



Before the
FEDERAL MARITIME COMMISSION

Washington, D.C. 20573

Docket No. 23-10

BED BATH & BEYOND INC. v. YANG MING MARINE TRANSPORT CORP.

VERIFIED COMPLAINT

I. INTRODUCTION

1. Complainant Bed Bath & Beyond Inc. (“BBBY” or “Complainant”), by its undersigned counsel, brings this Verified Complaint (the “Complaint”) against Respondent Yang Ming Marine Transport Corp. (“Respondent” or “Yang Ming”) pursuant to 46 U.S.C. Section 41301 to seek reparations for injuries to Complainant caused by Respondent’s violations of the Shipping Act of 1984, as amended, 46 U.S.C. Sections 40101 *et seq.* (the “Shipping Act”), alleged herein.

2. Yang Ming is a leading global container liner shipping company. Based on shipment capacity, Yang Ming is the ninth-largest carrier in the world. According to Yang Ming’s public statements, as of August 2023, it operates a fleet of 93 vessels with a 7.926 million deadweight tonnage capacity and an operating capacity of 705,000 twenty-foot equivalent units (“TEUs”). In addition to its own dedicated carrying capacity, Yang Ming also coordinates its activities with other major shipping lines. Yang Ming is a member of the THE Alliance, the second-largest global shipping alliance, with a combined deployed capacity of 3.03 million TEUs, representing 12% of global capacity. Other members of the THE Alliance are also leading global

carriers, with Ocean Network Express Pte. Ltd. being the sixth largest, Hapag-Lloyd AG the fifth largest, and HMM Company Limited the eighth largest.

3. The COVID-19 pandemic caused unprecedented challenges to trade and the global economy. During these difficult times, as alleged herein, Yang Ming took advantage of price inflation in the container shipping sector and unfairly exploited its customers. Consequently, Yang Ming's profits surged considerably, while shippers and the broader public in the U.S. had to shoulder the increased freight costs in the form of cost increases and inflation. This profiteering was particularly damaging to Complainant, which was forced to file a Chapter 11 bankruptcy petition on April 23, 2023.

4. As alleged herein, Yang Ming has engaged in a practice of systematically failing to meet its service commitments to Complainant and, upon information and belief, other shippers. Complainant entered into a service contract (the "Service Contract") with Yang Ming for the 2021–22 shipping year that specified minimum quantity commitments ("MQCs") of cargo to be shipped and corresponding service commitments by Yang Ming to provide vessel space sufficient to carry those MQCs. Upon information and belief, instead of honoring its service commitments to Complainant, Yang Ming systematically failed to meet those service commitments and allocated Complainant's bargained-for space to higher-priced cargo from other shippers to maximize Yang Ming's own profits. As a result, Complainant was forced to obtain space on the spot market at enormous expense during a period of unprecedented high spot prices.

5. Astonishingly, Yang Ming has taken the position that its own Service Contract is *illusory*, and that Yang Ming is not subject to any service commitment whatsoever. In response to Complainant raising the Shipping Act claims alleged herein in correspondence with Yang Ming, Yang Ming filed a retaliatory declaratory judgment complaint in the U.S. District Court for the

Southern District of New York—apparently in an attempt to evade the exclusive jurisdiction of the Federal Maritime Commission (“FMC”) to hear and adjudicate alleged violations of the Shipping Act—seeking a declaration that Yang Ming’s Service Contract permits Yang Ming to breach its service commitment at will, and that Complainant has no recourse whatsoever. That action is now automatically stayed as a result of Complainant’s bankruptcy.

6. Although Yang Ming’s assertion that its filed service contracts subject Yang Ming to *no service commitments at all* is particularly extreme and outrageous, Yang Ming was not alone in breaching its service commitments since the onset of the COVID-19 pandemic, and Complainant is not the only shipper to have suffered from such misconduct. In *MCS Industries, Inc. v. COSCO SHIPPING Lines Co., et al.*, FMC Docket No. 21-05, the FMC’s Chief Administrative Law Judge found that the Shipping Act violations alleged in that case, which parallel Yang Ming’s practice of failing to meet its service commitments to Complainant as alleged herein, “are of national significance, for example, that one of the largest container lines in the world ‘sought to take advantage of unprecedented high pricing by forcing shippers with service contracts, like Complainant, to resort to spot market purchases’ by the ‘practice of systematically failing to meet its quantity commitments’” When one of the respondents in that matter chose to suffer a decision on default against it rather than comply with its discovery obligations, the Chief Administrative Law Judge found that “[r]esolution of these allegations would provide clarity and guidance in the marketplace and benefit not just these parties, but also the shipping public.”

7. Yang Ming’s misconduct was not limited to its practice of flouting its service commitments. Yang Ming also engaged in a practice of coercing Complainant, and, upon information and belief, other shippers, to pay extracontractual prices and surcharges, including

Peak Season Surcharges (“PSS”), as a precondition to Yang Ming meeting even a portion of its service commitments.

8. In addition, upon information and belief, during 2021 and 2022, at least a substantial majority of the demurrage and detention charges (the “Charges”) assessed by Yang Ming and paid by Complainant were assessed for periods of time in which Complainant’s ability to pick up containers at the ports, or return empty containers promptly, was constrained due to circumstances outside the control of Complainant, such as congestion at ports and shortage of equipment.

