



Before the  
FEDERAL MARITIME COMMISSION  
Washington, D.C. 20573  
Docket No. 26-01  
20230930-DK-BUTTERFLY-1, INC. v. HMM COMPANY LIMITED

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## 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 HMM Company Limited (“Respondent” or “HMM”) pursuant to 46 U.S.C. Sections 41301 and 41310 to seek reparations for injuries to Complainant caused by Respondent’s violations of the Shipping Act of 1984, as amended, 46 U.S.C. Sections 40101 *et seq.* (the “Shipping Act”), alleged herein.

2. HMM is a leading global container liner shipping company. Based on shipment capacity, HMM is the eighth-largest carrier in the world. According to HMM’s public statements, following the end of 2022, it operated a fleet of 74 vessels with an operating capacity of 813 thousand twenty-foot equivalent container units (“TEUs”).

3. HMM coordinates its activities with other major shipping lines. As of February 2025, HMM is a member of the Premier Alliance along with carriers Ocean Network Express Pte. Ltd. and Yang Ming Joint Service Agreement. The other members of the Premier Alliance are also leading global carriers, with Ocean Network Express being the sixth-largest, Hapag-Lloyd the fifth-largest and Yang Ming the tenth-largest.

4. The COVID-19 pandemic caused unprecedented challenges to trade and the global economy. During these difficult times, as alleged herein, HMM took advantage of price inflation in the container shipping sector and unfairly exploited its customers. Consequently, HMM'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.

5. *First*, as alleged herein, HMM 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 HMM: one service contract (the "2020 Service Contract") for the period of July 1, 2020 through June 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 HMM to provide vessel space sufficient to carry those MQCs. Upon information and belief, instead of honoring its service commitments to Complainant under the 2020 and 2021 Service Contracts, HMM systematically failed to meet those service commitments and allocated Complainant's bargained for- space to higher-priced cargo from other shippers to maximize HMM'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.

6. HMM 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., Ltd. et al.*, FMC Docket No. 21-05, the Federal Maritime Commission’s (“FMC”) Chief Administrative Law Judge found that the Shipping Act violations alleged in that case, which parallel HMM’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 . . . .”<sup>1</sup> When one of the respondents in that matter 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.”

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

8. *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 HMM 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, shortage of equipment, and HMM’s own failure to schedule appointments for picking up containers.

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<sup>1</sup> Except where otherwise noted, all bold and italicized text reflects added emphasis.

9. Upon information and belief, HMM'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 HMM's control.

10. Upon information and belief, HMM has profited greatly from the conduct alleged herein. In reviewing its fiscal year 2021 performance, HMM boasted that it "accomplished new records in [the] company's financial history", with "[a] *year-over-year increase of 115.1% for revenue, 652.2% for operating income, and 4,205.3% for profit*". For fiscal year 2022, HMM touted its recording of "the best annual results" with "[a] *year-over-year increase of 34.7% for revenue, 34.9% for operating income, and 89.0% for profit*". Indeed HMM's record-breaking financial performance was at the great expense of Complainant, and upon information and belief, other shippers.

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. 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. HMM'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. The claims brought herein are timely pursuant to tolling agreements, as amended and extended, agreed to by the parties.

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

## **II. THE COMPLAINANT**

15. 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 and subject to the provisions of the 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**

16. Upon information and belief, Respondent HMM Company Limited is a company existing under the laws of the Republic of Korea with its principal place of business located at 194 Yulgok-ro, Jongno-gu, Seoul, Korea, acting in the United States by and through its agent, HMM (America), Inc., a company existing under the laws of the State of Texas with its principal place of business located at 222 W. Las Colinas Blvd., Suite 700, Irving, TX 75039. Respondent HMM is an "ocean common carrier" as that term is defined by 46 U.S.C. Section 40102(18) with FMC organization number 001452. Respondent HMM Company Limited is a "controlled carrier" of the Republic of Korea as that term is defined by 46 U.S.C. Section 40102(9).

17. Upon information and belief, Respondent HMM Company Limited and HMM (America), Inc. acted jointly in the conduct alleged herein with respect to Complainant and, upon information and belief, other shippers, and therefore are referred to herein collectively as “HMM.”

#### IV. JURISDICTION AND LEGAL AUTHORITY

18. 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.

19. The FMC has personal jurisdiction over Respondent HMM Company Limited 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.

20. By definition, HMM’s Service Contracts with Complainant required HMM 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.*”<sup>2</sup>

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

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<sup>2</sup> 46 U.S.C. § 40102(21); 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”).

23. HMM'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 HMM 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).

24. HMM'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).

25. HMM'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).

26. HMM's assessment of the Charges or a substantial majority thereof and the alleged acts or omissions of HMM that led to the assessment of such Charges constitute failures by HMM 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. 29638 (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.

27. HMM's assessment of the Charges or a substantial majority thereof and the alleged acts or omissions of HMM 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**

28. As alleged above, Complainant entered into two service contracts with HMM: 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 HMM to provide vessel space sufficient to carry those MQCs.

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

29. Complainant and HMM entered into the 2020 Service Contract, which governed the 2020–2021 shipping year. The 2020 Service Contract sets its MQC and service commitment at 1,000 forty-foot equivalent container units (“FEUs”), corresponding to an average monthly allocation of 100 FEUs.

30. The 2021 Service Contract governed the 2021–2022 shipping year. The 2021 Service Contract sets its MQC and service commitment at 2,000 FEUs, corresponding to 166.67 FEUs per month.

