC PFF201. Further auditing revealed that MSC had assessed the operating reefer rate on NOR shipments 2,629 times in 2021. MSC Answer at ¶60, 61; see also Jt. Stip. Fact ¶40.

BEIC PFF202. In 2021, on at least 925 occasions, MSC’s customers disputed the operating reefer detention and demurrage rate resulting in refunds totaling \$1,201,639.80. MSC Answer at ¶60; see also [REDACTED]

BEIC PFF203. In 2021, on at least 1,704 occasions, operating reefer charges were applied to NORs and went undisputed resulting in MSC retaining approximately \$857,944.57 in additional revenue. MSC Answer at ¶61.

BEIC PFF204. On February 2, 2024, Mr. Marco Sidoti (Mr. Sidoti) signed an affidavit in preparation for this proceeding. MSC0007310–7314.

BEIC PFF205. Sidoti is the Nationwide Demurrage/Detention Director at MSC and has “thorough knowledge of MSC’s policies with respect to the assessment and collection of the Charges for non-operating reefer (i.e. refrigerated) contains (“NORs”).” MSC0007310 at ¶1, 3.

BEIC PFF206. Sidoti attests that “upon discovery” of the misapplication of operating reefer rates to NORs, the issue was “promptly corrected,” and “ensured that NORs were correctly billed at the rate for dry containers moving forward.” MSC0007313 at ¶17.

BEIC PFF207. Sidoti further swears that this issue occurred “[d]uring a period in 2021” and that the 2,629 applications of “reefer Charges to NORs was corrected on or about September 16, 2021, and has not been an issue since.” MSC0007313–14 at ¶15, 21; MSC0000365 (showing an undated email to Sidoti attesting that the NOR issue should not have continued after 2021); MSC000489–93 (displaying an October 10, 2021 update to Sidoti that the Houston NOR calculations worked).

BEIC PFF208. [REDACTED] MSC0000773 (noting that [REDACTED]).

BEIC PFF209. Despite MSC’s claims that the NOR issue was fixed on September 16, 2021, many MSC customers disputed MSC’s charges well after

September 16, 2021, while other customers were still charged operating reefer rates well after September 16, 2021. See *infra* BEIC PFF210–283.

1. Recorded NOR [REDACTED]

a. [REDACTED] *Dispute 1*

BEIC PFF210. [REDACTED]  
[REDACTED] MSC0000846.

BEIC PFF211. [REDACTED]  
[REDACTED] MSC0000841–46.

BEIC PFF212. [REDACTED]  
[REDACTED] MSC0000839–41.

BEIC PFF213. [REDACTED]  
[REDACTED] MSC0000839–41.

BEIC PFF214. [REDACTED]  
[REDACTED] MSC0000838.

BEIC PFF215. [REDACTED]  
[REDACTED] MSC0000386.

BEIC PFF216. [REDACTED]  
[REDACTED] Id.

BEIC PFF217. [REDACTED]  
[REDACTED] MSC0000386.

BEIC PFF218. [REDACTED]  
[REDACTED] MSC0000384.



[REDACTED]

MSC0000743 (emphasis in original).

BEIC PFF227. [REDACTED] MSC0000741.

BEIC PFF228. [REDACTED] MSC0000737–40.

BEIC PFF229. [REDACTED] MSC0000736.

BEIC PFF230. [REDACTED] MSC0000735.

BEIC PFF231. [REDACTED] MSC0000734.

BEIC PFF232. [REDACTED] MSC0000733.

c. [REDACTED] *Dispute 3*

BEIC PFF233. [REDACTED] MSC0000824–833.

BEIC PFF234. [REDACTED] MSC0000823.

BEIC PFF235. [REDACTED] MSC0000822.

d. [REDACTED] *Dispute 4*

BEIC PFF236.

[REDACTED]

e. [REDACTED] *Dispute 5*

BEIC PFF237.

[REDACTED] MSC0000767; see also MSC0000770–72.

BEIC PFF238.

[REDACTED] MSC0000766; MSC0000772 (displaying [REDACTED])

f. [REDACTED] *Dispute 6*

BEIC PFF239.

[REDACTED] MSC0000755.

BEIC PFF240.

[REDACTED] Id.

BEIC PFF241.

[REDACTED] MSC0000753–54.

BEIC PFF242.

[REDACTED] MSC0000753.

BEIC PFF243.

[REDACTED] Id.

BEIC PFF244.

[REDACTED] MSC0000778.

BEIC PFF245.

[REDACTED] Id.

g. [REDACTED] *Dispute 7*

BEIC PFF246.

[REDACTED] MSC0000973.



BEIC PFF247.

[REDACTED]  
[REDACTED] Id.

2. Recorded NOR

[REDACTED]

BEIC PFF248.

[REDACTED]

[REDACTED]

MSC0000288.

BEIC PFF249.

[REDACTED]  
MSC0000286–87.

BEIC PFF250.

[REDACTED]  
[REDACTED] MSC0000286.

BEIC PFF251.

[REDACTED] Id.

BEIC PFF252.

[REDACTED] MSC0000285.

BEIC PFF253.

[REDACTED] Id.

BEIC PFF254.

[REDACTED] MSC0000284.

BEIC PFF255.

[REDACTED]  
MSC0000283.

BEIC PFF256. [REDACTED] Id.

BEIC PFF257. [REDACTED]  
MSC0000457.

BEIC PFF258. [REDACTED]  
MSC0000456.

BEIC PFF259. [REDACTED]  
MSC0000454.

BEIC PFF260. [REDACTED]  
MSC0000453.

3. Recorded NOR Disputes—Unnamed Companies

*a. Dispute 1*

BEIC PFF261. [REDACTED]  
[REDACTED]  
MSC000587.

BEIC PFF262. [REDACTED] Id.

*b. Dispute 2*

BEIC PFF263. [REDACTED]  
MSC0001026; see also MSC0001016–27.

BEIC PFF264. [REDACTED]  
MSC0001015.

4. Recorded NOR Dispute [REDACTED]

BEIC PFF265. [REDACTED]  
MSC0000631-644.

BEIC PFF266. [REDACTED]  
MSC0000631.

BEIC PFF267. [REDACTED]  
MSC0000627-30.

BEIC PFF268. [REDACTED]  
MSC0000627.

BEIC PFF269. [REDACTED]  
MSC0000626

BEIC PFF270. [REDACTED]  
MSC0000625.

BEIC PFF271. [REDACTED]  
MSC0000619-20.

BEIC PFF272. [REDACTED]  
MSC0000619.

BEIC PFF273. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

MSC0000618.

BEIC PFF274.

[REDACTED] MSC0000614-618.

BEIC PFF275.

[REDACTED] MSC0000612.

BEIC PFF276.

[REDACTED] MSC0000611.

BEIC PFF277.

[REDACTED]

5. Recorded NOR Dispute

[REDACTED]

BEIC PFF278.

[REDACTED]

[REDACTED]

MSC0001151.

BEIC PFF279.

[REDACTED]

MSC0001150.

BEIC PFF280.

[REDACTED]

[REDACTED]

Id.

BEIC PFF281.

[REDACTED] MSC0001149.

BEIC PFF282.

[REDACTED] Id.

BEIC PFF283.

[REDACTED]

**D. Proposed Findings with Respect to MSC Failure to Publish its Tariff Rates**

BEIC PFF284.

Throughout 2021, MSC’s U.S. tariff contained demurrage, detention, and per diem charges (collectively, “Charges”) for reefer containers and dry containers. Jt. Stip. Fact at ¶38.

BEIC PFF285.

Throughout 2021, MSC’s U.S. tariff did not contain separate Charges for non-operating reefer containers (NORs). Id. at ¶39.

BEIC PFF286.

MSC’s tariff continued to lack separate Charges for NORs until March 9, 2023. MSC Answer at ¶83; see also OIH at ¶83.

BEIC PFF287.

[REDACTED]

BEIC PFF288.

[REDACTED] MSC0000743

BEIC PFF289.

[REDACTED] MSC0000739

BEIC PFF290.

[REDACTED] MSC0000738–39

BEIC PFF291.

MSC published a rule that distinguishes between the NORs and reefers of other countries—Rule 300 of MSC’s tariff MESU-012 (Rule 300)—

and it became effective on December 9, 2015. OE Ex. 38 at BEIC 0000189 (showing that non-operating reefers in Afghanistan are treated as dry containers), BEIC 0000198 (showing that non-operating reefers in Canada are treated as dry containers), BEIC 0000222 (showing that non-operating reefers in Latvia are treated as refrigerated containers), BEIC 0000252 (showing that non-operating reefers in Trinidad and Tobago are treated as dry containers); OE Ex. 46 at BEIC 292 (showing the “Filing Record” of Rule 300, which displays the last published rule at December 9, 2015) (<https://rates.descartes.com/pta/DxiServlet.WsServlet/getFrame/We2J1fo000>) (last accessed on Apr. 3, 2024).

### III. JURISDICTION AND BURDEN OF PROOF

Section 41302(a) of the Shipping Act provides that the Commission is empowered to investigate any conduct, fee, or charge that the Commission believes to be in violation of the Act. 46 U.S.C. § 41302(a). As a common carrier, MSC is subject to and regulated by the Shipping Act. BEIC PFF 1. Thus, the Commission has jurisdiction over this proceeding as MSC committed acts prohibited by 46 U.S.C. §§ 41102(c) and 40501.

Furthermore, Section 41304 of the Shipping Act empowers the Commission to issue orders relating to violations of the Act after an opportunity for a hearing. 46 U.S.C. § 41304. It is within the Commission’s enumerated powers to assess civil penalties against MSC for its violative behaviors and issue an appropriate cease-and-desist order as stated in the OIH. 46 U.S.C. §§ 41107(a), 41304; OIH at 12–13.

