

**BEFORE THE
FEDERAL MARITIME COMMISSION**



ICL USA, Inc.

Complainant,

v.

Docket No. 24-04

Dependable Highway Express, Inc. and Mediterranean Shipping Company, (USA) Inc. on behalf of Mediterranean Shipping Company, S.A.,

Respondents.

VERIFIED COMPLAINT

INTRODUCTION

1. Complainant ICL USA, Inc. (“ICL” and “Complainant”) by its attorneys at Husch Blackwell LLP bring this Verified Complaint against Dependable Highway Express, Inc. (“DHE”) and Mediterranean Shipping Company, (USA) Inc. on behalf of Mediterranean Shipping Company, S.A (“MSC”) or collectively (“Respondents”) pursuant to alleged violations of the Shipping Act of 1998, as amended (“hereinafter the Shipping Act”), 46 U.S.C. § 41104(a)(2)(A), § 41102 (c) and 46 C.F.R. § 545.4 and § 545.5; and pursuant to the Federal Maritime Commission’s (“FMC[’s]”) authority to permit the filing of complaints under Section 11(a) of the Shipping Act, 46 U.S.C. § 41301(a), in response to Respondents’ violations of the Shipping Act.

2. Complainant alleges upon information and belief the following:

PARTIES AND OTHER ENTITIES

3. Complainant ICL is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 1 Cross Island Plaza, Rosedale, NY 11422, acting as destination agent in the United States for various affiliated FMC registered non-vessel operating common carriers, and for the transactions subject of this Complaint was designated on the ocean common carriers master bill of lading as Consignee.

4. Respondent DHE is a corporation organized and existing under the laws of California with its principal place of business at 2555 E. Olympic Boulevard, Los Angeles, CA 90023, and is a Federal Motor Carrier Safety Administration motor carrier, MC-13946, and for purposes of this matter performed port drayage services for ICL to, from and around the ports of Los Angeles and Long Beach to and from locations in southern California, including services for the return of empty containers to designated locations by ocean common carriers and/or ocean terminals. Respondent DHE to a significant extent also acted as an entity which assessed per diem related charges while not qualified to do so as a motor carrier, ocean common carrier, and/or a marine terminal operator in violation of the Shipping Act.

5. Respondent Mediterranean Shipping Company, S.A (“MSC”), for purposes of this proceeding, Mediterranean Shipping Company (USA), Inc., 420, 5th Avenue (at 37th Street)- 4th Floor, New York 10018, acts as agent in the United States for Mediterranean Shipping Company, S.A. (“MSC”), with headquarters located at Chem. Rieu 12, 1208 Genève, Switzerland, an ocean common carrier, a vessel-operating common carrier, as defined by 46 U.S.C. § 40102(18) for some of the shipments related to ICL acting as an agent for affiliated NVOCCs, and as destination agent consignee for such NVOCCs, for which MSC, acting in conjunction with DHE indirectly, invoiced and in some cases collected and retained detention charges payable by DHE, allegedly on behalf of ICL, which invoices for the most part had been approved as waived in a process separately impelled by ICL with MSC.

JURISDICTION

6. The FMC has primary subject matter jurisdiction over this action pursuant to the Shipping Act of 1998, as amended, 46 U.S.C. § 40101 *et seq.*

7. The FMC has jurisdiction over ICL designated as “consignee” on various ocean common carrier master bills of lading acting as destination agent consignee for an affiliated NVOCC, for the shipments subject of this proceeding from various Asian origin locations to the U.S. via the ports of Los Angeles and Long Beach, California.

8. The FMC has personal jurisdiction over Respondent MSC as a vessel operating ocean common carrier as that term is defined at 46 U.S.C. § 40102(18).

