

**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.**

**RESPONDENTS' OPENING BRIEF IN SUPPORT OF ITS MOTION TO STAY FMC  
PROCEEDING IN FAVOR OF THE DELAWARE FEDERAL COURT LITIGATION**

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## NATURE AND STAGE OF THE PROCEEDINGS

This proceeding is an action (the “FMC Action”) filed by Complainants Hubbell Incorporated and Hubs, Inc. (together, “Hubbell” or “Complainants”) to determine whether Respondents DSV Air & Sea, Inc. and DSV Ocean Transport A/S (together, “DSV” or “Respondents” and with Hubbell, the “Parties”) have violated the Shipping Act of 1984, 46 U.S.C. § 40101, *et. seq.* (the “Shipping Act”). There are threshold contract interpretation issues, however, that require that the Federal Maritime Commission (the “FMC” or “Commission”) stay this proceeding until those issues are resolved by the United States District Court for the District of Delaware.

The Parties disagree whether two Price and Freight Capacity Agreements (the “Capacity Agreements”) between the Parties are separate and distinct, enforceable ocean transportation agreements that were not terminated upon Hubbell’s termination of the Parties’ Non-Vessel Operating Common Carrier Service Arrangement (the “Service Agreement”). The Parties disagree about Hubbell’s obligations under the Capacity Agreements. Hubbell contends that any responsibilities it may have owed DSV were terminated when Hubbell terminated the Service Agreement. DSV maintains that the Capacity Agreements are not contingent on the Service Agreement and that the Capacity Agreements do not have a reciprocal termination provision.

In order to resolve this clear disagreement regarding the rights and legal obligations of the Parties, DSV filed suit against Hubbell on June 29, 2023, in the U.S. District Court for the District of Delaware (the “Delaware Action”), roughly two months before the filing of the FMC Action. In the Delaware Action, DSV asserted claims pursuant to the Declaratory Judgment Act at 28 U.S.C. § 2201 *et seq.*, and breach of contract. Specifically, DSV has asked the federal court to decide (i) the obligations of Hubbell and DSV under the Capacity Agreements due to Hubbell’s

termination of the Service Agreement and (ii) whether Hubbell is now in breach of the Capacity Agreements for failing to fulfill its weekly volume commitments for DSV and thus owes DSV significant monetary damages. The FMC lacks jurisdiction to decide those claims because they are straightforward contract interpretation issues that are independent of Hubbell’s theories about violations of the Shipping Act. While DSV will vigorously defend against Hubbell’s assertion of violations of the Shipping Act, the FMC Action should be stayed and not impede or delay the resolution of the preliminary, threshold, and independent claim of DSV against Hubbell for breach of contractual obligations.

### **STATEMENT OF FACTS**

On July 1, 2019, Hubbell and Panalpina, Inc., to which DSV is the successor in interest, entered into the Service Agreement. FMC Complaint (“FMC Compl.”) ¶¶ 17, 26. The Service Agreement is a Non-Vessel Operating Common Carrier (“NVOCC”) Service Arrangement (“NSA”), as contemplated under 46 C.F.R. Part 531 and in accordance with those requirements set forth in 46 C.F.R. § 531.6. *Id.* ¶ 23. The Service Agreement, among other things, governs the services provided by DSV in arranging for the transportation of Hubbell’s goods and executing logistics functions in connection therewith (the “Services”) as an NVOCC. *Id.* On or about April 1, 2022, the Parties executed two separate Capacity Agreements to confirm weekly cargo space capacity and rate allocations as set forth therein, among other things. *Id.* ¶ 28.

DSV maintains the Capacity Agreements are each a Negotiated Rate Arrangement (“NRA”), pursuant to 46 C.F.R. § 532.5. Delaware Complaint<sup>1</sup> ¶ 11 (“D. Del. Compl.”) (attached to the FMC Compl. as Exhibit 1). Pursuant to the Capacity Agreements, Hubbell agreed to weekly commitments of cargo at specified rates. *Id.* ¶¶ 12-16. Hubbell contends that the Capacity

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<sup>1</sup> Capitalized terms, unless otherwise defined herein, shall have the meanings ascribed to them in the FMC Complaint.

Agreements incorporate the Service Agreement and thus constitute NSAs within the meaning of 46 C.F.R § 531.6. FMC Compl. ¶ 30. As previously stated, DSV disagrees with Hubbell's interpretation of the Capacity Agreements and the Service Agreement. *See generally* D. Del. Compl. One month after signing the Capacity Agreements, Hubbell sought to renegotiate both the Service Agreement and Capacity Agreements because it was dissatisfied with the agreed-upon rates. *Id.* ¶ 18.

