DECISIONS OF THE FEDERAL MARITIME COMMISSION

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Rebecca F. Dye, Commissioner

Michael A. Khouri, Commissioner

Louis E. Sola, Commissioner

Carl W. Bentzel, Commissioner

Office of Administrative Law Judges

Erin M. Wirth, Chief Administrative Law Judge

The Federal Maritime Commission makes decisions in cases brought by parties who claim they have been harmed because of a violation of the legal prohibitions in the Shipping Act of 1984, 46 U.S.C. Chapters 401-143. The Commission can also determine to investigate a possible violation of the same law. In the first instance, these claims are heard by an Administrative Law Judge who issues an Initial Decision. That Initial Decision may become the final decision of the Commission 30 days later. However, the Initial Decision can be appealed by the parties to the proceedings, or any Commissioner can ask to review the Initial Decision. In either case, the Commission would then review the Initial Decision and issue a Final Decision in the case. This publication provides a compendium of Initial and Final Decisions in these matters and selected other Orders that may be significant or establish a new legal precedent.

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FEDERAL MARITIME COMMISSION

M/S. PARSONS OVERSEAS, *Claimant*

v.

SEVEN SEAS SHIPPING USA, INC., *Respondent*.

INFORMAL DOCKET NO. 1960(I)

Served: December 12, 2019

BY THE COMMISSION: Michael A. KHOURI, *Chairman*, Rebecca F. DYE, Daniel B. MAFFEI, Louis E. SOLA, and Carl W. BENTZEL *Commissioners*.

ORDER AFFIRMING-IN-PART AND VACATING-IN-PART DECISION ON REMAND AND REMANDING FOR DISCOVERY

I. INTRODUCTION

On July 9, 2018, the Small Claims Officer (SCO) found that Respondent violated 46 U.S.C. § 41102(c) when it: (a) released Claimant's cargo to an unauthorized party based on unauthorized bills of lading created by Respondent's agent; and (b) misled Claimant about the status of the cargo. Decision at 23-24 (July 9, 2018) (SCO Decision). The Commission vacated that decision and remanded the matter to the SCO to determine whether Respondent's acts or omissions occurred on a normal, customary, and continuous basis. Order Vacating and Remanding Decision at 2 (Mar. 7, 2019) (Remand Order). On remand, the SCO found that Claimant failed to establish that Respondent's unjust and unreasonable acts or omissions met that standard and dismissed the claim. Decision on Remand at 19-20 (July 2, 2019) (SCO Remand Decision).

Although the Commission disagrees with Claimant that applying the "normal, customary, and continuous" standard amounts to impermissible retroactive rulemaking, we believe that Claimant should have an additional opportunity to discover evidence about other shipments or other shippers relevant to whether Respondent or its agents engaged in the alleged unjust and unreasonable conduct on a normal, customary, and continuous basis. Consequently, the Commission vacates the SCO Remand Decision as to the normal, customary, and continuous issue and remands so that Claimant may discover evidence relevant to that standard.

II. BACKGROUND

This is a case between an apparel manufacturer/shipper (Claimant) and an ocean transportation intermediary (Respondent). SCO Remand Decision at 2. In September 2015, Claimant entered into a contract for the sale of apparel to a New York corporation called Prolink

Industries, Inc. (Prolink) for $58,000. *Id.* Claimant cleared the goods through the Customs Authority in India, paid local port charges and, at Prolink's instruction, tendered the goods to Respondent's agent, Virat Global Logistics Pvt. Ltd. (Virat), to arrange for transportation of the cargo from India to the United States. *Id.*

On September 13, 2015, Virat issued an original bill of lading to Claimant for the shipment which identifies Claimant as the shipper/exporter, the consignee as "To Order," Ocean Force Enterprises (Ocean Force), an entity related to Prolink as the notify party, and Prolink as the second notify party. *Id.* For unknown reasons, the agent also created two additional original bills of lading and issued them to Ocean Force. *Id.* The alternative bills of lading are identical to the originals, except that they identify Ocean Force as the shipper/exporter and Macy's.com, Inc. (Macys) as the notify party. *Id.* at 2-3.

While the goods were still in transit, Respondent received notification from Ocean Force that the goods had been sold to another company named Courage Clothing. Courage Clothing forwarded the alternate bills of lading to the Respondent. *Id*. at 3. When the cargo arrived, Respondent did not notify Claimant of the arrival. The cargo was subject to an intensive customs examination and released to Respondent on October 12, 2015. After receiving the alternative bills of lading, Respondent released the cargo, in three installments, to Courage Clothing in October 2015, February 2016 and March 2016. *Id.* This occurred without Claimant's knowledge.