9. a) The FMC has personal jurisdiction over Respondent DHE as a party for purposes of this proceeding when it acted in some instances directly or indirectly in conjunction with MSC

as a person that was invoiced per diem while acting as a motor carrier by picking up container loads and returning empties to MSC pursuant to the terms and conditions of a Uniform Intermodal Interchange and Facilities Access Agreement (“UIIA”) while DHE acted on behalf of ICL, the stated consignee for subject shipments and invoiced ICL for such demurrage and detention and other related per diem charges and which added a 10% surcharge for such per diem charges, for which it had no authority to assess pursuant to the Shipping Act.

b) Specifically, DHE, allegedly as a trucker, provided invoicing and collection services of detention or per diem in the liner trade on behalf of MSC by assessing the per diem charges DHE had received pursuant to the UIIA terms and conditions to ICL for purposes of collecting potential per diem charges from ICL. While ICL was never invoiced by MSC, pursuant to the bill of lading terms and conditions and Rules Tariff provisions of MSC, it could have invoiced these amounts to ICL, but did not. In this capacity DHE acted in conjunction with MSC indirectly in providing service in the tariffs liner trade which was not in accordance with the charges, rules, and practices published in MSC’s rules as they pertain to per diem surcharges of 10% of per diem assessed by DHE against ICL acting as consignee. Therefore, the practices of both MSC and DHE were in violation with the provisions of the Shipping Act in relation to detention charges invoiced to DHE and passed through to ICL by DHE, in particular with respect to the provision relating to the charging and collecting of per diem in the context of waivers obtained by ICL from MSC pursuant to established shipping law relating to MSC and/or terminal issues in not providing timely appointments for the delivery of empties. 46 C.F.R. § 545.5(c)(2)(ii), *TCW, Inc., Claimant v. Evergreen Shipping Agency (America) Corporation, & Evergreen Line Joint Service Agreement*, Respondents., 2021 WL 9204108, at *16, 3 F.M.C.2d 1, 17.

c) Lastly, DHE, charged and the attempted collection of additional per diem charges from ICL of 10% of the invoiced per diem issued by MSC to ICL allegedly for advancing per diem funds on behalf of ICL when, in fact, **these funds had not been advanced**. These charges are further acts in violation of the terms of 46 U.S.C. § 41104, since by doing so DHE was no longer acting pursuant to the rules as a motor carrier which tariff requires advancing the payment of the per diem before applying the 10% charge, but rather DHE was indirectly acting as a person in conjunction with MSC in acts inconsistent with the “rates, charges, classifications,

rules and practices contained in MSC's published tariffs" and, additionally DHE independently acted as an entity such as an ocean common carrier and/or marine terminal operator, and not a trucker, by charging per diem related charges (10% surcharge) when it did not advance per diem charges on behalf of ICL to MSC. These charges and attempted collection of such charges consist of violations of the provisions of the Shipping Act, which require that only ocean common carriers as defined at 46 U.S.C. § 40102(18) and maritime terminal operators as defined at 46 U.S.C. § 40102(15) may assess and collect such charges, but only by acting as an ocean common carrier and including its charges in a service contract and/or published tariff pursuant to 49 U.S.C. § 411041(a)(2)(A) in its automated tariff system. DHE's 10%-mark ups on MSC per diem charges passed on to ICL were not charges pursuant to motor carrier services as noted herein, and clearly were not charges by DHE acting as an ocean common carrier and/or a marine terminal operator when not qualified by the Shipping Act.

MEMORANDUM OF THE FACTS

10. Between on or about September 2021 and March/April 2022, ICL arranged to ship certain cargo with various ocean common carriers, including MSC, from various ports and points in Asia to the United States via the Port of Los Angeles and/or the Port of Long Beach, California.

11. For purposes of receiving this cargo, ICL during this period, contracted DHE solely for purposes of picking up full container loads from the aforementioned port terminals, delivering such full containers to ICL's transload facilities to be emptied, and lastly for picking up said empty containers to be returned to designated locations pursuant to directives received from the various ocean common carriers and/or terminals from which the containers had been picked up.

12. DHE sued ICL and related companies (ICL *et al.*) in the United States District Court for the Central District of California (Case No. 2:23-cv-05484-DDP-E) on or about 09/05/23), alleging that ICL *et al.* were liable for an outstanding balance of \$195,652.26 plus contractual interest and attorney's fees and costs of collection, of which \$178,425.00 was comprised of per diem charges, plus Admin Fees (defined as amounts owed for DHE's advancement of these fees on behalf of ICL *et al.*) of 10% of the per diem charges, totaling \$9,682.00, for a total amount of per diem related claims of \$188,107.00, of which \$96,820.00

were for amounts which had been waived by MSC pursuant to ICL's success in seeking those waivers, and .