31. Instead of honoring its service commitments, HMM undertook a practice of systematically failing to make space available under the Service Contracts, resulting in mounting shortages.

32. HMM was on notice, from the beginning of the 2020 Service Contract year, of how critical HMM's service commitment was to Complainant and how much Complainant's business depended on HMM fulfilling its commitment. In an email dated July 8, 2020, a BBY employee

wrote to HMM representatives, beseeching HMM to “pls ensure ALL of your origin offices are aware of our contract and list of affiliates. ***We can’t afford any booking confirmation delays ever, but esp at this critical time. We desperately need space from all of our carriers right now and its esp important for us to get off to a good start w/ you guys as one of our new carriers. We need your support right now as we have lots of cargo to move over the coming weeks, esp ex-Shanghai & Yantian.***”

33. Despite Complainant’s clear instructions, HMM’s failure to meet its service commitment began shortly after the 2020 Service Contract went into effect. BBBY noted on November 23, 2020, “[t]his [week’s] lift appears to be great but it is not consistent . . . [w]e need support into the east coast please advise”. Despite these efforts, HMM's responses remained consistent in their inability to meet the increased demand or make up for their mounting shortfalls, with Cynthia Peters stating on November 24, 2020, ***“we just don’t have the extra capacity to do more and go above the weekly allocation we put together for December.”***

34. BBBY regularly made HMM aware of these issues. On July 13, 2020, BBBY sent HMM projections for August and September, specifically asking HMM to “advise back within 72 hours of any concerns” and requesting “[a]ny additional space you can provide now going forward for Shanghai and Yantian”. On August 17, 2020, BBBY again sent HMM projections for September and October, stressing that “Shanghai is still an issue for us to west coast now and out to mid Sept. Also NINGBO, Fuzhou will also be busy for us with Ho Chi Minh needing some help as well. We need HYUNDAI’s support over this time,” and urging HMM to respond with any concerns and to identify shortfalls in coverage.

35. On December 1, 2020, again after mounting failures by HMM to satisfy its service commitments leading to backlogs of BBBY freight, Complainant said “[w]e need as much space

as you can provide for the foreseeable future and are willing to pay a higher PSS than what's in place now to get it so pls advise.” In an attempt to emphasize the issue, Complainant again stressed on December 2, 2020 “[h]owever, my question remains, what if we increased our PSS to \$1,500 or even \$2,000/40/40HC what add'l volume would that buy us? We have a large back log of containers that need to move now so we need as much space as you can provide right now and for the foreseeable future. Pls answer this question for us by tomorrow morning.”

36. On December 2, 2020, acknowledging the high demand for space, HMM wrote to BBY that “[t]he demand for space has not been easing up and has been increasing. ***This is a very fluid situation for us so much so that it's difficult for us to provide 'additional' space even with a higher PEK, especially into January.***” BBY responded and emphasized the urgency of needing additional space, stating on December 2, 2020, “[w]e have a large back log of containers that need to move now so we need as much space as you can provide right now and for the foreseeable future.”

37. Complainant brought the matter to the attention of HMM, in the hope that HMM would correct its practices, but to little avail. For example, in an email dated February 19, 2021, a BBY employee sent shipment projections for the months of March and April 2021 and stressed, “[p]lease advise asap any concerns as well as any ports you can accept additional cargo as ***we have a large number of containers still not moved from January and February***”.

38. HMM's failures throughout the 2020–2021 shipping year constituted a systematic practice of failing to fulfill its service commitments to Complainant.

39. Upon information and belief, HMM had the ability to perform its obligations under the Service Contract. HMM's cargo capacity is plainly large enough to accommodate the service commitments set forth in the 2020 Service Contract.

40. HMM's failed to meet its service commitment under the Service Contracts was abysmal. In all, during the 2020 Service Contract year, despite committing at the outset to provide 1,000 FEUs of space to Complainant, HMM provided only approximately 937.63 FEUs of space to Complainant. As a result of the 62.37-FEU shortfall, Complainant was forced to seek carriage from other sources at higher rates, or else forgo shipments entirely. As a result, Complainant has been damaged by at least \$440,870 more than the prices Complainant would have paid had HMM honored the pricing and service commitments guaranteed under the 2020 Service Contract.

41. HMM's performance during the 2021 Service Contract Year deteriorated even further. During the 2021 Service Contract year, despite agreeing to provide 2,000 FEUs of space to Complainant, HMM provided only approximately 1,468.63 FEUs. As a result of the higher rates Complainant was forced to pay to purchase space on the open market to make up for HMM's 531.37-FEU shortfall, Complainant has been damaged by at least \$8,924,103.50 more than the prices Complainant would have paid had HMM honored the pricing and service commitments guaranteed under the 2021 Service Contract.

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

43. Upon information and belief, HMM's actions were designed to, and did, enrich HMM by allowing HMM to obtain wildly inflated spot market prices or extracontractual fees instead of the agreed (and still profitable to HMM) carriage that HMM 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.

## **HMM's Unreasonable and Unfair Practice of Coercing Extracontractual Surcharges from Complainant**

44. In addition to failing to meet its service commitments, HMM engaged in an unfair practice of coercing financial concessions beyond the Service Contracts' scope as a prerequisite to honoring even a portion of its service commitments.

45. The names for these charges changed frequently—presumably in order to make them more palatable to the customer—but they were often known as PSS, PEK, 'Supreme' rates, or other various 'surcharges'.