On December 6, 2022, Hubbell notified DSV that it was terminating the Service Agreement and the Capacity Agreements pursuant to Section 10 of the Service Agreement. FMC Compl. ¶ 47. In response, DSV reminded Hubbell that the Capacity Agreements are separate and distinct, enforceable agreements that are not contingent on the Service Agreement and that the Capacity Agreements do not have a reciprocal termination provision. *Id.* ¶ 56. Hubbell failed to tender any loads to DSV under the Capacity Agreements since on or about March 6, 2023. *Id.* ¶ 53. Hubbell failed to pay DSV in accordance with the minimum volume commitments in the Capacity Agreements and DSV, accordingly, issued invoices to Hubbell for payment. *Id.* ¶¶ 59-61.

### **PROCEDURAL HISTORY**

As a result of the above, on June 29, 2023, DSV filed the Delaware Complaint against Hubbell in the District of Delaware. *See generally* D. Del. Compl. Following multiple requests for an extension of time to respond to the Delaware Complaint, Hubbell filed its own complaint on or about August 23, 2023, before the FMC against DSV. *See generally* FMC Compl. In the Delaware Complaint, DSV brings two claims against Hubbell: declaratory judgment and breach of contract. DSV asserts the nature of that action in Paragraph 1 of the Delaware Complaint, stating:

Plaintiff brings this action seeking a declaratory judgment that Hubbell's termination of the Parties' Non-Vessel Operating Common Carrier Service Arrangement (the "Service Agreement") on December 6, 2022, did not also terminate the Parties' two Price

and Freight Capacity Agreements (the “Capacity Agreements”). The Service Agreement and Capacity Agreements, while related, are separate, enforceable ocean transportation contracts, and there is no language in either indicating that one is contingent upon the other. Hubbell is now in breach of the Capacity Agreements for failing to fulfill its weekly volume commitments for DSV and owes DSV significant monetary damages....

D. Del. Compl. ¶ 1. In its Answer to the Delaware Complaint, Hubbell agrees with DSV that there is a preliminary issue of whether Hubbell properly terminated the Capacity Agreements, saying, “...Hubbell admits it terminated the Service Agreement referenced on December 6, 2022, denies the allegation that it did not terminate the Capacity Agreements, denies the allegation that they are ‘separate, enforceable ocean transportation contracts,’ and denies the remainder of Paragraph 1.” Del. Ans. ¶ 1; a true and correct copy of which is attached hereto as **Exhibit A**. Contemporaneously with the filing of its Answer to the Delaware Complaint, Hubbell moved to stay the Delaware Action. On September 15, 2023, DSV filed its opposition to Hubbell’s motion to stay the Delaware Action, which is pending reply by Hubbell.

#### **STANDARD OF REVIEW**

“The Commission may grant a request to stay a proceeding, however, the party seeking a stay has the burden to demonstrate the need for the stay.” *Greatway Logistics Group, LLC, Complainant v. Ocean Network Express Pte. Ltd., Respondent.*, 2021 WL 3090768, at \*2 (FMC July 16, 2021). As discussed by the U.S. Supreme Court, “the authority of a court to stay proceedings derives from the ‘power inherent in every court to control the disposition of the causes on its docket with economy of time and effort.’” *Id.* (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936)). The movant must first “make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else.” *Exclusive Tug Arrangements In Port Canaveral, Florida*, 2002 WL

31556298, at \*2 (FMC Nov. 15, 2022) (quoting *Landis*, 299 U.S. at 254). This tribunal has stated that a decision to grant a stay is discretionary and requires only the balancing of various competing interests. *General Motors LLC v. Nippon Yusen Kabushiki Kaisa; Wallenius Wilhelmsen Logistics As; and Eukor Car Carriers Inc.*, 2016 WL 240785, at \*2 (FMC Jan. 5, 2016).

The U.S. Supreme Court has enumerated the following factors to consider when staying a federal proceeding, such as this one, pending the outcome of a related federal or state court matter:

which court first assumed jurisdiction, the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, whether state or federal law provides the rule of decision on the merits, the adequacy of the state court to protect the parties' rights, and whether one of the actions has a vexatio[u]s or reactive nature.

*General Motors LLC*, 2016 WL 240785, at \*2 (citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 14-18 (1983)) (granting motion to stay FMC proceeding in favor of federal district court action on consideration of these factors).

### **ARGUMENT**

The FMC Action should be stayed in favor of the Delaware Action. Hubbell wants the FMC Action to proceed on the assumption that its recitation of the facts—and, critically, its conclusion that the Service Agreement and Capacity Agreements are a single integrated contract—is correct. But this is patently improper. As explained below, the claims DSV raises in the Delaware Complaint are threshold issues properly for the federal court's consideration—the rights and obligations of the Parties under the Service Agreement and Capacity Agreements. The FMC, on the other hand, lacks jurisdiction to decide claims such as breach of service contracts and requests for declaratory judgment. *See* 46 U.S.C. § 40502(f) (“[U]nless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court.”). At the very least, a legal determination by the federal court of what agreement(s) the Parties were/are

operating under is an element that may bear on any later review by the Commission of possible violations of the Shipping Act or Commission regulations. Based on the following factors, DSV has met its burden to demonstrate a stay is necessary, and the threshold contract issues should be determined by the federal court *before* the FMC may adjudicate Hubbell's claims in this action.