9. Upon information and belief, Yang Ming has profited greatly from the conduct alleged herein. In its 2021 Annual Report, Yang Ming stated that “the overall results in 2021 were better than expected” and it was “[b]lessed with the extraordinary performance in 2021.” For the year 2021, Yang Ming reaped a net income of NT\$165.602 billion [equivalent to US\$5.39 billion], *an increase of 1,258.86 percent* from NT\$12.187 billion [equivalent to US\$397 million] from 2020, which itself was an increase of *400 percent* from its 2019 results.¹

10. Yang Ming’s conduct alleged herein with respect to the receipt, handling, storage, and/or delivery of the property of Complainant and, upon information and belief, of other shippers, occurred on a normal and customary basis.

11. Accordingly, pursuant to 46 U.S.C. Section 41301, Complainant brings this Complaint seeking reparations for injuries caused by Yang Ming’s violations of the Shipping Act, as alleged herein.

¹ Except where otherwise noted, all bold and italicized text reflects added emphasis.

II. THE COMPLAINANT

12. Complainant Bed Bath & Beyond Inc. is a corporation existing under the laws of New York with its principal place of business located at 650 Liberty Avenue, Union, New Jersey 07083, telephone 908-688-0888, and via its undersigned counsel's telephone numbers and email addresses listed below. For purposes of the allegations of this Complaint, Complainant was a "shipper" as that term is defined by 46 U.S.C. Section 40102(23).

III. THE RESPONDENT

13. Upon information and belief, Respondent Yang Ming Marine Transport Corp. is a company existing under the laws of Taiwan with its principal place of business located at No. 271, Ming De 1st Road, Cidu District, Keelung 20646, Taiwan, acting in the United States by and through its agent, Yang Ming (America) Corp., a company existing under the laws of the State of New York with its principal place of business located at One Newark Center, 1085 Raymond Blvd., 9th Floor, Newark, NJ 07102. Respondent Yang Ming Marine Transport Corp. is an "ocean common carrier" as that term is defined by 46 U.S.C. Section 40102(18) with FMC organization number 000138.

14. Upon information and belief, Respondent Yang Ming Marine Transport Corp. and its agent Yang Ming (America) Corp. acted jointly in the conduct alleged herein with respect to Complainant and, upon information and belief, other shippers, and therefore are referred to herein collectively as "Yang Ming."

IV. JURISDICTION AND LEGAL AUTHORITY

15. The FMC has subject-matter jurisdiction over this Complaint pursuant to the Shipping Act and, in particular, 46 U.S.C. Sections 41301 through 41309.

16. The FMC has personal jurisdiction over Respondent Yang Ming Marine Transport Corp. as an “ocean common carrier”, as that term is defined by 46 U.S.C. Section 40102(18), that has entered into a “service contract”, as that term is defined by 46 U.S.C. Section 40102(21), with Complainant.²

17. By definition, Yang Ming’s Service Contract with Complainant required Yang Ming to “commit[] to a certain rate or rate schedule *and a defined service level, such as assured space*, transit time, port rotation, or similar service features.”³

18. Yang Ming’s practice alleged herein of systematically failing to meet its service commitments constitutes a failure by Yang Ming to establish, observe, and enforce just and reasonable practices relating to receiving, handling, storing, and delivering the property of Complainant and, upon information and belief, other shippers, in violation of 46 U.S.C. Section 41102(c).

19. Yang Ming’s practice of systematically failing to meet its service commitments also constitutes the provision of service in the liner trade that was not in accordance with the rules and practices contained in its Service Contract with Complainant, in violation of 46 U.S.C. Section 41104(a)(2).

20. Yang Ming’s practice alleged herein of conditioning partial performance of its service commitment on the payment of extracontractual prices and surcharges constitutes a failure

² Although the “boilerplate” portion of Complainant’s Service Contract nominally identified Yang Ming (America) Corp. as the contracting “Carrier” (despite the fact that, upon information and belief, Yang Ming (America) Corp. is not an FMC-registered vessel-operating common carrier or ocean transportation intermediary), the Service Contract Excel document reflected that Yang Ming (America) Corp. was the signatory “AS AGENT FOR: YANGMING MARINE TRANSPORT CORP. & YANGMING (UK) LTD.”, as did the amendments to the Service Contract.

³ 46 U.S.C. § 40102(21) (emphasis added); *accord* 46 C.F.R. § 530.3(q); *see also* 46 U.S.C. § 40502(c)(7) (requiring service contracts to include “service commitments” as essential terms); 46 C.F.R. § 530.8(b)(5) (same); 46 C.F.R. § 530.8(c) (providing for the certainty of terms in service contracts by, *inter alia*, prohibiting such essential terms from being “uncertain, vague or ambiguous”).

by Yang Ming to establish, observe, and enforce just and reasonable practices relating to receiving, handling, storing, and delivering the property of Complainant and, upon information and belief, other shippers, in violation of 46 U.S.C. Section 41102(c).

