

Before the
FEDERAL MARITIME COMMISSION
Washington, D.C. 20573
Docket No. 24-12



20230930-DK-BUTTERFLY-1, INC. f/k/a BED BATH & BEYOND INC. v.
EVERGREEN LINE JOINT SERVICE AGREEMENT (FMC#011982) consisting of
EVERGREEN MARINE CORP. (TAIWAN) LTD., EVERGREEN MARINE (UK) LIMITED,
ITALIA MARITTIMA SpA, EVERGREEN MARINE (HONG KONG) LTD., AND
EVERGREEN MARINE (SINGAPORE) PTE. LTD.

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 Evergreen Line Joint Service Agreement, Evergreen Marine Corp. (Taiwan) Ltd., Evergreen Marine (UK) Limited, Italia Marittima SpA, Evergreen Marine (Hong Kong) Ltd., and Evergreen Marine (Singapore) Pte. Ltd. (together “Evergreen”¹ or “Respondents”) pursuant to 46 U.S.C. Section 41301 to seek reparations for injuries to Complainant caused by Evergreen’s violations of the Shipping Act of 1984, as amended, 46 U.S.C. Sections 40101 *et seq.* (the “Shipping Act”), alleged herein.

¹ The Respondents are each parties to the Evergreen Line Joint Service Agreement, FMC Agreement No. 011982, and collectively do business under the common trading name Evergreen Line.

2. Respondents, in addition to Evergreen Marine (Asia) Pte. Ltd., which joined the Evergreen Line Joint Service Agreement in 2021, operate a fleet of container ships with a reported combined capacity of 1.66 million twenty-foot equivalent container units (“TEUs”).

3. 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. Evergreen is part of the Ocean Alliance, consisting of COSCO SHIPPING Lines Co., Ltd., Orient Overseas Container Line Limited, Evergreen, and CMA CGM S.A., which reportedly collectively controls about 35.8% of global container capacity. Currently, Evergreen itself reportedly has 5.7% of global container shipping capacity, with 211 total ships for a capacity of at least 1,645,185 TEUs of container space.

4. The COVID-19 pandemic caused unprecedented challenges to trade and the global economy. During these difficult times, as alleged herein, Evergreen took advantage of price inflation in the container shipping sector and unfairly exploited its customers. Consequently, Evergreen’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 surges and inflation. This profiteering was particularly damaging to Complainant, which was forced to file a Chapter 11 bankruptcy petition on April 23, 2023.

5. *First*, as alleged herein, Evergreen 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 Evergreen: one service contract (the “2020 Service Contract”) for the period of July 30, 2020 through July 31, 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 Evergreen to provide vessel space sufficient to carry those MQCs. Upon information and belief, instead of honoring its service commitments to Complainant under the Service Contracts, Evergreen systematically failed to meet those service commitments and allocated Complainant’s bargained-for space to higher-priced cargo from other shippers to maximize Evergreen’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, or else forgo making such shipments.

6. Evergreen 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—the Federal Maritime Commission’s (“FMC”) Chief Administrative Law Judge found that the Shipping Act violations alleged against the respondent MSC Mediterranean Shipping Company S.A. (“MSC”) in that case, which parallel Evergreen’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”² 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

² Except where otherwise noted, all bold and italicized text reflects added emphasis.

benefit not just these parties, but also the shipping public.” The decision on default against MSC in that case was recently affirmed by the Commissioners of the FMC in a unanimous 5-0 decision, finding that “the ALJ’s ultimate conclusions as to jurisdiction and the adequacy of [the complainant’s] claims are affirmed.”

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

8. *Third*, upon information and belief, during the 2020–2021 and 2021–2022 shipping years, at least a substantial majority of the demurrage and detention charges (the “Charges”) assessed by Evergreen and paid by Complainant were assessed for periods of time in which Complainant’s ability to pick up containers at the ports, or return empty containers promptly, was constrained due to circumstances outside the control of Complainant, such as congestion at ports and shortage of equipment.

