

Before the
FEDERAL MARITIME COMMISSION
Washington, D.C. 20573
Docket No. 23-12



20230930-DK-BUTTERFLY-1, INC. v. MSC MEDITERRANEAN SHIPPING COMPANY SA

VERIFIED COMPLAINT

I. INTRODUCTION

1. Complainant 20230930-DK-Butterfly-1, Inc., formerly known as Bed Bath & Beyond Inc. (“BBBY” or “Complainant”), by its undersigned counsel, brings this Verified Complaint (the “Complaint”) against Respondent MSC Mediterranean Shipping Company SA (“MSC” or “Respondent”) pursuant to 46 U.S.C. Section 41301 to seek reparations for injuries to Complainant caused by MSC’s violations of the Shipping Act of 1984, as amended, 46 U.S.C. Sections 40101 *et seq.* (the “Shipping Act”), alleged herein.

2. MSC is the largest container line in the world and is a member of the “2M alliance”, along with Maersk, the second largest container line in the world. Most of the top global container lines have organized themselves to form three major ocean “alliances”, which collectively control the vast majority of ocean container shipping. As a result, the global carriers wield enormous power over the global shipping industry.

3. The COVID-19 pandemic caused unprecedented challenges to trade and the global economy. During these difficult times, as alleged herein, MSC took advantage of price inflation in the container shipping sector and unfairly exploited its customers. Consequently, MSC’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. *First*, as alleged herein, MSC has engaged in a practice of systematically failing to meet its service commitments to Complainant and, upon information and belief, other shippers. Relevant here, Complainant entered into two service contracts with MSC: one service contract (the “2020 Service Contract”) for the period of July 1, 2020 through April 30, 2021 (the “2020–2021 shipping year”) and a second (the “2021 Service Contract” and, collectively with the 2020 Service Contract, the “Service Contracts”) for the period of May 1, 2021 through April 30, 2022 (the “2021–2022 shipping year”). The Service Contracts each specified minimum quantity commitments (“MQCs”) of cargo to be shipped and corresponding service commitments by MSC to provide vessel space sufficient to carry those MQCs. Upon information and belief, instead of honoring its service commitments to Complainant under the 2021 Service Contract, MSC systematically failed to meet those service commitments and allocated Complainant’s bargained-for space to higher-priced cargo from other shippers to maximize MSC’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. MSC as a carrier 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—a proceeding in which MSC was a named respondent—the FMC’s Chief Administrative Law Judge found that the Shipping Act violations alleged against MSC in that case, which parallel MSC’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’¹ When MSC chose to suffer a decision on default against it rather than comply with its discovery obligations in that case, 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.”

6. *Second*, MSC’s misconduct here was not limited to its practice of flouting its service commitments. MSC 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 MSC meeting even a portion of its service commitments under the 2020 and 2021 Service Contracts.

7. *Third*, upon information and belief, during the 2021 and 2022 shipping years, at least a substantial majority of the demurrage and detention charges (the “Charges”) assessed by MSC 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.

8. Upon information and belief, MSC’s practices were knowing and deliberate, and were not due to an absence of available cargo space or necessitated by any other circumstance outside of MSC’s control.

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

9. Upon information and belief, MSC has profited greatly from the conduct alleged herein. Although MSC is a private company that does not disclose its operating results to the public, MSC reportedly went on an unprecedented buying spree during the COVID-19 pandemic, suggesting that MSC is drawing on enormous windfall profits to support its acquisition activity. From the second half of 2020 through November 2021, MSC reportedly added approximately 124 vessels to its fleet, and since then has overtaken Maersk as the world's largest container line, with liner shipping data source Alphaliner listing MSC as having grown to own a fleet of 495 vessels, with an additional 299 chartered vessels and another 123 vessels on order.

10. In addition, MSC's financial information was reportedly obtained recently by the Italian newspaper *Il Messaggero*, purportedly showing total 2022 revenues of €86.4 billion (approximately \$91.1 billion)—an increase from approximately \$69 billion in revenues in 2021 and approximately \$29 billion in revenues in 2020—and net profits in 2022 of €36.2 billion (approximately \$38.4 billion). These reported financials corroborate MSC's booming profits during the pandemic, as does MSC's reported €63 billion (approximately \$68.7 billion) in cash reserves even after spending on increasing its fleet size.

11. Profiteering by container lines injures not only shippers but the entire consumer public, in the form of inflation. Inflation in the United States has risen to crisis levels and led to extreme fiscal tightening in the form of increased interest rates, while global ocean carriers have reported windfall profits and MSC has engaged in a multi-billion-dollar ship-buying spree that has led to it becoming the world's largest ocean carrier. Indeed, the International Monetary Fund released an Analytical Series report on January 24, 2023 indicating that "[t]he 2021 surge in global shipping costs was a canary in the coal mine for the persistent rise in inflation" and that "[g]iven

the actual increase in global shipping costs during 2021, we estimate that the impact on inflation in 2022 was more than 2 percentage points—a huge effect that few central banks would dismiss.”

12. MSC’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.

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

II. THE COMPLAINANT

14. Complainant 20230930-DK-Butterfly-1, Inc. is a corporation existing under the laws of New York with a mailing address: P.O. Box 1596, Union, New Jersey 07083, reachable via telephone via (954) 468-2444, and via its undersigned counsel’s telephone numbers and email addresses listed below. Prior to filing a change of name certificate to its present name with the New York State Division of Corporations, State Records, and Uniform Commercial Code on September 21, 2023, Complainant’s corporate name was Bed Bath & Beyond Inc. 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

15. Upon information and belief, Respondent MSC Mediterranean Shipping Company SA is a company existing under the laws of Switzerland with its principal place of business located at 12-14 Chemin Rieu, 1208 Geneva, Switzerland. MSC is a vessel-operating “ocean common carrier” as that term is defined by 46 U.S.C. Section 40102(18) with organization number 001699.