***i. The FMC Action Should be Stayed Because the U.S. District Court for the District of Delaware First Assumed Jurisdiction.***

The first factor asks which forum assumed jurisdiction first. The Delaware Action was first filed on June 29, 2023. Approximately two months later, after multiple requests for an extension of time to respond to the Delaware Complaint, on or about August 23, 2023, Hubbell filed its own complaint before the FMC against DSV. Thereafter, on September 1, 2023, Hubbell filed its answer to the Delaware Complaint and simultaneously filed a motion to stay the Delaware Action.

Quite simply, this factor weighs in favor of staying the FMC Action because DSV filed the Delaware Action first. Moreover, the Delaware Action is solely about DSV's straightforward claims for declaratory judgment and breach of contract which ask the federal court to decide the preliminary issues of whether the Capacity Agreements are separate, enforceable ocean transportation agreements and the Parties' resulting obligations, all of which affect Hubbell's claims here. Further, Hubbell filed its FMC Complaint against DSV *nearly two months after DSV initiated this litigation*, which should imply an attempt to thwart the federal court's jurisdiction over DSV's claims. Thus, this factor weighs in favor of a stay of this action.<sup>2</sup>

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<sup>2</sup> The sequence of events and the course of conduct among the Parties leave DSV in a position of not being able to dismiss the possibility that Hubbell filed its complaint at the Commission to divert or delay resolution of the contract issues pending before the District of Delaware and in hopes of finding a more friendly forum for its efforts to avoid responsibility under its contracts. Even if not the intent, permitting the FMC Action to go forward while the earlier-filed Delaware Action is in progress (or, worse yet, if Hubbell succeeds in its efforts to use the pendency of the FMC Action to stay the Delaware Action) will nonetheless have the unavoidable effect of delay and will add significant costs to achieving a final resolution of this commercial dispute.

**ii. *The Inconvenience of the Federal Forum Factor is Neutral.***

The second factor considers whether the FMC forum is inconvenient for the parties. DSV submits this factor is neutral because DSV and Hubbell are both sophisticated commercial entities represented by capable counsel who can litigate in this forum. It would be against good conscience however to litigate the FMC Action before the Delaware federal court has an opportunity to determine Hubbell's obligations under the Capacity Agreements.

**iii. *A Desire to Avoid Piecemeal Litigation Weighs Heavily in Favor of Staying This Action.***

The third factor considers whether staying the action would avoid piecemeal litigation. Here, this is an important consideration because the federal court is poised to decide threshold legal issues. Hubbell should not be permitted to proceed *here* without the benefit of those decisions.

In the FMC Action, Hubbell claims that DSV violated the Shipping Act by providing service not in accordance with the agreements, which Hubbell alleges are all NSAs. This directly contrasts with DSV's position in the Delaware Complaint that each of the Capacity Agreements is an NRA and only the Service Agreement is an NSA. However, the regulatory requirements of what constitutes NRAs and NSA are different. Thus, as a practical matter, a determination must first be made regarding the contractual undertakings of the parties before the FMC can determine whether DSV's conduct constitutes a violation of the Shipping Act. *See* 46 C.F.R. §§ 531.6, 532.5. This determination will apply, as Congress intended, general contract principles as well as evidence of the parties' course of dealing, and their mutual understandings, all of which are precisely within the purview of the U.S. District Courts. *See, e.g., In re Containership Co. (TCC) A/S*, 466 B.R. 219, 227 (Bankr. S.D.N.Y. 2012); *Pasha Auto Warehousing, Inc. v. Philadelphia Reg'l Port Auth.*, 1998 WL 188848, at \*7 (E.D. Pa. Apr. 21, 1998) (finding the district court had jurisdiction to proceed because the FMC lacked primary jurisdiction over interpretation of



maritime leases); *Tugz Int'l, L.L.C. v. Canaveral Port Auth.*, 2004 WL 1368689, at \*3 (M.D. Fla. Apr. 7, 2004) (denying defendant's motion to dismiss plaintiff's claim for violation of the commerce clause because this claim did not arise under the Shipping Act); *Zima Corp. v. M.V. Roman Pazinski*, 493 F. Supp. 268, 277 (S.D.N.Y. 1980) (holding that interpretation of the nature of defendant's contractual undertaking is a matter "well within the traditional competence of the courts" and thus deference to the FMC would be inappropriate), *aff'd sub nom. Zima Corp. v. M.*, 633 F.2d 208 (2d Cir. 1980).