46. In both Service Contracts, HMM expressly waived any right to assess additional PSS as a precondition of meeting its service commitment. Section 12(B) of the Service Contracts states: "The rates and charges included in this Contract are all-inclusive and shall be the entire cost of the transportation provided. *No assessorial or arbitrary charges or surcharges of any kind that would affect the cost of the services performed hereunder, including but not limited to any general rate increase, peak season surcharge, terminal handling charge, currency adjustment charge, equipment charge, or any other surcharge that are not specifically included in Appendix B shall apply to the shipments tendered by Shipper under this Contract.* Charges and surcharges included in any tariff incorporated in this Contract shall not apply to the shipments tendered hereunder, unless separately agreed to by Shipper in an amendment to this Contract."

47. On numerous occasions, despite being in serious breach of its service commitment to Complainant, Respondent made space available only on an exorbitant PSS or other improper surcharge basis. Shortly into the 2020 Service Contract year, starting from August 2020, HMM forced Complainant to agree to pay surcharges in order to obtain space HMM had committed to providing under the service contract.

48. HMM conditioned its provision of space on an explicit *quid pro quo*, in which Complainant had to agree to pay exorbitant PSS and other surcharges to get HMM to honor even a fraction of its service commitment. In an email dated October 28, 2020, HMM employee Cynthia Peters wrote to BBY explicitly conditioning space on Complainant's agreement to PSS, writing: "Regretfully, we are not in the position to take on incremental additional volume under your contract at this time. ***However to improve on our booking confirmation, we agree to a weekly space commitment/allocation.*** This was not in place prior and we feel it will greatly improve the results you will see from us. ***This would be subject to the extension of the PSS we have in place in your S/C at least through the end January (subject to review if we need to remove it prior or extend it further ) We need to add Qingdao & Xiamen origins to be included under the PSS as we currently have Yantian/Shanghai & Ningbo origins to LA/LGB & EC.***"

49. HMM demanded that BBY extend PSS through the end of January, 2021. In an email dated November 23, 2020, a BBY employee expressed frustrations regarding HMM's poor performance, writing: "This [week's] lift appears to be great but it is not consistent Wk 47 only 4.75 and currently only showing 2 in wk 49 We need support into the east coast please advise". That BBY employee later inquired "what would it take to help us move more th[a]n what you are moving for us in December." Another BBY then followed up to emphasize that "[w]e need as much space as you can provide for the foreseeable future and are willing to pay a higher PSS than what's in place now to get it so pls advise."

50. HMM employee Cynthia Peters replied to the BBY employees stating "[o]n a positive note, ***since we put into place a weekly space allocation by port pairs along with extension of the PEK [PSS] in your S/C through end of December, we have seen improvement in your weekly confirmed bookings [ ]*** trending somewhat higher than your pro-rated weekly MQC. ***Our***

*suggestion is to move forward with paying the PEK through end of January to continue this same space allocation.”* A BBY employee asked if additional PSS would guarantee more space, and Peters answered, “for now unfortunately we aren’t in the position to add more space allocation. *So to keep our current allocation going, I will have the amendment sent over to extend the PEK through end January.”*

51. Later, HMM increased its demands and forced Complainant to pay increased PSS through the end of the 2020 Service Contract term. In an email dated January 13, 2021, HMM employee Cynthia Peters wrote to BBY employees: “Having the PEK and set weekly space allocation *has definitely helped and improved our ability to confirm bookings for your S/C. My HQ advised we can continue to keep that same weekly space allocation, but are requesting [a] change in the PEK from current \$1000/ 40 & HC to \$1500/ 40 & HC.* This would be for the same origins/destinations that you have already noted in your S/C with a PEK charge. *They also would like you to consider this through the end of the S/C term.* I know you spoke to us about extending the PEK through end of March, so checking with you to see if you can agree to this further out beyond March. *Main reason is that market information we have is advising we don’t expect this current demand in the market to subside after LNY, but to continue at least through the 1st half of 2021.* Also, I am still working with my HQ about the option to accept more volume/bookings above your current weekly allocation, under a ‘Supreme’ rate level through February.”

52. Peters also made it clear that the \$1,500 PSS was a take-it-or-leave-it proposal. In a follow-up email dated January 19, 2021, Peters wrote “[l]et me know if you want to still go just *with the \$1500 PEK through March and keep your same current space allocation.*” Complainant

had no choice but to accept the charge and eventually responded “[a]t this point we accept the \$1500, please draft up an amendment”.

53. Despite having fallen well behind its service commitment to Complainant, HMM also sought to force Complainant to agree to extremely high “supreme” rates far beyond the pricing in the Service Contracts. For example, on June 15, 2021, HMM employee Cynthia Peters wrote to BBY that “*we can add ‘Supreme’ rates to your S/C[.] Semarang to PS ( LA/LGB ): \$9300 pc 40 & HC[;] Semarang to EC : \$11,000 pc 40 & HC. . . This would be valid through end of June. Subject to review beyond June 30th. We can allocate 2 T week to PS and 4 T week to EC with this supreme rate level.*”

54. HMM continued to extract “supreme” rates despite having failed to meet its basic service commitment. In an email dated June 22, 2021, HMM employee Cynthia Peters wrote to BBY and stated, “[s]pecial *supreme rate* for extra loader vessel JWRT0011E Shanghai to New York CY, \$9500 pc 40std & HC”.