9. Upon information and belief, Evergreen’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 Evergreen’s control.

10. Upon information and belief, Evergreen has profited greatly from the conduct alleged herein. Evergreen reported unprecedented profits during the COVID-19 pandemic: \$10.893 billion in 2021 and \$12.993 billion in 2022. These numbers represented exorbitant increases from the \$1.619 billion in profits that Evergreen realized for fiscal year 2020. As stated in Evergreen’s financial results presentation for the 2021 fiscal year, due to conditions such as

“port congestion, space supply and effective fleet space [being] reduced” there was an “increased risk of supply chain disruption leading to manufacturers becom[ing] even more eager to replenish inventory, resulting in non-stop market demand” leading to the record profits achieved during a global epidemic. Evergreen gained immense wealth in 2021 and 2022 while simultaneously injuring Complainant, and other shippers, through the conduct alleged herein.

11. Profiteering by container lines injures not only shippers but the entire consumer public, in the form of inflation. Such profiteering contributed to the increase in inflation in the United States to crisis levels and led to extreme, long lasting fiscal tightening in the form of increased interest rates, while global ocean carriers have reported windfall profits. 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. Evergreen’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 Evergreen’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 RESPONDENTS

15. Upon information and belief, Respondent Evergreen Marine Corp. (Taiwan) Ltd. is a company existing under the laws of Taiwan with a principal place of business located at 1-4F., 166 Minsheng East Road, Section 2, Taipei City, Taiwan, and is a vessel-operating "ocean common carrier" as that term is defined by 46 U.S.C. Section 40102(18) with FMC organization number 001262.

16. Upon information and belief, Respondent Italia Marittima SpA is a company existing under the laws of Italy with a principal place of business located at Passeggio S. Andrea, 4-34123, Trieste, Italy, and is a vessel-operating "ocean common carrier" as that term is defined by 46 U.S.C. Section 40102(18) with FMC organization number 020013.

17. Upon information and belief, Respondent Evergreen Marine (UK) Ltd. is a company existing under the laws of the United Kingdom with a principal place of business located at Evergreen House, 160 Euston Road, London, England, NW1 2DX U.K., and is a vessel-operating "ocean common carrier" as that term is defined by 46 U.S.C. Section 40102(18) with FMC organization number 020776.

18. Upon information and belief, Respondent Evergreen Marine (Hong Kong) Ltd. is a company existing under the laws of Hong Kong with a principal place of business located at 22-

23 Floor, Harcourt House, 39 Gloucester Road, Wan Chai, Hong Kong, and is a vessel-operating “ocean common carrier” as that term is defined by 46 U.S.C. Section 40102(18) with FMC organization number 020988.

19. Upon information and belief, Respondent Evergreen Marine (Singapore) Pte. Ltd. is a company existing under the laws of Singapore with a principal place of business located at 200 Cantonment Road, #12-01, Southpoint, Singapore, 089736, and is a vessel-operating “ocean common carrier” as that term is defined by 46 U.S.C. Section 40102(18) with FMC organization number 022005.

20. The foregoing Respondents, along with Evergreen Marine (Asia) Pte. Ltd. (a vessel-operating “ocean common carrier” as that term is defined by 46 U.S.C. Section 40102(18) with FMC organization number 029054), together form the Respondent Evergreen Line Joint Service Agreement, FMC No. 011982, and together do business as Evergreen Line. Evergreen Line Joint Service Agreement is itself a vessel-operating “ocean common carrier” as that term is defined by 46 U.S.C. Section 40102(18) with FMC organization number 020775.

IV. JURISDICTION AND LEGAL AUTHORITY

21. 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.

22. The FMC has personal jurisdiction over Respondents Evergreen Line Joint Service Agreement, Evergreen Marine Corp. (Taiwan) Ltd., Italia Marittima SpA, Evergreen Marine (UK) Ltd., Evergreen Marine (Hong Kong) Ltd., and Evergreen Marine (Singapore) Pte. Ltd., each 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.