It is for this very reason that DSV brought a declaratory judgment action first in the District of Delaware, to determine the contractual rights and obligations of the Parties and why DSV has opposed Hubbell's motion to stay the Delaware Action in favor of this one. Hubbell has it backwards; the Delaware Action should proceed, and the FMC case should be stayed. If the FMC Action is not stayed, piecemeal litigation will undoubtedly result because the FMC Action will proceed without the benefit of these threshold contract issues being decided by the appropriate adjudicative forum. Moreover, allowing this to happen inevitably prejudices DSV because it enables this action to proceed upon Hubbell's (incorrect) interpretation of the facts and law, potentially resulting in judgments that are contrary to the federal court's determinations. For example, if the federal court determines the Capacity Agreements to be NRAs, which are separate, distinct agreements from the Service Agreement, this affects any claim that DSV violated the Shipping Act in its performance under the Capacity Agreements, which Hubbell claims are NSAs. Thus, this factor weighs significantly in favor of a stay here.

***iv. Federal Law Weighs in Favor of Staying the FMC Action.***

The fourth factor considers which forum's law provides the rule of decision on the merits. It is axiomatic that federal courts have the conventional experience of deciding claims for

declaratory judgment and breach of contract. “The district court must meet its ‘virtually unflagging obligation ... to exercise the jurisdiction’ given to it by Congress, unless Congress intended for the action to proceed under the FMC’s auspices.” *Pasha*, 1998 WL 188848, at \*6 (quoting *NY Life Distribs., Inc. v. Adherence Group, Inc.*, 72 F.3d 371, 377 (3d Cir.1995)). “The ‘inefficiency of parallel or overlapping litigation should be minimized, but that is not a warrant for denying a suitor the access to court that the Congress gave it.’” *Id.* (quoting *Am. Assoc. of Cruise Passengers v. Cunard Line Ltd.*, 31 F.3d 1184, 1186 (D.C.Cir.1994)). Federal courts have held that the FMC’s exclusive jurisdiction is provided only over claims involving possible violations of the Shipping Act. *Pasha*, 1998 WL 188848, at \*6. And while the FMC bears the responsibility under the Shipping Act of regulating service contracts, it lacks jurisdiction to decide actions such as breach of service contracts. *In re Containership Co.*, 466 B.R. at 227 (citing 46 U.S.C. § 40502(f)).

To be clear, the FMC has jurisdiction to decide the claims Hubbell brings in this action. However, threshold issues necessary to full adjudication of the FMC Action are to be determined by the federal court. It would be against good sense to litigate alleged violations of the Shipping Act in this forum without knowing the rights and obligations of the Parties under the Service Agreement and Capacity Agreements. Thus, until a determination is made by the federal court on what agreements the Parties were operating under and the rights and obligations thereunder, including a determination of what kinds of shipping agreements are at issue, the FMC Action should be stayed.

***v. The Parties’ Rights are Protected by the Delaware Federal Court.***

The fifth factor considers whether the federal court has the means to adequately protect the parties’ rights. The federal court in Delaware will adequately protect the rights of the Parties because, as discussed above, its ruling will decide threshold contract issues that will focus the

issues before the FMC. In fact, a stay of the FMC Action will benefit both Parties. After the federal court determines the obligations of Hubbell under the Capacity Agreements, the Parties will have a clear understanding of their rights and obligations with respect to DSV's alleged violations of the Shipping Act, which may assist with any alternative dispute resolution. Thus, this factor also weighs in favor of a stay.

*vi. The Reactive Nature of Hubbell's FMC Complaint Justifies Staying the FMC Action.*

Finally, the last factor considers whether one of the actions has a vexatious or reactive nature. Here, DSV properly initiated the Delaware Action against Hubbell, seeking a declaratory judgment and breach of contract claim in connection with Hubbell's termination of the Capacity Agreements. In what appears to be an attempt to turn the tables, Hubbell sought several extensions of time to respond to the Delaware Action and then initiated the FMC Action against DSV. But the FMC lacks authority to decide the threshold contract issues appropriately before the Delaware federal court which, again, must be determined before Hubbell's allegations against DSV for Shipping Act violations may be adjudicated. Thus, given the reactive characteristic of Hubbell's FMC Action in response to DSV's Delaware Action, a stay of this case is warranted. Regardless of the outcome of the Delaware Action, Hubbell remains free to pursue its violation claims (as would the Commission acting on its own motion, regardless of Hubbell's actions), but such proceedings would have the benefit of the federal court's review of the contractual obligations of the Parties as a backdrop for review of DSV's regulatory compliance, should that remain an issue.

**CONCLUSION**

For the reasons stated above, Respondents respectfully request a stay of the FMC Action pending the outcome of the Delaware Action.

Dated: September 22, 2023

Respectfully Submitted By:

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