As to burden of proof, it is OE’s burden to prove by a preponderance of the evidence that MSC violated 46 U.S.C. §§ 41102(c) and 40501. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC—Possible Violations of 46 U.S.C. § 41102(c) (Hapag-Lloyd 21-09), 4 F.M.C.2d 53, 75 (ALJ April 22, 2022); Yakov Kobel and Victor Berkovich v. Hapag-Lloyd A.G., Hapag-Lloyd America, Inc., Limco Logistics, Inc., and Int’l Tlc,

Inc., 10-06, 2014 WL 5316331, at \*2 (Fed. Mar. Comm’n July 30, 2014) (ALJ remand initial decision), aff’d, 2015 WL 3465821 (Fed. Mar. Comm’n May 26, 2015). To meet this standard, OE must show that MSC violated the Shipping Act more probably than not. Hapag-Lloyd 21-09 at 75 (“Under the preponderance standard, a complainant must show that their allegations are more probable than not” (citation omitted)). And it “is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient,” barring, of course, mere speculation. Hapag-Lloyd 21-09 at 75 (citing 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 (Fed. Mar. Comm’n June 13, 1994))

#### IV. DISCUSSION

##### A. MSC Violated 46 U.S.C. § 41102(c) with its Unjust and Overbroad Application of Its Merchant Clause Definition

Section 41102(c) of the Shipping Act states 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 delivery property.” The Commission’s implementing regulations provide that:

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 omission 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 delivery property;
- d) The practice or regulation is unjust or unreasonable . . . .

46 C.F.R. § 545.4.

As this is a matter of enforcement and not a matter of civil reparations, OE does not need

to meet element (e) of section 545.4, proximate cause of claimed loss, to show a prima facie case. See Hapag-Lloyd (21-09) at 80, 90 (“It is not entirely clear how the proximate cause of loss element of Rule 545.4 applies in enforcement cases . . .”; “In Commission-instituted proceedings, unlike in private complaint proceedings, it is not necessary that the violation of a statute result in harm to the public for the respondent to be liable.” (citation omitted)). However, MSC’s violations have imposed financial costs on the parties involved and OE preserves this argument if it is deemed necessary to address at a later point in this proceeding.

MSC violated 46 U.S.C. § 41102(c) by applying an overly broad definition of the term “merchant” in its bill of lading to inaccurately bill third parties and attempt to unlawfully collect charges and fees from those third parties when they were not in contractual privity with MSC, did not derive a beneficial interest in the cargo moved, and did not consent to be bound by the terms of MSC’s bill of lading. Consequently, such a practice by MSC was unjust, unreasonable, and in contravention of the Shipping Act as all elements to establish violations of 46 U.S.C. § 41102(c) by MSC are present in this case.

#### 1. Statute of Limitations

Prior to addressing the elements, it is necessary to acknowledge Respondent’s affirmative defenses in its Answer to the Commission’s Order of Investigation. MSC Answer at 7. Respondent avers that “some of the alleged violations” may be “barred by the statute of limitations.” Id. As proposed above, the invoices issued to V. Alexander were dated from February 12, 2018 to December 6, 2018. The OIH was issued on August 10, 2023. Respondent’s affirmative defense, therefore, appears to be that 46 U.S.C. § 41109(e) seemingly bars OE from pursuing violations of the Shipping Act for the five invoices dated on February 12, 2018, April 11, 2018, and May 2, 2018. BEIC PFF40, BEIC PFF42, BEIC PFF44, BEIC PFF46, BEIC PFF48;



46 U.S.C. § 41109(e) (“A proceeding to assess a civil penalty or order a refund of money under this section must be commenced within 5 years after the date of the violation.”). However, MSC’s violative behavior is not limited to issuing invoices. MSC pursued payment and collection efforts from V. Alexander with respect to these invoices between March and July of 2021—three years after the invoice dates and well within the 5-year statute of limitations. 46 U.S.C. § 41109(e). Ultimately, the five invoices issued to V. Alexander prior to August 10, 2018<sup>2</sup> are not barred by the statute of limitations because MSC’s violation extends beyond just its issuance of invoices as MSC renewed the statute of limitations accrual by its actions of re-billing and attempting to collect these charges from V. Alexander between March and July 2021.

MSC’s violations—discussed in more depth below—are not defined solely by the date of its invoices to notify parties. Rather, these violations are evidenced by MSC’s insidious practice of holding notify parties (*i.e.*, third parties) liable for charges pursuant to its bill of lading terms. The dates of the invoices are merely a symptom of MSC’s continuing violations stemming from its bills of lading and billing practices. MSC may have issued five of the invoices in controversy prior to August 10, 2018, but it continued to pursue payment from V. Alexander for these invoices between March and July 2021. BEIC PFF55–87; see also MSC Answer at ¶22; OIH at ¶22. Therefore, MSC effectively extended the statute of limitations with respect to these invoices by committing violations of the Shipping Act between March and July 2021. See Maher, 2013 WL 9808667, at \*4 (“a claim accrues (and that statute of limitations begins to run) ‘when a defendant

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<sup>2</sup> Section 41109(e) only limits the Commission’s ability to assess a civil penalty—not the Commission’s ability to determine whether violations of the Shipping Act occurred or whether to issue a cease-and-desist order. 46 U.S.C. § 41109(e); see also Maher Terminals, LLC v. The Port Authority of New York and New Jersey (Maher), 08-03, 2013 WL 9808667, \*3 (Fed. Mar. Comm’n January 31, 2013) (Commission order granting in part and denying in part respondent’s motion for summary judgment). The Commission may still find that these five instances were part of MSC’s practice of violative behavior even if these five invoices are found time-barred by 46 U.S.C. § 41109(e).

commits an act that injures a plaintiff's business.” (citing Zenith Radio Corp. v. Hazeltine Rsch., Inc., 401 U.S. 321, 338 (1971)). Thus, OE contends that these five invoices are not barred by the Shipping Act's statute of limitations.

## 2. MSC is a Common Carrier

The first element of Section 41102(c) requires the respondent to be an ocean common carrier. 46 U.S.C. § 41102(c); 46 C.F.R. § 545.4. MSC is an ocean common carrier<sup>3</sup> and this fact is not in dispute in this proceeding. BEIC PFF1–2; MSC Answer ¶ 1. MSC is also the respondent in this proceeding. See OIH at 12. Thus, the first element of Section 41102(c) is satisfied given that MSC is the respondent in this proceeding and operates as an ocean common carrier in U.S. trades.

## 3. MSC Normally, Customarily, and Continuously Wielded its Merchant Clause to Hold Third Parties Liable for Invoices and Fees

The second element of Section 41102(c) requires the claimed act to occur on a normal, customary, and continuous basis. This standard is satisfied insofar as the evidence demonstrates that MSC invoices third parties for charges and fees on a normal, customary, and continuous basis. When interpreting the “normal, customary, and continuous” standard, the Commission looks to the “activities of maritime regulated entities that negatively affect the broader shipping public.” Interpretive Rule, Shipping Act of 1984 (Final Rule Re: Practice), 83 Fed. Reg. 64478, 64479 (Fed. Mar. Comm'n Dec. 17, 2018). Therefore, a successful claim under 46 U.S.C. § 41102(c) requires that the unreasonable regulation or practice “was the normal, customary, often repeated, systematic, uniform, habitual, and continuous manner in which the regulated common carrier was

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<sup>3</sup>An ocean common carrier is also defined as a vessel-operating common carrier pursuant to 46 U.S.C. § 40102(18).

conducting business.” Final Rule Re: Practice, 83 Fed. Reg. at 64479; see also TCW, Inc. v. Evergreen Shipping Agency (AM.) Corp. & Evergreen Line Joint Serv. Agreement (TCW), 5 F.M.C.2d 192, 199–200 (FMC 2022) (served Dec. 29, 2022).

*a. MSC’s Merchant Clause Occurred Normally, Customarily, and Continuously*

MSC’s tariffs and non-negotiable bills of lading contain the definition of Merchant and additional obligations that make a Merchant broadly responsible for MSC’s fees and charges related to ocean shipping. See BEIC PFF18–21. This clause, hereinafter referred to as “Merchant Clause,” effectively binds any shipper, consignee, holder of MSC’s bill of lading, “Person owing, entitled to or claiming the possession of the Goods or of [MSC’s bill of lading],” and anyone acting on behalf of such a Person to pay for MSC’s fees and charges related to shipping. BEIC PFF18. As it is memorialized throughout MSC’s bills of lading and tariff, the Merchant Clause itself is MSC’s normal business practice, occurring on a normal, customary, and continuous basis. See TCW, 5 F.M.C.2d at 199–200 (“SCO concluded that the claimed acts occurred on a normal, customary, and continuous basis because of their inclusion in the Evergreen UIIA Addendum . . . which mandates the alleged unreasonable conduct.”); MAVL et al. v. Marine Transp. Logistics, Inc. and Dimitry Alper (MAVL), 3 F.M.C.2d 135, 154–157 (ALJ 2021) (initial decision on remand) (served Sept. 29, 2021), aff’d, 5 F.M.C.2d 109 (FMC 2022) (served June 10, 2022) (“Marine Transport Logistics’ bill of lading provisions identify Marine Transport Logistics’ normal business practices.”). OE further posits that the Merchant Clause itself is an unreasonable practice. Yet unlike TCW and MAVL, MSC not only memorialized and sanctioned its unreasonable practice in boilerplate language, but also applied its unreasonable practice in its written billing procedures.

*b. MSC's Application of the Merchant Clause is Also Normal, Customary, and Continuous*

MSC has a written policy to invoice whoever it perceives to be the invoice party. BEIC PFF22–27. But MSC is negligent in ensuring that this invoice party is the consignee. BEIC PFF28–29. MSC's own procedure specifies that [REDACTED] BEIC PFF27. Therefore, it is MSC's normal, customary, and continuous practice to issue first invoices to notify parties instead of the consignees. BEIC PFF27–29, BEIC PFF58 (“Please note we bill to notify party . . . .”), BEIC PFF69 (“[MSC's] policy is to always bill the Notify party”), BEIC PFF116 (“[MSC] invoice[s] these to the invoice company . . . [s]o by procedure, we are forced to send these invoices to the invoice company listed on the [bill of lading]”). It is only through the Merchant Clause that MSC can so irresponsibly and unilaterally apply its charges to notify parties. MSC's Merchant Clause cannot justify MSC's unreasonable practice of billing third parties. Both MSC's Merchant Clause and its billing practice of invoicing notify parties occur on a normal, customary, and continuous basis and negatively impact the broader shipping public. Thus, the second element of section 41102(c) is met.