13. ICL does not dispute that generally it is contractually liable for the per diem amounts paid by DHE to ocean carriers and/or terminals related to per diem for shipments which were not waived by the ocean common carriers. However, the total amounts of per diem paid by DHE on behalf of ICL for the shipments related to MSC subject of this proceeding was not \$142,385 as invoiced by DHE, but in fact, consisted allegedly of advanced payments of \$45,565.00. (See **Exhibit 1**, "DHE Summary of MSC Paid and Unpaid Per Diem to Carriers", **Sheet 1**, See Columns G for relevant items in green with pertinent notations in Column K with specific reference notes to the waiver process and reference to supporting documents.

14. Complainant, however, is not liable for the amounts of the \$45,565 which DHE claims it paid to MSC for transactions when these payments were for amounts which MSC had waived in the BlueCargo waiver process initiated by ICL. Those amounts which were paid by DHE to MSC but which were waived by MSC pursuant to the actions taken by ICL on DHE's behalf total \$45,565.00, and are being sought for payment by DHE against ICL in the California case. (See **Exhibit 1**. "DHE Summary of MSC Paid and Unpaid Per Diem Carriers", **Sheet 2**, See Column G for relevant items in green with pertinent notations in Column K with specific reference to the waiver process and supporting waiver documents in **Exhibit 2**). These amounts invoiced to DHE by MSC must be immediately refunded by MSC to DHE since as noted in Exhibit 1, Sheet 2 these were not owed by either DHE or ICL in view of their waiver. Also note one item in Column G which is not in green, for \$270, as noted in Column G of Exhibit 1, Sheet 2. which was allegedly paid by DHE and has not yet been approved for waiver by MSC but note in the corresponding locations in Column K that ICL has sought a review of these items by MSC as of December 2023, and by this proceeding. If these are approved by MSC, the total sum to be

paid by MSC to DHE would be \$45,565 or \$45,295 if MSC is found not to owe the amount of \$270. Appropriate actions will be taken upon a response by MSC, with possible actions being a) ICL paying the \$270 amount to DHE, or b) amending this Complaint as to MSC to include these items for review, in this proceeding depending on the rationale utilized for a negative response by MSC for payment of the \$270 amount.

15. DHE as a Federal Motor Carrier Safety Administration (“FMCSA”) motor carrier maintains a tariff with the following provisions:

a) Dependable Highway Express, Harbor & Intermodal Division, RULES TARIFF, DPHE 101 Series 2.7

b) **Advancing Charges for Demurrage, Per Diem, Detention** Dependable will advance charges to make containers available after Demurrage has commenced and will assume responsibility to pay Detention/Per Diem on behalf of customers as a service, **upon its sole discretion. Charges for advancing funds are governed by Section 1.500.11 of this Tariff.** (Emphasis supplied).

c) **1.500.11 Advancing 3rd Party Charges, Payments Made by Carrier on Behalf of Customer Dependable** will, **upon authorization of the customer and the discretion of DPHE, advance funds to 3rd parties on the behalf of that customer.** Costs required to expedite the carriage of goods, such as forklift charges, demurrage, permit fees, Pier Pass fees, chassis lease fees, etc. will be paid by DPHE and invoiced back to the customer along with a surcharge for this service. The total charge for this service shall be Invoice **Cost + 10% surcharge**, with a minimum surcharge of \$25.00, except for chassis rental fees, which shall be subject to a surcharge of \$5.00 per use regardless of length, **and per diem (steamship line**

“detention” billing) which shall be subject to a 10% surcharge, with a minimum of \$25.00.

(Emphasis supplied).

These requirements as a motor carrier were clearly not followed by DHE in that it did not receive the authorization from customer ICL to advance Third Party Charges as noted in 1.500.11, especially as to per diem. In view of the investment and commitment ICL made with respect to the implementation of BlueCargo technology and the steps it had taken to accomplish the below noted waivers of \$904,410.00 in view of DHE’s lack of such or other pertinent technology. But, also more importantly, DHE did not adhere to its motor carrier rule tariff on this point---i.e., that DHE could only assert a 10% surcharge on per diem invoices only when they had advanced those funds. (See **Exhibit 1**. “DHE Summary MSC Paid and Unpaid Per Diem to Carriers”, **Sheet 2**, See Column H for invoices not paid by DHE abandoned the motor carrier role mandated by its tariff rule by initiating the 10% surcharges for of in green with pertinent notations in Column H totally \$96,820, for which \$9,682.00 was invoiced for those unpaid transactions as can be noted in Columns E,F, for those MSC shipments contrary to the motor carrier Rules Tariff with specific reference to the requirement for advancing payment of these before being entitled to charge 10% on these charges plus interest). In fact, DHE was not acting as a motor carrier in invoicing the amounts in Column H, for which it had not advanced payment, but for which it nevertheless sought the 10% surcharge. Note that those amounts were included in the Admin Fees in Column E which are comprised of \$9,682.00 (where per diem was not advanced) plus the amounts of \$4,556.50 (when per diem was advanced), the total of such unlawful charges being \$14,238.50 in Column E. This totality is an unlawful charge by DHE in that both Column G and H related to per diem charges which were unlawfully assessed by DHE since these charges were comprised of per diem charges which had been waived. Even for those

