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THE CONTAINERSHIP COMPANY (TCC) A/S under bankruptcy

On 24 January 2020 TCC filed its brief with the United States Court of Appeals seeking a reversal of the District Court's decision of 19 September 2019 holding that the defendant/shippers were not liable for any liquidated damages for their MQC shortfall because TCC did not complete the final 4 sailings under the Service Contracts. TCC argued that the District Court committed reversible error in several respects.

First, the District Court misconstrued the essential terms of the contract, particularly Terms 4 and 7, which when read together establish that TCC is entitled to recover its full liquidated damages for Appellees' MQC shortfall. TCC contended that the District Court's reliance on Terms 5 and 20 (restructuring and termination, respectively) to support its conclusion was in error because those Terms were inapplicable to TCC's situation.

Second, TCC argued that the District Court failed to understand Term 5's "ship evenly" requirement and its importance to the commercial context of Service Contracts. In this regard, TCC further argued that the District Court committed clear error in substituting "best efforts" and "good faith" standards in place of the Contracts' plain language "as far as possible" standard. This impermissibly reduced the applicable contractual and legal standard against which the shippers conduct (only shipping 32% of their MQC in the first 11 months of the contract) must be measured.

Third, TCC pointed out that the cornerstone of the District Court's decision, i.e., that the shippers MQC obligations were excused because the shippers could have tendered their full MQC on the final four sailings, was factually incorrect and resulted in a commercially absurd decision. It was factually incorrect because the remaining MQC was over 100,000 TEU and each vessel capacity was limited to 2,700 TEU. Moreover, given the 14 day advance booking requirements the evidence established that the shippers had no interest in trying to make up their MQC shortfall. The decision was commercially absurd because it was the gross nature of the breach that created the cash shortfall in TCC's operations that required cancellation of the final four voyages. Had the shipper's breach been less egregious, TCC would have had the cash flow to perform the final voyages and the shipper's most certainly would be liable for their MQC shortfall if the District Court's decisions stands. The District Court's interpretation of the Contract therefore leads to the commercially nonsensical result that the greater breach is a complete defense to the shippers while a lesser breach would have resulted in liability. The District Court's decision also results in an unconscionable forfeiture by the non-breaching party, TCC, and an unjustified windfall for the breaching shippers.

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(on behalf of Trustee Jørgen Hauschildt)