In December 2015, Claimant inquired about the status of its shipment, and, despite the shipment having been cleared of customs in October, was informed by Respondent's agent that the shipment was still undergoing a customs examination. In April 2016, Claimant learned that the shipment had been released to an unauthorized party. Claimant was only able to collect $10,000 of the $58,200 owed for the goods at issue. *Id.*

On March 6, 2018, Claimant filed a small claims complaint with the Commission seeking a reparations award for the $48,200 it was unable to recover from the buyer of its goods. *Id.* Claimant alleged that that Respondent, an FMC-licensed ocean transportation intermediary (OTI), created unauthorized bills of lading and released Claimant's cargo to an unauthorized party without obtaining the genuine bill of lading and misled the Claimant about the status of the shipment, all in violation of 46 U.S.C. § 41102(c). *Id.*

On July 9, 2018, the SCO issued a decision finding in favor of Claimant. The SCO found that Respondent created unauthorized bills of lading, misled Claimant about the status of Claimant's shipment, and released Claimant's shipment without the genuine endorsed original bill of lading required by the terms of the shipment and without Claimant's authorization. SCO Decision at 22-23. The SCO found that each of these actions gave rise to a § 41102(c) violation and awarded reparations of $48,200. *Id.* at 26. On July 10, 2018, the Commission decided to review that decision.

While this review was pending, the Commission revised its interpretation of 46 U.S.C. § 41102(c) and issued an interpretive rule reflecting that interpretation. Final Rule: Interpretation of Shipping Act of 1984 – Unjust and Unreasonable Practices; 83 Fed. Reg. 64478 (Dec. 17, 2018). The Commission clarified that the proper scope of the prohibition against unreasonable practices in the Shipping Act of 1984 requires that a regulated entity engage in a practice or

regulation on a normal, customary, and continuous basis. This interpretation brought the Commission's understanding of section 41102(c) in line with earlier caselaw, which, as recently as 2001, "required that the unreasonable regulation or practice was the normal, customary, often repeated, systematic, uniform, habitual, and continuous manner in which the regulated common carrier was conducting business." *Id.* at 64479.

On March 7, 2019, the Commission vacated the SCO Decision, finding that the interpretation of § 41102(c) the SCO had applied – the "old" interpretation – runs contrary to the original intent of congress, the rules on statutory construction, and Commission precedent. Remand Order at 2. Citing the interpretive rule, the Commission found that the proper interpretation of the statute requires that the acts or omissions occur on a normal, customary, and continuous basis. *Id.* The Commission remanded the proceeding to the SCO to determine whether the acts or omissions at issue satisfied the "normal, customary, and continuous" test. Following the remand, the SCO ordered the parties to file briefs discussing the revised § 41102(c) standard and identifying relevant facts. Mar. 12, 2019 SCO Email. The SCO also gave the parties the opportunity to obtain evidence from each other. *Id.* The parties timely filed briefs but did not apply to the SCO for discovery.

On July 2, 2019, the SCO issued a Decision on Remand finding in favor of the Respondent. SCO Remand Decision at 20. The SCO found that Claimant proved four of the five elements necessary to establish a § 41102(c) violation under the revised standard set forth in the interpretive rule but did not establish that Respondent's unjust and unreasonable conduct occurred on a normal, customary, and continuous basis. *Id.* at 17-20. The SCO reasoned that while there was evidence of more than one instance of illegal conduct by Respondent, there was insufficient evidence that Respondent had a practice of creating fraudulent bills of lading, releasing shipments to unauthorized parties, or misleading shippers regarding the status of their shipments. *Id.* at 20; *see also id.* ("In other words, a 'series of such occurrences' has not been shown."). On July 31, 2019, the Commission issued notice that it would review the SCO Remand Decision.

III. DISCUSSION

A. Standard of Review

In proceedings, "[w]here exceptions are filed to, or the Commission reviews, an initial decision, the Commission, except as it may limit the issues upon notice or by rule, will have all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). Thus, when the Commission reviews a decision de novo it may enter its own findings. *Kawasaki Kisen Kaisha, Ltd. v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 746, 753 (FMC 2014) (citing *OC Int'l Freight, Inc.*, 33 S.R.R. 566, 570 (FMC 2014)). The Commission reviews SCO decisions in informal proceedings under the same standard. *See Houbon v. World Moving Servs.*, 31 S.R.R. 1400, 1404 (FMC 2010); see also 5 U.S.C. § 557(b).

B. Retroactivity

On remand the SCO found that Respondent was (a) an ocean transportation intermediary; (b) the acts or omissions at issue related to or were connected with receiving, handling, storing,

or delivering property; (c) the acts or omissions at issue were unjust and unreasonable; and (d) the acts or omissions at issue were the proximate cause of the claimed loss. SCO Remand Decision at 18-19. These findings are supported by the evidence and we affirm the SCO Remand Decision in that respect.

The remaining question is whether the acts or omissions at issue occurred on a normal, customary, and continuous basis. In its brief on remand, Claimant argued that the Commission cannot lawfully apply the "normal, customary, and continuous" standard set forth in the Commission's final rule in this case because the SCO issued the decision awarding Claimant reparations under the "old" § 41102(c) standard before the Commission announced its intent to revise the standard in a Notice of Proposed Rulemaking on September 7, 2018, and before the Commission adopted the revised standard in a Final Rule on December 17, 2018. Claimant Apr. 11, 2019 Br. at 8-12. According to Claimant, the agencies cannot apply rules as the one at issue here retroactively. *Id.* The SCO declined to consider Claimant's retroactivity argument, as it was bound by Remand Order to apply the normal, customary, and continuous standard. SCO Remand Decision at 17.