55. Complainant had no choice but to accept HMM’s demanding PSS or other improper surcharges to ship cargos that had already been contracted in the service contracts. In an email dated June 24, 2021, a BBY employee wrote to HMM employee Cynthia Peters “I just listened to your below VM, and *to be very clear we understand that we’ll need to pay more than our contracted rates to get this add’l space so pls let us know what those rates are so we can move forward.*”

56. Despite collecting exorbitant PSS and premium charges, HMM still failed to meet its service commitment to Complainant. In an email dated July 19, 2021, a BBY employee wrote to HMM employee Cynthia Peters and again expressed BBY’s disappointment: “Hyundai

confirmed you would lift our allocation and that is why we signed the PSS that cost covers all of our bookings from the ports we spoke about. ***We are now paying more and getting less.***”

57. HMM’s misconduct continued into the 2021 Service Contract year. In August 2021, despite having recently agreed to the 2021 Service Contract (which HMM entered into with full knowledge of the overall shipping environment), HMM again offered space at an exorbitant premium. In an email dated August 3, 2021, HMM employee Cynthia Peters wrote to a BBY employee and stated, “I’ve been given information for two upcoming extra loader vessels to ask if you are interested in booking on either of them. 1) Vessel is the Hyundai Tacoma V0109 E, with ETD Shanghai August 27th and ETA LA September 15<sup>th</sup> ***We can accommodate 30 TEU for this vessel at special rate of \$9000 pc 40 std & HC*** 2) Vessel is the Hyundai Platinum V0074E, with ETD Yantian August 25th and ETA LA September 10<sup>th</sup> ***We feel we can provide 20 TEU for this vessel at special rate of \$10,000 pc 40 std & HC***”. In need of cargo space, BBY had no choice but to accept and did.

58. In an email dated August 4, 2021, HMM employee Cynthia Peters admitted that extra loader space is not being counted against contract shortfalls, writing “[a]nd ‘yes’ to your question about calculating space.... ***the allocation would be handled separately from extra loader space.***”

59. HMM’s imposition of PSS and other surcharges was unjust and unreasonable. In particular, during the 2021 Service Contract year, HMM agreed to its service commitment with full knowledge of the overall freight environment, and nonetheless immediately reneged on its commitment to extract exorbitant additional fees.

60. HMM’s practices succeeded in enriching HMM at Complainant’s expense, as shown by the record financial results HMM reported during the relevant periods. In reviewing its

fiscal year 2021 performance, HMM boasted that it “accomplished new records in [the] company’s financial history”, with “*a year-over-year increase of 115.1% for revenue, 652.2% for operating income, and 4,205.3% for profit*”. For fiscal year 2022, HMM touted its “best annual results” with “*[a] year-over-year increase of 34.7% for revenue, 34.9% for operating income, and 89.0% for profit*”. Notably, HMM admitted that its container shipping business was doing particularly excellent “due to higher long-term freight contract rates”.

61. In light of the unfair and unreasonable PSS, premium, “supreme” and other improper surcharges imposed by HMM, Complainant was forced to pay more than the rates agreed to in the Service Contracts to secure even a fraction of HMM’s service commitment.

62. In the 2020 shipping year, Complainant paid a premium of at least \$429,626.00 to HMM for cargo shipped during that period, which could have been avoided had HMM fulfilled its service commitment to Complainant in compliance with the 2020 Service Contract.

63. In the 2021 shipping year, Complainant paid a premium of at least \$2,906,340.00 to HMM for cargo shipped during that period, which could have been avoided had HMM fulfilled its service commitment to Complainant in compliance with the 2021 Service Contract.

64. 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.”

65. 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".

66. The FMC's investigation into carrier surcharges suggests that some of HMM'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, including HMM, followed the FMC's receipt of communications "from multiple parties reporting that ocean carriers are improperly implementing surcharges."

### **Extreme Port Congestion and Supply Chain Crunch Throughout the United States**

67. By September 2021, by tonnage, approximately 70% of all U.S.-international trade moved by water through U.S. ports. From 2019 to 2022, there was a sustained increase in containerized imports to U.S. ports. In late 2021 and early 2022 in particular, the number of container ships waiting to dock at a U.S. port more than doubled, peaking at more than 140 in early February 2022. Across all major U.S. ports, the supply chain crunch was driven by a confluence of pandemic-related disruptions, including labor shortages, increased consumer demand, and infrastructure inadequacies, with self-serving business practices by ocean carriers, marine terminals, and other supply chain participants. In that environment, soaring freight rates became the norm. The consolidation of the shipping industry further aggravated the situation, as carriers and carrier alliances prioritized profits over service reliability, leaving shippers and exporters to bear the brunt of the crisis while the carriers, under the guise of limited supply and congestion, raked in historic, unprecedented profits.

68. The Ports of Los Angeles and Long Beach, California, which together handled nearly 40% of U.S. imports in September 2021, experienced severe congestion throughout 2021 and early 2022. This congestion, driven by high consumer demand, the early Lunar New Year,

and the ongoing effects of the COVID-19 pandemic, led to significant delays in unloading and moving cargo. By late 2021, the twin ports were overwhelmed, with 87 vessels waiting offshore. The number of vessels waiting offshore grew to as many as 141 earlier in the same year. In an effort to alleviate container yard congestion, in October 2021, the city of Long Beach implemented a temporary measure allowing container stacks to double in height. Despite the efforts made, the situation deteriorated. Between 2020 and 2022, the Port of Los Angeles experienced notable fluctuations in container volumes, measured in TEUs, compared to the pre-pandemic period of 2017 to 2019. During the pre-pandemic years of 2017 to 2019, the port consistently handled around 9.3 to 9.5 million TEUs annually, however, 2021 saw a dramatic increase, with the port processing a record high of about 10.7 million TEUs, reflecting a significant surge in activity. By 2022, volumes slightly declined to approximately 9.9 million TEUs but remained higher than the pre-pandemic averages, indicating a sustained increase in activity despite the easing of pandemic-related disruptions.