4. MSC's Unlawful Charges to Third Parties Were Connected to MSC's Receiving, Handling, Storing, and Delivering of Property

The third element of Section 41102(c) requires the practice or regulation relate to or be connected with receiving, handling, storing, or delivering property. 46 U.S.C. § 41102(c); 46 C.F.R. § 545.4. Each invoice issued by MSC and imposed upon V. Alexander, J. Connor, and Welke was connected to a container that MSC had received, handled, stored, and delivered. See BEIC PFF37–87, BEIC PFF90–1105, BEIC PFF130–185. MSC's bills of lading that correspond to each of these invoices further establish that this element is met. See BEIC PFF37–54, BEIC

PFF 90–103, BEIC PFF130–32, BEIC PFF147, BEIC PFF148–150, BEIC PFF 157, BEIC PFF158–160, BEIC PFF 168, BEIC PFF 169–171, BEIC PFF177, BEIC PFF178–180, 185.

5. MSC’s Practice of Charging Notify Parties Through its Merchant Clause was Unjust and Unreasonable

The fourth element of Section 41102(c) requires the practice or regulation to be unjust or unreasonable. 46 U.S.C. § 41102(c); 46 C.F.R. § 545.4. This determination is dependent on a close “reading of the facts and settings of the controversy.” All Marine Moorings, Inc. v. Ito Corp. of Baltimore, 94-10, 1996 WL 264720, at \*9 (Fed. Mar. Comm’n May 15, 1996) (Commission order adopting initial decision). The test of reasonableness as applied to practices and regulations per section 41102(c) is whether the practice is lawful and appropriate, as reasonable implies “just, proper, ordinary or usual, not immoderate or excessive, equitable, or fit and appropriate to the end in view. Investigation of Free Time Practices—Port of San Diego, 9 F.M.C. 525, 547 (FMC 1966) (decided May 24, 1966) (quotation and citation omitted); see also Kawasaki Kisen Kaisha, Ltd v. The Port Authority of New York and New Jersey (Kawasaki), 11-12, 2014 WL 7328475, at \*9 (Fed. Mar. Comm’n Nov. 20, 2014) (Commission order affirming dismissal of complaint). A charge must be reasonably related “to an actual service performed” or “a benefit conferred” to the person charged. Kawasaki, 2014 WL 7328475, at \*9 (quotation and citation omitted).

A notify party is merely the person or party designated on a bill of lading or sea waybill that is “to be notified when the goods arrive at their destination.” Dynamic Worldwide Logistics, Inc. v. Exclusive Expressions, LLC (Dynamic), 77 F.Supp.3d 364, 367 n.3 (S.D.N.Y. 2015). A notify party does not have any agreed upon contract with the vessel operator and its bill of lading. A bill of lading is a maritime contract “between the shipper-consignor and the carrier; its terms and conditions bind the shipper and all connecting carriers.” S. Pac. Transp. Co. v. Com. Metals

Co., 456 U.S. 336, 342 (1982); see also Dynamic, 77 F. Supp.3d at 373 (quoting Thypin Steel Co. v. Asoma Corp. 215 F.3d 273, 277 (2d Cir. 2000)). V. Alexander, J. Connor, and Welke were listed only as notify parties on all the relevant bills of lading issued by MSC. BEIC PFF37, BEIC PFF90, BEIC PFF130, BEIC PFF148, BEIC PFF158, BEIC PFF169, BEIC PFF178. V. Alexander, J. Connor, Welke were not the shippers, consignees, or carriers with respect to these eighteen shipments. BEIC PFF38, BEIC PFF91, BEIC PFF131–32, BEIC PFF149–150, BEIC PFF159–60, BEIC PFF170–71, BEIC PFF179–80. Relying on its Merchant Clause, MSC nevertheless unlawfully and inappropriately held these notify parties liable for accumulated charges. BEIC PFF 39–54, BEIC PFF92–103, BEIC PFF117–29, BEIC PFF147, BEIC PFF157, BEIC PFF168, BEIC PFF177, BEIC PFF185. Such acts by MSC were unjust and unreasonable due to the fact that MSC performed no service for or conferred any benefit to V. Alexander, J. Connor, or Welke.

Notify parties neither assent to bills of ladings nor receive any services or benefits from bills of lading. In re M/V Rickmers Genoa Litig., 622 F. Supp. 2d 56, 71 (2009) (citing Stein Hall & Co. v. S.S. Concordia Viking, 494 F.2d 287, 291 (2d Cir. 1974) (other citations omitted). Notify parties cannot be bound to the terms and conditions of a bill of lading unless they consented to be bound. Id. It is unreasonable to hold notify parties responsible for charges and fees which they were not in privity of contract for as “[g]eneral contract law principles provide that one party cannot enforce a contract against another who did not assent to be bound by its terms and conditions.” See Intermodal Motor Carriers Conf., Am. Trucking Ass’ns, Inc. v. Ocean Carrier Equip. Mgmt. Ass’n Inc. et al. (IMCC), 6 F.M.C. 2d 45, 85 (ALJ Feb. 6, 2023) (citing Notice of Inquiry—Vessel-Operating Common Carrier Definition & Application of the Term ‘Merchant’ in Bills of Lading, Docket No. 20-16 at 4 (Oct. 7, 2020). Although V. Alexander, J. Connor, and

Welke may “fall within the definition of such a broad Merchant clause, a party is not bound to the terms of a bill of lading unless the party consents to be bound.” Zim Am. Integrated Shipping Servs. Co., LLC v. Sportswear Grp., 550 F. Supp.3d 57, 66 (S.D.N.Y. 2021) (citation omitted); see also United States v. Waterman S.S. Corp., 471 F.2d 186, 189 n. 4 (5th Cir. 1973) (holding that a “party cannot unilaterally employ definitions to bind another by provisions to which the other has not consented to be bound.”).

A party may consent to be bound by filing suit under a bill of lading and attempting to benefit from its terms or by presenting a negotiable bill of lading and accepting goods under it. Zim Am. Integrated Shipping Servs. Co., LLC v. Sportswear Grp., 20-cv-4838, 2021 WL 5450117, at \* 4 (S.D.N.Y. Nov. 18, 2021). But V. Alexander did not file suit under MSC’s bill of lading or attempt to benefit from its terms. In fact, V. Alexander tried to redirect MSC to the consignee who benefitted from MSC’s services. BEIC PFF57–81. Likewise, J. Connor did not file suit under MSC’s bill of lading or attempt to benefit from its terms. BEIC PFF102–05. Lastly, Welke did not file suit under MSC’s bill of lading or attempt to benefit from its terms. See generally BEIC PFF106–185. Welke tried vehemently to correct MSC and make clear that they were neither the consignee nor the beneficial cargo owner who could benefit from such terms. BEIC PFF 110 (“We have advised MSC on more than one occasion that Welke is not responsible for charges that are associated with driver waiting time . . . . We have no beneficial interest the [sic] cargo nor are we a party to the shipping terms of the bill of lading.”), BEIC PFF128 (“We are not the shipper or consignee and have no beneficial interest in the cargo shipped . . . .”), BEIC PFF144, BEIC PFF152, BEIC PFF165, BEIC PFF174.

Moreover, MSC admits that it did not obtain consent from V. Alexander, J. Connor, and Welke. MSC Answer at ¶23, 38, 47; OIH at ¶23, 38, 47. And because all eighteen bills of lading

in question are non-negotiable sea waybills neither V. Alexander, J. Connor, nor Welke could have accepted any goods pursuant to these non-negotiable sea waybills and consented to MSC's terms and conditions in its bill of lading. Jt. Stip. Fact at ¶9. Consequently, at no time did V. Alexander, J. Connor, and Welke consent to be bound by MSC's bills of lading thereby rendering MSC's reliance on its Merchant Clause to invoice these parties to be patently unreasonable.

Holding notify parties liable for charges they never consented to is unlawful and therefore unreasonable but threatening them with a shut out or the ordeal of having to fight a third-party collection agency is unjust. BEIC PFF33–34. MSC's current procedures require notify parties to either spend administrative resources fighting its invoices or financial resources by yielding to MSC's demands for fear of shut out. See generally BEIC PFF30–185. V. Alexander had to fight MSC's charges from 2018 through 2021—only for MSC to internally resolve to waive the charges after Consignee Company A refused to pay. BEIC PFF55–87. MSC did not even update V. Alexander of this development. BEIC PFF87. J. Connor had to pay MSC. BEIC PFF102–105. And Welke tried to tell MSC, multiple times, that it was just the customs broker, but Welke was nevertheless billed by MSC and then ultimately made to pay MSC. BEIC PFF127–129.

All of this is made even more egregious by MSC's ability to first bill the consignee for these charges instead of the notify party. BEIC PFF27, BEIC PFF29 (“When Notify is different than consignee some clients refuse to pay so we bill [consignee] directly at time of Billing . . .”). But MSC does not undertake such action because it involves “a lot of manual work” and is somehow “not realistic” to invoice the party whom MSC is in privity of contract with. BEIC PFF29. So instead of using its own administrative resources to correctly bill a consenting party, MSC essentially forces notify parties to waste their own resources to deal with MSC's charges and fees. This is an unjust and unreasonable practice that allows MSC to negligently bill third parties.



And the impact of this practice arguably extends well beyond the three notify parties at issue in this proceeding.

*a. It Is Unreasonable to Charge Detention to Parties Who Cannot Not be Incentivized to Promote Freight Fluidity*

Both V. Alexander and J. Connor were invoiced by MSC for detention charges. BEIC PFF 39–54, BEIC PFF92–103. In addition to MSC’s charges being unreasonable as to notify parties, MSC’s charges were likewise unreasonable pursuant to 46 C.F.R. § 545.5. See Interpretive Rule on Demurrage and Detention Under the Shipping Act (D&D Interpretive Rule), 85 Fed. Reg. 29638 (Fed. Mar. Comm’n May 18, 2020). The Commission’s regulations provide that “the reasonableness of demurrage and detention practices and regulations” will be assessed with consideration to “the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.” 46 C.F.R. § 545.5(c)(1). As an interpretive rule, this regulation applies to MSC’s unreasonable charges against V. Alexander and J. Connor despite its publication date being May 18, 2020. See Crocus Invs., LLC & Crocus, FZE v. Marine Transp. Logistics, Inc., 3 F.M.C.2d 110, 115 (FMC 2021) (served Aug. 18, 2021) (citing Health Ins. Ass’n of Am. V. Shalala, 23 F.3d 412, 424–25 (D.C. Cir. 1994)).