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

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

25. Evergreen’s practice alleged herein 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).

26. Evergreen’s practice alleged herein of coercing premium pricing and extracontractual surcharges from Complainant, and, upon information and belief, other shippers, by conditioning partial or full performance of its service commitment on the payment of extracontractual prices and surcharges constitutes a failure by Evergreen 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).

27. Evergreen’s practice alleged herein of coercing premium pricing and extracontractual surcharges from Complainant by conditioning partial or full performance of its

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

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).

28. Evergreen'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).

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

30. Evergreen's assessment of the Charges or a substantial majority thereof and the alleged acts or omissions of Evergreen 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.

V. THE MATTERS COMPLAINED OF (ALLEGED FACTS)

The Service Contracts

31. As stated above, Complainant entered into two service contracts with Evergreen: 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 MQCs of

cargo to be shipped and corresponding service commitments by Evergreen to provide vessel space sufficient to carry those MQCs.

Evergreen Systematically Failed to Meet Its Service Commitments under the Service Contracts in Favor of Higher-Priced Cargo

32. The 2020 Service Contract set its MQC and service commitment at 1,250 forty-foot equivalent container units (“FEUs”), corresponding to an average monthly allocation of 104.17 FEUs.

33. The 2021 Service Contract set its MQC and service commitment at 750 FEUs, corresponding to 62.5 FEUs per month.

34. Instead of meeting its service commitments to Complainant, Evergreen undertook a practice of systematically failing to make cargo space available under both Service Contracts, resulting in mounting shortages. Indeed, in the 2020–2021 shipping year, despite committing to provide 1,250 FEUs of cargo space to Complainant, Evergreen provided only 256.84 FEUs—*only 20%* of what was committed. There was only minor improvement in the 2021–2022 shipping year, where despite committing to provide 750 FEUs of cargo space to Complainant, Evergreen provided only 455.92 FEUs—just *60%* of what was committed.

35. As a result of Evergreen’s shortfalls in both the 2020–2021 and 2021–2022 shipping years, Complainant was forced to seek carriage from other sources at higher rates, or else forgo shipments completely. Complainant repeatedly made complaints to Evergreen, hoping Evergreen would take measures to honor its service commitments, but to no avail.

36. Evergreen’s failure to meet its service commitments began shortly after the 2020 Service Contract went into effect. In an email dated August 18, 2020, a BBY employee wrote to Evergreen including a chart of bookings for eight different lanes between Asia and the U.S. showing low bookings of less than 10 containers for six out of the nine weeks projected. “EMC

team, see below what was reported to us by Yusen origin for confirmed bookings [...] We need more support and we need it out of Shanghai.” Complainant made clear to Evergreen that Complainant needed the space for which it had contracted and wanted Evergreen to provide that amount of cargo space.

37. Despite BBY’s clear communications to Evergreen that BBY needed the cargo space for which it had bargained, including out of Shanghai, China, in an email dated September 2, 2020, a BBY employee wrote to Evergreen: “EMC, as of today we show ‘0’ confirmed bookings for EMC in [week] 37. We need support from Shanghai to [the United States East Coast] next week, please release 6 FEU to BBY based on our MQC allocation.” Upon information and belief, Evergreen was not responsive to this email or the prior one regarding BBY’s booking needs from Asia to the U.S., reflecting Evergreen’s pattern of not meeting its service commitments.

38. BBY continued to remind Evergreen that the agreed-upon cargo space allocation under the 2020 Service Contract was higher than what Evergreen was offering and actually carrying for BBY. In an email dated October 28, 2020, a BBY employee wrote to Evergreen employee Abdel El-Hely, “our contract is for 1250 FEU therefore our weekly allocation using 52 [weeks] should be 24 FEU’s. your below allocation weekly totals 9 FEU. We need the other 15 FEU’s.” BBY made clear that it was not being served in accordance with Evergreen’s service commitments and that it actually needed the cargo space for which it had bargained.

39. BBY consistently reached out to Evergreen when its allocations were short of the rate corresponding to the contractual MQC but received little or no response from Evergreen to address the issues raised. For example, in an email dated November 23, 2020, a BBY employee wrote to Evergreen: “EMC team, please advise what is happening in that we are not see the lift in wk 47 as well as wk 48. We need the support.” In this instance, Evergreen’s allocations to

Complainant were only 2.25 and 6.625 FEUs for the two weeks in question, far less than what was committed under the 2020 Service Contract.