items in Exhibit 1 for which ICL sought and obtained waivers which DHE had advanced in the amount of \$45,565 in Column G in its ocean carrier role ICL had not provided its permission due to the fact that ICL had already obtained waivers for those amounts, or was in the process of obtaining such waivers, which it did. None of the charges in Column E were lawful charges.

16. The entirety of Respondent MSC's charges of \$142,385, and corresponding Admin Fees of \$14, 238.50 as charged by DHE to ICL as MSC pass throughs in per diem and/or per diem related invoices were waived by MSC only after ICL undertook during the period relevant to subject shipments to have the amounts noted in paragraph 17 below waived from the below ocean carriers. (See paragraph 17 below). This action was undertaken specifically on behalf of DHE, and which waivers were granted to DHE directly, since the per diem invoices were all issued only to DHE pursuant to the Uniform International Intermodal Agreement ("UIIA") agreements with those carriers, and never to ICL. These waivers were accomplished pursuant to the BlueCargo software which keeps track of terminal activities, including appointment availabilities, which pursuant to FMC regulations provided the support for the waivers. There are many written exchanges between the below ocean carriers and ICL relating to the data derived for BlueCargo which all end up in waiving the noted charges in writing specifically issued to DHE but by efforts and costs undertaken by ICL. See Exhibit 2.

17. The following are the amounts of per diem waived by the carriers indicated relating to the DHE transactions during this period acquired by ICL on behalf of DHE pursuant to the BlueCargo software tool:

MSC	\$142,385.00;
Sealead	\$230,200.00;
CUL	<u>\$531,825.00</u>
Total:	\$904,410.00

These efforts for waiver were undertaken by ICL on behalf of DHE even though no invoices had been issued to Complainants for per diem by the ocean common carriers. The only invoices received by ICL for these amounts were generated by DHE, notwithstanding that all or the vast majority of the per diem invoices were waived as to DHE due to ICL's efforts to obtain such waivers. The BlueCargo software utilized for this purpose served to provide pertinent information of the terminal availabilities for purposes of seeking appointments for delivering of empties. The BlueCargo function is fully described in the Initial Decision in *Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC---Possible Violations of 46 U.S.C. § 41102(c)*, Docket No. 21-09 (April 22, 2022), an FMC Investigation in which Golden State Logistics ("GSL"), a drayage company exactly like DHE, demonstrated the use of and efficacy of BlueCargo in challenging ocean common carrier per diem charges on the basis of insufficiency of available appointments for purposes of returning empties on a timely basis. Interestingly, like in the DHE matter, GSL was similarly invoiced for per diem by the ocean common carriers pursuant to the UIIA agreements, which it challenged on its own behalf at the FMC utilizing BlueCargo for purposes of establishing the defense that appointments were not available at the specific terminals for which per diem had been assessed. Ironically, these facts are like the case at hand, with the exception that DHE did not have the BlueCargo capability as did GSL in the above case. The cost of maintaining BlueCargo to ICL was \$18,126 per annum, plus heavy costs in manhours in implementing these defenses which it successfully obtained to the amount of \$904,492.00 in ocean common carrier waivers on behalf of DHE without compensation from DHE.