Claimant is correct that, generally, an agency cannot apply rules retroactively. Absent express Congressional approval, "agencies lack the power to promulgate retroactive legislative rules." *Health Ins. Ass'n of Am. v. Shalala*, 23 F.3d 412, 422 (D.C. Cir. 1994) (citing *Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988)).[1] But agency interpretations announced in adjudications typically are retroactive and apply in the cases in which they are announced. *Health Ins. Ass'n*, 23 F.3d at 424 ("Even if this reading had been novel, agency interpretations announced in adjudications typically are retroactive, and, subject to some limits, permissibly so."); *Clark-Cowlitz Joint Operating Agency v. Fed. Energy Regulatory Comm'n*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc).

Here, the Commission set forth the "normal, customary, and continuous" standard in its Remand Order and in so doing cited the Commission's interpretive rule. Remand Order at 2. Any retroactive effect of the rule was "completely subsumed in the permissible retroactivity of the agency adjudication." *Health Ins. Ass'n*, 23 F.3d at 424; *see also id.* ("Since HCFA was already free to subject Sentara-Hampton to the standard expressed in its 1983 revisions even in the absence of their promulgation as such, the Sentara-Hampton court correctly held that the interpretive rule itself was not being given retroactive effect."); *see also St. Luke's Hosp. v. Sebelius*, 611 F.3d 900, 907 (D.C. Cir. 2010) (finding that in context of agency adjudication, agency could lawfully interpret a regulation notwithstanding its retroactive effect and that the retroactivity of the application of a guidance document the agency issued while the case was pending was "subsumed in the permissible retroactivity of the agency adjudication"); *Providence Health Sys. – Washington v. Thompson*, 353 F.3d 661, 667 (9th Cir. 2003) (citing

[1]The Commission disagrees, however, with Claimant's contention that *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974) and *Pfaff v. United States HUD*, 88 F.3d 739, 748 (9th Cir. 1996), give rise to a presumption that bears on the application of the standard here. The cited portion of *Textron* stands for the proposition that an agency has discretion in deciding how it announces new principles. 416 U.S. at 294. And *Pfaff* involved an agency standard that imposed penalties, injunctions, government surveillance, and potential damages on noncompliant parties. 88 F.3d at 748. As discussed below in Part III.C., the Commission's revised interpretation of § 41102(c) does not penalize Claimant in a manner that creates a manifest injustice.

Health Ins. Ass'n). The SCO therefore did not impermissibly apply a rule retroactively when it (at the Commission's direction) applied the "normal, customary, and continuous" standard to his case on remand.

Moreover, the Commission could have reached the same result – announcement of a revised § 41102(c) standard – without promulgating a rule at all. As the D.C. Circuit reasoned:

> Indeed, in the context of internal adjudicatory procedures, to hold that agencies can apply their new interpretations of pre-existing statutes or regulations retroactively only if they do not memorialize those interpretations in interpretive rules would create a perverse disincentive to issue such rules. The ironic result would be that entities affected by the agency's interpretations would be left more in the dark than before, for clues to the agency's reading of the relevant texts would emerge only on an ad hoc basis. And this even though an ad hoc answer developed in binding agency adjudication would enjoy judicial deference.

Health Ins. Ass'n, 23 F.3d at 424-25. The Commission here decided to give the public advance notice and an opportunity to comment with respect to the interpretation of § 41102(c). Having done so, the Commission is not precluded from applying that interpretation going forward, even as to this case.[2]

C. Manifest Injustice

The Commission also finds that applying the "normal, customary, and continuous" standard in this case does not work a manifest injustice to Claimant. In considering whether a "retrospective application" of a rule announced in an agency adjudication should be withheld because it is a manifest injustice, courts consider:

> (1) whether the particular case is of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Clark-Cowlitz, 826 F.2d at 1081 (quoting *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). Here, on balance the factors weigh against invoking the

[2] Contrary to Claimant's argument, Claimant Apr. 11, 2019 Br. at 11, the Notice of Proposed Rulemaking and Final Rule do not imply that the interpretive rule would not apply to cases pending before the Commission for review. The Notice of Proposed Rulemaking and Final Rule are silent on that issue. The statement that the Commission will "[i]n the future" apply the revised standard does not mention pending cases. 83 Fed. Reg. at 45370. Moreover, the Commission has acted consistently with that statement by applying that standard to all cases once the Final Rule issued, including the present case. The effective date of the Final Rule and the statement that the revised interpretation "will return" the Commission's approach to consistency with precedent likewise do not suggest anything about pending cases.

"manifest injustice" exception to the normal rule permitting retroactive application.

The first factor "recognizes that a number of reasons call for the application of a new rule to the parties to the adjudicatory proceeding in which it is first announced." *Clark-Cowlitz*, 826 F.2d at 1081-82 (internal quotation marks and citation omitted). Courts have also recognized that "by granting the benefit of a change in the law to those who efforts may have helped bring about the change, retroactive application of a new principle encourages parties to advance new theories or challenge outworn doctrines." *Retail, Wholesale*, 466 F.2d at 390. This is not a case in which the revised § 41102(c) standard is first being announced, and the Respondent here did not help bring about the change in interpretation. This factor therefore weighs in favor of the manifest injustice exception.

