UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KLM CONSULTING LLC,

Plaintiff,

-v-

PANACEA SHIPPING COMPANY INC. and MAERSK AGENCY U.S.A., INC.,

Defendants.

CIVIL ACTION NO. 22 Civ. 5194 (PAE) (SLC)

REPORT AND RECOMMENDATION

SARAH L. CAVE, United States Magistrate Judge.

TO THE HONORABLE PAUL A. ENGELMAYER, United States District Judge:

I. INTRODUCTION

Plaintiff KLM Consulting LLC ("KLM") filed this action asserting, inter alia, breach of contract claims against Defendants Panacea Shipping Company Inc. ("Panacea") and Maersk Agency U.S.A., Inc. ("Maersk Agency") arising out of the misplaced and delayed delivery of a shipping container. (ECF No. 1-1 (the "Petition")). After Panacea failed to appear and defend in this action, the Clerk of the Court entered a certificate of default against it. (ECF No. 65). The Honorable Paul A. Engelmayer granted Maersk Agency's motion for summary judgment, entered default judgment against Panacea, and referred the matter to the undersigned for an inquest on damages. (ECF Nos. 81–83). See KLM Consulting LLC v. Panacea Shipping Co., No. 22 Civ. 5194 (PAE), 2023 WL 7924860 (S.D.N.Y. Nov. 16, 2023) ("KLM I"). In support of its request to be awarded over $250,000.00 in damages, KLM has submitted proposed findings of fact and conclusions of law and accompanying declarations and exhibits. (ECF Nos. 87 – 87-3 (the "Damages Submission").

For the reasons set forth below, the Court respectfully recommends that KLM be awarded judgment against Panacea as follows:

1. Compensatory damages in the amount of $500.00.

2. Pre-judgment interest on its compensatory damages (i.e., $500.00) at a rate of nine percent per year from May 22, 2021 through the date of entry of judgment.

3. Post-judgment interest pursuant to 28 U.S.C. § 1961.

II. BACKGROUND

A. Factual Background

The factual background of this action is set out in KLM I and is incorporated by reference. See 2023 WL 7924860, at *1–2. Unless otherwise indicated, the Court draws the facts relevant to the inquest from the Petition and the Damages Submission. (ECF Nos. 1-1; 87 – 87-3). Given Panacea's default, the Court accepts as true all well-pleaded factual allegations in the Petition, except as to damages. See City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 137 (2d Cir. 2011) ("It is an 'ancient common law axiom' that a defendant who defaults thereby admits all 'well-pleaded' factual allegations contained in the complaint.") (quoting Vt. Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241, 246 (2d Cir. 2004)); Jordan v. Books, No. 22 Civ. 6154 (PAE), 2023 WL 4363003, at *2 (S.D.N.Y. July 6, 2023).[1]

KLM is a Wyoming limited liability company whose operations include exporting products from Texas to Douala, Cameroon. (ECF Nos. 1-1 ¶ 2; 87 ¶ 1). In November 2020, KLM contacted Panacea to arrange the shipping of property (the "Property")[2] in a shipping container

[1] Internal citations and quotation marks are omitted from case citations unless otherwise indicated.
[2] The Property "included one Suzuki Grand Vitara, one Mercedes C300, and one lot of personal items such as furniture, home interior items, construction equipment, and shoes." KLM I, 2023 WL 7924860, at *1. (See ECF Nos. 1-1 ¶ 6; 87 ¶ 5).

(the "Container") to Douala. (ECF Nos. 1-1 ¶ 6; 87 ¶¶ 2–3). Panacea, acting as a freight forwarder, was to provide the Container, arrange the shipping paperwork, and coordinate shipping of the Container from the Port of Houston to Douala. (ECF No. 87 ¶ 3). KLM intended to sell the Property on arrival in Cameroon. (ECF Nos. 1-1 ¶ 7; 87 ¶ 10).

KLM packed the Container and transported it to Houston, where Panacea oversaw its loading onto a Maersk Agency ship. (ECF Nos. 1-1 ¶ 6; 87 ¶¶ 6–7). Panacea prepared and issued a bill of lading dated December 24, 2020 (the "Sea Waybill"), which listed Panacea as the Shipper, KLM's CEO, Landry Kammogne ("Mr. Kammogne"), as the Consignee, and Maersk Agency as signatory as agent for the carrier, Maersk A/S. (ECF Nos. 70-3; 87 ¶ 8). The Sea Waybill provided:

PARTICULARS FURNISHED BY SHIPPER

Kind of Packages; Description of goods; Marks and Numbers; Container No./Seal No.	Weight	Measurement
SHIPPED ON BOARD MAERSK KENSINGTON \ 047E ON 2020-11-30 AT Houston 1 Container Said to Contain 3 UNITS 2011 SUZUKI GVT VIN: JS3TE0D23B4100794 2009 MERCEDES C300 VIN: WDDGF54X69R042303 1 LOT PERSONAL ITEMS X20201121355945 MRKU2439486 40 DRY 9'6 3 UNITS 8641.000 KGS 55.0000 CBM Shipper Seal : 1014248 SHIPPER'S LOAD, STOW, WEIGHT AND COUNT FREIGHT PREPAID CY/CY	8641.000 KGS	55.0000 CBM
Above particulars as declared by Shipper, but without responsibility of or representation by Carrier.		

Freight & Charges	Rate	Unit	Currency	Prepaid	Collect

(ECF No. 70-3 at 2). The Sea Waybill also incorporated Maersk A/S's Terms of Carriage (the "Terms of Carriage"), which, inter alia, limited the liability of the carrier and the vessel to $500.00

"per Package or customary freight unit[.]" (ECF No. 70-4 ¶ 7.2(b); see ECF No. 70-3 at 2). The Sea Waybill did not, however, provide any valuation on the Property in the Container. (ECF No. 70-3 at 2). Panacea and Maersk Agency agreed to have the Container delivered to Cameroon no later than January 11, 2021. (ECF No. 1-1 ¶ 7).

Although the Container shipped as planned from Houston on November 30, 2020, Panacea "mixed up two container numbers" and labeled the Container for delivery not to Cameroon but to the United Arab Emirates ("UAE"), where Maersk A/S delivered the Container on January 5, 2021. (ECF No. 87 ¶ 12; see ECF No. 1-1 ¶ 7;). The Container remained in the UAE for over five months, until it was released on May 22, 2021, by which time the purchasers of the Property had cancelled their orders due to failure of timely delivery. (ECF Nos. 1-1 ¶¶ 8–10; 87 ¶ 13).

KLM claims to have lost over $250,000 in sales revenue on the Property, "unnecessary travel expenses" for two trips to Cameroon to secure the release of the Property, and "unnecessary demurrage and terminal fees[.]" (ECF No. 87 ¶¶ 14, 18; see ECF No. 1-1 ¶¶ 10–11). Mr. Kammogne also claims to have suffered increased blood pressure, stress, and hindrance to "his daily mobility and bodily activities." (ECF No. 1-1 ¶ 11). KLM seeks ten categories of damages as follows:

Category of Damages	**Amount**
1. Airfare, first trip to Cameroon	$2,200.00
2. Transportation, first trip to Cameroon	$1,000.00
3. Accommodation, first trip to Cameroon	$8,375.00
4. Accommodation, extended while waiting for shipment in Cameroon	$5,544.00
5. Lost Profits	$248,182.00
6. Demurrage charge (Maersk)	$900.00
7. Demurrage charge (Douala)	$1,000.00
8. Storage fees, Port of Douala	$1,950.00

9. Court costs	$650.30
10. Attorneys' fees	$8,000.00
TOTAL	**$277,801.30**

(ECF No. 87 ¶ 18 (the "Requested Damages"); see ECF No. 87-2 at 4).[3] KLM also requests pre- and post-judgment interest. (ECF No. 87 ¶ 18(k)).