18. As a result of the efforts of ICL to obtain waivers from MSC, the following charges have been waived or will be waived because of this proceeding by MSC and/or DHE:

a. **Per diem charges** totaling **\$142,385** (see **Exhibit 1**, Sheet 2, Column D, and corresponding documents in **Exhibit 2**, which support the MSC waivers). Item in row 5 (\$270) needs to be part of the findings of fact of this proceeding one way or the other as previously noted; all other per diem items are supported by **Exhibit 2** waiver documentation from MSC. These charges are to be concluded as not owed to DHE by ICL, since the waivers were applied to DHE invoices from MSC as will be pled in Count 2.

b. **Admin Fee charges** totaling **\$14, 238.50** (see **Exhibit 1**, Sheet 2, Column E and corresponding documents in **Exhibit 2**), which support the MSC waivers). Items in row 5 (\$27) needs to be part of the findings of fact of this proceeding to include it or not; all other items are supported by **Exhibit 2** documentation underscoring MSC waivers. These charges are to be concluded as not owed to DHE by ICL pursuant to the facts provided in Paragraphs 15 through 17 herein and as will be pled in Count 2.

c. Per diem **Paid by DHE** totaling **\$45, 565.00** (see **Exhibit 1**, Sheet 2, Column G and corresponding documents in **Exhibit 2**, which support the MSC waivers). Item in row 5 (\$270) needs to be part of the findings of fact of this proceeding; all other items related to waivers by MSC are supported by **Exhibit 2** documentation. These charges are to be concluded as follows:

i. As not owed to DHE by ICL pursuant to the facts provided herein as to waivers obtained as to these shipments as applicable to the items as will be pled in Count 2.

ii. Payable by MSC to DHE pursuant to the facts provided herein as to waivers obtained as to these shipments and paid to MSC by DHE notwithstanding the applicable waivers to these sums and have not been refunded to DHE, and, therefore owed by MSC to DHE as will be pled in Count 1.

CAUSES OF ACTION

COUNT I: VIOLATIONS BY MSC OF THE SHIPPING ACT of 1998, as Amended 2022 (“the Shipping Act”), 46 U.S.C. § 41104(a)(2)(A); § 41102 (c); and, 46 C.F.R. § 545.5

19. Complainants hereby incorporate by reference each of the facts and allegations stated in paragraphs 1 through 18 as though set forth herein.

20. 46 U.S.C. § 41104(a)(2)(A) prohibits MSC, “[a] common carrier, either alone or in conjunction with any other person, directly or indirectly . . . [to] assess any party for a charge that is inconsistent or does not comply with all applicable provisions and regulations, including subsection (c) of section 41102 and part 545.5 of title 46, Code of Federal Regulations (or successor regulations)”

21. In the matters at hand DHE acting in conjunction with MSC, a common carrier, assessed per diem invoices, collected portions of same, and DHE paid for portions of same, and MSC did not refund such charges pursuant to waivers provided to ICL for the following per diem MSC transactions as provided herein below to the extent that, DHE, if as alleged, paid for waived invoices, and MSC unlawfully collected the following per diem sums for waived amounts of per diem without refunding same to DHE, the below are due to DHE:

Invoice	Date	Container	Per Diem	Carrier
M108495_1	12/28/21	MEDU4750583	6,225.00	MSC
M108496_1	01/07/22	MEDU8852095	6,655.00	MSC
M108497_1	01/07/22	FSCU9871687	6,655.00	MSC
M108501_1	01/07/22	TGBU9872170	6,870.00	MSC
M114358_1	01/13/22	MSMU8245602	1,710.00	MSC
M115123_1	02/28/22	TGHU9192869	7,515.00	MSC
DHE_M114106_ICL	03/04/22	FFAU4127763	9,665.00	MSC
M114113_1	01/04/22	TGBU9596658	270.00	MSC

Total Waived Per Diem: \$45,565.00

The above amount as noted in Column G of Exhibit 1, Sheet 2 which is not in green, for an amount of \$270 has not yet been approved for waiver by MSC but note in the corresponding locations in Column K that ICL has sought a review of this item by MSC as of December 2023. If this amount for \$270 is approved by MSC, **the total sum to be paid by MSC to DHE would be \$45,565.** If not approved, then the sum to be immediately paid by MSC to DHE would be **\$45,295.** See attached as **Exhibit 2**, the waivers requested by ICL via the BlueCargo route and provided by MSC for which payments were allegedly made by DHE to MSC, and for which no refunds have been made by MSC to either ICL or DHE.