The second factor also weighs in favor of the manifest injustice exception and against applying the "normal, customary, and continuous" standard to the present case, but it does not weigh heavily. The second factor "requires the court to gauge the unexpectedness of a rule and the extent to which the new principle serves the important but workaday function of filling in the interstices of the law." *Id*. at 1082. It "recognizes that the longer and more consistently an agency has followed one view of the law, the more likely it is that private parties have reasonably relied to their detriment on that view." *Id.* at 1083.

Here, the revised interpretation of § 41102(c) expressly departs from a line of established Commission caselaw. 83 Fed. Reg. at 45367. It does not fill gaps of the law but resulted from a change in agency policy. *Clark-Cowlitz*, 826 F.2d at 1083. This factor does not weigh that heavily against the general rule of retroactivity in adjudications, however, because the "old" interpretation was not that old. 83 Fed. Reg. at 45367. Commissioners also consistently dissented from Commission orders applying the old interpretation. *E.g.*, *Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R. 1720, 1744 (FMC 2013) (Khouri, Commissioner, dissenting).

The third factor asks if the party against whom the new rule is applied, in this case Claimant, relied on the former rule. There appears no evidence that Claimant relied on the "old" interpretation of § 41102(c). Claimant certainly litigated its case under the old § 41102(c) interpretation, and the SCO found liability under that standard. Claimant also asserts in its brief that it relied on precedent applying the "old" standard when it submitted its complaint. Claimant Apr. 11, 2019 Br. at 11. But there is no evidence that Claimant conformed its conduct to a Commission rule and is now being punished under a new rule. There is no evidence, for instance, that in shipping clothing from India to the United States, Claimant was relying on the fact that it could later possibly seek recovery under § 41102(c) for a single act or omission. In contrast, in *Retail, Wholesale*, the company against whom a new rule was applied had previously conformed its conduct to a well-established and long-accepted standard, and the agency was "attempt[ing] to punish conformity to that standard under a new standard subsequently adopted." 466 F.2d at 391.

The lack of "punishment" is also key to the fourth factor, the degree of burden that retroactive application would place on a party. By applying the revised interpretation of § 41102(c), the Commission is not burdening Claimant such that there is a manifest injustice. Claimant might find it more difficult to prove liability under the "normal, customary, and continuous" standard than under the prior standard. But "[t]he 'situation is not one in which some new liability is sought to be imposed on individuals for past actions which were taken in

good-faith reliance on agency pronouncements." *Clark-Cowlitz*, 826 F.2d at 1085-86 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974)). Nor is this a situation where the application of the revised interpretation is increasing the likelihood that parties will be fined or pay damages. *Id.* ("Nor are fines or damages involved here."). It is also of little significance that Claimant initially obtained a favorable SCO ruling because the Commission may review an SCO decision *de novo*. *See* 46 C.F.R. § 502.304(g); Part III.A., *supra; see also Clark-Cowlitz*, 826 F.2d at 1085 n. 10 ("All Clark-Cowlitz ever had was a favorable ruling from an ALJ, which was subject to plenary review by the full Commission.").

The fifth factor, which considers the statutory interest in applying the revised interpretation does not seem to weigh particularly in either direction. Among the purposes of the Shipping Act is to establish a nondiscriminatory regulatory process for ocean common carriage, 46 U.S.C. § 40101(1), and the "primary objective of the shipping laws administered by the FMC is to protect the shipping industry's customers, not members of the industry," *N.Y. Shipping Ass'n v. Fed. Mar. Comm'n,* 854 F.2d 1338, 1374 (D.C. Cir. 1988) (quoting *Boston Shipping Ass'n v. Fed. Mar. Comm'n,* 706 F.2d 1231, 1238 (1st Cir. 1983)). But there is also an interest in minimizing government intervention in the industry, 46 U.S.C. § 40101(1), and in the Commission focusing on activities (i.e. practices) that "negatively affect the broader shipping public," 83 Fed. Reg. at 45367, which both counsel against continuing to applying an "old" statutory interpretation that is more expansive than the Commission deems appropriate.

D. Opportunity for Discovery

Although the Commission believes application of the "normal, customary, and continuous" standard is appropriate, we recognize that this was not the interpretation of § 41102(c) when Claimant filed this case and when the SCO Decision was issued in Claimant's favor. As a consequence, Claimant would not have anticipated the need for evidence relating to Respondent's conduct with respect to other shipments or shippers. Moreover, Claimant's brief in response to remand focused on retroactivity, and it did not apparently avail itself of the opportunity to take discovery.

Given the procedural posture and timing of this case vis-à-vis the revised interpretation of § 41102(c), the Commission will give Claimant a final opportunity to seek discovery relevant to the "normal, customary, and continuous" standard. Because this is an informal proceeding under Subpart S of 46 C.F.R. Part 502, and discovery is not normally permitted, the SCO has the discretion to determine how best to permit any additional taking and submission of evidence. The Commission takes no position as to the SCO's application of the "normal, customary, and continuous" standard to the evidence previously submitted.

IV. CONCLUSION

For the reasons set forth above, the Commission **AFFIRMS** the SCO's finding on remand that Respondent was (a) an ocean transportation intermediary; (b) the acts or omissions at issue related to or were connected with receiving, handling, storing, or delivering property; (c) the acts or omissions at issue were unjust and unreasonable; and (d) the acts or omissions at issue were the proximate cause of the claimed loss.