40. Evergreen's failures throughout the terms of Complainant's Service Contracts constituted a systematic practice of Evergreen failing to fulfill its space commitments to Complainant.

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

42. Upon information and belief, Evergreen had the ability to perform its obligations under the Service Contracts. Evergreen is reportedly the world's seventh-largest ocean carrier. Evergreen is also a member of one of the largest shipping alliances across the globe, which, as alleged above, reportedly collectively controls about 35.8% of global container capacity. Evergreen's cargo capacity was plainly large enough to accommodate the MQCs set forth in the Service Contracts.

43. Upon information and belief, Evergreen's actions were designed to, and did, enrich Evergreen by allowing Evergreen to obtain wildly inflated spot market prices for its cargo space instead of the agreed (and still profitable to Evergreen) rates for carriage that Evergreen had already committed to providing under its Service Contracts with Complainant, and, upon information, under its service contracts with other shippers. As alleged above, Evergreen achieved unprecedented profits and revenues as a result of the misconduct alleged herein. As shown by Evergreen's reported revenues and profitability despite failing to carry 40-80% of its service commitments to Complainant, Evergreen's shortfalls on its service commitments to Complainant, and, upon information and belief, other shippers with service contracts, were the result of

Evergreen violating its service commitments and offering bargained-for space to other shippers who were willing to pay higher freight prices.

44. Upon information and belief, Evergreen's actions in deliberately failing to honor its service commitments in favor of other shippers or higher-priced freight 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 Evergreen's unfair and unreasonable practices alleged herein.

45. In all, during the 2020–2021 shipping year, despite committing at the outset to provide 1,250 FEUs of cargo space to Complainant, Evergreen provided only approximately 256.84 FEUs of space to Complainant. As a result of the 993.16-FEU shortfall, Complainant had to seek carriage from other sources at higher rates, or else forgo shipments entirely, resulting in diminished product offerings and lost profits. During the term of the 2020 Service Contract, Complainant incurred excess freight costs of at least \$1,469,697.96.

46. During the 2021–2022 shipping year, despite agreeing to provide 750 FEUs of cargo space to Complainant, Evergreen provided only approximately 455.92 FEUs of space to Complainant. As a result of the higher rates, Complainant was forced to purchase space on the open market to make up for Evergreen's 294.08-FEU shortfall or else forgo shipments entirely, resulting in diminished product offerings and lost profits. During the term of the 2021 Service Contract, Complainant incurred excess freight costs of at least \$2,501,232.01.

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

47. In addition to not honoring its service commitments, Evergreen engaged in an unfair practice of coercing financial concessions beyond the Service Contracts' terms, such as PSS or other surcharges, as a prerequisite to honoring even a fraction of its service commitments.

48. Rather than comply with its service commitments, Evergreen engaged in a scheme of inducing BBY to pay for additional PSS or other surcharges to transport its cargo. For example, in an email dated October 28, 2020, Evergreen employee Abdel El-Hely wrote to BBY: “I know we briefly discussed a possibility of a voluntary rate increase, do you have any proposed number we can provide Taipei HQ with?” Evergreen set up a dynamic with BBY to bargain for its space on an ongoing basis rather than provide allocations pursuant to Evergreen’s existing service commitments based on the existing contractually agreed rates. In another email within the same exchange, Mr. El-Hely wrote, “[r]ight now there are many accounts requesting increases ranging from \$1200-\$2000 voluntary till the end of December 2020. There are also some Top 500 accounts pushing Taipei for FAK levels + \$1000 for their rates.” These communications put extra pressure on BBY to increase the freight rates it was paying Evergreen on a “voluntary” basis just to get a fraction of the cargo space it was already supposed to be receiving under its existing service contract. BBY effectively had no option but to accept, as indicated by BBY’s response to Evergreen’s efforts to coerce additional payments: “[w]e need space, so if we need to agree upon a higher PSS (i.e. possibly \$1000/40/40HC) through YE20 then let us know at that time what that will get us.”

