

BEFORE THE  
FEDERAL MARITIME COMMISSION

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DOCKET NO. 23-09  
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HUBBELL INCORPORATED,

and

HUBS, INC.,

COMPLAINANTS,

v.

DSV AIR & SEA, INC.,

and

DSV OCEAN TRANSPORT A/S,

RESPONDENTS.

**OPPOSITION TO RESPONDENTS' MOTION TO STAY PROCEEDING**

Complainants Hubbell Incorporated (“Hubbell Incorporated”) and HUBS, Inc. (“HUBS”) (each a “Complainant” and collectively “Complainants” or “Hubbell”), by and through their undersigned attorneys, file this Opposition to Respondents’ Motion to Stay Proceeding in Favor of the Delaware Federal Court Litigation (“Motion to Stay” or “Motion”), filed by DSV Air & Sea, Inc. and DSV Ocean Transport A/S (together, “DSV” or “Respondents”). For the reasons provided below, Respondents’ Motion to Stay should be denied in its entirety.

## SUMMARY OF OPPOSITION

Respondents' Motion to Stay should be summarily denied. First, the Complaint alleges multiple, detailed violations of the Shipping Act of 1984, 46 U.S.C. § 40101, et. seq. (the "Shipping Act"), pursuant to: 46 U.S.C. § 41104(a)(2) and 46 C.F.R. § 531.6(c); 46 U.S.C. § 41102(c); and 46 U.S.C. §§ 41102(a)(3) and 41104(d)(2)(B). Respondents concede that (i) the Federal Maritime Commission ("FMC") has exclusive jurisdiction to adjudicate Shipping Act violations, and (ii) that "the FMC has jurisdiction to decide the claims Hubbell brings in this action." Motion at 9. Indeed, it is well established that the FMC has an *obligation* to determine whether an entity has violated the Shipping Act. See *Greatway Logistics Group, LLC v. Ocean Network Express Pte. Ltd.* ("Greatway"), 2021 WL 3090768 \*2 (ALJ July 16, 2021); see also *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.* ("Anchor"), 30 S.R.R. 991, 998 (FMC 2006). Notwithstanding Respondents' assertions that its complaint filed in Delaware (the "Delaware Action") alleges a purported breach of contract cause of action, there is no legitimate basis to stay adjudication of the well-plead Shipping Act causes of action alleged in the Complaint.

Second, Respondents misapply the Commission's precedent on motions to stay in the circumstances here. Citing *General Motors LLC v. Nippon Yusen Kabushiki Kaisa* ("General Motors"), 34 S.R.R. 7, 9 (ALJ 2016), Respondents apply the balancing factors articulated by the Supreme Court in *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.* ("Moses"), 460 U.S. 1, 14-18 (1983), without consideration of the Commission's precedent applicable to a proceeding that alleges Shipping Act violations. As the Presiding Officer explained in *Verterra Ltd. v. D.B. Group America Ltd. and D.B. Group India Ltd.* ("Verterra"), 2020 WL 1150930 \*5 (ALJ Mar. 5, 2020), the parties in *General Motors* filed a *joint motion* requesting a stay and the Commission's obligation to determine whether Shipping Act violations occurred was not at issue.

The Shipping Act allegations in the Complaint are central considerations in a proper evaluation of the Motion to Stay. *See also, Greatway*, 2021 WL 3090768 \*2; *TAK Consulting Engineers v. Sam Bustani, et al.* (“TAK Consulting”), 1998 WL 940845 (ALJ Oct. 22, 1998). These decisions each involved circumstances analogous to this proceeding—most significantly that the complaints all alleged violations of the Shipping Act—and each rejected motion to stay arguments materially similar to Respondents’ arguments here. As discussed below, a proper consideration of the factors, based on the application of established precedents, plainly does not favor a stay.

### **NATURE AND STAGE OF THE PROCEEDINGS**

Hubbell seeks a cease-and-desist order and reparations for injuries proximately caused by Respondents’ violations of the Shipping Act. The Respondents in this proceeding are Non-Vessel Operating Common Carriers (“NVOCCs”) that carried containerized cargo for the Complainants allegedly pursuant to Negotiated Service Arrangements (“NSAs”). The Complaint alleges, in detail, DSV’s violations of the Shipping Act.