IV. JURISDICTION AND LEGAL AUTHORITY

16. 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.

17. The FMC has personal jurisdiction over Respondent MSC Mediterranean Shipping Company SA 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.

18. By definition, MSC’s Service Contracts with Complainant required MSC 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.*”²

19. MSC’s practice alleged herein of systematically failing to meet its service commitments constitutes a failure by MSC 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).

20. MSC’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 Contracts with Complainant, in violation of 46 U.S.C. Section 41104(a)(2).

21. MSC’s practice alleged herein of coercing premium pricing and extracontractual surcharges from Complainant by conditioning partial or full performance of its service commitment on the payment of extracontractual prices and surcharges constitutes a failure by MSC

² 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”).

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).

22. MSC's practice alleged herein of coercing premium pricing and extracontractual surcharges from Complainant by conditioning partial or full performance of its service commitment on the payment of extracontractual prices and 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 Contracts with Complainant, in violation of 46 U.S.C. Section 41104(a)(2).

23. MSC'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).

24. MSC's assessment of the Charges or a substantial majority thereof and the alleged acts or omissions of MSC that led to the assessment of such Charges constitute failures by MSC 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.

25. MSC's assessment of the Charges, or a substantial majority thereof, and the alleged acts or omissions of MSC 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.

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

commitments to Complainant, 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)

The Service Contracts

27. As stated above, Complainant entered into two service contracts with MSC: the 2020 Service Contract, covering the 2020–2021 shipping year, and the 2021 Service Contract, covering the 2021–2022 shipping year. The Service Contracts each specified respective minimum quantity commitments (“MQCs”) of cargo to be shipped and corresponding service commitments by MSC to provide vessel space sufficient to carry those MQCs.

MSC’s Unreasonable and Unfair Practice of Coercing Extracontractual Surcharges from Complainant

28. MSC 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 its service commitments.

29. BBY objected to MSC’s improper and illegal practices during the 2020–2021 shipping year, during which MSC carried a volume of BBY cargo equaling or exceeding the MQC in the 2020 Service Contract, but did so at rates much higher than what were agreed in the 2020 Service Contract. After a series of emails regarding PSS and space allocation, a BBY employee wrote in a July 9, 2020 email to MSC that “this back and forth has been frustrating. We need you to move the cargo that we project, or at the very least what we agreed to w/ this year’s MQC, *at our agreed upon contract rates. We do NOT agree to any PSS so let’s put this discussion on hold for now.*” At the time, MSC’s U.S. senior vice president of sales Ronald Milone confirmed that PSS would be charged *only* for shipments *above and beyond* that for which BBY

had already contracted: “The *PSS was and will apply only when extra space is needed or BBB is over and above the allocation*. This is an extremely generous offer and we ask that you reconsider. A month from now if there is no improvement who knows what the offer may be. It’s a safety net and sometime you may want to reconsider.” But that assurance proved hollow.

30. In an email dated August 25, 2020, MSC employee Kevin Liu wrote to a BBY employee, “Due to strong demand, *Geneva is imposing even tighter control* and suggested BBY to consider PSS *from all origins* instead of just Yantian, Shanghai and Ningbo *for extra space opportunity*.” Later Mr. Liu followed up and pressured BBY to accept PSS: “Overall space is tight and equipment is getting tight too so *PSS contribution will help to improve the chance although still not necessarily enough to cover all your needs*. Spot market rate at the moment is already 3300 to LA and rising towards 3700 in Sept.”

31. MSC’s pressure campaign continued. In September 2020, BBY informed MSC that it was not getting a sufficient volume of containers shipped to the United States East Coast (“USEC,” or “EC”). MSC employee Ronald Milone acknowledged the issue: “what we are seeing is an extreme equipment shortage throughout China and SEA which will definitely have an impact on your weekly volumes forecasted.” MSC’s Kevin Liu then inquired of BBY whether it would be willing to abandon its contracted-for rates or PSS rates altogether: “*Would you consider paying spot market rate to EC so we can check whether we can get space all water?*” Mr. Liu suggested that the practice of paying spot-market prices was becoming widespread: “*Especially on USEC, we were told that many customers are paying the spot level trying to get space. Current rate level till 9/14 is \$4535 including chassis, and will go up several hundreds again after 9/15.*” Internally, BBY questioned Mr. Liu’s overture. A BBY employee inquired of another BBY employee why BBY would be asked to pay spot-market rates in excess even of the PSS that MSC was

imposing: “doesn’t our current PSS include shipments into the EC from the named ports of lading (i.e. SHA, YTN, etc.)? If so, then why do we need to pay a higher spot rate on these EC shipments?” The other BBY employee assumed MSC simply wanted more money, replying “I assume the \$600 is not good enough at this time.”

32. MSC’s imposition of PSS or spot market rates continued to be broad and programmatic—and MSC began signaling that payment of PSS, because all of its other customers were agreeing to pay it, was the only way to “place BBB to the front of the line.” On September 25, 2020, MSC sent out a customer notice announcing that it would implement PSS for all shipments from the Indian Subcontinent to USA effective October 26, 2020. MSC employee Anthony Taranto wrote to BBY employees on October 7, 2020: “*by accepting the PSS that this will place BBB to the front of the line to obtain equipment.*” On October 13, 2020, Mr. Taranto again wrote to BBY employees, writing “*All of MSC’s, contractual BCO’s [beneficial cargo owners; i.e., shippers] with a mutually agreed PSS clause, - have taken this PSS charge.*” Later, MSC employee Ronald Milone followed up further to persuade BBY to accept PSS, writing: “This announcement of the PSS was sent out a few weeks ago ex the India Subcontinent as well as the other regions serviced by MSC to the USA which is \$350.00 per container and *has been met with extreme support with almost an 85% acceptance rate.*”

33. Lost in the course of this pressure campaign by MSC was the fact that the PSS that BBY had agreed to pay MSC was to be only for space *above* MSC’s previously negotiated service commitments. BBY’s third-party logistics provider, Yusen Logistics, continued to confirm that understanding to BBY. In October 2020, Yusen suggested to BBY employees “extending the PSS with MSC as well. MSC is rather strict to release booking by their normal & PSS allocation. As *they will rate our cargo at PSS rate only for the extra volume above their*

committed space in the monthly projection, so there'll be no harm to file the PSS first just in case we will need to use it.”