As notify parties, serving only in the role of notify parties, V. Alexander and J. Connor had no control over the timely pick up or drop off of the containers listed in MSC’s bills of lading. BEIC PFF37–38, BEIC PFF90–91, BEIC PFF104 (“We don’t move the freight. We don’t organize the delivery. Thus, we have zero control over the incurring of detention . . .”). V. Alexander even clarified with MSC that they only handled “the clearance for these accounts,” referring to their services as a customs broker. BEIC PFF54; see also BEIC PFF 36. MSC nevertheless insisted that V. Alexander pay the invoices. BEIC PFF58–82. As notify parties with

no control over the freight fluidity of these containers, MSC's detention charges to V. Alexander and J. Connor could not have served any financial incentive to promote freight fluidity. Instead, these were unreasonable charges per 46 C.F.R. § 545.4(c).

*b. Welke was Unreasonably Charged for Service Not Rendered to Welke*

Welke was charged by MSC for services it did not receive. A charge is considered unreasonable if it is unrelated to any actual services performed or benefits conferred. Kawasaki, 2014 WL 7328475, at \*9 (quotation and citation omitted); see also Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n (Volkswagenwerk), 390 U.S. 261, 282 (1968) (citing Hellenic Lines Ltd.—Violation of Sections 16 (First) and 17 (Hellenic Lines), 7 F.M.C. 673, 675–676 (FMC 1964) (decided Jan. 9, 1964); IMCC, 6 F.M.C.2d at 57 (discussing the “well-established principle that to pass muster under section 41102(c), a regulation or practice must be tailored to meet its intended purpose”). And yet each invoice Welke received from MSC was for services rendered solely for the benefit to Shipper C or Consignee Company C. BEIC PFF147, BEIC PFF157, BEIC PFF168, BEIC PFF177, BEIC PFF185.

MSC BOL 8947 resulted in Welke being charged [REDACTED], when Welke had already explained to MSC that they were not responsible for such charges and had nothing to do with “the arranging and finalization of deliveries.” BEIC PFF147, 144. Consignee Company C and Shipper C were the beneficiaries of such services, and DHC had even originally excluded Welke when it informed Consignee Company C and Shipper C of potential late pickup fees. BEIC PFF141. MSC had originally excluded Welke when it first sent off the invoice to Consignee Company C and Shipper C. BEIC PFF142–43. Welke received no service or benefit for the charges it received based on MSC BOL 8947.

MSC BOL 4803 resulted in Welke being charged [REDACTED]

[REDACTED]

BEIC PFF157. Welke did not agree to these charges, Welke did not derive any services or benefits from these charges, and when asked about these charges, Welke deferred to Shipper C. BEIC PFF 151, BEIC PFF 152 (“Including our client as we do not have authority to advise on this matter.”). MSC had negotiated and decided on these additional services and charges with Shipper C where Welke was excluded from the discussion. BEIC PFF153–156. And yet, Welke was charged for services and benefits it did not receive from MSC BOL 4803.

MSC BOL 5438 resulted in Welke being charged [REDACTED]

[REDACTED] BEIC PFF168. The charge stemmed from the waiting time a trucker had while picking up a container in MSC BOL 5438. BEIC PFF163. This was a service rendered to Consignee Company C, and Shipper C emailed MSC to correct the bill to Welke. BEIC PFF 165. MSC refused and charged Welke as MSC policy dictates that MSC “can only invoice the ‘Invoice company’ listed on the [bill of lading]”. BEIC PFF167. Welke received no services or benefits but was charged for MSC BOL 5438.

MSC BOL 1949 resulted in Welke being charged [REDACTED]

[REDACTED] BEIC PFF177. Welke informed MSC that it was “simply the broker” and did not “have the authority to approve such charges.” BEIC PFF174. MSC nonetheless pressured Welke to pay the charges, despite Welke not receiving any benefit or services from the charges. BEIC175–176.

MSC BOL 6731 resulted in Welke being charged [REDACTED]

[REDACTED] BEIC PFF185. The charge was for one hour of billable waiting

time for a container under MSC BOL 6731. BEIC PFF184. But Welke was not involved in the pick-up and delivery of that container and Consignee Company C and DHC had already been discussing and negotiating pick-up and delivery. BEIC PFF183. Furthermore, MSC had been in contact with Consignee Company C about freight rates—showing that MSC knew who would ultimately be receiving MSC’s services. BEIC PFF182. And yet MSC charged Welke for services and benefits it did not receive from MSC BOL 6731.

All charges from MSC BOL 8947, MSC BOL 4803, MSC BOL 5438, MSC BOL 1949, and MSC BOL 6731 stemmed from services Welke did not receive and instances where MSC was made aware that Welke was not the beneficiary from such services. Each of these charges were unreasonable as MSC insisted on charging Welke for services it never received.

It was unlawful and unreasonable for MSC to use its Merchant Clause to try and hold V. Alexander, J. Connor, and Welke liable for its invoices. It was also contrary to the Commission’s interpretation of “reasonable” for MSC to charge V. Alexander and J. Connor detention invoices. Lastly, it was unreasonable for MSC to charge Welke for so many services that it did not receive. Thus, the fourth element of Section 41102(c) is met.

Collectively the record amply demonstrates that MSC violated 46 U.S.C. § 41102(c) with respect to each of the eighteen bills of lading in controversy through MSC’s application of its Merchant Clause to include V. Alexander, J. Connor, and Welke despite their third-party status in these transactions. Therefore, the ALJ should find that, on these eighteen (18) occasions, MSC failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property in violation of 46 U.S.C. § 41102(c).

## **B. MSC Violated 46 U.S.C. § 41102(c) by Unreasonably Billing NORs as Reefers**

### **1. MSC is a Common Carrier**

As discussed above, MSC is an ocean common carrier. BEIC PFF1–2. MSC is also the respondent in this proceeding. OIH at 12. Thus, the first element of Section 41102(c) is met.

### **2. MSC Normally, Customarily, and Continuously Billed NORs the Reefer Rate Instead of the Dry Container Rate**

As discussed above, the second element of Section 41102(c) requires the claimed act occur on a normal, customary, and continuous basis. This standard is satisfied given that MSC normally, customarily, and continuously invoiced NORs as operating reefers in 2021. BEIC PFF193–203, BEIC PFF202. This was not a single occurrence, but an often repeated, systematic, uniform, and habitual billing by MSC of NORs as operating reefers. BEIC PFF201–203; see also Final Rule Re: Practice, 83 Fed. Reg. at 64479. Mr. Marco Sidoti, MSC’s Nationwide Demurrage/Detention Director, stated that this was a misapplication within MSC’s internal billing system that resulted in a billing error. BEIC PFF205–07; see also MSC0007311–13 at ¶8–14. Meaning that, however long or widespread this practice occurred, it was a systematic problem embedded within MSC’s billing system. Admitted instances in excess of 2,600 NORs billed as reefers—subsequently exceeding \$2 million in overcharges to MSC’s customers—is not a single occurrence but a normal, customary, and continuous practice that negatively affected the broader shipping public over a significant period of time. BEIC PFF202–203. Thus, the second element of section 41102(c) is met.

### **3. MSC’s Erroneous Billing Practice was Connected to MSC’s Receiving, Handling, Storing, and Delivering of Property**

As discussed above, the third element of Section 41102(c) requires the practice or

regulation relate to or be connected with receiving, handling, storing, or delivering property. 46 U.S.C. § 41102(c); 46 C.F.R. § 545.4. Each inaccurate invoice issued by MSC wherein it charged the NOR rate instead of dry container rate was connected to a container that MSC received, handled, stored, and delivered. See generally BEIC PFF186–283. Thus, this element is met.

4. The Overcharge Resulting from MSC’s Misapplication of the Operating Reefer Rate to Non-Operating Reefers was Unjust and Unreasonable

As discussed above, the fourth element of Section 41102(c) requires the practice or regulation to be unjust or unreasonable. 46 U.S.C. § 41102(c); 46 C.F.R. § 545.4. This is a determination dependent on a close “reading of the facts and settings of the controversy.” All Marine Moorings, Inc. v. Ito Corp. of Baltimore, 94-10, 1996 WL 264720, at \*9 (Fed. Mar. Comm’n May 15, 1996) (Commission order adopting initial decision). And the intent of a respondent is irrelevant when assessing reasonableness, because the “offense is committed by the mere doing of the act, and the question of intent is not involved.” Volkswagenwerk, 390 U.S. at 282 (citing Hellenic Lines, 7 F.M.C. at 675–676).

MSC admitted to charging the operating reefer detention and demurrage rate with respect to at least 2,629 NORs in 2021. BEIC PFF201. This practice forced MSC to issue refunds to its customers 925 times for a total of \$1,201,639.80. BEIC PFF202. Moreover, in at least 1,704 instances, MSC applied operating reefer rates to NOR shipments, and such overcharges remained undisputed resulting in a financial windfall for MSC. BEIC PFF203. These facts are not in dispute. See MSC Answer at ¶¶60–61. It is the mere fact of MSC’s continued misapplication of the operating reefer rate to NOR shipments that is unreasonable.

A charge is likely to be reasonable if it is related to the actual service performed. Kawasaki, 2014 WL 7328475, at \*9. An operating reefer’s detention and demurrage rate is higher than that

of a dry container. BEIC PFF192. This is to account for an operating reefer's enhanced handling and care. BEIC PFF188. A higher rate for an operating reefer versus a dry container is reasonable. Such a rate correlates to the enhanced care an operating reefer requires.

However, the critical distinction is that a NOR does not have the same handling and care requirements as an operating reefer. BEIC PFF189. To charge a NOR the same detention and demurrage rate as an operating reefer—without any of the required enhanced handling needed for an operating reefer—is unreasonable. The higher rate commanded by the use of an operating reefer that is then levied by MSC upon a NOR is unrelated to the actual service performed for a NOR and therefore confers no additional benefit to the shipper. As a result, MSC's application of operating reefer charges to NORs was unreasonable due to the fact these charges were unrelated to the actual service performed for NORs. Thus, the fourth element of Section 41102(c) is met. Accordingly, the ALJ should find that, with respect to each one of the 2,629 admitted overcharges, MSC failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property in violation of 46 U.S.C. § 41102(c).