22. These payments made by DHE were made without the authority of ICL before they were made, as required by DHE's motor carrier Rules Tariff and nothing would have prohibited DHE from seeking refunds of these funds inappropriately paid if done so before it became aware of the waivers by MSC. Additionally, MSC inappropriately received or purposely or inadvertently did not refund the paid amounts by DHE to ICL or DHE for the above transactions for which MSC had granted waivers in violation of 46 U.S.C. § 41102(c) by failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property" by accepting and/or not refunding sums received for per diem chargers for which MSC had granted waivers. Lastly, that MSC by not refunding such per diem sums which had been waived also violated 46 C.F.R. § 545.5 by violation of the Incentive Principle by the unreasonable assessing of per diem when it had provided waivers due to the practices of imposing detention charges when empty containers could not be returned.

23. Complainant ICL has standing to make this pleading as a defense on the basis that DHE is erroneously making the collection claims against ICL rather than MSC, the ocean common carrier which unlawfully accepted sums owed for per diem charges which MSC had waived, and has not subsequently returned such funds to MSC.

**COUNT 2: DHE VIOLATIONS OF THE SHIPPING ACT of 2022 (“the Shipping Act”),
46 U.S.C. § 41104(a)(2)(A)**

24. Complainants hereby incorporate by reference each of the facts and allegations stated in paragraphs 1 through 23 as though set forth herein.

25. DHE, by the charging and attempted collection of charges of 10% from ICL for advancing per diem funds on behalf of ICL when, in fact, **these funds had not been advanced**, are further acts in violation of the terms of 46 U.S.C. § 41104(a)(2)(A) , since by doing so it was no longer acting pursuant to the rules as a motor carrier since the motor carrier tariff required the advance payment by DHE of the per diem on behalf of ICL before applying the 10% charge on per diem charges. In this instance DHE was indirectly acting as a person in conjunction with MSC in acts inconsistent with the “rates, charges, classifications, rules and practices contained in MSC’s published tariffs” and, additionally unlawfully acted as an entity such as an ocean common carrier and/or marine terminal operator, **and not a trucker**, by charging per diem related charges (Admin Fees)when as a trucker it was not authorized to do so by its own Rules Tariff, thereby acting in violation of the provisions of the Shipping Act of 1998, as amended which require that only ocean common carriers as defined at 46 U.S.C. § 40102(18) and maritime terminal operators as defined at 46 U.S.C. § 40102(15) may provide such services and assess and collect such per diem related charges. (Emphasis supplied). These fees which are unlawful fees as to ICL from DHE as noted herein would be 10% of \$96,820----**i.e., \$9,682.00.** (See Exhibit 1, Sheet 2, Column H)

26. Notwithstanding that DHE was acting as a motor carrier with respect to the Admin Fee charges where it did advance funds in the amount of \$45,565 for which it charged Admin Fees of **\$4,556.50**, these Admin Fee were likewise unlawful, not only from the perspective that DHE's Rules Tariff (see Paragraph 15 (c)) required the "authorization of the Customer", which ICL had not granted, but more importantly, these charges upon which the Admin Fees would be based were unlawful fees from the FMC and the Shipping Act perspective as noted herein, and cannot be utilized to serve as a basis for additional Admin Fees especially when DHE will get fully reimbursement for paying its MSC invoices due to the efforts of ICL in obtaining these waivers, and by bringing this proceeding and provisions in Count 1.

27. Therefore, ICL would be entitled to be credited for the additional Admin Fees charged by DHE in the amount of \$4,556.50 for the per diem fees for funds which it had advanced, but clearly not on ICL's behalf, since it had obtained waivers for all these charges. Therefore, ICL would be entitled to get credits from DHE for the Admin Fees charged to ICL--- i.e., \$4,556.50 plus \$9,682.50, for a total of **\$14,238.50**.

28. DHE further violated 46 U.S.C. § 41104(a)(2)(A) by acting in conjunction with MSC, a common carrier directly or indirectly ". . . [to] assess any party (ICL) for a charge that is inconsistent or does not comply with all applicable provisions and regulations, including subsection (c) of section 41102 and part 545.5 of title 46, Code of Federal Regulations (or successor regulations)" DHE knew or should have known that the per diem charges issued to it totaling **\$142,385** (See Exhibit 1, Sheet 2, Column D, and which it passed on to ICL for payment **were waived by MSC** due to ICL efforts and consisted of unlawful charges pursuant to 46 U.S.C. § 41104(a)(2)(A) and § 41102(c). In any case, these charges whether issued by MSC directly or indirectly by DHE to ICL are unlawful charges of per diem per the facts of this

proceeding, and such charges would be unlawful to pursue against ICL by either DHE, as an indirect invoicing party for MSC and/or by MSC directly.