49. Evergreen’s communications with BBY suggest Evergreen’s understanding that the PSS it was seeking to extract from BBY was not a legitimate surcharge for an additional service provided or specific “peak season”-related issue, but instead merely a vehicle for renegotiating the ocean freight rates to which it had agreed in the Service Contracts. Evergreen sought to influence BBY to avoid specifying the separate amounts of PSS that Evergreen was demanding as a precondition for carrying freight pursuant to the Service Contracts. Instead, Evergreen asked to incorporate PSS into the parties’ existing contract rates. In an email dated

November 24, 2020, Evergreen employee Abdel El-Hely wrote to a BBY employee, “Taipei is asking if it’s OK to move the PSS from your notes section into your rates section. What this means is you currently have a note stating your PSS is valid till end of December under the ‘notes tab’ in your contract. If we remove this and instead just add the PSS amount into the ‘rates tab’ [then] this will allow Taipei to confirm more than the above allocation. I believe this will help on Taipei’s end to get confirmations faster since maybe POL will see that you guys are paying a premium in the rate sheet directly and can confirm bookings faster?” El-Hely’s email highlights Evergreen’s pattern and practice of favoring shippers who were “paying a premium in the rate sheet” in determining whether and how to allocate cargo space on Evergreen’s voyages (without regard to Evergreen’s service commitments to Complainant and, upon information and belief, other shippers with service contracts with Evergreen). This exchange also suggests that Evergreen was inconsistent in how it was documenting or applying PSS during this time, potentially gaming its options among shippers to BBY’s detriment.

50. BBY made Evergreen aware that its practices were causing significant injuries to BBY’s business. For example, in an email dated December 3, 2020, a BBY employee wrote to Evergreen employee Jim Yang that “we need our minimum MQC /52 (24-FEU per week). We are paying a premium which is not a small dollar amount. . . . As mentioned we have cargo backed and part is due to EMC short fall in not loading our minimum’s.” Evergreen conceded in response that it had failed to comply with its service commitment. Evergreen employee Abdel El-Hely stated, “there is no way that we can provide MQC / 52 right now especially with the current market situation. The 2500 TEU we signed for. . . . we will definitely try to get as close as possible to by end of contract season, but for right now with the current container shortage in certain ports and space situation we will try to do as much above forecast as possible.” Despite Evergreen’s

awareness of the issue, BBBY's space allocation was never rectified, and the issues persisted into the 2021–2022 shipping year.

51. Evergreen's practice of systematically failing to fulfill service commitments and coercing premiums from BBBY continued throughout the term of the 2021 Service Contract. For example, , in an email dated September 23, 2021, a BBBY employee wrote to Evergreen employees regarding space booking records: "see below numbers being reported by Yusen for noted weeks and your acceptance against the . . . allocation. Why are we not getting support." BBBY communicated to Evergreen that it was underperforming, in spite of bidding for a higher allocation that it could not meet at the expense of BBBY booking with another carrier.

52. By January 2022, Evergreen communications reflect that it was brazenly auctioning off cargo space at huge premiums while continuing to fail to honor its service commitments to contracted shippers such as BBBY. In an email dated January 4, 2022, Evergreen employee Abdel El-Hely disclosed that space on a particular sailing was being auctioned off at extremely high premiums, writing: "[t]here is no rate that is required (you have rates in the contract) but most people are taking \$7-8000 premiums to the West Coast currently to really stay below market level but above the older signing levels." When BBBY asked, "[a]re you saying that we have to pay \$7-8K above our contract rates to get space on this XL?" Mr. El-Hely replied, "[n]o there is no requirement it's optional, most accounts are paying those levels at minimum for west coast." Evergreen thus not only set up a system of auctioning off cargo space for its own additional profit without regard to its service commitments, but also directly communicated that system to BBBY despite BBBY's clear frustration that it was not getting its bargained-for cargo space.