Respondents filed an action in Delaware federal court seeking a determination of whether the NSAs were NSAs or if they were Negotiated Rate Arrangements (“NRAs”), a question that Respondents admit is a matter of Shipping Act law and regulation. *See* Complaint, Exhibit 1, Delaware Complaint, ¶¶ 9, 14. If, and only if, the Delaware court were to make a determination on the Shipping Act questions (in Respondents’ favor) would the Delaware court then be in a position to address Respondents’ alleged breach of contract theory and allegations. *See* Complaint, Exhibit 1 (Delaware Complaint, ¶ 39 (“Such a declaration is necessary and appropriate at this time so that DSV may pursue its claims for breach of the Capacity Agreements against Hubbell.”)).

Further, both Respondents’ declaratory cause of action and its alleged breach of contract cause of action in Delaware directly relate to, and are intertwined with, the violations alleged in

the Complaint concerning Respondents' repeated attempts to change the commercial terms of the agreements, including attempts to weaken and/or remove the termination rights, and an attempt to recast the NSAs as NRAs (which in effect is precisely what Respondents are attempting yet again by filing the Delaware Action). *See* Complaint ¶¶ 33-44.

### **RELEVANT FACTS**

Facts relevant to this Opposition are set out in the body when cited herein. At this stage of the proceeding and for the purposes of the Motion to Stay and Opposition, we refer to the facts as alleged in the Complaint as a more fulsome source of the facts in this matter to date. Further, we object to the inaccurate and/or selective recitation of facts in the Motion to Stay, specifically including Respondents' misstatements and omissions concerning the negotiation of NSAs in March 2022, and the multiple attempts by Respondents thereafter to modify the terms of those agreements for ulterior commercial reasons under the guise of FMC concerns.

### **STANDARD OF REVIEW**

The FMC has discretion to stay proceedings within the general authority of the Presiding Officer to manage the case docket; however, the party seeking a stay has the burden to demonstrate the need for the stay. *See Greatway*, 2021 WL 3090768, at \*2. The FMC considers that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). Further, the applicable factors and standard for stays pending a related federal court filing, when the FMC complaint alleges well-plead Shipping Act violations, is set forth in the FMC precedent discussed below, including *Greatway*, 2021 WL 3090768, *TAK Consulting*, 1998 WL 940845, and *Verterra*, 2020 WL 1150930.

## ARGUMENT

### **I The Complaint Alleges Shipping Act Violations that the FMC Has an Obligation to Adjudicate**

The FMC has an obligation to address well-plead allegations of the Shipping Act. *See Greatway*, 2021 WL 3090768 \*3, *citing Mediterranean Shipping Co. USA v. Cargo Inc.*, 46 F. Supp. 3d 294, 301 (S.D.N.Y. 2014) (*citing Gov't of Guam v. American President Lines*, 28 F.3d 142, 144 (D.C. Cir. 1994) (“alleged violations of the Shipping Act must be addressed with the Federal Maritime Commission.”); *D.L. Piazza Co. v. West Coast Line*, 210 F.2d 947, 948 (2d Cir. 1954) (predecessor agency has exclusive primary jurisdiction over Shipping Act matters); *see also Anchor*, 30 S.R.R. 991, 998.

The Complaint alleges Shipping Act violations and underlying factual allegations in support of causes of action under: 46 U.S.C. § 41104(a)(2) and 46 C.F.R. § 531.6(c) (engaging in NVOCC service not in accordance with an NSA), 46 U.S.C. § 41102(c) (unreasonable practices/demurrage, detention/excessive charges), and 46 U.S.C. §§ 41102(a)(3) and 41104(d)(2)(B) (retaliation and other unfair or unjustly discriminatory action for any other reason). The factual allegations in support of these causes of action are set forth in detail in the Complaint. ¶¶ 16-65. The Motion to Stay does not advance a serious argument for how or why all of the Shipping Act violations alleged in the Complaint (including, for example, demurrage/excessive charges) could possibly meet Respondents’ burden to justify a stay as to these alleged violations.

As to the narrow, related issue in the Delaware Action, the Commission’s precedent holds that “even when there is litigation between the parties in other courts, the Commission has an obligation to determine whether an entity has violated the Shipping Act.” *See Verterra*, 2020 WL 1150930 \*2, *citing Cargo One, Inc. v. Cosco Container Lines Co. Ltd*, 28 S.R.R. 1635, 1645 (FMC

2000) (denying motion to stay where the Complaint alleged Shipping Act violations that the Commission is obligated to adjudicate), and “even though a proceeding in another forum may have resolved some issues between the parties,” *Verterra Ltd*, 2020 WL 1150930 \*2, citing *Anchor*, 30 S.R.R. 991, 998. Here, notwithstanding Respondents’ mischaracterization of the partial, related matter presented in the Delaware Action, Respondents fail to meet their burden to justify a stay as to any Shipping Act violations at issue in the Complaint.