### **C. MSC Failed to Publish NOR Tariff Rates in Violation of 46 U.S.C. § 40501**

Section 40501 of the Shipping Act provides that common carriers must publish their tariffs for “public inspection” and that those tariffs must “state separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules that in any way change, affect, or determine any part of the total of the rates or charges.” 46 U.S.C. §§ 40501(a)(1), (b)(4).

In 2021, MSC failed to publish separate demurrage, detention, and per diem charges (collectively, “Charges”) for reefer containers and NORs. BEIC PFF284–85. In contrast, MSC

published separate Charges for reefer containers and dry containers. BEIC PFF284. Meanwhile, MSC inconsistently applied reefer container and dry container Charges to NORs. See generally BEIC PFF193–283. The difference between a NOR being charged reefer Charges versus dry container Charges could be as much as [REDACTED]. BEIC PFF190–92. The disparity between the two types of Charges changed, affected, and determined the total charges many of MSC’s customers were subjected to in 2021. See generally BEIC PFF193–283. And it was not until March 9, 2023, that MSC addressed the issue and amended its U.S. tariff thereby clarifying its Charges for NORs. BEIC PFF286. Thus, from at least January 1, 2021, through March 9, 2023, MSC continuously violated Section 40501 of the Shipping Act by failing to publish separate Charges for NORs in its tariff.

Section 41107 of the Shipping Act provides that “[e]ach day of a continuing violation is a separate violation.” 46 U.S.C. § 41107(a). This means that for two years and over two months between January 1, 2021, to March 9, 2023, MSC acted in contravention of 46 U.S.C. § 40501, accumulating seven hundred and ninety-eight (798) separate violations.

#### **D. Civil Penalties Should be Assessed for Respondent’s Knowing and Willful Violations**

The Commission’s Order states that if “violations of the Shipping Act and the Commission’s regulations are found” that “civil penalties should be assessed against MSC and, if so, the amount of the penalties to be assessed.” OIH at 12. OE contends that MSC committed multiple violations of the Shipping Act. First, as previously described and established, there are 18 violations of Section 41102(c) due to MSC’s use of its Merchant Clause to assess and collect charges from third parties. Second, there are 2,629 violations of Section 41102(c) due to overcharges resulting from MSC’s misapplication of its operating reefer rate to NOR shipments.



Third, there are 798 violations of Section 40501 covering the period of time that MSC failed to publish certain NOR detention and demurrage rates in its U.S. tariff. The record demonstrates that MSC accumulated more than 3,000 violations of the Shipping Act and significant civil penalties must, therefore, be assessed against MSC in this proceeding. See Stallion Cargo, Inc.—Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 99-18, 2001 WL 35725562, \*16 (Fed. Mar. Comm’n October 18, 2001) (Commission order) (holding that after having found a violation, the determination for an ALJ is not “whether to assess a civil penalty but rather, the amount of penalty to assess.”).

Congress gave the Commission statutory authority to assess civil penalties for each violation committed under the Shipping Act and factors to consider in assessing penalties against those found to have violated the Act. 46 U.S.C. §§ 41107(a), 41109. Specifically, the Commission’s regulations at 46 C.F.R. 502.603(b) iterate the statutory requirements as follows:

(b) *Determination of amount—(1) Factors for consideration.* In determining the amount of a civil penalty assessed . . . the Federal Maritime Commission shall take into consideration:

- i) The nature, circumstances, extent, and gravity of the violation committed;
- ii) With respect to the violator:
  - (A) The degree of culpability;
  - (B) Any history of prior offenses;
  - (C) The ability to pay; and
  - (D) Such other matters as justice may require . . . .

It is worth emphasizing that 46 U.S.C. § 41107(a) contains a two-tiered structure for establishing maximum penalties for violations under the Shipping Act. The main distinction between the two tiers is a determination as to whether such violations were committed knowingly and willfully by the Respondent. Each of the above criteria will be addressed below following a discussion of the knowing and willful standard and how it applies to each category of MSC’s

violations in this case.

1. MSC’s Violations Were Committed Knowingly and Willfully

In Section 41107(a), Congress provided a \$5,000 maximum penalty amount for violations of the Shipping Act, a Commission regulation, or a Commission order. 46 U.S.C. § 41107(a). When adjusted for inflation, this current amount is \$14,608. Part 506—Civil Monetary Penalty Inflation Adjustment (2024 Inflation Adjustment), 89 Fed. Reg. 1465 (Fed. Mar. Comm’n Jan. 10, 2024). The maximum penalty for a violation knowingly and willfully committed is \$25,000—or currently \$73,045 as adjusted for inflation. 46 U.S.C. § 41107(a); 2024 Inflation Adjustment, 89 Fed. Reg. 1465.

The increased penalty for knowing and willful violations of the Act was first authorized by the Shipping Act of 1984. Its predecessor statute, the Shipping Act of 1916, authorized a singular maximum civil penalty of \$5,000 for each violation. Congress believed that the penalties imposed under the 1916 Act failed to serve as an effective deterrent to prohibited acts and that violators could simply absorb penalties in these amounts as part of the “cost of doing business.” See H.R. REP. No. 53, Part 1, 98<sup>th</sup> Cong. 1<sup>st</sup> Sess., reprinted in 1984 U.S.C.C.A.N. 167, 184. Accordingly, it added a separate penalty provision authorizing a penalty of up to \$25,000<sup>4</sup> for each violation knowingly and willfully committed. Congress therefore intended that the Commission apply a two-level structure establishing maximum penalties—one level for violations that are not knowing and willful and a substantially enhanced level that is 5 times that amount for knowing and willful violations.

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<sup>4</sup> Adjusted for inflation, this amount is currently \$73,045. 2024 Inflation Adjustment, 89 Fed. Reg. 1465.

This five-to-one ratio demonstrates a clear Congressional intent to enhance the deterrent effects of civil penalties assessed for violations committed knowingly and willfully. See Martyn Merritt, AMG Services Inc. et. al—Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 89-27, 1992 WL 366114, at \*2–3 (Fed. Mar. Comm’n Sept. 28, 1992) (Commission order on remand from 2nd Cir.) (“In determining the amount of penalties to be imposed, it is expected that the ALJ will give due regard to the gravity and extent of the violations . . . and the Congressional purpose to deter violations by imposing greater civil penalties in the 1984 Act.”)

OE contends that all violations herein were committed by MSC knowingly and willfully, and thus the maximum civil penalty amount for each one of these violations is \$73,045. Moreover, the minimum amount per violation should be no less than \$14,609—one dollar more than the maximum amount for a violation not committed knowingly and willfully. See OJ Com., LLC v. Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft A/S &Co. KG and Hamburg Sud North America, Inc. (OJ Commerce), 6 F.M.C.2d 165, 226 (ALJ 2023) (“In Commission enforcement proceedings, enhanced civil penalties are awarded ‘if the violation was willfully and knowingly committed.’”). This is consistent with how the Commission generally assesses civil penalties found to be knowing and willful. Hapag-Lloyd 21-09, 4 F.M.C.2d at 90 (citing EuroUSA Shipping, Inc., et al.—Possible Violations of Shipping Act, 31 S.R.R. 1131, 1152 (ALJ 2009, admin final Jan. 7, 2010) (omitting other citations)).

Knowing and willful violations are ones that are committed purposefully, or with “obstinate behavior akin to gross negligence.” Rose Int’l, Inc. v. Overseas Moving Network (Rose), 96-05, 2001 WL 865708, at \*47 (Fed. Mar. Comm’n June 1, 2001) (Commission report and order adopting initial decision in part and vacating initial decision in part) (citation omitted).

If an entity or person knew or had knowledge of the facts of the violation and acted “with reckless disregard or plain indifference to the Act,” then such a violation is also knowing and willful. Parks Int’l Shipping, Inc., 06-09, 2013 WL 9808960, at \*4 (Fed. Mar. Comm’n Sept. 16, 2013) (Commission report and order adopting initial decision in part and vacating initial decision in part). Because persistent failure to inform or even attempt to inform oneself, one’s company, or one’s business practice, “might mean that a [person] was acting knowingly and willfully in violation of the Act.” Rose, 2001 WL 865708, at \*47; see also OJ Commerce, 6 F.M.C.2d at 226.

*a. MSC’s Merchant Clause*

Regarding the Section 41102(c) violation for MSC’s use of its Merchant Clause, the language of its bills of lading and written billing procedures were generated and controlled entirely by MSC. BEIC PFF18–30. Thus, MSC had knowledge of the facts of this violation. And because it is well established that notify parties cannot be bound to the terms and conditions of a bill of lading unless they consented to be bound, MSC acted with gross negligence of the Shipping Act when it billed V. Alexander, J. Connor, and Welke.

At one point, V. Alexander informed MSC that it was acting in contradiction of the law, yet MSC insisted on continuing to bill V. Alexander. BEIC PFF56–61, BEIC PFF74–81. Welke also informed MSC that they were not responsible for the charges, yet MSC continued to bill Welke. BEIC PFF110, BEIC PFF128, BEIC PFF144, BEIC PFF152, BEIC PFF174. Most notably, MSC exhibited its own purposeful ignorance when it reflected on its billing practices:

In general, we have been running into many issues where the notify party on the [bill of lading] is also the invoice company who will be billed for rail detention and those Notify parties are claiming they do not have responsibility for those charges as they are not the [consignee] . . . We do think this is something that needs to be looked at more in depth in terms of who is the party we need to be billing from legal standpoint but also if there is any way to make these changes without large

changes from how [port of loading] is manifesting [bills of lading] invoice [companies].

BEIC PFF30.

In lieu of looking into the legality of its Merchant Clause and billing practices, MSC prioritized implementing minimal changes and continually shifting its responsibilities and administrative burdens onto third parties. This reflects not only MSC's persistent failure to inform itself but also the fact that MSC purposefully acted in violation of the Shipping Act. Therefore, all eighteen (18) violations of 46 U.S.C. § 41102(c) involving MSC's use of its Merchant Clause were committed knowingly and willfully by MSC.