21. Yang Ming's practice alleged herein of conditioning partial performance of its service commitment on the payment of extracontractual surcharges also constitutes the provision of service in the liner trade that was not in accordance with the rules and practices contained in its Service Contract with Complainant, in violation of 46 U.S.C. Section 41104(a)(2).

22. Yang Ming's actions alleged herein further constitute unreasonable refusals to deal or negotiate with Complainant, in violation of 46 U.S.C. Section 41104(a)(10).

23. Yang Ming's assessment of the Charges or a substantial majority thereof and the alleged acts or omissions of Yang Ming that led to the assessment of such Charges constitute failures by Yang Ming to establish, observe, and enforce just and reasonable practices relating to receiving, handling, storing, and delivering the property of Complainant, in violation of 46 U.S.C. Section 41102(c) and the FMC's Interpretive Rule on Demurrage and Detention under the Shipping Act, 85 Fed. Reg. 29,638 (May 18, 2020) (partially codified at 46 C.F.R. Section 545.5) (the "Interpretive Rule"), and in particular the Incentive Principle articulated in the Interpretive Rule.

24. Yang Ming's assessment of the Charges or a substantial majority thereof and the alleged acts or omissions of Yang Ming that led to the assessment of such Charges also constitute violations of 46 U.S.C. Section 41104, including in particular 46 U.S.C. Section 41104(a)(10)'s prohibition on unreasonable refusals to deal or negotiate.

25. Yang Ming's practices alleged herein of retaliating against Complainant's efforts to enforce Yang Ming's service commitment by systematically failing to meet its remaining

service commitments to Complainant and threatening a refusal to deal unless Complainant agreed to an amendment to the Service Contract reducing its MQC, and other conduct alleged herein, constitute unlawful retaliation against Complainant in violation of the former 46 U.S.C. Section 41104(a)(3), now codified at 46 U.S.C. Section 41102(d).

V. THE MATTERS COMPLAINED OF (ALLEGED FACTS)

Yang Ming Systematically Failed to Meet Its Service Commitments under the Service Contract

26. Complainant and Yang Ming entered into the Service Contract, effective as of May 1, 2021, and covering the time period from May 1, 2021 through April 30, 2022. The Service Contract set its MQC and service commitments at 1,000 forty-foot equivalent container units (“FEUs”), corresponding to an average monthly allocation of 83.33 FEUs.

27. Instead of honoring its service commitments, Yang Ming undertook a practice of systematically failing to make space available under the Service Contract, resulting in mounting shortages. All told, despite committing to provide 1,000 FEUs of space to Complainant during the Service Contract year, Yang Ming provided only approximately 149 FEUs of space to Complainant—*85% less* than committed.

28. As a result of the 851-FEU shortfall, Complainant was forced to seek carriage from other sources at higher rates, or else forgo shipments entirely.

29. Yang Ming’s failure to meet its service commitments began immediately after the Service Contract went into effect. From the first week of the contract period, Yang Ming substantially constrained the space it made available to Complainant. In an email dated May 17, 2021, a BBY employee expressed his deep frustration with Yang Ming’s poor performance at the start of the contract term, writing “if you annualize the below (9 FEU’s/wk x 52 wks/yr) it equates to 468 FEU’s/yr. *We just signed a contract w/ YM a couple of weeks ago for 1000 FEU’s*

so at this point you're offering us less than half of what you promised? If so that's totally unacceptable and not the way I think you'd like to start your first ever direct contract w/ BBB[Y]!"

30. Yang Ming admitted that it was at fault for failing to provide space to Complainant. In an email dated May 19, 2021, Yang Ming employee Dan Vidal admitted to BBBY that "[t]o be totally transparent, *we unfortunately miscalculated our vessel allocation and over committed to all of our current contract holders.*"

31. Strikingly, Yang Ming failed to carry *any* containers for BBBY during the first month of the Service Contract term, and only 3.38 FEUs for BBBY during the second month.

32. Complainant promptly brought the matter to the attention of Yang Ming's senior management team, in the hope that Yang Ming would correct its practices. For instance, in August 2021, BBBY proposed a meeting with Yang Ming's executive management team, given "the poor state of our current relationship," in which Yang Ming had failed to honor the service commitments in the Service Contract.

33. On March 30, 2022, BBBY wrote again to Yang Ming, complaining that "for the small allocation we have with YangMing we are trending well below the weekly allocation. . . . and you can see below *YangMing is not close to hitting the weekly allocations.*" Yang Ming acknowledged that Yang Ming's poor service was inconsistent with the contract it entered into with Complainant, acknowledging that, "[b]ased on the contracts and MQC's that we have agreed to *we would hope that these issues are limited exception and not the rule.*"

34. Yang Ming's failure throughout the Service Contract year constituted a systematic practice of failing to fulfill its service commitments to Complainant.

35. Upon information and belief, and as shown by Yang Ming's revenues and profitability despite failing to ship 85% of the committed freight from Complainant, Yang Ming's

shortfalls of its service commitments to Complainant and other shippers with service contracts were the result of Yang Ming violating its service commitments and offering bargained-for space to other shippers who were willing to pay higher freight prices.