53. Evergreen's behavior demonstrates a conscious pattern of entering into service contracts with shippers at quoted prices with the intention of not actually meeting its service

commitments under such service contracts at the agreed-upon rates as rates on the open market continued to increase. Instead, Evergreen either imposed additional and ever-rising charges above and beyond its contracted rates, such as PSS or other surcharge rates, or neglected to provide cargo space to the contracted shippers, at all. Overall, Evergreen's wrongful imposition of extracontractual surcharges, including PSS, caused Complainant to overpay for the carriage that it did receive from Evergreen by at least \$247,087.00 during the 2020–2021 shipping year and at least \$70,568.00 during the 2021–2022 shipping year.

The Demurrage and Detention Charges

54. For the period beginning in April 2021, BBBY paid, in connection with Evergreen voyages, at least \$820,181.13 in demurrage Charges and at least \$438,526.35 in detention Charges imposed by Evergreen, totaling at least \$1,258,708.18.

55. These Charges were excessive and, in large part, operated to penalize BBBY for conditions outside of BBBY's control. For example, communications between BBBY and/or its drayage vendors and Evergreen clearly indicate that a lack of appointments or dual appointment requirements resulted in BBBY and/or its drayage vendors being unable to pick up or return Evergreen containers. In particular at the ports of Los Angeles and Long Beach, BBBY and/or its drayage vendors were unable to secure appointments for picking up or returning Evergreen containers, or were turned away when attempting to access the port. Communications between BBBY and its drayage vendors emphasized that port congestion, lack of appointments and lack of equipment made it extremely difficult to move these containers.

56. One of BBBY's drayage providers repeatedly reported in its regular delivery updates that congestion at terminals and lack of equipment impeded its ability to pick up and return containers. For example, on December 14, 2021, an employee of that drayage provider 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, another employee of the drayage provider wrote, “[a]ll other appointments from yesterday had to be rescheduled due to chassis shortages or terminal congestion.” On December 30, 2021, an employee of the drayage provider 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.”

57. The issues underlying the Charges persisted, and on January 6, 2022, an employee of the same drayage provider wrote, “[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.” Further, in an email dated May 19, 2022, an employee with another drayage vendor wrote to BBY: “[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.”

58. Evergreen understood the conditions interfering with the flow of containers. On multiple occasions, Evergreen publicly admitted that during the relevant periods port congestion and lack of equipment, among other factors caused by the pandemic, significantly interfered with the shipping industry. None of the factors were within the control of BBY. For example, in its 2021 Annual Report, Evergreen stated that “[a]ffected by the epidemic, the major ports around the world are suffered [sic] shortage of labor forces and container equipment, poor terminal operation efficiency and port congestion, resulting in the reduction of effective fleet capacity and an imbalance between supply and demand, thereby seriously impairing the global industrial and

logistics.” In its 2022 Annual Report, Evergreen reported that port congestion continued to cause challenges in the handling and transport of containers, stating “[a]ffected by the epidemic, terminal and ports congestion, the effective market capacity reduction, coupled with difficulties in intermodal logistics operations, the shipping industry is facing shortages in manpower, shipping capacity and container equipment.”

59. During the relevant time period, BBBY repeatedly made complaints to Evergreen regarding these unreasonable and unfair Charges. On October 18, 2021 and February 9, 2022, for example, BBBY made requests for Evergreen to reduce or eliminate the Charges. Evergreen refused to accommodate either request. Moreover, one of BBBY’s logistics agents disputed unfair detention charges with Evergreen on a number of occasions, but each time was rejected by Evergreen.

60. 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.”

61. 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).

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

63. Upon information and belief, the Charges assessed by Evergreen 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.

64. 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.

65. Upon information and belief, the Charges imposed by Evergreen comprised at least \$820,181.13 in demurrage Charges and at least \$438,526.35 in detention Charges, totaling at least \$1,258,708.18.

Evergreen's Refusals to Deal or Negotiate

66. Evergreen's conduct with respect to Complainant as alleged herein, including systematically failing to meet its service commitments to Complainant throughout the 2020–2021 and 2021–2022 shipping years 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.