B. Procedural Background

On March 4, 2022, KLM filed the Petition in Texas state court, asserting against Maersk Agency and Panacea claims for: (1) breach of contract (the "Contract Claim"); (2) negligence (the "Negligence Claim"); and (3) misrepresentation of goods and services in violation of section 17.505(a) of the Texas Deceptive Trade Practices Act (the "TDTPA Claim"). (ECF No. 1-1 ¶¶ 13–24). Despite KLM's invocation of Texas law and disavowal of any claim under the Carriage of Goods by Sea Act ("COGSA"), Maersk Agency timely removed the action to the United States District Court for the Southern District of Texas, on the ground that KLM's claims constituted a claim of delay under COGSA. (ECF No. 1; see ECF No. 1-1 ¶ 30). Panacea consented to the removal. (ECF Nos. 1 at 7; 1-7).

On June 7, 2022, the Honorable David Hittner (S.D. Tex.) denied KLM's motion to remand, rejecting KLM's purported disclaimer and finding that KLM's claims to recover damages caused by the delayed delivery of the Container "arise under COGSA" and therefore were removable. (ECF No. 13 at 2–4 ("KLM is seeking to recover damages caused by delay, which is governed by COGSA.")). On June 13, 2022, Judge Hittner granted Maersk Agency's motion to transfer the

[3] The "summary of expenses" attached to Mr. Kammogne's declaration totals $269,151, which differs from the Requested Damages by $8,650.30, representing the "court costs" and attorneys' fees included in the table above. (Compare ECF No. 87-2 at 4 with ECF No. 87 ¶ 18).

action because the Sea Waybill—the contract applicable to KLM's claims—contained a forum selection clause providing for exclusive venue in this District. (ECF Nos. 10, 14).

On November 16, 2022, Maersk Agency filed a third-party complaint against Panacea, seeking indemnification should KLM recover against Maersk Agency. (ECF No. 40 (the "Third-Party Complaint")). After Panacea failed to appear and respond to either the Petition or the Third-Party Complaint, Maersk Agency and KLM each moved for entry of default against Panacea. (ECF Nos. 55; 56). Following a conference on April 10, 2023, Judge Engelmayer denied KLM's request for leave to amend the Petition and set a schedule for Maersk Agency's anticipated motion for summary judgment (the "MSJ"). (ECF No. 60; see ECF min. entry Apr. 10, 2023). On April 24, 2023, Maersk Agency filed the MSJ, to which KLM did not respond. (ECF Nos. 69; 70). See KLM I, 2023 WL 7924860, at *3.

On April 17, 2023, the Clerk of the Court entered a certificate of default against Panacea based on its failure to respond to the Petition. (ECF No. 65 (the "Certificate")). On April 19, 2023, KLM filed a motion for default judgment against Panacea. (ECF No. 66 (the "Default Motion")). Judge Engelmayer directed KLM to file a memorandum of law in support of the Default Motion and set a deadline for Panacea to appear and oppose the Default Motion. (ECF No. 77). KLM timely filed a memorandum of law accompanied by an affidavit from its counsel and a summary of damages totaling $269,151.00. (ECF Nos. 78; 78-1; 78-2). Maersk Agency filed a response to the Default Motion in which it objected "to the proof for and quantum of damages" KLM sought. (ECF No. 80 at 1 (the "Objections")).

On November 16, 2023, Judge Engelmayer granted the MSJ, finding that KLM was "bound by the Sea Waybill," whose "plain terms . . . preclude[d] KLM from bringing suit against Maersk

Agency[,]" which acted only "as an agent of Maersk A/S, the Carrier." KLM I, 2023 WL 7924860, at *3–4.[4] The same day, Judge Engelmayer granted the Default Motion, finding that "proof of service ha[d] been filed," Panacea "ha[d] not appeared in this District, the time for doing so expired, and [it] failed to appear to contest entry of a default judgment," and, accordingly, entered default judgment for KLM against Panacea and referred the action for this damages inquest. (ECF Nos. 82 (the "Default Order"); 83).

On December 15, 2023, the Court entered an order directing: (1) KLM to file by January 16, 2024 "proposed findings of fact, supported by affidavit and/or other evidentiary material, and conclusions of law, supported by citations to controlling authority, concerning damages"; and (2) Panacea to respond to the Damages Submission by February 15, 2024. (ECF No. 85 (the "Scheduling Order")). In the Scheduling Order, the Court warned Panacea that its failure to timely respond or request an in-person hearing would result in the issuance of a report and recommendation on damages without an in-court hearing. (Id.) On December 18, 2023, KLM filed proof of service of the Scheduling Order on Panacea. (ECF No. 86). On January 16, 2024, KLM filed the Damages Submission, which it served on Panacea via ECF. (ECF Nos. 87; 87-1; 87-2; 87-3; see ECF No. 87 at 8). To date, Panacea has not responded to the Damages Submission or contacted the Court.

[4] In granting the MSJ, Judge Engelmayer deemed moot Maersk Agency's Objections, the Third-Party Complaint, and Maersk Agency's request for entry of default against Panacea. KLM I, 2023 WL 7924860, at *2 n.3, *4 n.4.

III. LEGAL STANDARDS

A. Obtaining a Default Judgment

A party seeking a default judgment must follow the two-step procedure set forth in Federal Rule of Civil Procedure 55. See Bricklayers & Allied Craftworkers Loc. 2 v. Moulton Masonry & Constr., LLC, 779 F.3d 182, 186–87 (2d Cir. 2015); Fed. R. Civ. P. 55. First, under Rule 55(a), where a party has failed to plead or otherwise defend in an action, the Clerk of the Court must enter a certificate of default. See Fed. R. Civ. P. 55(a). Second, after entry of the default, if the party still fails to appear or move to set aside the default, the Court may enter a default judgment. See Fed. R. Civ. P. 55(b). Whether to enter a default judgment lies in the "sound discretion" of the trial court. Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 95 (2d Cir. 1993). Because a default judgment is an "extreme sanction" that courts are to use as a tool of last resort, Meehan v. Snow, 652 F.2d 274, 277 (2d Cir. 1981), the district court must "carefully balance the concern of expeditiously adjudicating cases, on the one hand, against the responsibility of giving litigants a chance to be heard, on the other." Fermin v. Las Delicias Peruanas Rest., Inc., 93 F. Supp. 3d 19, 29 (E.D.N.Y. Mar. 19, 2015) (citing Enron, 10 F.3d at 96).