36. Upon information and belief, Yang Ming's actions in deliberately failing to honor its service commitments and instead allocating space to the highest bidder also contributed to the inflationary spiral in container rates by artificially increasing demand, including by forcing shippers who had already negotiated service contracts into the open market to make up for shortfalls caused by Respondent's unfair and unreasonable practices.

37. Upon information and belief, Yang Ming had the ability to perform its obligations under the Service Contract. Yang Ming is one of the world's largest international container transportation and logistics companies. Yang Ming is also a member of the second-largest global shipping alliance with other major container shipping companies. Yang Ming's cargo capacity is plainly large enough to accommodate the MQC set forth in the Service Contract.

38. Yang Ming's performance—or lack thereof—under the Service Contract was abysmal. In all, during the Service Contract year, despite committing at the outset to provide 1,000 FEUs of space to Complainant, Yang Ming carried only approximately 149 FEUs of cargo for Complainant. As a result of Yang Ming's 851-FEU shortfall, Complainant was forced to seek carriage from other sources at higher rates, or else forgo shipments entirely. As a result, Complainant has been damaged by at least \$6,645,288.80.

Yang Ming's Unreasonable and Unfair Practice of Coercing Extracontractual Surcharges from Complainant

39. In addition to failing to meet its service commitments, Yang Ming engaged in an unfair practice of coercing financial concessions beyond the Service Contract's scope, such as PSS or other surcharges, as a prerequisite to honoring even a portion of its service commitments.

40. At the beginning of the Service Contract year, Yang Ming forced Complainant to agree to pay extracontractual PSS or other surcharges in order to obtain space Yang Ming had already committed to providing under the Service Contract. On May 21, 2021 (at which time Yang Ming had failed to carry *a single container* under the Service Contract), Yang Ming employee Dan Vidal circulated an email to Yang Ming’s customers, including Complainant, announcing “Yang Ming Line Peak Season Surcharge Tpeb Into Canada & USA.” Vidal stated that “[a]s a reminder please note that the Transpacific Eastbound Peak Season Surcharge will go into effect on 6/1/2021. This said *I would like to advise that there we will implement full amounts as outline[d] below. There is no plan to deviate from these levels.*”

41. Yang Ming’s imposition of PSS as a precondition to moving freight was long-standing and extended past any normal concept of a “peak season.” On June 24, 2021, Yang Ming employee Vidal circulated another email extending the surcharges, repeating the same script as it did in May: “I would like to advise due to current market conditions, *Yang Ming Line will implement full amounts as outline[d] below. There is no plan to deviate from these levels.*” On October 15, 2021, Vidal circulated another email imposing PSS, and announced that Yang Ming “*will extend this out for the duration of the contract.*”

42. Yang Ming’s imposition of PSS throughout more than 90% of the Service Contract period, and *on every FEU that it actually carried for Complainant* pursuant to the Service Contract, was unjust and unreasonable, especially in light of the already very high prices agreed upon at the outset of the Service Contract.

43. Yang Ming brazenly informed Complainant that its assessment of PSS was designed to effectively convert the pricing agreed in the Service Contract to a “market level” pricing—essentially abandoning its service commitments unless Complainant was willing to pay

spot market prices. When a BBY employee asked Yang Ming: “*I need to see if this PSS has really ‘bought’ us any extra space during this time*”, Yang Ming admitted that “[t]he Peak Season was not implemented with the intent to gain more support or provide BBB with more support. *It was implemented to keep rates in line with market levels.* Since its inception of 6/1/21, *all importers* [were] and are still paying this charge.”

44. Yang Ming’s behavior suggests a conscious pattern of entering into service contracts with shippers at quoted prices with the intention of not actually meeting its service commitments under such service contracts at the agreed-upon rates. Instead, Yang Ming either imposed additional charges beyond the contract rates, such as PSS, or neglected to provide transportation to the contracted shippers, at all.

45. Upon information and belief, Yang Ming’s actions were designed to, and did, enrich Yang Ming by allowing Yang Ming to obtain wildly inflated spot market prices for carriage that Yang Ming had already committed to providing under its Service Contract with Complainant and other shippers or to overcharge for freight that it did agree to carry purportedly under a service contract.

46. Yang Ming’s practices succeeded in enriching Yang Ming at the expense of Complainant and, upon information and belief, other shippers, as shown by the record financial results Yang Ming reported during the relevant periods. As stated in its 2021 Annual Report, Yang Ming reaped a net income of NT\$165.602 billion [equivalent to US\$5.39 billion], *an increase of a whopping 1,258.86 percent* from the NT\$12.187 billion [equivalent to US\$397 million] Yang Ming reported in 2020, which was already a *400 percent* increase compared to the results in 2019.

47. On August 4, 2021, the FMC launched an inquiry into the timing and legality of ocean carrier practices with respect to surcharges. FMC Chairman Daniel B. Maffei noted that

cargo rates were already at “record highs”, and that “[n]ow, we hear increasing reports of ocean carriers assessing new additional fees, such as ‘congestion surcharges’, with little notice or explanation.”