69. The Port of Oakland, California also faced severe congestion throughout 2021. Carrier Maersk warned in a May 26, 2021 customer advisory that, although the Port of Los Angeles and Long Beach “remain strained with vessel wait times averaging between one to two weeks”, “the situation is even more dire at the Port of Oakland, where wait times now extend up to three weeks.” In June 2021, the Port of Oakland reported significant increases in cargo volume, reaching an all-time high of handling the equivalent of 1.08 million TEU containers from January through May 2021, driven by a 26% rise in imports in May compared to the previous year. Bryan Brandes, the Maritime Director of the Port of Oakland, highlighted the unprecedented challenges, citing both record cargo volumes at U.S. West Coast ports and pandemic related disruptions at a Chinese port.

70. At the Port of New York and New Jersey, the busiest container port on the U.S. East Coast, pandemic disruptions also resulted in a significant strain on operations, as the terminals struggled to handle increased import volumes. COVID-19's effects on the workforce further exacerbated congestion issues, with Sam Ruda, Director of the Port Authority of New York and New Jersey, stating “[w]e have seen a spike in the number of labour[ers] going out into quarantine”. While containers became backlogged at ports due to the pandemic's supply chain challenges, demurrage and detention charges for mounted for shippers. Increased demand coupled with existing limits to capacity and the labor shortages caused by initial COVID-19 pandemic reductions led to further challenges to cargo movement. The overall impact on the port was significant, with cargo volumes reaching 8.12 million TEUs by the end of November 2021, compared to 7.47 million TEUs for the entire year of 2019. In early January 2022, the Port of New York and New Jersey faced an unusual backlog of container ships anchored off Long Island, resulting from a surge in cargo volumes combined with a spike in COVID-19 cases among dockworkers, leading to increased quarantine rates. Consequently, the average wait time at anchorage for container carriers rose from 1.6 days for all of 2020 to 4.75 days in the final week of 2021. In May 2022, the Port of New York and New Jersey, was still experiencing significant congestion due to a surge in cargo volumes. The average number of container ships waiting to dock reached 14 per day, the highest since the onset of the COVID-19 pandemic.

71. The Port of Savannah, Georgia, a major logistics hub for the southeastern United States, experienced some of the longest vessel queues in its history during the 2021-2022 period, with at times more than 40 ships anchored offshore waiting to unload. Port leaders reported that ongoing congestion and labor challenges at West Coast ports “caused shippers to redirect cargo to the East Coast, [and] a lot of that has come to Savannah”, which saw a significant increase in

redirected shipments as a result. As of October 2021, almost 80,000 shipping containers had been left at the Port of Savannah as they awaited delivery either to their final destinations or to warehouses that were already full.

72. Secondary ports across the United States, including those along the coast of the Gulf of Mexico and smaller ports on the Atlantic Ocean, experienced varying degrees of strain as shippers sought alternatives to congested major ports. The ripple effects of diverted cargo flow often overwhelmed these smaller ports, which lacked the same level of infrastructure and operational capacity. This dynamic highlighted the interconnectedness of the national port system and the critical need for a more resilient and flexible logistics network to manage future disruptions.

73. For example, during the supply chain crisis, the Port of Houston, Texas became increasingly significant due to its central role in Gulf Coast logistics. While it initially avoided the extreme congestion seen on the coasts, once the “East Coast’s big ports became too busy, shippers began to send more containers to Houston instead” and by “January 2022, Houston saw a 27 percent rise in containerized traffic year-on-year, leading to a shortage of space.” There was no sign of slowdown throughout 2022. In October 2022, the container volume at Port Houston once again grew by double digits, continuing the trend seen throughout 2022. “A total of 371,994 TEUs were handled during the month, a 13% increase compared to October 2021.” These difficulties strained its infrastructure, highlighting the cascading effects of the national supply chain disruptions.

74. The Northwest Seaport Alliance, which includes the Ports of Seattle and Tacoma, Washington was similarly affected during the crisis. In October 2021, “[w]ith congestion spreading to other ports across the United States [certain carriers] announced that they will be

omitting calls in Seattle due to the mounting delays at the port.” Additionally, “Hamburg-based Hapag-Lloyd also announced that it would omit Seattle on at least four sailings of its Pacific North Loop 3 service from Nov. 8 onward, calling on Oakland in the meantime.” These ports were critical nodes in the supply chain on trade routes between the United States and Asia, but were also vulnerable to the same systemic pressures as Los Angeles and Long Beach. The surge “led to stalls in the supply chain as ports struggled to keep up with a throng of ships, rail and truck traffic waiting to load and unload containers full of goods.”

### **The Demurrage and Detention Charges**

75. For the period September 2021 through January 2023, Complainant paid, in connection with HMM voyages, \$4,017,399.51.00 in demurrage Charges and \$680,400.05 in detention Charges, totaling \$4,697,799.56.