34. Once BBY stopped paying PSS, however, MSC would refuse to provide space, which essentially forced BBY to accept any PSS imposed by MSC, even for volumes that did not exceed the 2020 Service Contract's service commitments. In an email dated October 21, 2020, a BBY employee wrote to MSC employees Ronald Milone and Kevin Liu, “we asked Yusen HK to provide us w/ any update re each carriers current performance as it relates to supporting our account. Below is their feedback re MSC. Pls note the below call outs highlighted in RED related to lack of space and the subject PSS. Based on this feedback, it appears your origin offices are not aware of this PSS for October which is a concern that we've called out numerous times because of the delay on your side sending it to us for our review/signature! We need this issue addressed/resolved immediately, esp given our dramatic increase in volume starting next month. *MSC is the most supportive carrier in the past months as they are able to release additional space under PSS, but this month there's no PSS and we have space issue with them.*”

35. Having suffered repeated failures to secure cargo space from MSC, BBY in November 2020 agreed to a premium rates contract, “20-572WW-999.” (the “-999” or “-999 contract”) which—like the PSS that it had already been paying—should have applied *only* to shipments *above and beyond* the volumes contemplated in the 2020 Service Contract. Internally, BBY noted that this -999 contract was onerous: in an email dated November 11, 2020, BBY wrote to Yusen, “we did finalize with MSC. The rate is higher th[a]n any rates we have in place with other carriers as well as with the NVO's.”

36. Notwithstanding BBY agreeing to enter into the extraordinary -999 contract, MSC soon began imposing charges that MSC *acknowledged it had no contractual basis to impose*

as a further coercive *quid pro quo* requirement for BBBY to obtain carriage of its cargo. In an email dated November 24, 2020, MSC employee Eugenia Garrisi Terhune wrote to BBBY employees, “Effective 12/02 we are applying a GRI [general rate increase] with no exceptions for all Turkey rates, at usd 150/container. We are completely overbooked out of Turkey and we are experiencing challenges in terms of equipment and space. ***We are aware that you have a no GRI clause in your contract. The only way for us to grant space and allocation once the MQC is fulfilled is to apply this increase.***” As such, MSC improperly coerced BBBY to accept PSS and premium contract rates, which should have applied only to volumes above and beyond the 2020 Service Contract’s MQC, but which ultimately were charged on cargo that should have shipped at the originally contracted rates, and then, even after securing the -999 contract, further demanded ***additional*** extracontractual charges while acknowledging that no basis for such additional charges existed.

37. MSC also forced BBBY to ***change its previously confirmed bookings*** under standard contract rates to premium contract rates, threatening that otherwise BBBY would not get any space. In an email dated November 11, 2020, a Yusen employee reported to a BBBY employee, “Today we have received the notice from MSC/VN, ***we must confirm to change the following booking under the premium rate contract. Otherwise, they’ll cancel the booking. . . .*** Due to the tight time and space/eqt issue recently, we have to accept it in order to ship this cargo as plan. However, ***it’s really unacceptable on this sudden notice which leaves us no choice but to accept.***” The Yusen employee later wrote to MSC employee Keven Liu and complained, “SO was released prior to the premium rate contract being filed. And we are pushed to accept changing this booking to be under the new premium rate agreement, otherwise booking will be cancelled. It’s unreasonable with the ETD just a few days away.”

38. Meanwhile, MSC began insisting that more and more of BBBY's shipments be carried under the -999 contract or "diamond tier" rates, despite MSC's service commitment to Complainant remaining unfulfilled. The situation caused confusion and concern within BBBY: in an email dated November 11, 2020, a BBBY employee wrote to MSC employee Kevin Liu, "***I want to ensure that MSC is still providing us w/ space (basically MQC/52 weeks) at our agreed upon contract rates, and that any incremental volume may need to be booked/confirmed using our new "DTT [i.e., diamond tier, or "DT"]/999" premium rates. Pls confirm this is still the case so that ALL of our confirmed shipments are NOT being charged this premium rate.***" Mr. Liu promised that MSC would follow its commitment. However, it was later shown that MSC only released 1 TEU for BBBY under the standard contract rates and asked that the rest of bookings be placed under premium contracts. A BBBY employee expressed his frustration to MSC employee Kevin Liu, who then effectively informed BBBY that 1 FEU at contracted-for rates was the best MSC could do: "***mostly we can only take 1 FEU per week per lane out of Ho Chi Minh at contract rates. However, it will be your instruction to Yusen whether or what you want to book under DT.***" BBBY effectively had no other option but to accept, as it acknowledged internally: "I'm not happy w/ MSC's below response but I guess it is what it is! Pls ensure we get the below space ***at our contract rates*** and use their DT/999 rates as needed to in order to secure our req'd space."

39. Further, in order to maximize its freedom to price gouge and take advantage of spot market prices, MSC set very short durations for the premium contracts. In an email dated November 24, 2020, MSC employee Mei Xu wrote to BBBY employees and offered a premium contract with a 14-day duration for December 2020. BBBY employee replied with frustration, "This short rate duration is disappointing!" MSC employee replied, "Indeed this is not ideal ***but***

unfortunately our head office felt absolutely necessary to keep the short validity due to uncertainty in current ever changing condition.”