The Commission **VACATES** the SCO's finding on remand that Claimant failed to demonstrate that Respondent's conduct occurred on a normal, customary, and continuous basis.

The Commission **REMANDS** this case to give Claimant a final opportunity to seek discovery regarding whether Respondent or its agent engaged in its unjust and unreasonable conduct with respect to other shipments or shippers.

By the Commission.

Rachel E. Dickon
Secretary

[1]Pages 9 through 28 are intentionally deleted

[1]The December 17, 2019 Order in Docket No. 14-15 was published in duplicate erroneously and has been removed. It can be found at 1 F.M.C.2d 498. The December 20, 2019 Order in Petition No P3-18 was published in duplicate erroneously and has been removed. It can be found at 1 F.M.C.2d 504.

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

NGOBROS AND COMPANY NIGERIA, *Complainant*

v.

OCEAN CARGO LINK, LLC AND KINGSTON ANSAH, *Respondents*.

DOCKET NO. 14-15

Served: February 4, 2020

BEFORE: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION GRANTING VOLUNTARY DISMISSAL OF PROCEEDING[1]

[Notice Not to Review served March 6, 2020, decision administratively final.]

On January 15, 2020, Complainant Ngobros and Company Nigeria Limited filed a status report and requested an "order of dismissal without prejudice pursuant to 46 CFR § 502.72 (3)." Complainant indicated that it had attempted to contact Respondents but had not been successful. Respondents did not file a response to the dismissal request.

The complaint was filed on November 24, 2014, and an initial decision finding violations of the Shipping Act was issued on November 10, 2015. The Commission reviewed the proceeding and on December 17, 2019, the Commission issued an order vacating the initial decision, dismissing as moot the claims against Kingston Ansah, and remanding the claims against Ocean Cargo Link, LLC in light of the Commission's revised interpretation of section 41102(c) of the Shipping Act. The Commission stated that while the review was pending, Mr. Ansah filed for bankruptcy and plead guilty to federal crimes. Commission Order at 4.

Commission Rule 72(a)(3) permits voluntary dismissals by the presiding officer.

> (3) *By order of the presiding officer*. Except as provided in paragraphs (a)(1) and (a)(2) of this section, an action may be dismissed at the complainant's request only by order of the presiding officer, on terms the presiding officer considers proper. If the motion is based on a settlement by the parties, the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable. Unless the order states otherwise, a dismissal under this paragraph is without prejudice.

[1] This order will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this order within twenty-two days of the date of service of the order. 46 C.F.R. § 502.254(h).

This proceeding cannot be voluntarily dismissed under Rule 72(a)(1) as the answer has been served and cannot be dismissed by stipulation under Rule 72(a)(2) as Complainant was unable to located Respondents to obtain an agreement to stipulate. In addition, no settlement has been reached. The Complainant states good cause to dismiss the proceeding and should not be required to expend additional resources on this matter. Accordingly, dismissal under Rule 72(a)(3) without prejudice is appropriate.

It is hereby **ORDERED** that complainant's request for voluntary dismissal without prejudice be **GRANTED**. It is **FURTHER ORDERED** that the complaint be **DISMISSED WITHOUT PREJUDICE** and this proceeding be **DISCONTINUED**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

MARINE TRANSPORT LOGISTICS, INC., *Complainant*

v.

CMA-CGM (AMERICA) LLC, *Respondent*.

DOCKET NO. 18-07

Served: February 18, 2020

BEFORE: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION APPROVING CONFIDENTIAL SETTLEMENT AGREEMENT[1]

[Notice Not to Review served March 20, 2020, decision administratively final.]

I. Introduction

On January 30, 2020, Complainant Marine Transport Logistics, Inc. ("Marine Transport Logistics" or "MTL") and Respondent CMA-CGM (America) LLC ("CMA") filed a joint petition for approval of settlement ("motion"). The parties attached a copy of the settlement agreement and release. The parties jointly move for approval of the settlement agreement, voluntary dismissal with prejudice, and confidentiality for the settlement agreement.

II. Procedural History

On August 23, 2018, Marine Transport Logistics filed a complaint alleging violations of the Shipping Act including that Respondent violated 46 U.S.C. §§ 41102(c), 41104(9), and 41104(10), in the shipment and failure to deliver nine containers to Yemen in December 2017. On September 26, 2018, Respondent CMA filed its answer, denying the allegations and raising affirmative defenses.

On October 25, 2018, the parties filed a joint motion requesting a stay of proceedings while the parties pursued mediation with the assistance of the Commission's Office of Consumer Affairs and Dispute Resolution Services ("CADRS"). A limited extension was granted. The parties filed additional status reports and requests for stays on December 14, 2018, February 15, 2019, March 22, 2019, April 22, 2019, and June 6, 2019, indicating that settlement negotiations were ongoing. On May 30, 2019, this proceeding was reassigned to the undersigned. On June

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227.

10, 2019, an order was issued denying an extended stay and providing a deadline to file dispositive motions.

On July 10, 2019, Respondent filed a motion to dismiss. On August 6, 2019, Complainant filed an opposition to the motion to dismiss and a cross-motion for leave to file an amended complaint. On October 8, 2019, an order was issued granting the amended complaint and denying the motion to dismiss.