76. Upon information and belief, the Charges assessed by HMM 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. For example:

- On December 14, 2021, an employee with one of BBBY’s drayage vendors 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, an employee with one of BBBY’s drayage vendors wrote, “[a]ll other appointments from yesterday had to be rescheduled due to chassis shortages or terminal congestion.”
- On December 30, 2021, an employee with one of BBBY’s drayage vendors 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.”
- On January 6, 2022, an employee with one of BBBY’s drayage vendors 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.”

77. In an email dated May 19, 2022, one of BBY’s drayage vendors 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.” HMM was well aware of such a congestion crisis during the relevant period. In the congestion updates published by HMM from November 16, 2020, to December 16, 2021, HMM’s own analysis shows that congestion at North American ports peaked in mid-September 2021, and then created a record-high sustained plateau after October 2021.

78. The issue of lack of appointments at terminals, also created hurdles for Complainant to return empty containers. For example, in an email exchange in February 2022, BBY’s trucking company revealed that “it appears our biggest hurdle right now is lack of appointments to return these containers.” Specifically, the port terminal was not accepting empty containers without a dual appointment.

79. On numerous occasions, HMM would impose charges on Complainant despite the lack of appointments being outside Complainant’s control. For example:

- In an email dated September 24, 2021, a BBY employee wrote to an employee with the Port of LA 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 HMM required dual appointments, further compounding the issue.

- In an email exchange in February 2022, one of BBBY’s drayage vendors stated that “it appears our biggest hurdle right now is lack of appointments to return these containers.” The affected containers include HMM containers. BBBY brought the matter to HMM’s attention. In an email dated April 28, 2022, a BBBY employee wrote to HMM employees Cynthia Peters and Kim Salerno, “Cindy see comments below from Graham on having issues getting containers returned due to [appointments] etc...***Please provide options and also confirm we will not get charged for detention due to these delays***”. An HMM employee replied, admitting that “[t]here is no alternate return place . . . . ***Dual Transaction : Trapac (20?, 40?std) // YTI (all size) // WBCT(all size)***”.
- In another delivery status email dated April 28, 2022, an employee with one of BBBY’s drayage vendors wrote to a BBBY employee and advised “No Available Appts at WBCT/TRAPAC/ITS” for HMM 40DV containers and “No Available Appts at WBCT/TRAPAC” for HMM 45HC containers. As one BBBY employee wrote, “[w]e have been trying to return empties from Hyundai, ***but are not having any luck getting any appointments.***” BBBY promptly reached out to HMM regarding the matter. HMM employee Gihee Lew replied, “[t]here is no alternate return place. HMM empty return for 1st shift 4 / 28 / 2022---- Subj to Change Dry empty : . . . . ***Dual Transaction : Trapac (20?, 40?std) // YTI (all size) // WBCT(all size)***”.

80. In a daily drayage carrier update email dated May 17, 2022, an employee with one of BBBY’s drayage vendors advised BBBY employees that there were “No Available Appts at TTI/YTI” for HMM 40DV and 45HC containers, and “Duals at TRAPAC” for HMM 20DV and 40HC containers.

- In an email dated May 20, 2022, an employee with one of BBBY’s drayage vendors wrote to BBBY employees about the return status of empty containers and indicated “Only Duals at TRAPAC” for HMM 20DV, 40DV, 40HC, and 45HC containers.
- In an email dated August 9, 2022, an employee with one of BBBY’s drayage vendors wrote to BBBY employees and stated, “the majority of our current empties belong to Hyundai and Trapac is only terminal receiving Hyundai empty returns and ***they are only being received as part of a dual transaction*** and we have no current containers coming out of Trapac to do duals with.”

81. BBBY’s records also reflect that many containers were pending pickup but not able to be picked up until a later date—with demurrage charges still being incurred—as in the case of Container Nos. HMMU2007431 and TLLU2578756, where HMM charged BBBY an additional nearly \$5,000 in demurrage charges. In other examples from January 2022 through May 2022, BBBY’s records make clear that it and its agents were working together to secure pickup appointments for containers including KOCU4357224, FSCU8497150, and GAOU6340457, with the drayage vendor reporting that they were still pending updates from carriers who were still

working to secure appointments “for these and many more aging loads at the terminals.” Despite BBY’s efforts, these individual containers resulted in astronomical demurrage charges of \$33,888.59, \$61,681.55, and \$44,874.30, respectively.

82. BBY’s records also reflect the astronomical scale of the demurrage charges for idling containers (charges that would in many instances run into multiple tens of thousands of dollars) that HMM imposed on BBY, despite HMM failing to schedule appointments for those very same containers. In February 2022, HMM’s Cynthia Peters provided a list of more than 50 long-dwelling containers at ports on the east and west coast and asked for an update on an “action plan”, and BBY’s drayage vendor responded that “[w]e will have scheduled for pick-up as soon as possible.”. These exorbitant demurrage fees were imposed even though BBY’s drayage vendor was working to secure appointments as soon as it could and despite market conditions outside of BBY’s control that created long dwell times. Despite known market issues, the amounts charged for demurrage on these containers were enormous, with containers such as DFSU4274066 and BSIU9953211 incurring detention charges of greater than \$40,000 each.