40. Yusen asked several times about the duration of different premium contracts in order to avoid bookings for BBY being rejected by MSC. In an email dated November 30, 2020, MSC employee Kevin Liu confirmed that the -999 rate had expired that day and would not be extended, and asked BBY to make new bookings under a separate diamond tier rate. Later, Liu wrote again, “Sorry I was told just now that only Yantian/Shanghai/Ningbo/Xiamen/Vung Tau (Ho Chi Minh)/Haiphong can be filed under -DT, and other origins will continue to be filed under 999. So while the priority rate levels are the same across all origins, please use -DT to book only from the 6 origins mentioned above and continue to use -999 for other ports.” BBY’s response was right to the point, writing ***“I remain disappointed on how poorly it’s being communicated internally w/in MSC! I have to believe that this ‘confusion’ has resulted in us missing sailings and/or not being able to get on desired sailings. We can’t afford any more miscommunications issues like this, so pls ensure that all impacted origin offices are clear on what rate needs to be used so Yusen knows how to make these bookings.”*** Notably, these ports of origin were included in the 2020 Service Contract.

41. Adding insult to injury, the constantly updated premium contracts were not timely delivered to MSC’s origin offices, causing BBY’s booking requests to be rejected due to issues with MSC’s internal communication. The day after BBY communicated its disappointment and implored MSC to put an end to the “miscommunications,” BBY’s logistics provider Yusen reported continued confusion: “MSC local team still cannot find the rate filed in neither 20-572WW-999 nor 20-572WW-DT for Fuzhou.” Once again MSC employee Kevin Liu claimed that this was just an unintentional mistake, writing “Sorry this was my fault as I missed Xiamn/ Fuzhou

office when I inform China offices.” But the issues continued. The following day, Yusen reported “we got feedback from your Ningbo office they cannot find the rate in the DT contract. And they are not confirming the space with us.”

42. As 2021 arrived, MSC continued to induce BBY to book under premium rates, ignoring service commitments in the 2020 Service Contract with BBY. In an email dated April 7, 2021, a Yusen employee wrote to MSC employee Kevin Liu, “Please see the attached – origin has rejected the booking- even for standard allocation. Can you push to release space based on the *volume commitment under the normal contract* and then also advise how much more space MSC can provide under the DT rate?” Mr. Liu replied, “we will try our best to release the space to client under the liner approved forecast. *But they also need to consider to book under DT/999 for the coming booking due to the current vessel space is very tight.*” Indeed, MSC intentionally and continually claimed that shipping space was limited and that BBY should pay PSS or premium shipping rates for carriage that was supposed to be provided pursuant to the existing Service Contracts and repeatedly pressured Complainant to enter into premium contracts for carriage on shipping lanes expressly included in the Shipping Contracts.

43. Rate confusion also continued. In an email dated April 13, 2021, Yusen employee wrote to MSC employee Kevin Liu, “MSC Ningbo team is advising they cannot find the DT rate filed in the 2nd half of April and they are not accepting our booking.” The Yusen employee followed up several times, writing: “We desperately need to get this confirmation sent to MSC/Nbo for them to process on our DT booking. We don’t have much time left and space is very tight now. Can you pls help us to f/u with MSC/US and make sure they will respond to our request today?” Mr. Liu replied, “please also understand that space and equipment is very limited now so even DT

bookings may not all get accepted.” A BBY employee questioned, “Not sure if this is a space issue and or still not clear with Ningbo that DT is being filed.”

44. MSC became increasingly brazen, eventually indicating that it was *only* making space available for cargo shipped under premium rates. In an email dated April 14, 2021, a BBY employee wrote to MSC employees Dever Mahoney and Maria Starikova, “please confirm your booking acceptance process out of India. *Are you accepting any bookings under the normal rates vs the DT rates?*” A Yusen employee pointed out that MSC only released a booking under premium contracts, but not under the normal contract, writing “*Your team is releasing booking under -999 only and they advise there’s no space under normal contract.* Can you pls discuss with them to change the s/c# of our bookings by your committed allocation?”

45. Only four days into the 2021–2022 shipping year, MSC announced a PSS/premium charges plan. BBY remained unclear about the proposal, asking, “Pls clarify for me how this proposed PSS compares to your NVO ‘premium’ rate as it relates to getting space (i.e. we get our weekly allocations at our agreed upon contracts rates, and any extra space on that vessel will be sold to the NVO’s using “‘premium’ rates and then BCO’s using ‘PSS’ rates)?” Mr. Liu replied “NVO premium is usually the Diamond level *which has higher priority than BCO rates with PSS.*” MSC thus admitted that premium contracts received higher “priority” than PSS rates, which, in turn, received higher priority than BCO or “contract” rates, all while falling vastly short of its service commitments under the 2021 Service Contract.

46. Thereafter, MSC delayed in responding to BBY regarding premium rates, causing BBY to lose the opportunity even to enter into premium contracts and secure space. In an email dated July 29, 2021, a BBY employee wrote to MSC employee Kevin Liu, “this is extremely disappointing! We questioned your original offer from last week because your proposed rates were

the highest we've ever seen. We were then asked to provide our incremental weekly space needs from select origins along w/ a counteroffer, which we did, w/ the belief you'd come back to us w/ some type of counter so we could come to an agreement for August. Instead of getting feedback to our counter, we receive your below email days later saying we get nothing!" Mr. Liu replied, "If we asked liner to requote now the rates will be much much higher than what was quoted last time because space was sold out." The next day Mr. Liu wrote to the BBBY employee, "Liner said the premium rates now will have to be \$5000 higher than previous quote."