## **II. Respondents Improperly Apply the Balance of Interest Factors**

The entirety of Respondents’ argument in the Motion to Stay is comprised of novel attempts to argue the balance of interest factors, while failing to consider on-point and analogous existing precedent concerning motions to stay involving complaints alleging violations of the Shipping Act. *See* Motion at 5-10.

The FMC has addressed the question of the applicable standard for a stay in favor of a related federal or state proceeding on a number of previous occasions. *See, e.g., Greatway*, 2021 WL 3090768 \*2; *TAK Consulting*, 1998 WL 940845; and *Verterra*, 2020 WL 1150930. The FMC has considered that “no single factor is dispositive,” and the balance is “heavily weighted in favor of the exercise of jurisdiction.” *See TAK Consulting*, 1998 WL 940845 \* 5 (citing to *Moses*, 460 U.S. 1).

*Greatway* and *Tak Consulting* are particularly instructive. In *Greatway* and *Tak Consulting*, the FMC denied a motion to stay pending a district court and state court litigation, respectively, filed prior to the FMC proceeding. Violations of the Shipping Act that the FMC was obligated to adjudicate were the pivotal elements in both decisions. *See Greatway*, 2021 WL 3090768 \*4; *see also TAK Consulting*, 1998 WL 940845 \*6. The instant Complaint is analogous to the core issues in the cases, which should provide the legal basis for the analysis here. It is

therefore not surprising that Respondents' treatment of the individual factors is neither compelling, nor legally sufficient, to meet its burden for demonstrating a stay.

**A. The FMC Action Should not Be Stayed Because the U.S. District Court for the District of Delaware Does not Have Jurisdiction over the Shipping Act Violations**

Respondents argue that this factor favors the Motion to Stay stay because the Delaware Action, filed on June 29, 2023, was filed first. While the Delaware Action was filed first, Respondents were well aware that Complainants were contemplating FMC action against them long before the Delaware Action was filed. *See* Complaint ¶¶ 34, 38, 48, 58, and 96-97. In any event, as reflected in *Greatway*, 2021 WL 3090768 \*4 and *Verterra*, 2020 WL 1150930 \*5, the prior federal and state complaint filings in those cases did not outweigh the later filed FMC complaints, which as here, alleged violations of the Shipping Act that were properly before the FMC, not the alternative forum.<sup>1</sup>

**B. The FMC Is a Convenient Forum**

The FMC is plainly a convenient forum. The Delaware court does not have jurisdiction over Shipping Act violations, the FMC is a forum of national jurisdiction, the FMC has procedures similar to federal court, including discovery, and the FMC has substantial flexibility for remote practice. *See Greatway*, 2021 WL 3090768 \*4 (noting the convenience of the FMC forum).

**C. The FMC Action Avoids Piecemeal Litigation**

Respondents' argument that staying the FMC proceeding would prevent piecemeal litigation is nonsensical. Breaking off one part of the dispute for the Delaware court to consider,

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<sup>1</sup> In response to Respondents' baseless accusation of forum shopping (Motion at 6.n2, 8), Hubbell filed its Complaint in the FMC because the FMC is the proper forum, not "in hopes of finding a more friendly forum" and certainly no "to avoid responsibility under the contracts." Nor will the FMC action result in delay in light of the fact that the Initial Order has already been issued and in light of the FMC's 150-day statutory discovery window. The FMC matter is already on track for a faster pace than the Delaware Action where no initial conference has been held, let alone any schedule issued, and a motion to stay pends.

even if it was appropriate for it to consider it, would still require overlapping considerations and determinations in two forums. That is the definition of piecemeal litigation. Since the FMC is the only forum that can resolve the Shipping Act claims, and the FMC certainly can and should address the Shipping Act questions concerning regulation agreements, the forum should be the FMC. *See Greatway*, 2021 WL 3090768 \*4.