In considering whether to enter a default judgment, district courts are "guided by the same factors [that] apply to a motion to set aside entry of a default." First Mercury Ins. Co. v. Schnabel Roofing of Long Is., Inc., No. 10 Civ. 4398 (JS) (AKT), 2011 WL 883757, at *1 (E.D.N.Y. Mar. 11, 2011). "These factors include: (1) whether the default was willful; (2) whether ignoring the default would prejudice the opposing party; and (3) whether the defaulting party has presented a meritorious defense." Avail 1 LLC v. Latief, No. 17 Civ. 5841 (FB) (VMS), 2020 WL 5633869, at *4 (E.D.N.Y. Aug. 14, 2020), adopted by, 2020 WL 5633099 (E.D.N.Y. Sept. 21, 2020)

(citing Swarna v. Al-Awadi, 622 F.3d 123, 142 (2d Cir. 2010)); see Enron, 10 F.3d at 96 (noting that "[a]lthough the factors examined in deciding whether to set aside a default or a default judgment are the same, courts apply the factors more rigorously in the case of a default judgment because the concepts of finality and litigation repose are more deeply implicated in the latter action").

B. Determining Liability

A defendant's default is deemed "a concession of all well-pleaded allegations of liability," Rovio Ent., Ltd. v. Allstar Vending, Inc., 97 F. Supp. 3d 536, 545 (S.D.N.Y. 2015), but a default "only establishes a defendant's liability if those allegations are sufficient to state a cause of action against the defendants." Gesualdi v. Quadrozzi Equip. Leasing Corp., 629 F. App'x 111, 113 (2d Cir. 2015) (summary order). The Court must determine "whether the allegations in [the] complaint establish the defendants' liability as a matter of law." Id.; see Henry v. Oluwole, No. 21-2468, 2024 WL 3404958, at *6 (2d Cir. July 15, 2024) ("Only after the district court is convinced that the facts meet the elements of the relevant cause of action—whether those facts are established by well-pleaded allegations or proven by admissible evidence—may the district court enter a default judgment."). If the Court finds that the well-pleaded allegations establish liability, the Court then analyzes "whether [the] plaintiff has provided adequate support for the relief it seeks." Gucci Am., Inc. v. Tyrrell-Miller, 678 F. Supp. 2d 117, 119 (S.D.N.Y. 2008). If, however, the Court finds that the complaint fails to state a claim on which relief may be granted, the Court may not award damages, "even if the post-default inquest submissions supply the missing information." Perez v. 50 Food Corp., No. 17 Civ. 7837 (AT) (BCM), 2019 WL 7403983, at *4 (S.D.N.Y. Dec. 4, 2019), adopted by, 2020 WL 30344 (S.D.N.Y. Jan. 2, 2020).

C. Determining Damages

Once liability has been established, the Court must "conduct an inquiry in order to ascertain the amount of damages with reasonable certainty." Am. Jewish Comm. v. Berman, No. 15 Civ. 5983 (LAK) (JLC), 2016 WL 3365313, at *3 (S.D.N.Y. June 15, 2016), adopted by, 2016 WL 4532201 (S.D.N.Y. Aug. 29, 2016). A plaintiff "bears the burden of establishing [its] entitlement to recovery and thus must substantiate [its] claim with evidence to prove the extent of damages." Dunn v. Advanced Credit Recovery Inc., No. 11 Civ. 4023 (PAE) (JLC), 2012 WL 676350, at *2 (S.D.N.Y. Mar. 1, 2012), adopted by, 2012 WL 1114335 (S.D.N.Y. Apr. 3, 2012). The plaintiff must demonstrate that the compensation it seeks "'relate[s] to the damages that naturally flow from the injuries pleaded.'" Am. Jewish Comm., 2016 WL 3365313, at *3 (quoting Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 159 (2d Cir. 1992)).

The evidence the plaintiff submits must be admissible. Poulos v. City of New York, No. 14 Civ. 3023 (LTS) (BCM), 2018 WL 3750508, at *2 (S.D.N.Y. July 13, 2018), adopted by, 2018 WL 3745661 (S.D.N.Y. Aug. 6, 2018); see House v. Kent Worldwide Mach. Works, Inc., 359 F. App'x 206, 207 (2d Cir. 2010) (summary order) ("[D]amages must be based on admissible evidence."). If the documents the plaintiff has submitted provide a "sufficient basis from which to evaluate the fairness of" the requested damages, the Court need not conduct an evidentiary hearing. Fustok v. ContiCommodity Servs. Inc., 873 F.2d 38, 40 (2d Cir. 1989); see Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., 109 F.3d 105, 111 (2d Cir. 1997) (noting that a court may determine appropriate damages based on affidavits and documentary evidence "as long as [the court has] ensured that there [is] a basis for the damages specified in the default judgment").

IV. DISCUSSION

A. Default Judgment

In accordance with the two-step process in Rule 55, the Clerk of the Court entered the Certificate and Judge Engelmayer entered the Default Order. (ECF Nos. 65; 82). The Court's analysis of the relevant factors set forth above reveals first, that the Court can infer from Panacea's failure to submit any written response to KLM's Default Motion or Damages Submission, after having been properly served, that its default was willful. (ECF Nos. 34; 35; 49; 56-1; 64; 77; 79; 86; 87 at 8). See Indymac Bank, F.S.B. v. Nat'l Settlement Agency, Inc., No. 07 Civ. 6865 (LTS) (GWG), 2007 WL 4468652, at *1 (S.D.N.Y. Dec. 20, 2007) (finding that a failure to respond to a complaint and subsequent motion for default judgment "indicate[s] willful conduct"). Second, delaying entry of a default judgment might prejudice KLM, "as there are no additional steps available to secure relief in this Court." Bridge Oil Ltd. v. Emerald Reefer Lines, Inc., No. 06 Civ. 14226 (RLC) (RLE), 2008 WL 5560868, at *2 (S.D.N.Y. Oct. 27, 2008). Third, "having failed to file an answer or otherwise participate in the litigation, [Panacea] cannot establish a meritorious defense." Bisnow LLC v. Lopez-Pierre, No. 20 Civ. 3441 (PAE) (SLC), 2022 WL 17540573, at *8 (S.D.N.Y. Nov. 2, 2022), adopted by, 2022 WL 17540349 (S.D.N.Y. Dec. 5, 2022).

Accordingly, because the requirements of Rule 55 have been satisfied and the relevant factors weigh in KLM's favor, the Court finds that entry of a default judgment is appropriate in this action.

B. Liability

1. Jurisdiction and Venue

As a threshold matter, this Court has subject matter jurisdiction over this action. As Judge Hittner found, KLM's claims arise under a federal statute—COGSA—giving rise to the Court's subject matter jurisdiction under 28 U.S.C. § 1331. (See ECF No. 13 at 3–4).

The Court also has personal jurisdiction over Panacea. Personal jurisdiction is "a necessary prerequisite to entry of a default judgment." Reilly v. Plot Commerce, No. 15 Civ. 5118 (PAE) (BCM), 2016 WL 6837895, at *2 (S.D.N.Y. Oct. 31, 2016), adopted by, 2016 U.S. Dist. LEXIS 160884 (S.D.N.Y. Nov. 21, 2016). Panacea was a party to the Sea Waybill, which contained a forum selection clause providing for exclusive jurisdiction in this District, consented to removal to this District, and was properly served with the original Petition. (ECF Nos. 1-1 ¶¶ 6, 13–16; 1-4 at 16 ¶ 26; 1-7; 13; 56-1 ¶¶ 4–5). See KLM I, 2023 WL 7924860, at *2.