47. Meanwhile, MSC communication issues continued to affect BBBY. In an email dated August 5, 2021, a Yusen employee wrote to MSC employees Kevin Kiu and Angela Della Loggia, "MSC VN is holding up the SO release due to missing rate of reefer shipment. The rate has been agreed to and we were told MSC origin would process the bookings. Please communicate this to the MSC VN office and advise all if there are any issues holding this up. We need to get these goods moving and need your help to do so!"

48. All the while, MSC's PSS demands continued to increase. In an email dated October 22, 2021, MSC employee Dever Mahoney wrote to BBBY employees, indicating MSC's intention of raising the PSS to \$3,000. A BBBY employee asked, "what add'l space has/will this provide us if we agree to extend it?" Mr. Mahoney replied "Equipment remains tight in India. By contributing to the PSS, *it helps you go to the front of the line* for the equipment release."

49. MSC's behavior demonstrates a conscious and growing 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 as rates on the open market continued to increase. Instead, MSC either imposed additional and ever-rising charges beyond the contract rates, such as PSS or premium contracts, or neglected to provide transportation

to the contracted shippers, at all. Overall, MSC's wrongful imposition of extracontractual surcharges, including PSS and the imposition of premium contracts, caused Complainant to overpay for the carriage that it did receive from MSC by at least \$5,523,788.00 during the 2020–2021 shipping year and at least \$9,005,149.00 during the 2021–2022 shipping year.

MSC Systematically Failed to Meet Its Service Commitments under the 2021 Service Contract in Favor of Higher-Priced Cargo

50. In an email dated September 8, 2020, a BBY employee wrote to MSC employee Ronald Milone, “the fact that MSC is *blanking* any TP sailings during this time when all US importers are scrambling for space is unbelievable!” The BBY employee questioned MSC's motives: “I understand its typical to do blank sailings during this time when the Chinese factories are closed, but this year is different. *Freight is back logged everywhere*, and as an importer I have to believe there's enough freight w/in the alliances to justify a sailing or two during this time from at least the larger origin ports to help alleviate this situation. *Unless it's the carriers intent to continue to unrealistically constrict supply to keep spot market rates at historic highs??*”

51. Although MSC ultimately carried a volume of BBY cargo during the 2020–2021 shipping year equaling or exceeding the MQC in the 2020 Service Contract—albeit under the duress and coercion of significant improper additional costs—Complainant nonetheless raised its concerns about MSC's intent to satisfy its service commitments.

52. During the 2021–2022 shipping year, BBY's concerns were vindicated.

53. The 2021 Service Contract set its MQC and service commitments, after amendments, at 4,240 forty-foot equivalent container units (“FEUs”), corresponding to an average monthly allocation of 353.33 FEUs.

54. Instead of honoring its service commitments, MSC undertook a practice of systematically failing to make space available under the Service Contract, resulting in mounting

shortages. All told, despite committing to provide 4,240 FEUs of space to Complainant during the 2021–2022 shipping year, MSC provided only approximately 2,553.50 FEUs of space to Complainant—**40% less** than committed.

55. As a result of this 1,686.50-FEU shortfall, Complainant was forced to seek carriage from other sources at higher rates, or else forgo shipments entirely.

56. During the 2021–2022 shipping year, BBY made clear its frustrations with MSC failing to provide contracted space. For example, in an email dated March 29, 2022, a BBY employee wrote to MSC employee Justyna Wolf, “we need support from MSC still in Turkey. Below are orders ready but ***we cannot secure space.***”

57. BBY also made clear that MSC’s failure to provide agreed space would have a materially adverse impact on BBY. In an email dated April 14, 2022, a BBY employee wrote to MSC employee Wolf, “Yusen origin continues to provide us with negative results in MSC acceptance. . . . ***Again we continue to have back log due to limited lift which MSC is our main carrier so any shortfall from MSC will impact us deeply.***”

58. MSC’s failures throughout the 2021–2022 shipping year constituted a systematic practice of failing to fulfill its service commitments to Complainant.

59. Upon information and belief, MSC had the ability to perform its obligations under the Service Contract. MSC is the world’s largest international container transportation and logistics company. MSC is also a member of the second-largest global shipping alliance. MSC’s cargo capacity is plainly large enough to accommodate the service commitments set forth in the 2021 Service Contract.

60. MSC’s performance under the 2021 Service Contract was abysmal. During the 2021–2022 shipping year, Complainant had to obtain alternative carriage at higher rates for at least

1,686.5 FEUs of cargo that MSC could and should have carried, which cost Complainant at least \$7,290,314 more than the prices Complainant would have paid had MSC honored the pricing and service commitments guaranteed under the 2021 Service Contract.

61. Upon information and belief, MSC's failure to provide contracted space to Complainant was part of a practice by MSC of preferring higher-priced freight.

62. Upon information and belief, MSC's failure to provide contracted space to Complainant was also retaliation against Complainant for Complainant's complaints to MSC during the 2020-2021 shipping year, during which Complainant called MSC's practices "unacceptable", accused MSC of artificially limiting supply through the use of blank sailings, and complained of the obvious issues with MSC claiming that no space was available under the 2020 Service Contract while allocating space under premium contract rates.

63. Upon information and belief, MSC's actions were designed to, and did, enrich MSC by allowing MSC to obtain wildly inflated spot market prices or extracontractual fees instead of the agreed (and still profitable to MSC) carriage that MSC had already committed to providing under its Service Contracts with Complainant and other shippers or to overcharge for freight that it did agree to carry purportedly under a service contract.

64. Upon information and belief, and as shown by MSC's reported revenues and profitability despite failing to carry 40% of its service commitments to Complainant, MSC's shortfalls on its service commitments to Complainant and other shippers with service contracts were the result of MSC violating its service commitments and offering bargained-for space to other shippers who were willing to pay higher freight prices.