Status reports on December 16, 2019, and January 15, 2020, indicate that the parties had exchanged initial discovery, scheduled depositions, and were continuing to remain actively involved in settlement negotiations.

III. Discussion

Using language borrowed in part from the Administrative Procedure Act,[2] Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A American Jurisprudence, 2d Ed., 777-778 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation."

[2] "The agency shall give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c).

Old Ben Coal, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

The parties state:

> In the instant case, the settlement is the result of arm's-length negotiations between two sophisticated entities, both of whom have been represented by counsel during the negotiation process. The proposed agreement does not contravene any law or public policy, nor is it unjust or discriminatory in any way. Additionally, this agreement will not result in any adverse effects to any third parties or on the shipping public. The proposed settlement is fair and reasonable, and reflects the Parties' desire to resolve their issues without the need for costly and uncertain litigation.

Motion at 3.

Based on the representations in the settlement motion and other documents filed in this matter, the parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The parties are represented by counsel and have been discussing settlement over an extended period of time. The proceeding would require potentially expensive additional discovery and briefing. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. There is no evidence of fraud, duress, undue influence, or mistake nor harm to the public. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991).

The full text of the settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

IV. Order

Upon consideration of the motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the petition to approve the settlement agreement between Marine Transport Logistics, Inc. and CMA-CGM (America) LLC be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

LOGFRET, INC., *Complainant*

v.

KIRSHA, B.V., LEENDERT JOHANNESS BERGWERFF A/K/A HANS BERGWERFF, AND LINDA SIEVAL, *Respondents*.

DOCKET NO. 18-10

Served: February 20, 2020

BEFORE: Erin M. WIRTH, *Chief Administrative Law Judge*.

ORDER DENYING RESPONDENTS' PETITION FOR ATTORNEY FEES[1]

[Exceptions filed by Respondents, 3/26/2020, Commission final decision pending.]

I. Background

A. Summary

On October 23, 2019, Respondents filed a petition seeking attorney fees ("Petition") and a motion for confidential treatment ("Motion") in this proceeding which became administratively final on October 21, 2019. In response to an order, on November 7, 2019, Respondents filed a supplement to the petition for attorney fees ("Petition Supplement"). After the denial of a motion to strike, which granted additional time to respond to the petition, Complainant timely filed its response to the petition ("Response") on January 13, 2020. Complainant did not contest Respondents' motion for confidential treatment.

Complainant Logfret, Inc. ("Logfret") is a non-vessel-operating common carrier ("NVOCC") and an affiliate of Logfret B.V., a common carrier based in The Netherlands. Respondents are two individuals and a corporation: Mr. Bergwerff, a Dutch national, was Managing Director of Logfret B.V.; Ms. Sieval, a Dutch national, was a sales manager for Logfret B.V; and corporate Respondent Kirsha B.V. is a corporation in The Netherlands whose owner and managing director is Mr. Bergwerff. Amended Complaint at 2-3.

Complainant alleged that "Mr. Bergwerff, with the help of Ms. Sieval, directed the staff of Logfret B.V. to handle inbound shipments to the United States through Delmar USA rather than Logfret, for at least two accounts" and that for "months thereafter, Mr. Bergwerff and Ms. Sieval knowingly received information about the nature, kind, quantity, and destination of cargo tendered or delivered to Logfret B.V. with the intent to be shipped to the United States on Logfret bills of lading." Amended Complaint at 5-6. Respondents denied the allegations,

[1] This order will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this order within twenty-two days of the date of service of the order. 46 C.F.R. § 502.254(h).

asserting that this was "an internal disagreement among Logfret entities, employees and former management of Logret, B.V.," the Logret affiliate in The Netherlands. Respondents' Opposition to Motion to Amend Complaint at 4.

The initial decision granted Respondents' motion to dismiss, concluding that "this appears to be an employment dispute between affiliates, not a Shipping Act violation," and stating:

> The amended complaint does not make a plausible claim that the Respondents were NVOCCs as they did not hold themselves out or assume responsibility as required by the Shipping Act. Therefore, both personal and subject matter jurisdiction are lacking. In addition, there is no basis to assert jurisdiction based on Respondents being "other persons" and no attempt is made to pierce the corporate veil.

Initial Decision at 19 (citation omitted).

B. Procedural History

This proceeding began with a complaint filed on November 14, 2018. The time to respond to the complaint was extended to January 2019. On January 28, 2019, Respondents Kirsha B.V., Mr. Bergwerff, and Ms. Sieval filed a motion to dismiss the complaint.

On February 7, 2019, Complainant Logfret filed a motion to amend the complaint. In response to an order, on February 21, 2019, Complainant filed a memorandum in support of the motion to amend the complaint and attached the proposed amended complaint. On March 7, 2019, Respondents filed an opposition to the motion to amend the complaint and statement of impact of the proposed amendment on their motion to dismiss. On April 24, 2019, an order was issued granting the motion to amend the complaint and allowing the parties additional time to brief the motion to dismiss as applied to the amended complaint.

On May 8, 2019, Complainant filed a memorandum in opposition to Respondents' motion to dismiss. On May 20, 2019, Respondents filed a reply to Complainant's opposition to the motion to dismiss. On September 17, 2019, an initial decision was issued granting the motion to dismiss. No exceptions were filed and the initial decision became administratively final on October 21, 2019.