48. Chairman Maffei observed, “[i]t seems to me that [congestion-related] factors would already have been included into the record high rates charged by the carriers. As Chairman, I want to know the carriers’ justifications for additional fees and I strongly support close scrutiny by the FMC’s Bureau of Enforcement aimed at stopping any instance where these add-on fees may not fully comply with the law or regulation.”

49. The FMC’s investigation into carrier surcharges suggests that some of Yang Ming’s unjust and unreasonable practices may have already been adopted by other large carriers. The FMC’s press release stated that the investigation into major carriers followed the FMC’s receipt of communications “from multiple parties reporting that ocean carriers are improperly implementing surcharges.”

The Demurrage and Detention Charges

50. For the period August 2021 through August 2022, Complainant paid, in connection with Yang Ming voyages, at least \$647,221.74 in demurrage Charges and \$99,569.05 in detention Charges, totaling at least \$746,790.79.

51. As Commissioner Rebecca F. Dye emphasized in her Final Report from the FMC’s Fact Finding Investigation 29, “the Interpretive Rule on Detention and Demurrage promulgated by the Commission pursuant to Fact Finding 28 provides the shipping public with an *enforceable principle* that the Commission employs to assess the reasonableness of demurrage and detention practices and regulations under the Shipping Act of 1984, as amended.”

52. As illustrated in the FMC’s Interpretive Rule, “the purpose of demurrage and detention are to incentivize cargo movement,” and therefore the FMC “will consider in the reasonableness analysis under section 41102(c) the extent to which demurrage and detention are serving their intended purposes as financial incentives to promote freight fluidity” (internal quotation marks omitted).

53. As alleged herein, Yang Ming’s assessment of the Charges, or a substantial majority thereof, and the acts or omissions of Yang Ming that led to the assessment of such Charges, were incapable of incentivizing cargo movement and therefore unreasonable.

54. Upon information and belief, the Charges assessed by Yang Ming and paid by Complainant were assessed during periods of time in which such Charges were not just or reasonable because of circumstances outside the control of Complainant and its agents and service providers, such as congestion at ports and shortage of equipment.

55. Yang Ming openly recognized the existence of such factors, including congestion, that interfered with the ordinary movement of containers. For example, in its 2021 Annual Report, Yang Ming wrote “[w]hat with the restocking of retailers and surging consumer demand, *as well as the scarcity of capacity and equipment caused by port congestion and bottlenecks, there was added pressure on global supply chain due to operational constraints.*” Yang Ming touted in the same release that such bottlenecks directly led to “*elevated freight rates and carriers’ profitability.*”

56. Yang Ming also acknowledged these factors in direct communications with Complainant. For example, on November 4, 2021, Yang Ming employee Dan Vidal acknowledged disruptions at U.S. West Coast ports, writing “[a]s you may well know, the backlog and lack of storage space for containers have contributed to a severe bottleneck at Southern California ports.”

57. On October 18, 2021, Complainant made a formal request for a refund of certain Charges. Yang Ming refused. Notably, however, in the very email where Yang Ming refused to accommodate Complainant's request, Yang Ming employee Dan Vidal conceded that extraordinary congestion was to blame for the Charges, writing: "*[w]e fully understand the congestion problem.*"

58. Facing additional Charges imposed by Yang Ming, Complainant made another refund request on February 9, 2022, and discussed the Charges with Yang Ming, but to little avail.

59. The Charges imposed on Complainant did not serve, and could not have served, as a financial incentive to promote freight fluidity, but instead operated only as a punitive penalty on Complainant for circumstances over which Complainant and its agents and service providers had little to no control.

Yang Ming's Baseless Denial of Its Service Commitments

60. Upon information and belief, Yang Ming entered into the Service Contract knowingly and deliberately.

61. Upon information and belief, Yang Ming filed the Service Contract with the FMC because Yang Ming knew that the Service Contract created an enforceable service commitment that varied from the terms of Yang Ming's published tariff.

62. Yang Ming conceded to Complainant that the Service Contract constituted an actual commitment by Yang Ming. For example, in an email dated May 19, 2021, Yang Ming employee Dan Vidal admitted to BBY that "[t]o be totally transparent, *we unfortunately miscalculated our vessel allocation and over committed to all of our current contract holders.*"

63. When the end of the Service Contract year approached, Yang Ming threatened to hold Complainant's space hostage under the following year's service contract if Complainant did

not sign an amendment to the Service Contract reducing the MQC from 1,000 FEUs to 149 FEUs. Yang Ming repeatedly demanded this amendment on March 31, 2022, April 4, 2022, and April 7, 2022. Finally, on April 13, 2022, Yang Ming resorted to an outright threat to induce Complainant to sign the amendment, writing “[w]e need to get this amendment filed. ***We do not want rating errors that could impact shipments for Q2.***”

64. Yang Ming’s refusal to deal if Complainant did not sign such a drawdown amendment demonstrates that Yang Ming understood that it had made, and failed to meet, a service commitment to carry 1,000 FEUs.