67. BBY and Evergreen 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 due to Evergreen's practices alleged herein of refusing to deal with Complainant pursuant to the Service Contracts in favor of more expensive freight by selling Complainant's bargained-for space to other shippers who agreed to pay higher prices.

68. In addition to Evergreen's outright admissions that it would not work with Complainant to make cargo space available pursuant to the terms of the Service Contracts, Evergreen's overall failure to honor its service commitments throughout the course of the 2020–2021 and 2021–2022 shipping years confirms Evergreen's refusal to deal.

69. As alleged herein, Evergreen's refusals to deal or meet its service commitments continued throughout the terms of the 2020 and 2021 Service Contracts.

Evergreen's Unfair and Unreasonable Practices

70. During the 2020–2021 and 2021–2022 shipping years, Evergreen engaged in numerous unfair and unreasonable practices against Complainant, including but not limited to: failing to satisfy its service commitments in preference for higher-priced freight from other shippers willing to accept such high rates; failing to provide Complainant with cargo space allocations equaling the MQCs specified in the Service Contracts; providing cargo space allocations but then renegeing on those bookings; failing to respond to Complainant and its agents' requests for information or solutions to Evergreen's ongoing failures; failing to timely provide information necessary for Complainant to complete shipments; and profiteering at Complainant's expense.

71. Through their numerous communications, Complainant's representatives made significant efforts to enforce the terms of the service commitments in the Service Contracts and to engage in fair business dealings with Evergreen. Despite such efforts, Evergreen failed to meet its

obligations under 46 U.S.C. Section 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.

Complainant's Injuries

72. As alleged herein, Evergreen's behavior has caused significant harm to Complainant in numerous ways, such as causing 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.

73. Evergreen's shortfalls in honoring its service commitments during the 2020–2021 shipping year forced Complainant to secure alternative cargo space on the open market at high prices, resulting in excess ocean freight costs during the 2020–2021 shipping year of at least \$1,469,697.96.

74. Evergreen's shortfalls in honoring its service commitments during the 2021–2022 shipping year forced Complainant to secure alternative cargo space on the open market at high prices, resulting in excess ocean freight costs during the 2021–2022 shipping year of at least \$2,501,232.01.

75. Evergreen's wrongful imposition of extracontractual surcharges, including PSS, on top of the rates that Complainant should have paid under the Service Contracts, caused Complainant to overpay for the carriage that it did receive from Evergreen by at least \$247,087.00 during the 2020–2021 shipping year and at least \$70,568.00 during the 2021–2022 shipping year.

76. Evergreen's wrongful imposition of the Charges directly injured Complainant, in amounts up to or exceeding \$1,258,708.18 in improper demurrage and detention charges.

77. As the FMC's Chief Administrative Law Judge has already found in another matter alleging similar wrongdoing, 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, Evergreen's unlawful practices may become industry standard, sending a message to all global container lines that it is acceptable to ignore service contracts and impose punitive detention and demurrage charges upon shippers because of delays and conditions outside of shippers' control.

VI. CAUSES OF ACTION

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

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

79. Evergreen'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 Evergreen's bad faith denial of its service commitments, constituted failures by Evergreen 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

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

81. Evergreen's assessment of the Charges or a substantial portion thereof, and the alleged acts or omissions of Evergreen that led to the assessment of such Charges, constituted failures by Evergreen 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)

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

83. Evergreen's practices alleged herein of systematically failing to meet its service commitments to Complainant, attempting to coerce Complainant to pay PSS and other surcharges just to carry a fraction of the bargained-for volumes of cargo, as well as its 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 Evergreen'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)

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

85. Evergreen's practices alleged herein of systematically failing to meet its service commitments to Complainant and preferring higher-priced carriage from other customers,

Evergreen's assessment of the Charges, or a substantial portion thereof, and the acts or omissions of Evergreen 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).

VII. CAUSATION

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

87. Evergreen's actions in coercing Complainant to pay PSS 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 Evergreen pursuant to the terms of the Service Contracts or forgo shipping such cargo altogether.