On October 23, 2019, Respondents filed a petition seeking attorney fees and a motion for confidential treatment in this proceeding. On October 28, 2019, *sua sponte*, an order was issued providing additional time for Respondents to supplement their petition and for Complainant to file a response. On November 7, 2019, Respondents filed their supplement to the petition for attorney fees.

On November 14, 2019, Complainant filed a motion to strike Respondents' petition for attorney fees as premature. On November 19, 2019, an order on Complainant's motion to strike the petition for attorney fees was issued denying the motion to strike the petition but expanding the time for Complainant to respond to the petition and supplement until January 13, 2020. On January 13, 2020, Complainant filed its timely response to Respondents' petition.

II. Discussion

A. Burden of Proof

Commission Rule 254 states that the appeal of an award of attorney fees is governed by the procedures in 46 C.F.R § 502.227. 46 C.F.R. § 502.254(h). The applicant for an award of attorney fees bears the burden of establishing entitlement to an award, documenting the appropriate hours, and justifying the reasonableness of the rates. 46 C.F.R. § 502.254(d); *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984) ("[C]ourts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates."); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (The "fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates."). The petition was filed by Respondents and they have the burden of proof.

B. Arguments of the Parties

In their petition, Respondents request attorney fees, document the staff involved and hours spent, and state that "[b]ased on FMC precedent and the facts and outcome in this proceeding attorney's fees should be awarded to Respondents." Petition at 1-2. In their supplement, Respondents assert that they are eligible for an award of attorney fees as prevailing parties, and entitled to an award because "Complainant submitted a frivolous complaint" which was "motivated by an improper internal corporate dispute outside of the FMC's jurisdiction" and "exhibited 'objective unreasonableness.'" Petition Supplement at 2-3. Respondents assert that "Complainant egregiously failed to substantiate the legal and factual components of its case," that "bizarre inconsistencies" in arguments "added vexatious, expensive, and unfair tasks" in defending against the amended complaint, and that "two of the respondents [are] individuals who also experienced significant personal and emotional tax during the pendency of the proceeding." Petition Supplement at 3-5.

Complainant argues that an automatic award of attorney fees is not consistent with the statutory amendments to the attorney fee provision; a presumption of attorney fees is not consistent with the purposes of the Shipping Act; the FMC has previously denied attorney fees in a proceeding similar to this one; and Respondents have failed to substantiate and justify adequately the large amount of attorney fees requested. Response at 6-16.

C. Eligibility for Attorney Fees

As an initial matter, it is worth addressing whether the undersigned has jurisdiction to address the merits of the petition for attorney fees. The parties did not raise this issue, however, "every federal court has an independent obligation to satisfy itself of the existence of subject matter jurisdiction." *Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 2014 U.S. Dist LEXIS 60901 at *15-16 (N.D. Cal. 2014). Federal Courts typically rule on attorney fee requests even where a plaintiff lacks statutory standing. *Minden*, 2014 U.S. Dist LEXIS 60901 at *16-20 ("the overwhelming majority of district courts around the country (and within this Circuit) agree with the Seventh Circuit's approach and assess the merits of an attorneys' fees award even after finding a plaintiff lacked Copyright Act standing."). Accordingly, it appears that the attorney fee petition is within the jurisdiction of the undersigned.

On March 1, 2016, the Commission amended its Rules of Practice and Procedure governing the award of attorney fees in order to implement the statutory amendments made by the Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-282, § 402, 128 Stat. 3022 (Dec. 18, 2014); see generally Docket No. 15-06.

Commission Rule 254 states that in "any complaint proceeding brought under 46 U.S.C. § 41301 (sections 11(a)-(b) of the Shipping Act of 1984), the Commission may, upon petition, award the prevailing party reasonable attorney fees." 46 C.F.R. § 502.254(a). "The term 'prevailing party' . . . is a 'legal term of art,' and is 'interpreted . . . consistently'" and the premise is "'the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.'" Final Rule, 81 Fed. Reg. 10,508 at 10,511-12 (Mar. 1, 2016) (citing *Smyth v. Rivero*, 282 F.3d 268, 274 (4th Cir. 2002) (citations omitted) and *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist*., 489 U.S. 782, 792-93 (1989)).

The leading Commission cases implementing the rule are *Edaf Antillas, Inc. v. Crowley Caribbean Logistics*, 34 S.R.R. 439 (FMC 2016) and *Baltic Auto Shipping Inc. v. Hitrinov*, 34 S.R.R. 944 (FMC 2017) and the parties were ordered to address the issues raised by these cases.

In the underlying proceeding, Respondents' motion to dismiss was successful and the amended complaint was dismissed with prejudice. This constituted a material alteration of the legal relationship of the parties as required to be a prevailing party. In their response to the petition, Logfret states that "Logfret does not take issue with the determination that the Initial Decision effected a material alteration in the legal relationship of the parties, or with Respondents' claim that Respondents are the 'prevailing party' in this proceeding for purposes of the Petition for Attorney's Fees." Response at 6 n.6. Respondents are therefore *eligible* for attorney fees as the prevailing party, however, in order to be awarded attorney fees, they also need to be found to be *entitled* to attorney fees.