65. Upon information and belief, MSC'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 MSC's unfair and unreasonable practices.

66. Indeed, 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."

67. 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."

68. The FMC's investigation into carrier surcharges suggests that some of MSC'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

69. During the 2020–2021 shipping year and 2021–2022 shipping year, BBY paid at least \$13,388,055.62 in demurrage Charges and at least \$9,832,435.82 in detention Charges imposed by MSC, totaling at least \$23,220,491.44.

70. These Charges were excessive and, in large part, operated to penalize BBY for conditions outside of BBY's control. For example, communications between BBY and/or its drayage vendors and MSC clearly indicate that a lack of appointments or dual appointment requirements resulted in BBY and/or its drayage vendors being unable to pick up or return MSC containers.

71. In an email dated March 25, 2021, an employee with Knight Transportation ("Knight"), one of BBY's drayage vendors, wrote to BBY employees, "[h]ere's the updated container tracking & yard report for 03/25/21. . . . *There are no appointments available for MSC,*"

72. According to a delivery status update sent on September 16, 2021, the same issue prevented Pacific Drayage Services ("Pacific"), another of BBY's drayage providers, from returning empty MSC containers. In that email, a Pacific employee advised, "Only in duals for MSC."

73. In another email dated September 24, 2021, a BBY employee wrote to an employee of the Port of Los Angeles, California and stressed the effects of a lack of appointments on the ability to clear containers: "[w]e are hearing from our local operations that they *can't get appointments to swap their 100+ empties right now*. . . . From our Logistics Manager at St George Warehouse in Sante Fe Springs: 'Here's a quick summary, by line, for you to see how bad it is returning your empties and getting the chassis back in service! As of 9/23/2021 2130... 90 empties I can't return to pull 90 loads out with, that's crazy... compounding daily by 100's of trucking companies and you'll see that any additional port hours don't mean anything until we can terminate THEIR equipment.'" The email indicates that there were no appointments available to return MSC

containers and that BBY had no control over the inability to return those containers despite its desire to do so.

74. In an email dated October 14, 2021, a Pacific employee cited MSC as an example to illustrate that lack of appointments caused the difficulty of returning empties in the Los Angeles/Long Beach, California port complex, writing: “[a] great example is Med shipping this week (I’ve attached some screen shots for your review) The only mty return option for Day Shift has been APM Terminals. Nightshift is a little better, adding TTI as an available accepting point. However, while they say ‘accepting’, mtys have to be booked on appointment- of which there are very few available. The appointments are released on a sporadic schedule and are generally gobbled up by the trucking community within 10 minutes of release. This week, we’ve had about 120 Meds that needed to be returned we’ve been successful in booking appointments on about 20 of them before the appointments are filled. ***It’s not a capacity issue for trucks, it’s an appointment scheduling issue.***”

75. In a delivery status email dated April 28, 2022, an employee with Forrest Logistics (“Forrest”), yet another of BBY’s drayage providers, wrote to BBY employees and advised, “No Available Appts at WBCT/TTI” for MSC 20’ and 40H’ containers.” A BBY employee wrote, “[w]e have been trying to return empties from MSC, but are not having any luck getting any appointments.”

76. BBY promptly brought these matters to MSC’s attention. In an email dated April 28, 2022, a BBY employee wrote to MSC employees Maria Starikova and Ronald Milone, “[p]lease work with your equipment department and provide us with options. Also ***given no appointments available how do we get the detention charges waived.***” MSC employee Susanna Chiara Biletta admitted, “. . . WBCT is accepting ***on duals*** on both shifts.”

77. Despite BBBY's efforts, the problems continued. In a delivery status email dated May 17, 2022, a Forrest employee again advised a BBBY employee, "No Available Appts at TTI/WBCT" for MSC twenty-foot ("20'") and forty-foot high capacity/high cube ("40H'") containers.

78. In an email dated May 20, 2022, a Forrest employee yet again wrote to BBBY employees about the delivery status of empty containers, which indicated "No Available Appts at TTI/WBCT" for MSC 20' and 40H' containers.

79. In an email dated June 20, 2022, a Forrest employee wrote to BBBY employees with a delivery status report, advising, "[i]t looks like MSC has appointments second shift tonight and both shifts tomorrow for MSC Empty Returns, but *only as dual transactions.*"

80. In June 2022, there were 31 empty containers waiting to be returned to the ATSI yard due to lack of appointments. In an email dated June 15, 2022, a Forrest employee wrote to BBBY and stated, "*[o]ur biggest hurdle is with MSC.* The majority of the containers at ATSI belong to MSC and there have been no empty return appointments available recently." In an email dated June 20, 2022, a Forrest employee wrote to a BBBY employee with a status update, "[t]wenty of the aging empties are MSC 20's and 40'HCs and return appointments have been scarce. When appointments are available, they're generally second shift at the terminals and the ATSI Yard closes at 4pm. The other condition to appointments being available, is that a Dual Transaction must take place." In a later update email dated June 22, 2022, a Forrest employee wrote "[m]ost of the oldest aging empties (MSC containers) are buried at ATSI, so we are working to empty return anything in the way to be able to access those aging containers."

81. BBBY reached out to MSC regarding the difficulty of returning these containers on June 15, 2022. MSC employee Ronald Milone seemed to acknowledge that the problem was not

BBBY's, but instead MSC's, to fix, stating, "[i]t is a bit more complicated at the moment so we ask that you be patient until we can come up with a reasonable and equitable solution."