65. Upon information and belief, Yang Ming’s outright threat to breach its prospective service commitments to Complainant in the 2022–23 shipping year if Complainant did not sign a drawdown amendment to its existing Service Contract was made in retaliation for Complainant’s complaints that Yang Ming had failed to meet its service commitment during the 2021–22 shipping year. Such retaliation is itself a violation of the Shipping Act, and essentially amounted to an attempt by Yang Ming to double down on its violations of the Shipping Act by threatening ***further*** violations if Complainant did not agree to the drawdown amendment.

66. Nonetheless, when Complainant approached Yang Ming in 2023 in an attempt to resolve the issues stemming from Yang Ming’s misconduct presented in this Complaint, Yang Ming suddenly changed its tune and ***denied that it had any service commitments, at all.***

67. Yang Ming’s new, self-serving interpretation of its own service contracts as illusory stands in direct contrast to Yang Ming’s prior conduct, first in negotiating and filing the Service Contract, then acknowledging that Yang Ming’s service contracts created actual commitments to its customers, and finally by retaliating against Complainant and threatening an outright refusal to deal if Complainant did not agree to reduce the MQC of the Service Contract.

Yang Ming's Refusals to Deal or Negotiate

68. Yang Ming's conduct with respect to Complainant as alleged herein constituted unlawful refusals to deal or negotiate.

69. To ensure booking space would be available, Complainant provided detailed forecasts breaking down its anticipated needs under the Service Contract. However, when Complainant or its agents actually sought to book the space for which Complainant had contracted, Complainant was unable to secure the space. For example, in an email dated May 12, 2021, an employee of Yusen Logistics, Complainant's logistics agent, wrote to Yang Ming employee Dan Vidal and employees of Complainant, "*[o]rigin really needs the support from Yang Ming. . . . can you do anything to assist with securing space for the attached rejected bookings?*"

70. In May and June 2021, despite committing to carry an MQC equaling an average of 83.33 FEUs on a monthly basis, Yang Ming carried just 3.38 FEUs of cargo for Complainant for the two-month period and *zero* in May 2021.

71. As alleged herein, Yang Ming's refusals to deal or meet its service commitments continued throughout the term of the Service Contract.

72. As alleged above, at the end of the contract period, Yang Ming threatened to hold Complainant's space hostage unless Complainant agreed to sign a drawdown amendment. In an email dated March 31, 2022, Yang Ming demanded Complainant sign an amendment retroactively reducing the MQC, threatening vaguely that such an amendment "will *avoid any issue* once the contract expires on 4/30/2022." After BBY did not immediately sign the amendment, Yang Ming pressed for it repeatedly. Finally, on April 7, 2022, Vidal wrote again to BBY employees with an outright threat that Yang Ming would refuse to carry BBY's freight if BBY did not accept

Yang Ming's self-serving amendment, writing: "[w]e need to get this amendment filed. *We do not want rating errors that could impact shipments for Q2.*"

Complainant's Injuries

73. As alleged herein, Yang Ming's behavior has caused significant harm to Complainant in numerous ways, such as producing delays in freight transportation, appropriating scarce resources for ocean freight expenses, causing uncertainty and scarcity within the business, and disrupting Complainant's ability to operate and ensure the timely availability of merchandise for sale to U.S. customers, and resulting in injuries, including lost profits, in an amount to be determined at trial.

74. Yang Ming's shortfalls in honoring its service commitments forced Complainant to secure space on the open market at high prices, resulting in damages of at least \$6,645,288.80.

75. Yang Ming's imposition of extracontractual surcharges, including PSS, caused Complainant to overpay for the carriage that it did receive from Yang Ming, resulting in damages of at least \$294,841.00.

76. Yang Ming's wrongful imposition of the Charges directly injured Complainant, in amounts up to or exceeding \$647,221.74 in improper demurrage Charges and up to or exceeding \$99,569.05 in improper detention Charges.

77. As the FMC's Chief Administrative Law Judge has already found in another matter, abuses like those alleged herein are matters of "national importance." Abusive, unjust, and unreasonable practices by major international ocean carriers, such as the conduct alleged herein, are likely to wield outsized influence over general practices in the industry. If not corrected, Yang Ming's unlawful practices may become industry standard, sending a message to all global container lines that it is acceptable to ignore service contracts, coerce surcharges from customers

as a precondition to carrying previously contracted cargo, and impose punitive detention and demurrage charges upon shippers because of delays and conditions outside of shippers' control.

78. Moreover, Yang Ming's deliberate decision to violate its service commitment after Complainant raised issues with Yang Ming's performance, which continued throughout the 2021–22 shipping year, coupled with Yang Ming's threats and coercion to secure a drawdown amendment, constitute retaliation against Complainant in violation of 46 U.S.C. Section 41104(a)(3), now codified at 46 U.S.C. Section 41102(d). Knowing and willful breaches of the anti-retaliation provisions of the Shipping Act may entitle Complainant to an award doubling the amount of reparations payable to Complainant under 46 U.S.C. Section 41305(c).