Finally, as Judge Hittner previously found, venue is proper in this District because the forum selection clause in the Sea Waybill was mandatory and enforceable, and "therefore sufficient to justify transfer" of the action to this District. (ECF No. 14 at 4).

2. Breach of Contract Claim

To state a claim for breach of contract under New York law,[5] a plaintiff must allege four elements: "(1) the existence of a contract; (2) the performance of that contract by one party;

[5] Although it invoked Texas law in the Petition (see ECF No. 1-1 ¶ 14), in its Damages Submission, KLM exclusively argues for damages under New York law. (ECF No. 87 ¶ 19). KLM's invocation of New York law is "'sufficient to establish the applicable choice of law.'" Horowitz v. Spark Energy, Inc., No. 19 Civ. 7534 (PGG) (DF), 2020 WL 6561600, at *7 n.5 (S.D.N.Y. July 31, 2020) (quoting Arch Ins. Co. v. Precision Stone, Inc., 584 F.3d 33, 39 (2d Cir. 2009)), adopted by, 2020 WL 4917180 (S.D.N.Y. Aug. 21, 2020); see

(3) the breach of that contract by the other party; and (4) damages." LG Cap. Funding, LLC v. Energy Edge Techs. Corp., No. 17 Civ. 9021 (AKH), 2018 WL 4278344, at *1 (S.D.N.Y. Aug. 28, 2018); see Lenard v. Design Studio, 889 F. Supp. 2d 518, 528 (S.D.N.Y. 2012) (same).[6]

The Court finds that KLM has adequately established each element of its Contract Claim: KLM and Panacea were party to the Sea Waybill, pursuant to which Panacea was to arrange for the Container to be shipped and delivered to Cameroon, but due to Panacea's mistake, the Container was delivered to the UAE, resulting in damages to KLM. (ECF No. 1-1 ¶¶ 6–16; 87 ¶¶ 2–18). See Freightliner Custom Chassis Corp. v. Landstar Ranger Inc., No. 20 Civ. 1390 (FJS) (CFH), 2022 WL 252390, at *5 (N.D.N.Y. Jan. 27, 2022) (finding that plaintiff adequately alleged breach of contract claim against freight forwarder); see also Burns v. Scott, 635 F. Supp. 3d 258, 278 (S.D.N.Y. 2022) (adopting report and recommendation finding plaintiff's allegations sufficient to establish breach of contract claim on defendant's default). Panacea's "'default is an admission of all well-pleaded allegations against [it].'" LG Cap. Funding, 2018 WL 4278344, at *1 (quoting Vt. Teddy Bear Co., 373 F.3d at 246). Accordingly, Panacea is liable to KLM on the Contract Claim.

3. KLM's Other Claims

Because KLM has established Panacea's liability as to the Contract Claim and "the entirety of the relief sought by [KLM] can be awarded under [this] cause[] of action," the Court "need not

also Walker v. Thompson, 404 F. Supp. 3d 819, 823 n.3 (S.D.N.Y. 2019) ("Declining to engage in a choice of law analysis is especially appropriate here, where the parties have failed to brief the question and applied New York law without analysis.").

[6] KLM filed this action on March 4, 2022 (see ECF Nos. 1 at 1; 1-1), approximately 14 months after the Container was mistakenly delivered to the UAE rather than Cameroon, (see ECF No. 1-1 ¶ 12), and thus well within New York's six-year statute of limitations for breach of contract claims. See Clarex Ltd. v. Natixis Sec. Ams. LLC, 988 F. Supp. 2d 381, 388 (S.D.N.Y. 2013) (explaining that statute of limitations for breach of contract claim begins to run on the date of breach).

assess" Panacea's liability under the Negligence and TDTPA Claims. Haydel v. Exponential Wealth Inc., No. 21 Civ. 10604 (JGK) (SLC), 2023 WL 8438475, at *9 (S.D.N.Y. Sept. 8, 2023), adopted by, 2023 WL 8439070 (S.D.N.Y. Dec. 5, 2023); see Label Health, LLC v. Haywire Consulting, Inc., No. 20 Civ. 5640 (VSB) (SDA), 2021 WL 2269885, at *4 n.8 (S.D.N.Y. Apr. 30, 2021) ("Since Plaintiff has obtained complete monetary relief against Defendant Haywire on Plaintiff's breach of contract claim, the Court need not consider the fraudulent inducement claim insofar as it is pled against Haywire."), adopted by, 2021 WL 2269819 (S.D.N.Y. June 3, 2021); PAPS v. GME Ent., Inc., No. 09 Civ. 2508 (MHD), 2012 WL 5873584, at *7 (S.D.N.Y. Nov. 19, 2012) (where plaintiff sought single amount of damages on multiple theories, one of which he satisfied, declining to "consider his alternative legal theories"); Dorn v. Berson, No. 09 Civ. 2717 (ADS) (AKT), 2012 WL 1004907, at *6 (E.D.N.Y. Mar. 1, 2012) (declining to "analyze the other theories for which Plaintiff seeks a lesser amount of recovery" where defendant was liable on claim that "yield[ed] the highest recovery" on default judgment), adopted by, 2012 WL 1004905 (E.D.N.Y. Mar. 23, 2012); cf. Indu Craft, Inc. v. Bank of Baroda, 47 F.3d 490, 497 (2d Cir. 1995) ("A plaintiff seeking compensation for the same injury under different legal theories is of course only entitled to one recovery.").

Accordingly, the Court does not analyze the elements of liability for the Negligence and TDTPA Claims.[7]

[7] KLM did not even mention—much less address—the Negligence or TDTPA Claims in its Default Motion or Damages Submission. (See ECF Nos. 66; 77; 87). This failure is a further reason not to analyze these claims. See Haydel, 2023 WL 8438475, at *7–8 (the Court "limit[ing] its analysis to the claims and relief discussed in the [default] Motion and Damages Submission" and deeming abandoned all other claims that the plaintiff failed to address).

C. Damages Calculations

No party has requested a hearing on damages and Panacea has not submitted any written materials. Therefore, the Court has conducted its inquest based solely on the materials in KLM's Damages Submission. See Cement & Concrete Workers Dist. Council Welfare Fund v. Metro Found. Contractors, Inc., 699 F.3d 230, 234 (2d Cir. 2012) ("[A] district court may determine there is sufficient evidence either based upon evidence presented at a hearing or upon a review of detailed affidavits and documentary evidence."); Perez, 2019 WL 7403983, at *3; Fed. R. Civ. P. 55(b)(2).

1. Evidentiary Basis

The Court must assess whether KLM has provided sufficient evidence to support its Requested Damages. See Transatlantic Marine, 109 F.3d at 111; Bleecker v. Zetian Sys., Inc., No. 12 Civ. 2151 (DLC), 2013 WL 5951162, at *6 (S.D.N.Y. Nov. 1, 2013). As set forth above, KLM's Requested Damages fall into ten categories. (See § II.A, supra). The Court considers whether KLM's evidentiary proof is sufficient as to each category.