83. Demurrage charges were also imposed on Complainant due to HMM’s own actions or inactions, including HMM’s delay in alerting Complainant of container release. For example, in January 2021, BBY’s trucker was facing difficulty when attempting to pick up an HMM container. Later that same day, HMM advised Complainant’s trucker to come back to pick up the same container the same day, which was a practical impossible in light of the fact that Complainant’s trucker had already been turned away and there was no reasonable possibility of Complainant being able to make another same-day reservation. BBY expressed its frustration at this unreasonable demand, writing “Cindy, *you alert us of release late, drayage carriers plan their*

*day early in day.* Any demurrage for this shipment will need to be reviewed that BBB[Y] paid as we have a scanned copy of the SWB.”

84. The demurrage charges imposed by HMM on BBY also cannot be justified as any kind of incentive for BBY to expeditiously move its cargo, as BBY repeatedly attempted to work with its providers to move containers and to stock empty shelves, as was widely reported in news media. One example is Container No. HMMU6193606, which incurred \$11,665.50 in demurrage charges despite an email from BBY to its drayage vendors that it was critical to move that container.

85. In addition, BBY’s communications record also reflects that HMM frequently imposed detention charges despite diligent efforts by BBY and its drayage vendors to move and return containers. An illustrative example of this is an email from one of BBY’s drayage vendors to HMM in March 2021 informing HMM that “there are no available return locations and or single-transaction appointments to return your equipment for today” and asking for “an alternate return location” and either an extension or stoppage of the “per diem clock”. In response to the drayage vendor’s request for an alternative return location and relief from punitive detention charges, HMM simply responded, “[s]orry, there is no exemption” from the detention charges, even though no appointments were available.

86. Another example is HMM’s imposition of \$8,400 in detention charges for Container No. HMMU6393707. On January 28, 2022, an employee with GFA Total Logistics Solution informed personnel from Odyssey Logistics and BBY that “[d]ue to a heavy congestion at GPA and some other issues, our team was focus on pull LFD containers and was not able to return any to the rail”, noting that they planned to return the containers as of that day. The email chain reflects that GFA had anticipated returning the container, and others, for a number of days

but that issues with reservations had caused delays. By early February 2022, after days of discussion between GFA and Odyssey Logistics regarding attempts to return containers, including Container No. HMMU6272979, that “[t]here were not enough reservations left to in gate tomorrow for all so I grabbed some Saturday ones. I can always check during the day if you want me to and see if any more open up tomorrow.” Despite these efforts to return this container, HMM imposed \$5,500 in detention. The same email chain similarly shows attempts to return Container Nos. CAIU7668919 and HMMU6332300 for a number of days before any reservation was received. Again, despite these clear efforts at efficient returns, HMM charged \$7,000 and \$5,625 in detention, respectively.

87. On October 18, 2021, Complainant made a formal request for a refund of certain Charges. On October 25, 2021, HMM acknowledged this refund request and asked Complainant to provide detailed evidence about the “inability of timely empty return” as per HMM’s dispute resolution process.

88. On February 9, 2022, Complainant made another request for a refund of the charges to HMM. Once again, HMM refused to accommodate. However, in this letter, HMM admitted that its operation was impacted by “severe vessel blank sailings due to issues related to COVID-19 and congestion”.

89. 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.”

90. 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.”

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

92. Upon information and belief, the Charges assessed by HMM 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.

93. 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.

#### **HMM’s Refusals to Deal or Negotiate**

94. HMM’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, 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.

95. BBY and HMM 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 HMM'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.

96. As alleged herein, HMM's refusals to deal or meet its service commitments continued throughout the terms of the Service Contracts. In particular, at the end of the 2020 Service Contract term, HMM threatened to hold Complainant's space hostage unless Complainant agreed to sign a drawdown amendment. HMM made clear that a drawdown was a prerequisite to a new contract, stating "[a]s follow up to your email below and our phone call yesterday, I will have a S/C amendment done to adjust the MQC on your current 2020 S/C since you need both in hand to sign the new 2021 contract."

### **Complainant's Injuries**

97. As alleged herein, HMM'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 resulting in injuries, including lost profits, in an amount to be determined at trial.

98. HMM's shortfalls in honoring its service commitments during the 2020–2021 and 2021–2022 shipping years forced Complainant to secure space on the open market at high prices,

resulting in excess costs of at least \$440,870.00 under the 2020 Service Contract and \$8,924,103.50 under the 2021 Service Contract.

99. HMM'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 HMM by at least \$429,626.00 during the 2020–2021 shipping year and \$2,906,340.00 during the 2021–2022 shipping year.

100. HMM's wrongful imposition of the Charges directly injured Complainant, in amounts up to or exceeding \$4,017,399.51.00 in improper demurrage charges and up to or exceeding \$680,400.05 in improper detention charges.

101. As the FMC's Chief Administrative Law Judge has already found in another matter alleging similar wrongdoing by another ocean carrier, abuses like those alleged herein are matters of "national significance". 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, HMM's unlawful practices may become industry standard, sending a message to all global container lines that it is acceptable to ignore service contracts and 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.

102. Between September 2023 and December 2025, Complainant attempted to discuss potential resolution of Complainant's claims with Respondent. Complainant and Respondent entered into a tolling agreement and, as such, Complainant's claims alleged herein are timely brought.