82. But MSC did not fix the problems. In an email dated June 24, 2022, a Forrest employee wrote to a BBBY employee an update that in relation to three MSC containers, "WBCT shut off MSC for Empty Returns." Incredulous, BBBY sought to confirm that it would not be charged for issues beyond its control, asking MSC employee Ronald Milone, "[w]e aren't being charged detention on these boxes if we can't return right?" In fact, for two containers, TGBU5864990 and TRHU7799080, BBBY had to pay \$37,780.00 and \$40,360.00 respectively in detention charges assessed by MSC.

83. In an email dated June 27, 2022, a Forrest employee wrote to a BBBY employee, "[r]ight now, APM is accepting MSC 40'HC Empties during both shifts today, but dual transactions are required."

84. Port congestion and lack of chassis—neither of which BBBY could control—also created hurdles for BBBY and/or its drayage vendors to pick up or return containers, and ultimately resulting in MSC assessing inappropriate Charges against BBBY. For example, one of BBBY's drayage providers, Knight, repeatedly advised in its regular delivery updates that congestion at port terminals and lack of equipment impeded its ability to pick up and return containers. For example, on December 14, 2021, a Knight employee wrote, "[w]e are continuing to see terminal congestion and chassis shortages across all terminals but will keep doing our best to move as many containers as possible." On December 22, 2021, a Knight employee indicated, "[a]ll other appointments from yesterday had to be rescheduled due to chassis shortages or terminal congestion." On December 30, 2021, a Knight employee wrote, "[t]erminal congestion continues to be a big issue our carriers are seeing as well as chassis shortages which is cause for many

rescheduled appointments.” A week later, on January 6, 2022, a Knight employee stated in an email “[w]e’re continuing to see many of the same issues at each terminal – chassis shortages and terminal congestion which is causing many delays to our carriers and has resulted in many rescheduled appointments.”

85. In an email dated May 19, 2022, a Pacific employee wrote to BBY employees, “[w]e are working diligently to get all ctrs p/u as soon as possible but are still dealing with the on-going chassis shortage at the harbor as well as terminal congestion. We are having to set up dual transactions on almost every ctr in order to reuse those chassis on the new moves. There is not always an empty avail to match up with each load. When ctrs are rescheduled, the next avail appts might be 2-3 days later.”

86. BBY brought these issues, too, to MSC’s attention and demanded a refund of unreasonable and unfair demurrage and detention charges assessed by MSC, but to little or no avail. In a letter dated October 18, 2021, BBY noted, “[BBY], as well as many other international ocean shippers, has been unable to at times secure valid pier pick-up or delivery appointments at the Port of Los Angeles/Long Beach, or when provided such appointments, has been turned away when attempting to access the port The result is that [BBY] cannot timely obtain its containerized goods or return empty containers, causing these containers to go beyond their free time due to no fault of our own.” In the letter, BBY requested that it be “exempt from detention and demurrage charges that are not proven to be caused by our actions, and over which we have not control.” The request was refused by MSC, even as MSC acknowledged that the issues were caused by “factors beyond the control of MSC *or any single party*.”

87. 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.”

88. 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).

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

90. Upon information and belief, the Charges assessed by MSC 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, lack of appointments, and shortage of equipment.

91. 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.

MSC’s Refusals to Deal or Negotiate

92. MSC’s conduct with respect to Complainant as alleged herein, including systematically failing to meet its service commitments to Complainant throughout the 2021–2022 shipping year, demanding extra-contractual premium contract pricing or PSS pricing and other

surcharges, and refusing to accommodate Complainant's requests for a full or partial refund of unreasonable demurrage and detention charges, constituted unlawful refusals to deal or negotiate.

93. BBY and MSC engaged in detailed discussions regarding forecasts breaking down Complainant's anticipated needs under the Service Contracts. However, as alleged above, when Complainant or its agents actually sought to book the space for which Complainant had contracted, Complainant was unable to secure the space at the appropriate prices, if at all, due to MSC's practices alleged herein of refusing to deal with Complainant pursuant to the Service Contracts in favor of more expensive freight in the form of added surcharges or by selling Complainant's bargained-for space to other shippers who agreed to pay higher prices.

94. As alleged herein, MSC's refusals to deal or meet its service commitments continued throughout the terms of the Service Contracts.

Complainant's Injuries

95. As alleged herein, MSC'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.

96. MSC's shortfalls in honoring its service commitments during the 2021–2022 shipping year forced Complainant to secure space on the open market at high prices, resulting in excess costs of at least \$7,290,314.33.

97. MSC's wrongful imposition of extracontractual surcharges, including PSS and the imposition of premium contracts, on top of the rates that it should have paid under the Service Contracts, caused Complainant to overpay for the carriage that it did receive from MSC by at least

\$5,523,788.00 during the 2020–2021 shipping year and at least \$9,005,149.00 during the 2021–2022 shipping year.

98. MSC’s wrongful imposition of the Charges directly injured Complainant, in amounts up to or exceeding \$13,388,055.62 in improper demurrage charges and up to or exceeding \$9,832,435.82 in improper detention charges.

99. As the FMC’s Chief Administrative Law Judge has already found in another matter alleging similar wrongdoing by MSC, 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, MSC’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.