The first category of damages KLM seeks is the airfare for its first trip to Cameroon. (ECF No. 87 ¶ 18(a)). In support of this category, KLM has provided a copy of the flight receipt for a roundtrip flight from Dallas, Texas to Cameroon from April 15, 2021 to May 7, 2021. (ECF No. 87-2 at 6–11). The receipt, however, reflects airfare of $1,327.75, not $2,200.00 as KLM includes in the Requested Damages. (See ECF Nos. 87 ¶ 18(a); 87-2 at 4, 8). KLM does not explain the reason for claiming that the airfare for the first trip to Cameroon was $2,200.00, nor can the Court otherwise discern a basis for that figure in the Damages Submission. Accordingly, the Court

finds that KLM has provided evidentiary support for the first category of damages only in the amount of $1,327.75.

The second category of damages KLM seeks is "[t]ransportation" for its first trip to Cameroon in the amount of $1,000.00. (ECF No. 87 ¶ 18(b)). KLM's Damages Submission does not include any description of these "[t]ransportation" costs, nor any receipts reflecting what might conceivably be interpreted as transportation costs in the amount of $1,000.00. The Court finds that KLM has not provided evidentiary support for its second category of damages, which therefore are not recoverable. See Credit Lyonnais Sec. (USA), Inc. v. Alcantara, 183 F.3d 151, 155 (2d Cir. 1999) (explaining that district court may not award default damages for which there is insufficient evidentiary support); Geographic Location Innovations LLC v. Bell & Ross, Inc., No. 21 Civ. 5535 (KPF) (JLC), 2022 WL 7748172, at *3–4 (S.D.N.Y. Oct. 11, 2022) (recommending that no damages be awarded where plaintiff failed to provide adequate evidentiary basis); DB Structured Prods., Inc. v. Imperial Lending LLC, No. 07 Civ. 4105 (GBD) (THK), 2011 WL 5531528, at *2 (S.D.N.Y. Nov. 14, 2011) (declining to award damages for which plaintiff failed to provide sufficient evidence).

The third category of damages KLM seeks is the accommodations during the first trip to Cameroon. (ECF No. 87 ¶ 18(c)). In support of this category, KLM has provided what appears to be a receipt (in French) for a hotel in Douala for Mr. Kammogne from April 17, 2021 to June 12, 2021, a period of 57 days, in the amount of 6,403,950 Cameroon Francs. (ECF No. 87-2 at 26). Although KLM has provided neither a translation of the receipt nor a currency conversion, using publicly available information, the Court calculates that 6,403,950 Cameroon Francs equates to

$11,697.35 (US).[8] As noted above, however, the airfare receipt reflects that Mr. Kammogne was in Douala from April 16, 2021 to May 7, 2021, a period of 21 days. (ECF No. 87-2 at 4–7). Using a daily rate of $205.22 ($11,697.35 / 57), accommodations for the first trip to Cameroon totaled $4,309.62 ($205.22 * 21). The Court therefore finds that KLM has provided evidentiary support for accommodations for the first trip to Cameroon in the amount of $4,309.62.

The fourth category of damages KLM seeks are for accommodations "extended while waiting for shipment in Cameroon[.]" (ECF No. 87 ¶ 18(d)). As noted above, however, the airfare receipt reflects that Mr. Kammogne departed Cameroon on May 7, 2021 (ECF No. 87-2 at 6–7), and KLM admits that the Container was released from the UAE on May 22, 2021, by which time "all the purchasers for the Property had cancelled their orders[.]" (ECF No. 1-1 ¶ 10). The Damages Submission does not contain an airfare receipt showing a date on which Mr. Kammogne returned to Cameroon after May 7, 2021.[9] Mr. Kammogne testified that he arrived in Douala on or about May 19, 2021 and returned to Texas on June 12, 2021, a period of 24 days. (ECF No. 87-1 at 15–16). Using the same daily rate above, $205.22, the accommodations for this period amount to $4,925.28 ($205.22 * 24). The Court therefore finds that KLM has provided evidentiary support for accommodations the 24 days from May 19, 2021 to June 12, 2021, while he was waiting for the Container to arrive in Cameroon of $4,925.28 (not $5,544.00 as included in the Requested Damages). (See ECF No. 87 ¶ 18(d)).

[8] As of April 17, 2021, $1.00 (US) equated to 547.47 Cameroon Francs. See EXCHANGE RATES, USD-XAF Exchange Rate History, https://www.exchangerates.org.uk/USD-XAF-exchange-rate-history.html (last visited July 30, 2024). 6,403,950 / 547.47 = 11,697.35.

[9] The Damages Submission includes an itinerary for a roundtrip flight from Dallas to Douala on July 12, 2021 to August 2, 2021, and while the receipt appears to reflect that the cost of this flight was $400.00 (US), KLM has not explained how this trip was attributable to Panacea. (ECF No. 87-2 at 12–13).

The fifth category of damages KLM seeks are "lost profits" in the amount of $248,182.00. (ECF No. 87 ¶ 18(e)). In support of this category, KLM provides two letters dated in February 2021—again in French without translation—in which customers appear to be cancelling orders for the Property due to delayed delivery and providing the values of the orders in Cameroon Francs. (ECF No. 87-2 at 27–28). In the absence of a currency conversion from KLM, the Court has computed the total amount of the cancelled orders to be $252,241.35.[10] The Court finds that KLM has provided evidentiary support for lost profits damages in this amount.

The sixth and seventh category of damages KLM seeks are demurrage charges for Maersk and at the Port of Douala in the amounts of $900.00 and $1,000.00, respectively. (ECF No. 87 ¶¶ 18(f)–(g)). Demurrage is "extended freight." Ocean Transport Line, Inc. v. Am. Philippine Fiber Indus., Inc., 743 F.2d 85, 92 (2d Cir. 1984). As the Second Circuit has explained, "one who undertakes to guaranty the costs of ocean freight is secondarily liable for any demurrage incurred." Id. In support of this category, KLM has submitted—again in French and without currency conversion—three invoices from Maersk in the amounts of 27,666.00 Cameroon Francs, 13,833.00 Cameroon Francs, and 195,570.00 Cameroon Francs. (ECF No. 87-2 at 15–20). The Court converts these amounts to $50.64, $27.44, and $362.19, respectively, or a total of $440.27.[11]

[10] The first order was for (i) tiles valued at 50,000,000.00 Cameroon Francs, or $92,358.28 (US), and (ii) shoes valued at 40,000,000.00 Cameroon Francs, or $73,886.62 (US), using a conversion rate on February 10, 2021 of $1.00 US to 541.37 Cameroon Francs. (ECF No. 87-2 at 27). The second order was for (i) office supplies valued at 25,000,000.00 Cameroon Francs, or $46,234.65 (US), and (ii) two vehicles valued at 11,000,000.00 and 10,500,000.00 Cameroon Francs, or $20,343.25 (US) and $19,418.55 (US), respectively, using a conversion rate on February 15, 2021 of $1.00 US to 540.72 Cameroon Francs. (Id. at 28). The sum of the first and second orders is $252,241.35. See EXCHANGE RATES, USD-XAF Exchange Rate History, https://www.exchangerates.org.uk/USD-XAF-exchange-rate-history.html (last visited July 30, 2024).