VI. CAUSES OF ACTION

COUNT I: VIOLATION OF 46 U.S.C. § 41102(c)

79. Complainant repeats and realleges each and every allegation above as if fully set forth herein.

80. Yang Ming's practices alleged herein of systematically failing to meet its service commitments to Complainant and, upon information and belief, other shippers, seeking to coerce Complainant and, upon information and belief, other shippers, to pay PSS and other improper surcharges in order to obtain previously contracted space, as well as Yang Ming's efforts to coerce amendments to the Service Contract and bad faith denial of its service commitments, constituted failures by Yang Ming to establish, observe, and enforce just and reasonable practices relating to receiving, handling, storing, and delivering the property of Complainant and, upon information and belief, other shippers, in violation of 46 U.S.C. Section 41102(c).

COUNT II: VIOLATION OF 46 U.S.C. § 41102(c) & 46 C.F.R § 545.5

81. Complainant repeats and realleges each and every allegation above as if fully set forth herein.

82. Yang Ming's assessment of the Charges, and the alleged acts or omissions of Yang Ming that led to the assessment of such Charges, constituted failures by Yang Ming to establish, observe, and enforce just and reasonable practices relating to receiving, handling, storing, and delivering the property of Complainant, in violation of 46 U.S.C. Section 41102(c), 46 C.F.R. Section 545.5, and the FMC's Interpretive Rule.

COUNT III: VIOLATION OF 46 U.S.C. § 41104(a)(2)

83. Complainant repeats and realleges each and every allegation above as if fully set forth herein.

84. Yang Ming's practices alleged herein of systematically failing to meet its service commitments to Complainant, attempting to coerce Complainant to pay PSS and other surcharges just to carry a fraction of the bargained-for freight allocations in the Service Contract, as well as coercing amendments to the Service Contract and bad faith denial of its service commitments, constituted provision of service in the liner trade that was not in accordance with the rules and practices contained in Yang Ming's Service Contract with Complainant, for which no exception or exemption applies and that have not been suspended or prohibited by the FMC, in violation of 46 U.S.C. Section 41104(a)(2).

COUNT IV: VIOLATION OF 46 U.S.C. § 41104(a)(10)

85. Complainant repeats and realleges each and every allegation above as if fully set forth herein.

86. Yang Ming's practices alleged herein of systematically failing to meet its service commitments to Complainant and demanding a drawdown amendment with respect to Yang Ming's service commitments as a condition of entering into future agreements and carrying cargo for Complainant in the future, Yang Ming's assessment of the Charges, repeated refusals to refund the Charges or portions thereof, and the acts or omissions of Yang Ming that led to the assessment of the Charges, constituted unreasonable refusals to deal or negotiate with Complainant in violation of 46 U.S.C. Section 41104(a)(10).

COUNT V: VIOLATION OF 46 U.S.C. § 41102(d) (formerly 46 U.S.C. § 41104(a)(3))

87. Complainant repeats and realleges each and every allegation above as if fully set forth herein.

88. Yang Ming's practices alleged herein of responding to Complainant's efforts to enforce the service commitment by systematically failing to meet its remaining service commitments to Complainant and threatening a refusal to deal unless Complainant agreed to a drawdown amendment, and other conduct alleged herein, constituted unlawful retaliation against Complainant in violation of 46 U.S.C. Section 41102(d) (formerly codified at 46 U.S.C. Section 41104(a)(3)).

VII. CAUSATION

89. Yang Ming's practices of systematically failing to meet its service commitments to Complainant has directly and proximately injured Complainant by forcing Complainant to make alternate transportation arrangements for cargo that was supposed to be carried by Yang Ming pursuant to the terms of the Service Contract at substantially higher prices or forgo shipping such cargo altogether.

90. Yang Ming's assessment of the Charges has directly and proximately injured Complainant by forcing Complainant to pay unjust and unreasonable Charges.

91. Yang Ming's conduct has caused Complainant to incur other injuries, including delays, failures to receive time-sensitive merchandise, reduced inventory available for sale, unnecessary expenses, lost profits, as well as attorneys' fees and expenses relating to litigation.

VIII. REPARATIONS SOUGHT/COMPLAINANT'S DAMAGES

92. Yang Ming's alleged misconduct has injured Complainant in several ways.

93. During the term of the Service Contract, Yang Ming's alleged misconduct caused Yang Ming to carry only 149 FEUs of the 1,000 contracted FEUs of cargo for Complainant, resulting in an 851 FEU shortfall to be made up by Complainant from other available shipping methods. As a result of Yang Ming's shortfall, Complainant was damaged by at least \$6,645,288.80 for carriage of those FEUs in excess of what it would have paid pursuant to the Service Contract.

94. During the term of the Service Contract, as a result of Yang Ming's imposition of PSS, Complainant was forced to pay Yang Ming an excess cost of approximately \$294,841.00 over and above the rates that Complainant would have had to pay had Yang Ming charged the rates set forth in the Service Contract.

95. Yang Ming's assessment of the Charges has actually injured Complainant in amounts up to or exceeding \$647,221.74 in demurrage Charges and up to or exceeding \$99,569.05 in detention Charges paid to Yang Ming. Complainant believes that a substantial majority of the Charges, in an amount to be determined by the FMC in this proceeding, were unjustly and unreasonably assessed, and requests reparations for all such Charges that the FMC determines did

not comply with 46 U.S.C. Section 41102(c) or 41104 or determines to be unreasonable under 46 C.F.R. Section 545.5 and the Incentive Principle of the Interpretive Rule.