88. Evergreen's assessment of the Charges has directly and proximately injured Complainant by forcing Complainant to pay unjust and unreasonable detention and demurrage charges.

89. Evergreen'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

90. Evergreen's alleged misconduct has injured Complainant in several ways.

91. During the term of the 2020–2021 shipping year, Evergreen’s misconduct alleged herein caused Evergreen to carry only 256.84 FEUs of the 1,250-FEU MQC in the 2020 Service Contract for Complainant, resulting in a 993.16-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.

92. During the term of the 2021–2022 shipping year, Evergreen’s misconduct alleged herein caused Evergreen to carry only 455.92 FEUs of the 750-FEU MQC in the 2021 Service Contract for Complainant, resulting in a 294.08-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.

93. The damage done to Complainant’s business as a result of Evergreen’s misconduct was extreme and debilitating. The additional incremental cost of replacing Evergreen’s 993.16-FEU shortfall during the 2020–2021 shipping year was at least \$1,469,697.96 more than what Complainant would have paid had Evergreen honored its service commitments.

94. The additional incremental cost of replacing Evergreen’s 294.08-FEU shortfall during the 2021–2022 shipping year was at least \$2,501,232.01 more than what Complainant would have paid had Evergreen honored its service commitments.

95. 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 Evergreen's service commitment shortfall of 1,287.24 FEUs.

96. 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.

97. As will be proven at trial, in many instances, Complainant was unable to mitigate Evergreen'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.

98. 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 Evergreen's service commitment shortfall of 993.16 FEUs in the 2020–2021 shipping year and 294.08 FEUs in the 2021–2022 shipping year, then Complainant's lost profits would have amounted to an astronomical \$86,147,339.87.

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

100. During the 2020–2021 shipping year and the 2021–2022 shipping year, Complainant paid at least \$820,181.13 in demurrage charges and at least \$438,526.35 in detention

charges imposed by Evergreen, totaling at least \$1,258,708.18. 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.

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

IX. PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests that the FMC require Evergreen 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 Evergreen has violated 46 U.S.C. Section 41102(c) by systematically failing to meet its service commitments to Complainant and, upon information and belief, other shippers under its service contracts, by seeking to coerce Complainant and, upon information and belief, other shippers, to pay PSS and other improper 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 Evergreen has violated 46 U.S.C. Section 41104(a)(2) by providing service not in accordance with the rules and practices

contained in Evergreen's Service Contracts with Complainant, for which no exception or exemption applies and that have not been suspended or prohibited by the FMC; and that Evergreen 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 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;

3. An Order compelling Evergreen to cease and desist from violation of the Shipping Act, and to put in place lawful and reasonable practices to preclude Evergreen from systematically failing to meet its service commitments to Complainant and other shippers under its service contracts 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 Evergreen 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; and

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

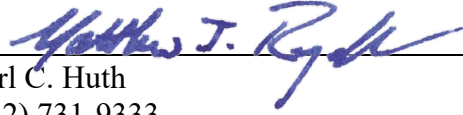
X. REQUEST FOR ORAL HEARING

Complainant requests an oral hearing in Washington, DC.

Dated: February 14, 2024

Respectfully submitted,

HUTH REYNOLDS LLP



Karl C. Huth

(212) 731-9333

huth@huthreynolds.com

Matthew J. Reynolds

(646) 872-9353

reynolds@huthreynolds.com

Gregory A. Crapanzano II

(917) 575-3440

gcrapanzano@huthreynolds.com

Mohini P.B. Rarrick

(818) 235-9753

mpriya@huthreynolds.com

*Counsel for Complainant 20230930-DK-
BUTTERFLY-1, Inc., f/k/a Bed Bath & Beyond
Inc.*

VERIFICATION

I, David Kastin, am an authorized signatory of Complainant 20230930-DK-Butterfly-1, Inc. (formerly known as Bed Bath & Beyond Inc.), P.O. Box 1596, Union, New Jersey, 07083, email david.kastin@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 February 14, 2024.