[11] The currency conversion rates on the dates in the three invoices—May 5, 2021; May 6, 2021; and May 11, 2021—were $1.00 (US) to 546.36 Cameroon Francs, 543.81 Cameroon Francs, and 539.96 Cameroon

The eighth category of damages KLM seeks are storage charges for the Port of Douala in the amount of $1,950.00. (ECF No. 87 ¶ 18(h)). Although KLM cites Mr. Kammogne's declaration as support for this category (see id. n.14), the Court discerns no receipt or other documentary support for this amount. The Court therefore finds that KLM has not provided evidentiary support for storage charges.

The ninth category of damages KLM seeks are court costs of $650.30. (ECF No. 87 ¶ 18(i)). KLM provides no receipts or other evidentiary support for its claimed court costs, and therefore has not established its entitlement to these costs. See Galindo v. Yummy Foods Deli Corp., No. 21 Civ. 45 (JGLC) (SLC), 2024 WL 947283, at *18 (S.D.N.Y. Jan. 17, 2024) (declining to award costs for which plaintiffs did not provide invoices), adopted by, 2024 WL 515245 (S.D.N.Y. Feb. 9, 2024); Victor v. Sam's Deli Grocery Corp., No. 19 Civ. 2965 (SLC), 2022 WL 3656312, at *16 (S.D.N.Y. Aug. 25, 2022) (declining to award service costs for which plaintiffs did not provide invoices); Khotovitskaya v. Shimunov, No. 18 Civ. 7303 (NGG) (CLP), 2021 WL 868781, at *2 (E.D.N.Y. Mar. 9, 2021) (denying costs where party failed to submit documentation substantiating costs).

The tenth and final category of damages KLM seeks are attorneys' fees in the amount of $8,000.00. (ECF No. 87 ¶ 18(j)). In support of its requested attorneys' fees, KLM provides declaration from its counsel attesting that KLM "has paid" that amount, but has not provided invoices or contemporaneous time records reflecting this amount. (ECF No. 87-3).

As an initial matter, the Court notes that "[t]here is no [] right to an award of attorney's fees on an ordinary claim of breach of contract." U.S. Naval Inst. v. Charter Commc'ns, Inc., 936

Francs, respectively. (ECF No. 87-2 at 15–20). See EXCHANGE RATES, USD-XAF Exchange Rate History, https://www.exchangerates.org.uk/USD-XAF-exchange-rate-history.html (last visited July 30, 2024).

F.2d 692, 698 (2d Cir. 1991). Similarly, "'[t]he general rule in admiralty is that attorneys' fees are not recoverable by the prevailing party.'" Saray Dokum v. Madeni Aksam Sanayi Turizm A.S., No. 17 Civ. 7495 (JPC) (GWG), 2023 WL 5164211, at *16 (S.D.N.Y. Aug. 11, 2023) (quoting Genesis Marine, L.L.C. of Del. v. Hornbeck Offshore Servs., L.L.C., 951 F.3d 629, 631 (5th Cir. 2020)).[12] Here, KLM has offered no legal basis—either in the Default Motion or the Damages Submission—to support its request for attorneys' fees. (See ECF Nos. 66; 77; 87).

In any event, "[w]hether an attorneys' fee award is reasonable is within the discretion of the court." Victor, 2022 WL 3656312, at *13. To determine a "presumptively reasonable fee," the Court multiples the hours counsel reasonably spent on the litigation by a reasonable hourly rate. Millea v. Metro-N. R. Co., 658 F.3d 154, 166 (2d Cir. 2011). The party seeking attorneys' fees "bears the burden of showing the reasonableness of the fee by providing definite information regarding the way in which time was spent." Major League Baseball Prop., Inc. v. Corporacion de Television y Microonda Rafa, S.A., No. 19 Civ. 8669 (MKV) (GWG), 2021 WL 56904, at *4 (S.D.N.Y. Jan. 7, 2021); see Scott v. City of N.Y., 643 F.3d 56, 57–59 (2d Cir. 2011) (per curiam) (holding that an application for attorneys' fees in a case arising under federal law must normally be supported by contemporaneous time records); Cabrera v. Schafer, No. 12 Civ. 6323 (ADS) (AKT), 2017 WL 9512409, at *6 (E.D.N.Y. Feb. 17, 2017) (explaining that, "even in instances where

[12] The Court notes that, "[i]n keeping with the basic tenets of contract law, 'attorney fees and costs may be awarded where . . . the bill of lading provides for the award of attorney fees.'" OOCL (USA) Inc. v. Transco Shipping Corp., No. 13 Civ. 5418(RJS), 2015 WL 9460565, at *7 (S.D.N.Y. Dec. 23, 2015) (citing Maersk Inc. v. Alan Mktg., Inc., No. 97 Civ. 3495 (HB), 1998 WL 167323, at *3 (S.D.N.Y. Apr. 10, 1998)). Here, however, KLM has not identified any provision of the Sea Waybill entitling it to attorneys' fees. To the contrary, the Terms of Carriage required KLM to "indemnify the Carrier against all claims, liabilities, losses, damages, costs, delays, attorney fees and/or expenses caused to the Carrier, his Sub Contractors, servants or agents or to any other cargo or to the owner of such cargo during the Carriage arising or resulting from any impediment, delay, suspension, stoppage or interference whatsoever in the Carriage of the Goods." (ECF No. 70-4 ¶ 8.3).

a court excuses the mandate to provide contemporaneous records, 'the burden is on the attorney claiming such fees to keep and present records from which the court may determine the nature of the work done, the need for it, and the amount of time reasonably required'") (quoting Farb v. Baldwin Union Free Sch. Dist., No. 05 Civ. 596 (JS) (ETB), 2011 WL 4465051, at *10 (E.D.N.Y. Sept. 26, 2011)), adopted by, 2017 WL 1162183 (E.D.N.Y. Mar. 27, 2017). KLM's failure to provide contemporaneous billing records or other documentation reflecting its counsel's hourly rates and time expended prevents the Court from performing the exercise required to determine whether the requested fees of $8,000.00 are reasonable. Accordingly, the Court finds that KLM has failed to provide sufficient evidentiary support for its request for an award of attorneys' fees. See PriMed Pharm. LLC v. Starr Indem. & Liab. Co., No. 21 Civ. 1025 (SLC), 2024 WL 283463, at *5 (S.D.N.Y. Jan. 25, 2024) (denying motion for attorneys' fees where plaintiff "failed to submit sufficient billing documentation that would allow the Court to assess the reasonableness of" the requested fees).