Furthermore, the Commission's interpretive rule regarding unjust and unreasonable practices with respect to demurrage and detention was published on May 18, 2020. D&D Interpretive Rule, 85 Fed. Reg 29638. MSC was aware of the Commission's D&D Interpretive Rule. See id. at 29641 (displaying MSC's comments as a member of the World Shipping Council). So, in this instance, MSC was not only aware of the facts of this violation, but also of how the Commission would interpret "reasonableness," regarding detention and demurrage invoices. MSC acted with impunity as it had knowledge of how the Commission would interpret the detention invoices that were issued to V. Alexander and J. Connor.

Respondent may argue that the V. Alexander invoices were dated before May 18, 2020. But as explained earlier, MSC effectively re-invoiced and re-billed V. Alexander on March 10, 2021. BEIC PFF55; see also MSC Answer at ¶23, OIH at ¶23. And MSC continued to do so on March 12, 2021, April 6, 2021, May 19, 2021, July 15, 2021, and July 19, 2021. BEIC PFF58, 61, 65, 73, 75. Each of these requests for payment were well after May 18, 2020. Likewise, each of MSC's invoices issued to J. Connor were dated after May 18, 2020. BEIC PFF93–101.

Therefore, in addition to issuing these invoices to notify parties in violation of 46 U.S.C. § 41102(c), MSC did so knowingly and willfully.

As for Welke, not only was MSC fully aware of its own Merchant Clause and billing procedures, but Welke had informed MSC several times that it was being charged for services it did not receive. BEIC PFF110 (“We have advised MSC on more than one occasion that Welke is not responsible for charges that are associated with driver waiting time or any other costs associated with the delivery of containers to the consignee location.”). MSC went so far as to open an account on behalf of Welke for MSC’s own billing purposes. BEIC PFF111. However, even after acknowledging that Welke was not responsible for some outstanding amounts, MSC continued to bill Welke for its charges. BEIC PFF112, BEIC PFF114 (“First of all these costs should be invoiced to [Shipper C instead of] Welke.”), BEIC PFF124 (“please send Final Notice to both Welke . . . .”), BEIC PFF125 (“[w]e can not [sic] collect anything from Welke because they already replied to us that they do not have any responsibility for those shipments.”).

MSC was aware of its own Merchant Clause and billing procedures, but as to Welke, MSC was particularly aware that it was acting in contravention of the Shipping Act when it forced a party to pay for charges based on services it did not receive. BEIC PFF129. Therefore, in addition to knowingly and willfully issuing invoices to notify parties unlawfully, MSC also violated 46 U.S.C. § 41102(c) knowingly and willfully with respect to each invoice it issued to Welke.

*b. MSC’s NOR Billing Practice*

Regarding the Section 41102(c) violation for MSC’s practice of billing of NORs as operating reefers, MSC became aware of the faulty requirements in its system when [REDACTED]

[REDACTED] BEIC PFF210.

Regardless of whether this was the earliest that MSC knew of the issue, MSC’s awareness is evidenced by the fact that Mr. Sidoti recognized that this occurred in 2021. BEIC PFF207. Mr. Sidoti avers that this problem was “corrected on or about September 16, 2021, and has not been an issue since.” Id.

Contrary to Mr. Sidoti’s representations, MSC’s practice of charging NORs the operating reefer rate continued to be an issue after September 16, 2021, as multiple customers emailed MSC and requested MSC to rectify their invoices. See BEIC PFF210–283. This includes both customers who emailed MSC after September 16, 2021—about their previously issued invoices—and customers who were incorrectly charged the operating reefer rate after MSC purportedly fixed the issue on September 16, 2021. Id. Several of these invoices containing erroneous charges were issued by MSC well into 2022.<sup>5</sup> BEIC PFF192–200, BEIC PFF218, BEIC PFF221–47, BEIC PFF253–60, BEIC PFF263–64, BEIC PFF273–277. The evidentiary record demonstrates that Mr. Sidoti had been responding to these issues and was aware that they were ongoing well past September 16, 2021. BEIC PFF230–32, BEIC PFF244–45, BEIC PFF255–56, BEIC PFF261–62.

While Mr. Sidoti attests that the billing error was corrected and “has not been an issue since,” Mr. Sidoti was nevertheless informed that only the Houston port was fixed while he was still receiving emails originating from other ports across the country that were still having issues. BEIC PFF207; see also BEIC PFF230–32, BEIC PFF244–45, BEIC PFF255–56, BEIC PFF261–62. This constitutes obstinate behavior akin to gross negligence on the part of MSC to take the report of only one port and claim that the billing error for NORs was no longer an issue when MSC

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<sup>5</sup> The OIH does not address the possible violations MSC committed in 2022, but OE posits that there were a great deal of unaccounted operating reefer detention and demurrage charges for NORs as OE only reviewed a fraction of the disputes which already revealed discrepancies and billing inaccuracies.

calls on over 500 ports. BEIC PFF202, BEIC PFF4. This constitutes knowing and willful behavior as MSC knew and had reason to know that it was violating the Shipping Act and overcharging its customers by misapplying the operating reefer rate to NORs. Mr. Sidoti was copied on emails regarding the issue and even took affirmative steps to correct the attendant problems well after September 16, 2021. BEIC PFF230–32, BEIC PFF244–45, BEIC PFF255–56, BEIC PFF261–62. Therefore, based on Mr. Sidoti’s explanatory statements in his capacity as MSC’s employee, MSC was aware that the issue was ongoing beyond September 16, 2021. Id. As the Nationwide Demurrage/Detention Director at MSC, Mr. Sidoti had knowledge that the violations continued even after he signed an affidavit for use in this proceeding claiming that the issue had been resolved on September 16, 2021. BEIC PFF204–207. MSC flagrantly violated the Shipping Act by charging NOR shipments the operating reefer rate and then claiming that the issue was fixed when the evidence demonstrates that MSC knew otherwise.

MSC’s actions were knowing and willful, especially as MSC’s [REDACTED]

[REDACTED] BEIC PFF208 [REDACTED]

[REDACTED] The fact that MSC failed to conduct an internal audit and proactively reconcile its billing processes, resulting in at least 2,629 reefer overcharges and 1,704 undisputed reefer charges, is a clear display of MSC’s reckless disregard and plain indifference to the requirements of the Shipping Act. Thus, these 2,629 reefer overcharges were either a deliberate act in flagrant contravention of the Shipping Act or a grossly negligent accounting error that MSC should have been aware of and more proactive in resolving. Either way, the ALJ should find that, with respect to each one of these 2,629 aforementioned instances, MSC knowingly and willfully committed violations of 46 U.S.C.



§ 41102(c).

*c. MSC's Failure to Publish NOR rates in its U.S. Tariff*

Regarding the Section 40501 violation for failing to publish NOR rates in its U.S. tariff, as an experienced carrier, MSC had reason to know that having NOR rates in its tariff for detention and demurrage could “change, affect, or determine any part of the total of the rates or charges” to its customers and yet MSC did not publish such rates in its U.S. tariff until March 9, 2023. BEIC PFF286; 46 U.S.C. § 40501(a)(1), (b)(4). In stark contrast to its failure to publish such rates in the U.S., MSC published Rule 300 of its MESU-012 (Rule 300) on December 9, 2015. BEIC PFF291. Rule 300 specifies how NORs will be treated in several different countries. *Id.* This fact demonstrates that MSC knew to publish the NOR rate in distinction to the operating reefer rate as early as December 9, 2015. However, OE contends that MSC purposefully did not do so in the U.S., which is in direct contravention of 46 U.S.C. § 40501.

Additionally, several MSC customers asked MSC for clarification regarding its NOR rate—the earliest known request is from [REDACTED] BEIC PFF287–90. These customer interactions effectively notified MSC that there was confusion about its rates. On March 9, 2022, MSC acknowledged that its NOR rates were “not at the moment explicitly laid down in [its] tariff, but [that it was their] intention to modify [their] tariff entry to make this more plain.” BEIC PFF198. Instead, MSC waited more than a year to publish these rates in its U.S. tariff. BEIC PFF286. MSC should have taken the appropriate steps in response by timely publishing its NOR rates and clarifying its NOR charges for its customers and shipping public in the U.S. trades. Therefore, the ALJ should find that each of the 798 violations of 46 U.S.C. § 40501 committed by MSC were done so knowingly and willfully.

## 2. Nature, Circumstances, Extent, and Gravity of the Violations

At the core of this proceeding is MSC’s billing practices that resulted in MSC unjustly profiting at the expense of its customers. The record amply shows that MSC itself was [REDACTED] [REDACTED] BEIC PFF208. It also reflects the fact that MSC had collected [REDACTED] [REDACTED] BEIC PFF11. MSC had internal concerns about its practices, but avoided making any changes to its conduct because it would involve “a lot of manual work” and would not be “realistic to review all invoices” correctly. BEIC PFF30. MSC also knew or had reason to know that its billing system was erroneously invoicing and overcharging NOR shipments as operating reefers—even after attesting that the issue had been fixed on September 16, 2021. BEIC PFF230–32, BEIC PFF244–45, BEIC PFF255–56, BEIC PFF261–62 (showing that Mr. Sidoti was aware that the issue was ongoing well past September 16, 2021). Besides acknowledging that it occurred “[d]uring a period in 2021,” MSC does not even know how long its system was overcharging NORs the reefer rate. BEIC PFF207. But the record shows that there [REDACTED] [REDACTED] BEIC PFF207, BEIC PFF 233 [REDACTED] [REDACTED]), BEIC PFF210. [REDACTED] [REDACTED] yet its bill of lading terms remain unchanged and the NOR rates in its U.S. tariff were only published in March of 2023. Moreover, there remains to be a public statement or report regarding the ongoing nature of MSC’s NOR billing accuracy into 2022 and 2023, as OE only reviewed a certain fraction of MSC’s 2021 data.<sup>6</sup> All of this points to the iniquitous nature, vast extent, and severe gravity of MSC’s violations

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<sup>6</sup> OE notes that MSC is in the best position to audit its own billing statements but is the least incentivized to do so.

of the Shipping Act.

Furthermore, in the context of evaluating this activity, it is important to consider MSC's experience, knowledge, and sophistication as the largest shipping company in the world. See BEIC PFF4–11. It was opportunistic for MSC to commit these violations at the height of the COVID pandemic amidst significant global shipping tension and competition. MSC's global status, size, resources, and experience all collectively highlight the egregious nature of the violations at issue in this proceeding.