96. In addition to the direct costs of replacing Yang Ming's service commitments shortfalls at higher rates, Yang Ming's misconduct has caused Complainant to incur other injuries, including delays, reduced inventory, unnecessary expenses and lost profits, as well as attorneys' fees and expenses relating to litigation, in an amount to be determined at trial.

97. As recently recognized by the FMC's Chief Administrative Law Judge in *OJ Commerce v. Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft A/S & Co. KG et al.*, FMC Docket No. 21-11, in which an ocean common carrier similarly failed to fulfill its service commitments and caused a shortfall of container carriage for the shipper, lost profits can be determined by calculating the average profits per container of the shipper's cargo actually carried by the carrier multiplied by the shortfall of containers that the carrier failed to carry. The per-container average profit applicable to Complainant's goods for the relevant time period is a matter of fact to be proven at trial, and at least one methodology of calculating Complainant's lost profits would be to multiply Complainant's average per-container profit by Yang Ming's service commitment shortfall of 851 FEUs. Complainant's lost profits shall be demonstrated in an amount to be proven at trial.

98. In all, the injuries alleged in this Complaint total an amount up to or exceeding \$7,686,920.59, in addition to other injuries, including lost profits, to be calculated at trial.

99. In light of Yang Ming's willful retaliatory conduct alleged herein, Complainant requests that any award of reparations to Complainant be doubled pursuant to 46 U.S.C. Section 41305(c).

IX. PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests that the FMC require Yang Ming to answer this Complaint pursuant to 46 U.S.C. Section 41301(b), and prays for relief from the FMC as follows:

1. An investigation by the FMC pursuant to 46 U.S.C. Section 41301(c) of the allegations in this Complaint and the Charges' compliance with 46 U.S.C. Sections 41102(c) and 41104 and reasonableness pursuant to 46 C.F.R. Section 545.5 and the Incentive Principle of the Interpretive Rule;

2. An Order, after due investigation pursuant to 46 U.S.C. Section 41301(c), finding that Yang Ming has violated 46 U.S.C. Section 41102(c) by systematically failing to meet its service commitments to Complainant and, upon information and belief, other shippers under its service contracts, by seeking to coerce Complainant and, upon information and belief, other shippers, to pay PSS and other improper surcharges in order to obtain previously contracted space, and by assessing unjust and unreasonable detention and demurrage Charges in connection with its receipt, handling, storage, and delivery of the property of Complainant, that Yang Ming has violated 46 U.S.C. Section 41104(a)(2) by providing service not in accordance with the rules and practices contained in Yang Ming's Service Contract with Complainant, for which no exception or exemption applies and that have not been suspended or prohibited by the FMC, that Yang Ming has violated 46 U.S.C. Section 41102(d) (formerly 46 U.S.C. Section 41104(a)(3)) through its retaliatory conduct, and that Yang Ming has violated 46 U.S.C. Section 41104(a)(10) by systematically failing to meet its service commitments to Complainant under the Service Contract, by demanding a drawdown amendment on Yang Ming's service commitments as a condition of entering into future agreements and carrying cargo for Complainant in the future, and by assessing

unjust and unreasonable detention and demurrage Charges in connection with its receipt, handling, storage, and delivery of the property of Complainant;

3. An Order compelling Yang Ming to cease and desist from violation of the Shipping Act, and to put in place lawful and reasonable practices to preclude Yang Ming from systematically failing to meet its service commitments to Complainant and other shippers under its service contracts, coercing Complainant and other shippers to pay PSS and other improper surcharges in order to obtain previously contracted space, or assessing unjust and unreasonable detention and demurrage charges in connection with its receipt, handling, storage, and delivery of the property of Complainant and other shippers;

4. An Order requiring Yang Ming to pay Complainant reparations for the unlawful conduct alleged herein in an amount to be proven pursuant to 46 U.S.C. Section 41305, with interest pursuant to 46 U.S.C. Section 41305(a), Complainant's reasonable attorneys' fees as "the prevailing party" pursuant to 46 U.S.C. Section 41305(e), and any other sum the FMC determines to be proper;

5. An additional award doubling any reparations under 46 U.S.C. Section 41305(c) as a result of Yang Ming's retaliatory conduct; and

6. Such other and further orders or relief as the FMC deems just and proper.

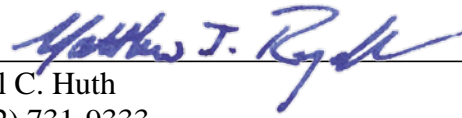
X. REQUEST FOR ORAL HEARING

Complainant requests an oral hearing in Washington, DC.

Dated: September 7, 2023

Respectfully submitted,

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Inc.*

VERIFICATION

I, David Kastin, am Chief Legal Officer of Complainant Bed Bath & Beyond Inc., 650 Liberty Avenue, Union, New Jersey, 07083, telephone 908-688-0888, email david.kastin@bedbath.com. I have read the foregoing Verified Complaint and believe, to the best of my knowledge, information, and belief, including information received from others, that the facts stated therein are true and correct. I declare under penalty of perjury that the foregoing is true and correct. Executed on September 7, 2023.