In summary, the Court finds that KLM has provided adequate evidentiary support only for the first, third, fourth, fifth, and sixth categories in the following amounts:

Category of Damages	**Requested Amount**	**Amount Supported by Evidence**
1. Airfare, first trip to Cameroon	$2,200.00	$1,327.75
2. Transportation, first trip to Cameroon	$1,000.00	$0.00
3. Accommodation, first trip to Cameroon	$8,375.00	$4,309.62
4. Accommodation, extended while waiting for shipment in Cameroon	$5,544.00	$4,925.28
5. Lost Profits	$248,182.00	$252,241.35
6. Demurrage charge (Maersk)	$900.00	$440.27
7. Demurrage charge (Douala)	$1,000.00	$0.00
8. Storage fees, Port of Douala	$1,950.00	$0.00
9. Court costs	$650.30	$0.00

10. Attorneys' fees	$8,000.00	$0.00
TOTAL	**$277,801.30**	**$263,244.27**

2. Limitation of Liability

The Court's finding that KLM has provided adequate evidentiary support for five categories of damages does not, however, equate to a finding that these damages should be awarded. See, e.g., Am. Jewish Comm., 2016 WL 3365313, at *3 (explaining that plaintiff must demonstrate that requested damages "naturally flow from the injuries pleaded"). As noted above, Judge Hittner held that KLM's Contract Claim against Panacea—which is based on the Sea Waybill—"arise[s] under COGSA." (ECF No. 13 at 4). The Court therefore considers the quantum of damages to which KLM is entitled under COGSA and the Sea Waybill.

a. Legal Standard

COGSA applies "to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade." 46 U.S.C. § 30701, statutory notes § 13; see Goga v. Zim Am. Integrated Shipping Serv. Co., No. 06 Civ. 5783 (LAK) (GWG), 2008 WL 2875059, *5 (S.D.N.Y. July 25, 2008).[13] COGSA requires that "every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of" COGSA. Goga, 2008 WL 2875059, *5; see 46 U.S.C. § 30701, statutory notes § 13. Any bill of lading must also show "[e]ither the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper." 46 U.S.C. § 30701, statutory notes § 3(b).

[13] COGSA was previously codified at 46 U.S.C. §§ 1300–15. "In 2006, Congress recodified Title 46 of the U.S. Code, and COGSA was uncodified but reprinted at 46 U.S.C. § 30701, historical and statutory notes." Caddell Constr. Co. (DE), LLC v. Danmar Lines Ltd., No. 18 Civ. 2900 (LLS), 2018 WL 6726549, at *3 n.1 (S.D.N.Y. Dec. 20, 2018); see Pub. L. No. 109-301; 120 Stat. 1485 (2006).

"Section 4(5) of COGSA dramatically limits the liability of carriers and ships for damage to the goods they transport." Marisa v. M/V CMA CGM LA TOUR, No. 05 Civ. 2962 (NRB), 2006 WL 2521269, at *2 (S.D.N.Y. Aug. 29, 2006). Section 4(5) of COGSA provides, in relevant part:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package . . . , or in case of goods not shipped in packages, per customary freight unit, . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

46 U.S.C. § 30701, statutory notes § 4(5). This provision means that, if a shipper seeks "to protect its interest in the cargo beyond the package limitation amount, it ought to . . . contract[] for that right." Thyssen, Inc. v. S/S Eurounity, 21 F.3d 533, 541 (2d Cir. 1994); accord Aluminios Pozuelo Ltd. v. S.S. Nagivator, 407 F.2d 152, 155–56 (2d Cir. 1968) ("If shippers find the $500 per package limitation outdated because of inflationary trends and technological developments, the statute provides that they can obtain at their option full coverage merely by declaring the nature and value of the goods in the bill of lading and, where necessary, by paying a higher tariff."). "Under the fair opportunity doctrine, . . . the COGSA limit is inapplicable if the shipper does not have a fair opportunity to declare higher value and pay an excess charge for additional protection." Nippon Fire & Marine Ins. Co. v. M/V Tourcoing, 167 F.3d 99, 101 (2d Cir. 1999) (per curiam). "[L]anguage on the back of the [bill of lading] incorporating COGSA's provision and the space for declaring excess value on the front are sufficient notice of the limitation of liability and the means of avoiding it." Gen'l Elec. Co. v. MV Nedlloyd, 817 F.2d 1022, 1029 (2d Cir. 1987).

As the Second Circuit has explained, the term "package" under COGSA means "a class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal

or completely enclose the goods." Aluminios Pozuelo, 407 F.2d at 155. "Beyond this definition, the question of what constitutes a COGSA package is largely a matter of contract interpretation[,]" requiring the Court to "look to the agreement between the parties as set forth in the bill of lading." D.W.E. Corp. v. T.F.L. Freedom, 704 F. Supp. 380, 383 (S.D.N.Y. 1989) (Leval, J.) (collecting cases). "Entries on the bill of lading evidence the intent of the parties" and may be binding "even when the contents of the shipment diverge from the description on the bill." Id.; see Mitsui & Co. v. Am. Exp. Lines, Inc., 636 F.2d 807, 823 (2d Cir. 1981) (Friendly, J.) (holding that shipper was bound by false description of container's contents on bill of lading).

Where a shipping container is involved, the container may not constitute a COGSA package where the bill of lading discloses the "contents and the number of packages or units[.]" Mitsui & Co., 636 F.2d at 821. "[W]hen the bill of lading discloses not only the number of containers but the number of cartons within each, the cartons, not the containers, will be treated as COGSA packages." D.W.E. Corp., 704 F. Supp. at 383. On the other hand, while the Second Circuit has, in the past, been "reluctant to treat a container as a package, . . . nothing precludes parties from agreeing in the bill of lading that the container shall constitute a COGSA package." Id. (collecting cases). Thus, "when the bill of lading expressly refers to the container as one package, or when the parties fail to specify an alternative measure of the 'packages' shipped, the courts have no choice but to respect their express or implied understanding and to treat the container as a single package." Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdam, 759 F.2d 1006, 1015 (2d Cir. 1985). Furthermore, a container holding "unpacked household goods that would, absent a container, have been shipped in a crate of comparable size" has also been

recognized as a COGSA package. Id.; see Rosenbruch v. Am. Exp. Isbrandtsen Lines, Inc., 543 F.2d 967, 969–70 (2d Cir. 1976).

b. Application

Here, the Sea Waybill incorporated COGSA's provisions and the $500.00 limitation of liability. (ECF Nos. 70-3; 70-4 ¶ 7.2(b)). It also included space to declare excess value, but KLM did not declare any value, let alone a value higher than $500.00, for the Property in the Container. (ECF No. 70-3). Instead, KLM simply wrote: "1 Container Said to Contain 3 UNITS." (Id.) Nor does the Sea Waybill indicate that KLM paid anything other than a lump sum freight charge for transportation of the Container. (Id.) Had it done so, presumably Panacea "would have increased the freight rate for the carriage and provided full coverage for" KLM, which is bound by its failure to "declare a higher value." Goga, 2008 WL 2875059, at *6. Accordingly, the Court finds that COGSA's limitation of liability applies and KLM may not recover the full amount of its Requested Damages, even in the reduced amount set forth above. See Aluminios Pozuelo Ltd., 407 F.2d at 155–56 (limiting shipper's recovery to $500.00 for skidded toggle press within shipping container where the shipper "fail[ed] to declare the true value of its cargo before shipment"); Goga, 2008 WL 2875059, at *8 (limiting shipper's recovery to $500 for damages to one vehicle within shipping container); D.W.E. Corp., 704 F. Supp. at 385–86 (limiting shipper's recovery to $500.00 where bill of lading referred to "One (1)" container).