MSC's bills of lading have remained unchanged to this day. BEIC PFF20. MSC has wasted and continues to waste the resources and time of many smaller companies as it pushes off its administrative task of simply billing the correct party onto others, effectively making notify parties their bill collectors. See BEIC PFF29 (“We invoice these to the invoice company because a lot of times when we invoice to the [consignee], or another party, they don't pay then our freight cashier team has to try and collect these. So by procedure, we are forced to these invoices to the invoice company listed on the [bill of lading].”), BEIC PFF30 (“When Notify is different than consignee some clients refuse to pay so we bill [consignee] directly at time of Billing . . . This can be a lot of manual work and not realistic to review all invoices/clients in this way.”). This proceeding only addresses 18 invoices out of a universe of many more invoices MSC surely sent and continues to send out to its customers. As it is established that this is MSC's practice—both regarding the Merchant Clause in its bills of lading and its application to notify parties as stated in its billing procedures—it is a plausible inference that MSC has billed many more notify parties (*i.e.*, underlying third parties) and created significantly more administrative tasks and hassles for other smaller companies. For a regulated entity as large as MSC to have this type of contravention systemically written and applied in its business practice is a display of extremely severe and

extensive Shipping Act violations that are antithetical to the Commission’s mission to protect the public from unfair and deceptive practices.

As to MSC’s practice of overcharging NOR shipments in 2021, only 925 of the 2,629 NORs charged the operating reefer rate were disputed. BEIC PFF197. Yet MSC did not immediately refund all of the 2,629 overcharged NOR shipments in 2021. BEIC PFF201–203, BEIC PFF210–283 (recounting a few of the NOR overcharge disputes that customers had to request from MSC); see also OIH at ¶¶60–61; MSC Answer at ¶¶60–61. With its abundant resources, MSC should have corrected its billing error as soon as it was discovered, and then it should have proactively refunded the overcharges to its customers. As the billing party, MSC was in the better position to reach out to its customers rather than placing the administrative burden of discovering and disputing these charges on to their customers, especially in the absence of published NOR rates in its U.S. tariff. For example, in [REDACTED]

[REDACTED] BEIC PFF210–20. [REDACTED]

[REDACTED]

[REDACTED] BEIC PFF233–35. [REDACTED]

[REDACTED] BEIC PFF248–60. [REDACTED]

[REDACTED]

[REDACTED] BEIC PFF265–77. And documents submitted by MSC

during the discovery process [REDACTED]

[REDACTED] Id.

[REDACTED] each had to expend a lot of effort to try and get MSC to resolve its overcharges. And at risk and fear of getting shut out, many customers ultimately paid the operating reefer charges that they knew to be incorrect. BEIC PFF224–29,

BEIC PFF 273. [REDACTED]

[REDACTED] BEIC PFF278–83. [REDACTED]

[REDACTED] Id. [REDACTED]

[REDACTED] Id. OE contends that MSC’s abuse of its relative market power to force its customers to pay whatever is demanded of them for fear of shut out constitutes an aggravating factor in this case. Moreover, an additional aggravating factor is MSC’s failure to immediately refund its NOR overcharges to its customers in 2021.

It bears addressing that refunds do not absolve MSC of its Shipping Act violations. The fact that MSC overcharged NOR shipments the operating reefer rate is itself the violation of the Act. Volkswagenwerk, 390 U.S. at 282 (citing Hellenic Lines, 7 F.M.C. at 675–676). MSC’s intent behind committing the violation does not negate the administrative burden placed upon its customers who had to fight MSC for a refund, nor does a refund change the fact that so many customers overpaid MSC in the first place. The gravity of this category of violations remains unchanged regardless of whether MSC issued refunds to its customers. In fact, MSC’s prolonged delay in issuing these refunds serves as an aggravating factor that must be considered in the assessment of a civil penalty.

In addition to being refunded the overcharged reefer rate, many of MSC’s customers were cheated free time. BEIC PFF213–18, BEIC PFF228, BEIC PFF236, BEIC PFF240, BEIC PFF248, BEIC PFF263, BEIC PFF 267–269, BEIC PFF278. This goes to the vast and unknown extent of MSC’s violations. Customers who were charged the operating reefer rate instead of the NOR rate, also had their free time calculated to an operating reefer instead of a NOR—which meant that many of MSC’s customers were given less free time than they were entitled to. At times, MSC would correct the free time calculation and then fail to fix the overcharged reefer rate.

BEIC PFF228, BEIC PFF242. One could reasonably infer that out of the 925 disputes and MSC's lax billing accuracy, MSC failed to correctly fix both free time calculations and operating reefer rates with respect to many of its overcharged NOR customers.

This is only for the few NOR overcharges that were disputed. Of the 1,700 overcharged shipments remaining, and the possibly many more unaccounted for, it is unclear how extensive MSC's systemic billing inaccuracies are and how many unlawful detention and demurrage overcharges MSC collected. It speaks to the malicious nature of these violations that MSC itself was [REDACTED] and that it took no public actions—such as external audits or public service announcements to its customers—to address these extensive problems.

MSC was able to continuously overcharge its customers the operating reefer fee because it did not publish a separate detention and demurrage rate for NORs in its U.S. tariff. By failing to publish these rates as required by the Shipping Act, MSC placed the shipping public at a disadvantage thereby creating opportunities for MSC to continuously exploit and overcharge its customers. MSC employees even represented to its customers that NORs received the operating reefer rate. BEIC PFF195–96, BEIC PFF278–83. However, this practice extended beyond a mere clerical error when there was an actual MSC employee claiming that NORs were charged the same amount as operating reefers. BEIC PFF195 (“reefer rates apply to the box itself regardless of whether the reefer was non-operating or active.”) By not having clear rates and failing to publish its NOR detention and demurrage rates in its tariff, MSC was able to unreasonably mislead and overcharge many of its customers.

The substantial quantity of overcharged NOR shipments speaks to the extent and gravity of MSC's failure to publish its NOR rates. Due to MSC's billing inaccuracy, the actual extent of

MSC's overcharges is immeasurable at this point.<sup>7</sup> It must be reiterated that MSC is a sophisticated ocean common carrier. As the largest shipping company in the world, MSC knew or should have known to publish rates in its U.S. tariff and thereafter correctly apply those rates to the tendered cargo. BEIC PFF7. MSC published its NOR detention and demurrage rates in other countries on December 9, 2015. BEIC PFF291. However, it published NOR detention and demurrage rates in the U.S. on March 9, 2023, over seven years later. Such a delay to timely update its U.S. tariff demonstrates not only the purposeful, knowing, and willful nature of MSC's failure but also the intentional aspect inherent in MSC's billing inaccuracies.

### 3. MSC's Culpability and History of Prior Offenses

MSC bears a high degree of culpability for the aforementioned violations at issue in this proceeding. MSC was responsible for drafting the language of its Merchant Clause which was then included in each bill of lading MSC issued to its customers. MSC was responsible for its own billing procedures. MSC issued the invoices to each notify party in this proceeding, and likely to many more third parties not identified in this proceeding. MSC generated and issued each invoice containing overcharges for NOR shipments. Finally, MSC, having the responsibility as a regulated entity to maintain a tariff reflecting all of its active rates and charges, failed to publish the NOR rates in its U.S. tariff for several years. All of these activities were fully within MSC's control and were committed knowingly and willfully, thus significantly elevating MSC's degree of culpability.

With respect to MSC's history of prior offenses the administrative law standard of proof is not the criminal standard, and the Commission "is a regulatory agency presumed to be familiar

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<sup>7</sup> To be clear, this amount is immeasurable to the Commission. MSC, on the other hand, could certainly devote its resources to ensure it was justly and correctly billing its customers.

with the industry it regulates,” and therefore able to draw reasonable inferences. Ever Freight Ltd. et al. (Ever Freight), 28 S.R.R. 329, 336 (ALJ 1998), administratively final, June 26, 1998. It is reasonable to infer that MSC violated section 41102(c) on many more occasions regarding its practice of sending invoices to notify parties and its practice of overcharging NOR shipments the operating reefer rate. OE reviewed only 18 invoices that MSC sent to notify parties, however, it is important to note that MSC’s bill of lading has remained unchanged since 2018. BEIC PFF20. MSC is the largest shipping company in the world with a dominating share of the U.S. market. BEIC PFF5–7. Consequently, there is a strong likelihood that MSC issued its bills of lading and invoices to numerous underlying third parties in contravention of the Shipping Act. To limit the Commission’s consideration of MSC’s policies to the 18 invoices at issue in this proceeding is unlikely to deter MSC given that its violative behavior is embedded in its bill of lading and billing procedures. Ever Freight, 28 S.R.R. at 336 (“to limit penalties only to discrete instances uncovered by BOE would not be realistic or effective in carrying out a policy of deterrence . . . .”). The Commission is permitted to draw reasonable inferences from the evidence and reach conclusions in the absence of a “smoking gun.” Universal Logistic Forwarding Co., Ltd., 00-10, 2001 WL 503660, \*10, (Fed. Mar. Comm’n Apr. 11, 2001) (ALJ initial decision), adopted in relevant part, 2002 WL 207541 (Fed. Mar. Comm’n Jan. 18, 2002) (“it is reasonable to infer that the 45 discrete violations shown on the record that occurred for two months in 1998 do not represent all the instances of Universal’s misconduct. In some cases it is not necessary to prove violations by showing a ‘smoking gun’ and reasonable inferences may suffice.”).

This standard applies in consideration of MSC’s NOR overcharges as MSC itself was unaware or attested to being unaware that the NOR issue was continuing to occur beyond September 16, 2021. As MSC was also [REDACTED] the Commission



can infer that MSC overcharged other NOR shipments the operating reefer rate prior to 2021 and beyond 2022.