29. See attached Exhibit 1, Sheet 1, Column E which includes the per diem charges in the amount of **\$142,385.00** all of which were unlawful charges due to their waiver by MSC, and were, therefore, unlawful for DHE as well to invoice to ICL, and the full amount must be credited by DHE to ICL, especially to the extent that MSC reimburses DHE the amounts which they retained per diem and should not have.

INJURY TO BE SUFFERED BY ICL

30. ICL, to the extent that the amount that DHE is claiming to be paid the sums waived by MSC in the amount of \$45,295 in its court case in the United States District Court for the Central District of California (Case No. 2:23-cv-05484-DDP-E) to satisfy the per diem amounts claimed by DHE requires that those sums be refunded to ICL or DHE immediately.

31. Further since this payment made by DHE was not accomplished with the authorization of ICL and was not per diem that was due to MSC, in view DHE's requirements of its tariffs, and further would not be due as unlawful charges to ICL based on per diem charges which MSC had waived at the request of ICL would further be injured by the Admin Fees assessed by DHE in the amount of 10% of the sum paid---i.e., fees which would be assessed for in the amounts of \$14,238 by DHE.

32. ICL, would be further damaged to the extent that DHE seeks amounts from ICL claiming any portion of the per diem sums waived by MSC which total \$142,385, all of which were waived.

PRAYER FOR RELIEF

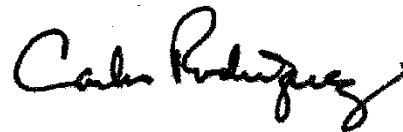
WHEREFORE, ICL respectfully prays for relief from the Commission as follows:

1. An Order compelling Respondents MSC and DHE to answer the charges made herein and scheduling a hearing in Washington D.C. during which the Commission may receive evidence in this matter.
2. An Order, after due investigation and hearing, finding Respondent MSC to have violated 46 U.S.C. § 41104(A)(2) and 46 U.S.C. § 41104(c); and 46 C.F.R. § 545.5.
3. An Order, after due investigation and hearing, finding Respondent DHE to have violated 46 U.S.C. § 41104(A)(2).
4. An Order compelling Respondent MSC to cease and desist from refusing to immediately provide to DHE the amount of \$45,565 for amounts paid to MSC by DHE for per diem on which waivers existed.
5. An Order compelling Respondent DHE to cease and desist from continuing to request payment in the sum of \$45,565 as owing to it from ICL
6. An Order compelling Respondent DHE to cease and desist from requesting payment for advancing funds which it was not authorized to advance in amounts of 10% of the amounts paid to MSC for per diem which had been waived by MSC in the amounts of \$14,238 and for which DHE is compensated by MSC by Order herein.
7. An Order compelling Respondent MSC to cease and desist from refusing to immediately provide to ICL or DHE the amount of \$45,565 for amounts paid to MSC by DHE for per diem on which waivers existed.
 - a) An Order compelling DHE to cease and desist from claiming sums are owed to it of the per diem charges issued to it related to MSC totaling \$142,385 (See Exhibit 1, Sheet 2, Column D, and which it passed on to ICL for payment which were waived by MSC.

b) Such other and further relief as the FMC determines to be just and proper, including attorney's fees.

Dated: December 27, 2023

Respectfully Submitted:



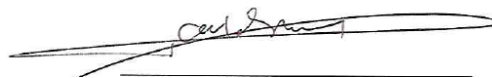
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Counsel for Complainant, ICL USA

VERIFICATION

David Eshel, CEO of ICL (USA), Inc. pursuant to 28 U.S.C. § 1746, the undersigned hereby declares under penalty of perjury that he has read the foregoing Verified Complaint, and that the facts stated therein to the best of his knowledge, information and belief further declares that the foregoing is true and correct on information, belief, and upon information received from others.

Dated: December 27, 2023



David Eshel, President
ICL (USA), Inc.
1 Cross Island Plaza
Rosedale, NY 11422