## **VI. CAUSES OF ACTION**

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

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

104. HMM'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 surcharges in order to obtain previously contracted space, as well as HMM's efforts to coerce amendments or premium rate addenda to the Service Contracts and bad faith denial of its service commitments, constituted failures by HMM 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**

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

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

107. Furthermore, Respondents' practices and actions related to the assessment of demurrage and detention Charges under bills of lading with Complainant are inconsistent with or do not comply with all applicable provisions and regulations, including 46 U.S.C. Section 41102(c)

or 46 C.F.R. Section 545 (or successor regulations), in violation of 46 U.S.C. Section 41104(a)(14).

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

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

109. HMM'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 and 2021 Service Contracts 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 HMM'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)**

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

111. HMM's practices alleged herein of systematically failing to meet its service commitments to Complainant and preferring higher priced carriage of other shippers' cargo, and HMM'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. § 41104(a)(14)**

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

113. HMM's practices and actions related to the assessment of demurrage and detention charges under through bills of lading with Complainant are inconsistent with or do not comply with all applicable provisions and regulations, including 46 U.S.C. Section 41102(c) or 46 C.F.R. Section 545 (or successor regulations), in violation of 46 U.S.C. Section 41104(a)(14).

## **VII. CAUSATION**

114. HMM'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 HMM pursuant to the terms of the Service Contracts at substantially higher prices or forgo shipping such cargo altogether.

115. HMM'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 HMM pursuant to the terms of the Service Contracts or forgo shipping such cargo altogether.

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

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

## **VIII. REPARATIONS SOUGHT/COMPLAINANT'S DAMAGES**

118. HMM's alleged misconduct has injured Complainant in several ways.

119. During the 2020–2021 shipping year, HMM’s misconduct alleged herein caused HMM to carry only 937.63 FEUs of the 1,000-FEU MQC in the 2020 Service Contract for Complainant, resulting in a 62.37-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.

120. During the 2021–2022 shipping year, HMM’s alleged misconduct alleged herein caused HMM to carry only 1,468.63 FEUs of the 2,000-FEU MQC in the 2021 Service Contract for Complainant, resulting in a 531.37-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.

121. The damage done to Complainant’s business as a result of HMM’s misconduct alleged herein was extreme and debilitating. The additional incremental cost of replacing HMM’s 593.74-FEU shortfall during the 2020–2021 and 2021–2022 shipping years was at least \$9,364,973.50 more than what Complainant would have paid had HMM honored its service commitments.

122. As explained by the FMC’s Chief Administrative Law Judge in *OJ Commerce, LLC 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 HMM's service commitment shortfall of 593.74 FEUs.

123. 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.

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

125. 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 HMM's service commitment shortfall of 593.74 FEUs during the 2020–2021 and 2021–2022 shipping years, then Complainant's lost profits would have amounted to at least an astronomical \$39,735,497.32.

126. During the term of the 2020 Service Contract, as a result of HMM's imposition of unjust and unreasonable PSS, premium pricing, and other charges as alleged herein, Complainant was forced to pay HMM approximately \$429,626.00, over and above the rates that Complainant would have had paid had HMM charged the rates negotiated and agreed in the 2020 Service Contract.

127. During the term of the 2021 Service Contract, as a result of HMM's imposition of unjust and unreasonable PSS, premium pricing, and other charges alleged herein, Complainant was forced to pay HMM approximately \$2,906,340.00, over and above the rates that Complainant

would have had paid had HMM charged the rates negotiated and agreed in the 2021 Service Contract.

128. During the 2021–2022 shipping year and from May 2022 to January 2023, Complainant paid at least \$4,017,399.51 in demurrage charges and at least \$680,400.05 in detention charges imposed by HMM, totaling at least \$4,697,799.56. 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(a) or determines to be unreasonable under 46 C.F.R. Section 545.5 and the Incentive Principle of the Interpretive Rule.

129. 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 HMM 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:

a. HMM 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 service contracts, by preferring higher priced carriage of other shippers' cargo, and by seeking to coerce Complainant and, upon information and belief, other shippers, to pay PSS, premium pricing, and other improper surcharges or enter into premium contracts in order to obtain previously contracted space, in connection with its receipt, handling, storage, and delivery of the property of Complainant;

- b. HMM violated 46 U.S.C. Section 41102(c), 46 U.S.C. Section 41104(a)(14), 46 C.F.R. Section 545.5, and the FMC's Interpretive Rule by assessing unjust and unreasonable detention and demurrage Charges in connection with its receipt, handling, storage, and delivery of the property of Complainant;
- c. HMM violated 46 U.S.C. Section 41104(a)(2) by providing service not in accordance with the rules and practices contained in Respondents' Service Contracts with Complainant, for which no exception or exemption applies and that have not been suspended or prohibited by the FMC; and
- d. HMM violated 46 U.S.C. Section 41104(a)(10) by systematically failing to meet its service commitments to Complainant under the Service Contracts, by preferring higher priced carriage of other shippers' cargo, by seeking to coerce Complainant to pay PSS, premium pricing, and other improper surcharges or enter into premium contracts in order to obtain previously contracted space, and by assessing unjust and unreasonable detention and demurrage Charges against Complainant.

3. An Order compelling HMM to cease and desist from violation of the Shipping Act, and to put in place lawful and reasonable practices to preclude HMM 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 HMM 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: December 30, 2025

Respectfully submitted,

HUTH REYNOLDS LLP



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*Counsel for Complainant 20230930-  
DKButterfly-1, Inc.*

## VERIFICATION

I, David Kastin, am an authorized signatory of Complainant 20230930-DKButterfly-1, Inc. (formerly known as Bed Bath & Beyond Inc.), PO 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 December 23, 2025.



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