The cases that Respondents cite are inapposite. *See* Motion at 7-9. *Pasha Auto Warehousing, Inc. v. Philadelphia Regional Port Auth.* (“Pasha”), involved property rights stemming from a construction lease. 1998 WL 188848 (E.D.Pa. Apr. 21, 1998). *In re Containership Co. (TCC) A/S* (“In Re Containership Co.”), involved contract obligations in the context of bankruptcy issues. 466 B.R. 219, 226 (Bankr. S.D.N.Y. 2012). *Tugz Int’l, L.L.C. v. Canaveral Port Auth.*, involved a constitutional claim for conduct that might also have given rise to a claim under the Act. 2004 WL 1368689 (M.D. Fla. Apr. 7, 2004). *Zima Corp. v. M.V. Roman Pazinski*, involved the status of the regulated parties under the terms of a contract and the Carriage of Goods by Sea Act application, not Shipping Act violations. 493 F. Supp. 268, 277 (S.D.N.Y. 1980).

As the Presiding Officer observed in *TAK Consulting*, when distinguishing other similarly inapposite decisions on the same principle, the “cases did not primarily implicate questions of the Commission's jurisdiction and the disputes arose primarily in admiralty or commercial law. However, when a complainant sought relief under the Shipping Act against an NVOCC (non vessel operating common carrier) who had abused tariff law and acted unreasonably in its dealings with a shipper customer the Commission did not stay or otherwise defer to court proceedings.” 1998 WL 940845 \*6 (internal citations omitted). The instant Complaint plainly seeks relief under the Shipping Act.



#### **D. The Shipping Act Provides the Rule of Decision on the Merits**

Respondents essentially concede this factor in favor of the FMC. Respondents musings that the Delaware court, like and federal court, has experience with traditional and routine contract law is *non sequitur*. The Shipping Act plainly provides the rule of decision with respect to Shipping Act matters, including the alleged “threshold” matter of law and regulation pertaining to NSAs and NRAs. To the extent that a federal court could interpret the Shipping Act, the Shipping Act would still provide the rule of decision on the merits. And even in that scenario the FMC would be better suited to interpret Shipping Act law and regulation. As to the totality of the Complaint and the matters in issue, the Delaware court does not have the means of adequately protecting parties’ rights because it cannot adjudicate these Shipping Act violations that it lacks jurisdiction to adjudicate and that in all events are not before the court.

#### **E. The FMC Action Is not Vexatious or Reactive**

Finally, the fact that Complainants filed a Complaint with the FMC alleging well-pleaded violations of the Shipping Act is not “vexatious or reactive” for the purpose of this factor. *See TAK Consulting*, 1998 WL 940845 \*6 (observing that filing a complaint alleging Shipping Act violations is not indicative of an intent to vex or harass); *see also Greatway*, 2021 WL 3090768 \*4 (“The Commission is the only forum that can resolve the Shipping Act claims. Further, it does not appear that the detailed complaint is vexatious or reactive in nature as the allegations raised involve plausible Shipping Act issues.”). Respondents even characterize Hubbell’s complaint as “allegations against DSV for Shipping Act violations.”<sup>2</sup>

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<sup>2</sup> To the extent that Respondents are arguing that filing the Complaint after the Delaware action constitutes “reactive” under this factor, Motion at 8, the timing of the filings is addressed in the applicable factor on timing considered above. With respect to Respondents’ insinuation about extensions to respond to the Delaware Actions, the extensions were *joint motions*. In any case, it is not pernicious to utilize an extension of time to evaluate and respond in light of the otherwise short default response period, which was made effectively shorter because the Delaware complaint served on a registered agent on the eve of the Fourth of July holiday weekend without any courtesy notice to opposing counsel or to the Complainants, who, as the Complaint shows, were in otherwise in communications with Respondents and

**CONCLUSION**

For the reasons stated above, Complainants respectfully request that the Motion to Stay be denied.

Dated: September 29, 2023

Respectfully submitted,

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their counsel. Moreover, the last joint extension arose because the Hubbell defendants were preparing the motion to stay the Delaware Action and reached out to confer with DSV's counsel as required under the local meet and confer rules, and DSV utilized that time to evaluate its position on the then proposed motion to stay. Notably, the FMC has a similar meet and confer requirement applicable to non-dispositive motions such as Respondents' Motion to Stay, but no effort was made to meet and confer in advance of DSV's service of the Motion to Stay in violation of the applicable FMC rules.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the execution date which appears below, the undersigned served the attached document on counsel at the following email addresses:

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