The remaining question is whether KLM's damages are limited to a single payment of $500.00, i.e., whether the Container was a single "package" or "customary freight unit" under COGSA. See Goga, 2008 WL 2875059, at *7. As noted above, the Court must look to the Sea Waybill to determine what constitutes the COGSA package. See Hercules OEM Grp. v. Zim

Integrated Shipping Servs. Ltd., No. 22 Civ. 2636 (JLR), 2023 WL 6317950, at *8–9 (S.D.N.Y. Sept. 28, 2023). The "packages" section of the bill of lading is the relevant "starting point" for this inquiry. Seguros Illimani S.A. v. M/V Popi P, 929 F.2d 89, 94 (2d Cir. 1991). "In the event of ambiguity," courts "look elsewhere in the bill of lading and to other evidence of the parties' intentions." Id. "Where the bill of lading's language remains inconclusive, the Court may consider outside evidence, such as [] how the cargo was prepared for shipment." Hercules OEM Grp., 2023 WL 6317950, at *9. Where the goods are not shipped in packages, the Court must assess the "customary freight unit." 46 U.S.C. § 30701, statutory notes § 4(5). "'[W]here a flat rate is charged for an entire shipment of cargo, the customary freight unit will be the entire shipment." Vigilant Ins. Co. v. M/T Clipper Legacy, 656 F. Supp. 2d 352, 358 (S.D.N.Y. 2009). Because bills of lading are "contracts of adhesion, ambiguities are generally resolved against the carrier." Hercules OEM Grp., 2023 WL 6317950, at *9.

Here, the Sea Waybill specified that the "particulars furnished by" KLM was "1 Container Said to Contain 3 UNITS." (ECF No. 70-3). In addition, there is no indication that KLM was charged separate amounts for the items that comprised the Property. (See id.) Rather, the parties appear to have computed freight on "the entire shipment" in the Container. Vigilant, 656 F. Supp. 2d at 359.

Accordingly, the Court respectfully recommends that KLM's damages be limited to $500.00 as provided by the Sea Waybill, which incorporates the Maersk Waybill's limitation of liability, and COGSA. See Norwich Union Fire Ins. Soc., Ltd. v. Lykes Bros. S.S. Co., 741 F. Supp. 1051, 1058 (S.D.N.Y. 1990) (limiting defendant's liability for one container or one customary freight unit to $500.00).

3. Interest

As noted above, KLM also requests pre- and post-judgment interest. (ECF No. 87 ¶ 18(k)).

a. Pre-Judgment Interest

"In this Circuit, prejudgment interest will be denied in admiralty cases only under extraordinary circumstances." Fed. Ins. Co. v. Sabine Towing & Transp. Co., 783 F.2d 347, 352 n.4 (2d Cir. 1986); see GlobeRunners Inc. v. Env't Packaging Techs. Holdings, Inc., No. 18 Civ. 4939 (JGK) (BCM), 2020 WL 1865536, at *4 (S.D.N.Y. Mar. 6, 2020) ("In admiralty cases, courts generally award prejudgment interest to prevailing plaintiffs."), adopted by, 2020 WL 1862565 (S.D.N.Y. Apr. 14, 2020). "District courts in this circuit have broad discretion to fix both the rate of prejudgment interest and the date when such interest begins." Man Ferrostaal, Inc. v. M/V Akili, 763 F. Supp. 2d 599, 614 (S.D.N.Y. 2011) (citing Mentor Ins. Co. (U.K.) Ltd. v. Brannkasse, 996 F.2d 506, 520 (2d Cir.1993)), aff'd on other grounds, 704 F.3d 77 (2d Cir. 2012); see GlobeRunners, 2020 WL 1865536, at *4 ("The rate of prejudgment interest is to be determined by the trial court in its sound discretion.").

KLM is entitled to pre-judgment interest, as "[t]here are no exceptional circumstances" warranting its denial. Man Ferrostaal, 763 F. Supp. 2d at 614. KLM has not, however, requested a specific rate of pre-judgment interest or date when such interest should begin to accrue. (See ECF No. 87). Therefore, the Court must determine the appropriate rate and accrual date of the interest.

"In breach of contract cases applying New York law, prejudgment interest is awarded at the statutory rate of 9%, 'unless the parties contracted for a different rate[.]'" GlobeRunners, 2020 WL 1865536, at *4 (quoting E*Trade Fin. Corp. v. Deutsche Bank AG, 374 F. App'x 119, 123

(2d Cir. 2010) (summary order)). Here, neither the Sea Waybill nor the Terms of Carriage reflect an agreed rate of pre-judgment interest. Accordingly, the Court finds that New York's nine percent statutory rate is appropriate.

In admiralty cases, "[i]nterest is intended as a cure for an actual loss of cash, and so should run from the time that the loss took place, which is [typically] the expected date of delivery of the damaged or lost cargo." Man Ferrostaal, 763 F. Supp. 2d at 614 (citing Mitsui & Co., 636 F.2d at 824); see Orient Overseas Container Line Ltd. v. Crystal Cove Seafood Corp., No. 10 Civ. 3166 (PGG), 2012 WL 463927, at *12 (S.D.N.Y. Feb. 14, 2012) ("Pre-judgment interest is ordinarily awarded from the time when destroyed or lost goods should have been delivered by the carrier, although the district court has broad discretion to decide when interest begins[.]"). Here, Panacea and Maersk Agency agreed to have the Container delivered to Cameroon no later than January 11, 2021, but due to Panacea's mistake, Maersk A/S delivered the Container to the UAE, where it remained until May 22, 2021, by which time the purchasers of the Property had cancelled their orders due to failure of timely delivery. (ECF Nos. 1-1 ¶¶ 7–10; 87 ¶¶ 12–13). "This latter date," i.e., May 22, 2021, and not January 11, 2021, "is when prejudgment interest should commence." Man Ferrostaal, 763 F. Supp. 2d at 614. Prior to May 22, 2021, KLM "had no expectation that they would have use of the [Property], and therefore no loss." Id.

Accordingly, the Court respectfully recommends that KLM be awarded pre-judgment interest on its damages (i.e., $500.00) at a rate of nine percent per year from May 22, 2021 through the date of entry of judgment.

b. Post-Judgment Interest

The applicable federal statute provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court . . . calculated from the date of entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." 28 U.S.C. § 1961. The Second Circuit has explained that an award of post-judgment interest is mandatory. See Schipani v. McLeod, 541 F.3d 158, 165 (2d Cir. 2008). Given the mandatory nature of post-judgment interest, the Court respectfully recommends that KLM be awarded post-judgment interest in an amount consistent with 28 U.S.C. § 1961.

V. CONCLUSION

For the reasons set forth above, we respectfully recommend that KLM be awarded judgment against Panacea as follows:

1. Compensatory damages in the amount of $500.00.
2. Pre-judgment interest on its compensatory damages (i.e., $500.00) at a rate of nine percent per year from May 22, 2021 through the date of entry of judgment.
3. Post-judgment interest pursuant to 28 U.S.C. § 1961.

KLM shall promptly serve a copy of this Report and Recommendation on Panacea and file proof of service by **August 2, 2024**.

Dated: New York, New York
July 31, 2024

SARAH L. CAVE
United States Magistrate Judge

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NOTICE OF PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

The parties shall have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. See also Fed. R. Civ. P. 6(a), (d) (adding three additional days when service is made under Fed. R. Civ. P. 5(b)(2)(C), (D) or (F)). A party may respond to another party's objections within fourteen (14) days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Such objections, and any response to objections, shall be filed with the Clerk of the Court. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), (d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Engelmayer.

FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), (d), 72(b); Thomas v. Arn, 474 U.S. 140 (1985).