As part of its history of prior offenses, on at least four occasions, between approximately 1989 and 2006, MSC was the subject of several enforcement actions that were resolved through the Commission's informal compromise procedures. BEIC PFF 13–17. Specifically, MSC entered into compromise agreements with the Commission to resolve allegations that it had violated, *inter alia*, sections 10(b)(1) and 10(b)(2) of the Shipping Act. Id. Prior to the recodification of the Shipping Act in 2006, sections 10(b)(1) and 10(b)(2) were the predecessors to 46 U.S.C. §§ 41104(a)(1) and (a)(2) and similarly placed certain prohibitions upon the activities of carriers with respect to the rates and charges in their tariffs and service contracts.<sup>8</sup> In each instance, as part of the compromise, MSC paid civil penalties to the Commission in various amounts ranging from \$50,000 to \$500,000. BEIC PFF14–17. The types of alleged violations involved in these compromises between MSC and the Commission were, *inter alia*, MSC's rebating practices, as well as providing service in the liner trade that was not in accordance with the rates and charges in MSC's published tariff or service contracts. Id.

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<sup>8</sup> Sections 10(b)(1) and 10(b)(2) stated in relevant part as follows: “No common carrier, either alone or in conjunction with any other person, directly or indirectly, may (1) allow any person to obtain transportation for property at less than the rates and charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or by any other unjust or unfair device or means; (2) provide service in the liner trade that (A) is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or service contract entered into under section 8 of this Act unless excepted or exempted under section 8(a)(1) or 16 of this Act; or (B) is under a tariff or service contract which as been suspended or prohibited by the Commission under section 9 of this Act or the Foreign Shipping Practices Act of 1988 (46 U.S.C. App. 1710a); . . . .”

#### 4. MSC's Ability to Pay a Civil Penalty

MSC has the ability to pay a substantial civil penalty, commensurate with its violations. As previously stated, MSC is estimated to be largest shipping company in the world. BEIC PFF7. Because it is privately owned, its exact income and profits are unknown. See BEIC PFF2. But in 2021–2023, MSC was the largest importer of goods into the U.S., which amounts to 3.6 million TEUs in 2023 alone. BEIC PFF5; OE Ex. 42 at BEIC 0000270. The second largest importer of goods into the U.S. in 2023 was CMA-CGM, S.A. (CMA) with approximately 3.1 million TEUs. OE Ex. 42 at BEIC 0000270. As a public company, CMA's revenue is published and easily accessible—CMA's revenue in 2023 was 47.02 billion USD. 2023 ANNUAL FINANCIAL RESULTS: FINANCIAL RESULTS REFLECT A YEAR OF CONTRASTS FOR THE TRANSPORT AND LOGISTICS INDUSTRY AND CONFIRM THE RELEVANCE OF THE CMA-CGM GROUPS STRATEGY, CMA-CGM, <https://www.cmacgm-group.com/en/news-media/2023-annual-financial-results>, February 23, 2024 (last accessed Apr. 3, 2024). One can reasonably infer that MSC's revenue is similar if not higher than CMA's as it is a larger company with a bigger share of the U.S. market. See BEIC PFF 5–6. Other reports estimate MSC's earnings from June 2021–2022 to be at \$27 billion. BEIC PFF7. MSC's earnings are not publicly available but the Commission should infer that MSC would be able to pay a substantial civil penalty commensurate with the extent and gravity of its violations.

#### 5. Calculation of Proposed Civil Penalty to be Assessed against MSC

A substantial civil penalty should be assessed against MSC for each of its violations. The civil penalty should be proportional to the deterrence factor intended by Congress and assessed pursuant to the civil penalty inflation adjustment effective for 2024 as required by 46 C.F.R.

§ 506.5.<sup>9</sup> See also 2024 Inflation Adjustment, 89 Fed. Reg. 1465. The ALJ should consider that MSC committed all of the violations at issue knowingly and willfully—18 violations of 46 U.S.C. § 41102(c) for its application of the Merchant Clause to invoice V. Alexander, J. Connor, and Welke; 2,629 violations of 46 U.S.C. § 41102(c) for its overcharges of NOR shipments; and 798 violations for 46 U.S.C. § 40501 accounting for each day between January 1, 2021 through March 9, 2023 for MSC’s failure to publish its NOR detention and demurrage rates in its U.S. tariff. Each one of these violations negatively impacted the wider shipping community, displaying that the nature, circumstances, extent, and gravity of these violations to be pervasive.

It is reasonable to infer that the nature of MSC’s violations is continuing inasmuch as MSC has not exhibited any effort to change the parameters and application of the Merchant Clause in its bills of lading. Moreover, the evidence shows that MSC continued to overcharge NOR shipments into 2022 and only published its NOR detention and demurrage rates in its U.S. tariff in 2023. MSC has a substantial history of prior offenses with the Commission and, as an ocean common carrier who prides itself in having a high degree of sophistication and experience<sup>10</sup>, is fully capable of informing itself regarding the requirements of the Shipping Act. The combination of all these factors along with MSC’s ability to pay and the importance of a deterrent effect of

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<sup>9</sup> According to the Commission’s regulations at 46 C.F.R. § 506.5, “[a]ny adjustment in a civil monetary penalty under this part shall apply only to civil monetary penalties, including those whose associated violation predated such increase, which are assessed after the date the adjustment takes effect.”

<sup>10</sup> MSC publicizes itself as a company that is “recognised and respected as a global leader in container shipping”. Moreover, MSC publicly claims that its “brand, which our customers have come to know today, is one which spans a world-leading position as a cargo carrier, receives respected acknowledgement as a terminal investor in some of the world’s busiest ports, is operator of award-winning luxury cruises, and is the provider of numerous passenger ferries.” CAPT. GIANLUGI APONTE, *A Message from our Founder: A Family Company*, MSC GROUP 4, [https://www.msc.com/-/media/files/msc-cargo/msc-group-brochures/msc\\_group\\_brochure.pdf](https://www.msc.com/-/media/files/msc-cargo/msc-group-brochures/msc_group_brochure.pdf) (visited on April 3, 2024).

penalties for violations in this case should be considered in the assessment of a significant civil penalty. Therefore, OE recommends that the ALJ apply the following calculus as a baseline:

| <b>Statute</b>       | <b>Violative Behavior</b> | <b>No. of Violations</b> | <b>Penalty per Violation</b> | <b>Total</b>    |
|----------------------|---------------------------|--------------------------|------------------------------|-----------------|
| 46 U.S.C. § 41102(c) | Merchant Clause           | 18                       | \$73,045 <sup>11</sup>       | \$1,314,810.00  |
| 46 U.S.C. § 41102(c) | NOR Overcharges           | 2629                     | \$17,609 <sup>12</sup>       | \$46,294,061.00 |
| 46 U.S.C. § 40501    | Failure to Publish Rates  | 798                      | \$19,609 <sup>13</sup>       | \$15,647,982.00 |
| <b>Grand Total</b>   |                           |                          |                              | \$63,256,853.00 |

#### **E. Cease and Desist Orders Should be Issued Against MSC**

The Order in this proceeding also directed that “in the event violations of the Shipping Act and the Commission’s regulations are found, an appropriate cease and desist order should be issued as authorized by the Shipping Act.” OIH at 12; see 46 U.S.C. § 41304. As there are over 3,000 violations in this proceeding, an appropriate cease and desist order should be issued against MSC’s continuing violative behaviors. See TCW at 206.

OE, therefore, requests that Respondent be ordered to cease and desist from violating the Shipping Act at 46 U.S.C. § 41102(c) with the use of the Merchant Clause in its bills of lading to assess charges against third parties as follows: MSC is to cease and desist (1) invoicing or making any other form of written or oral demand for monies owed under the Bill of Lading or tariff for freight and/or charges to any parties other than shippers, consignees, and persons with a beneficial

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<sup>11</sup> Pursuant to the latest civil penalty inflation adjustment effective January 15, 2024, the amount of \$73,045 represents the statutory maximum for each knowing and willful violation of the Shipping Act.

<sup>12</sup> This recommended amount per violation is \$3000 above the floor of \$14,609 for each knowing and willful violation pursuant to the latest civil penalty inflation adjustment effective January 15, 2024.

<sup>13</sup> This recommended amount per violation is \$5000 above the floor of \$14,609 for each knowing and willful violation pursuant to the latest civil penalty inflation adjustment effective January 15, 2024.

interest in the cargo or with whom MSC has a direct contractual relationship; and (2) all efforts at collecting monies owed to MSC from any parties other than shippers, consignees, and persons with a beneficial interest in the cargo or with whom MSC has a direct contractual relationship. See Ocean Network Express (North America), Inc. and Ocean Network Express Pte., Ltd. – Possible Violations of 46 U.S.C. § 41102(c), 5 F.M.C.2d 182, 189 (ALJ 2022) (served Dec. 13, 2022) (issuing a cease-and-desist order limiting an ocean common carrier’s definition and application of merchant in its bill of lading as it relates to third-party billing practices). OE further requests that Respondent be ordered to cease and desist from violating the Shipping Act at 46 U.S.C. § 41102(c) by overcharging its shipper customers in its application of its Operating Reefer tariff rates to NOR shipments.

Cease and desist orders are appropriate “when there is a reasonable likelihood that a respondent will continue or resume its unlawful activity. . . . One reason to issue such an order is to alert the shipping industry so as to forestall future violations and to enhance enforcement ability by adding another tool, namely, enforcement of a Commission cease and desist order, if necessary.” Ever Freight Int’l Ltd., 28 S.R.R. at 336. These orders have been issued in cases involving similar concerns present here such as a respondent’s blatant disregard for the Shipping Act and harm to the shipping public. In addition to protecting the shipping public, a cease-and-desist order with respect to the Respondent in this proceeding would enable the Commission to pursue further relief should MSC engage in similar unlawful activities in the future.

## **V. CONCLUSION**

For the reasons set forth above, OE respectfully requests the ALJ find MSC to be in violation of the Shipping Act at 46 U.S.C. §§ 41102(c) and 40501. There are no mitigating circumstances that should apply as MSC committed these violations knowingly and willfully.

Therefore, OE requests the ALJ enter judgement against MSC and impose an appropriate civil penalty in an amount no less than \$63,256,853.00. Responsive to the Order of Investigation, the ALJ should also order MSC to cease and desist violating the Shipping Act at 46 U.S.C. § 41102(c).

Respectfully submitted,

April 3, 2024

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**CERTIFICATE OF SERVICE**

I hereby certify that on this **3rd day of April, 2024** a copy of the foregoing has been served upon all counsel of record in accordance with 46 C.F.R. Part 502.

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