100. Moreover, MSC’s deliberate decision to enter into the 2021 Service Contract after Complainant had previously raised issues with MSC’s performance, but then violate its service commitments to BBY under the 2021 Service Contract, which continued throughout the 2021–2022 shipping year, 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)

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

102. MSC'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 MSC's efforts to coerce amendments or premium rate addenda to the Service Contracts and bad faith denial of its service commitments, constituted failures by MSC 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

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

104. MSC's assessment of the Charges, and the alleged acts or omissions of MSC that led to the assessment of such Charges, constituted failures by MSC 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)

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

106. MSC'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 previously bargained-for volumes of cargo under the 2020 Service Contract, or, in the case of the 2021 Service Contract, a fraction of the bargained-for volumes of cargo, as well as coercing amendments or premium rate addenda to the Service Contracts 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 MSC's Service Contracts 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)

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

108. MSC's practices alleged herein of systematically failing to meet its service commitments to Complainant and preferring higher priced carriage of other shippers' cargo, and MSC's acts or omissions 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))

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

101. MSC's practices alleged herein of responding to Complainant's efforts to enforce the service commitments and contracted-for prices in the 2020 Service Contract by entering into the 2021 Service Contract, but then systematically failing to meet its service commitments to Complainant during the 2021–2022 shipping year, as well as the other misconduct 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

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

111. MSC's actions in coercing Complainant to pay PSS and enter into premium rate contracts as a precondition to procure space for which Complainant had already contracted have directly and proximately injured Complainant by forcing Complainant to pay a premium for cargo that was supposed to be shipped by MSC pursuant to the terms of the Service Contracts or forgo shipping such cargo altogether.

112. MSC's assessment of the Charges has directly and proximately injured Complainant by forcing Complainant to pay unjust and unreasonable Charges.

113. MSC'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

114. MSC's alleged misconduct has injured Complainant in several ways.

115. During the 2021–2022 shipping year, MSC's misconduct alleged herein caused MSC to carry only 2,553.5 FEUs of the 4,240-FEU MQC in the 2021 Service Contract for Complainant, resulting in a 1686.5-FEU shortfall for which Complainant had to make alternate

transportation arrangements at higher prices or forgo shipping such cargo altogether, resulting in excess freight charges paid, lost profits, and/or other business damage.

116. The damage done to Complainant's business as a result of MSC's misconduct alleged herein was extreme and debilitating. The additional incremental cost of replacing MSC's 1686.5-FEU shortfall during the 2021–2022 shipping year was at least \$7,290,314.33 more than what Complainant would have paid had MSC honored its service commitments.

117. 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 another ocean common carrier similarly failed to fulfill its service commitments under a service contract 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 in the relevant time period 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 MSC's service commitment shortfall of 1686.5 FEUs.

118. Based on the cargo that Complainant successfully shipped during the 2020–2021 shipping year and the 2021–2022 shipping year and the prices for which that cargo was sold, the per-container average profit applicable to Complainant's cargo during the 2020–2021 shipping year and the 2021–2022 shipping year would be approximately \$66,924.07 or more.

119. As will be proven at trial, in many instances, Complainant was unable to mitigate MSC's failure to honor its service commitments to Complainant by securing higher-priced freight on the open market, and sustained lost profits as a result of the reduction of imported cargo.

120. The lost profits sustained by Complainant on a per-container basis substantially exceed the excess costs incurred by Complainant's purchase of alternative carriage. As an illustration, based on the above per-container average profit, had Complainant been unable to secure any alternative carriage for MSC's service commitment shortfall of 1686.5 FEUs during the 2021–2022 shipping year, then Complainant's lost profits would have amounted to an astronomical \$112,867,444.06.

121. During the term of the 2020 Service Contract, as a result of MSC's imposition of unjust and unreasonable PSS, premium pricing, and other charges as alleged herein, Complainant was forced to pay MSC approximately \$5,523,788.00 over and above the rates that Complainant would have paid had MSC charged the rates negotiated and agreed in the 2020 Service Contract.

122. During the term of the 2021 Service Contract, as a result of MSC's imposition of unjust and unreasonable PSS, premium pricing, and other charges as alleged herein, Complainant was forced to pay MSC approximately \$9,005,149.00 over and above the rates that Complainant would have paid had MSC charged the rates negotiated and agreed in the 2021 Service Contract.

123. During the 2020–2021 shipping year and the 2021–2022 shipping year, Complainant paid at least \$13,388,055.62 in demurrage charges and at least \$9,832,435.82 in detention charges imposed by MSC, totaling at least \$23,220,491.44. 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.

124. In addition to the injuries stated in the preceding paragraph, Complainant also suffered other injuries, to be calculated at trial.

125. In light of MSC's willful retaliatory conduct alleged herein, Complainant also 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 MSC 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 MSC 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, premium pricing, and other improper charges 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 MSC has violated 46 U.S.C. Section 41104(a)(2) by providing service not in accordance with the rules and practices contained in MSC's Service Contracts with Complainant, for which no exception or exemption applies and that have not been suspended or prohibited by the FMC; that MSC has violated 46 U.S.C. Section 41104(a)(10) by systematically failing to meet its service commitments to Complainant under the Service Contract, coercing Complainant or other shippers to pay

improper PSS, premium pricing contract pricing, and other charges, and by assessing unjust and unreasonable detention and demurrage Charges in connection with its receipt, handling, storage, and delivery of the property of Complainant; and that MSC has violated 46 U.S.C. Section 41102(d) (formerly 46 U.S.C. Section 41104(a)(3)) through its retaliatory conduct against Complainant;

3. An Order compelling MSC to cease and desist from violation of the Shipping Act, and to put in place lawful and reasonable practices to preclude MSC 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 or enter into premium contracts 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 MSC 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 award of reparations under 46 U.S.C. Section 41305(c) as a result of MSC's retaliatory conduct; and

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

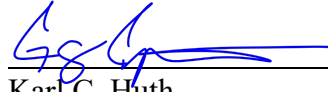
X. REQUEST FOR ORAL HEARING

Complainant requests an oral hearing in Washington, DC.

Dated: November 20, 2023

Respectfully submitted,

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*Counsel for Complainant 20230930-DK-
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VERIFICATION

I, David M. Kestin, am an authorized signatory of Complainant 20230930-DK-Butterfly-1, Inc. (formerly known as Bed Bath & Beyond Inc.), PO Box 1596, Union, New Jersey 07083, email david.kestin@butterflywdd.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 November 20, 2023.