D. Entitlement to Attorney Fees

The Commission has stated that the "primary consideration in determining entitlement to attorney fees is whether such an award is consistent with the purposes of the Shipping Act, and any factors the Commission relies upon in individual cases should be consistent with these purposes" and "prevailing complainants and prevailing respondents should be treated in an even-handed manner in determining whether to award attorney fees." Final Rule, 81 Fed. Reg. at 10,509, 10,513.

> In *Fogerty v. Fantasy, Inc*., 510 U.S. 517, 534 n.19 (1994), a Supreme Court case that addressed entitlement, wherein prevailing plaintiffs and prevailing defendants were treated similarly, the Court put forth several factors to utilize in considering entitlement: "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." (quoting *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 156 (3d Cir. 1986) (internal quotations omitted). Although *Fogerty* addressed attorney fee awards under a different statute, we believe that they provide a useful guide for the Commission.

Edaf, 34 S.R.R. at 445.

In *Edaf*, the Complainant "knowingly disregarded the ALJ's orders on numerous occasions, abandoned its claim, forced multiple Respondents to expend significant resources of both time and money in their defense and, perhaps most egregiously, failed to terminate the claim when it could have limited the expense of the Respondents." *Edaf*, 34 S.R.R. at 445. The Commission concluded:

> We believe that deterring complainants from failing to prosecute their claims by awarding respondents attorney fees furthers the purposes of the Shipping Act. Proceedings that continue on because of non-responding parties like this one, waste the time and resources of both respondents and the Commission and potentially delay the resolution of other complaint proceedings. Therefore, we are granting in part IFS/Neutral and CCL's petitions for attorney fees in this case.

Edaf, 34 S.R.R. at 445.

In *Baltic Auto*, the Commission denied attorney fees in a case that was dismissed for statute of limitations grounds and therefore did not reach the merits of the claim. The Commission found the Complainant in *Baltic Auto* "had a colorable argument that its claim arose within the statute of limitations and that the claim was not objectively unreasonable." *Baltic Auto*, 34 S.R.R. at 955.

"'Objective unreasonableness' is generally used to describe claims that have no legal or factual support." *Viva Video, Inc. v. Cabrera*, 9 Fed. App'x 77, 80 (2d Cir. 2001). The "fact that a claim was not successful does not automatically mean that it was objectively unreasonable." *Baltic Auto Shipping*, 34 S.R.R. at 955.

> The mere fact that a defendant has prevailed, however, does not necessarily equate with an objectively unreasonable claim. To hold otherwise would establish a *per se* entitlement of attorney's fees whenever issues pertaining to judgment are resolved against a copyright plaintiff. . . . This is not a correct construction of the law. Similarly, the fact that a defendant has prevailed on a motion to dismiss or on summary judgment does not require the court to award fees. However, if a copyright claim is clearly without merit or otherwise patently devoid of legal or factual basis, that claim ought to be deemed objectively unreasonable, and an award of fees and costs is then proper.

Chivalry Film Prods. v. NBC Universal, Inc., 2007 U.S. Dist. LEXIS 86889 at *6-7 (S.D.N.Y. 2007) (internal quotation marks and citation omitted). Moreover, it is common to have alternate theories of liability and for factual and legal arguments to develop after a complaint is filed.

This case falls between *Edaf* where a fee petition was granted and *Baltic Auto* where a fee petition was denied. Unlike the complainant in *Edaf*, Complainant *sub judice* did not fail to follow instructions and did not fail to prosecute its claims. However, unlike in *Baltic Auto*, the merits were reached in this case and the underlying case was dismissed, although on a preliminary issue.

Respondents assert that the complaint was "frivolous" and that Complainant "egregiously failed to substantiate the legal and factual components of its case." Petition Supplement at 3. The factual scenario raised by Complainant was unusual. Although the elements needed to establish jurisdiction are well-settled, there were no similar cases discussing this jurisdictional scenario which would have provided clear guidance. While Complainant was not successful, even after being permitted to amend its complaint, it raised a colorable claim which was not frivolous. In addition, the claim was not objectively unreasonable as it was not clearly without merit or otherwise patently devoid of legal or factual basis. This factor does not weigh in favor of granting attorney fees.

The Court may consider the non-prevailing party's motive in pursuing the litigation and whether there is a need to award fees as a deterrent. "[P]arties are improperly motivated only if they do not have a good faith intent to protect a valid interest, but rather a desire to discourage and financially damage a competitor by forcing it into costly litigation." *Warren Publi'g Co. v. Spurlock*, 2010 U.S. Dist. LEXIS 20584 at *37 (E.D. Pa. 2010) (citation omitted). While it is possible that Complainant was motivated by improper intent, whether to undermine a potential competitor, restrain competition, cause personal distress, or gain unfair advantage in the other litigation between the parties, it is also possible that Complainant wanted to pursue every avenue possible to legally protect its business interests. There is not sufficient evidence to determine Complainant's motivation and therefore, this factor does not weigh in favor of granting the petition.

While the relative financial strength of the parties is a valid consideration in setting the *amount* of attorney fees, *Lieb v. Topstone Indus.*, 788 F.2d 151, 156 (3d Cir. 1986), it is not clear whether it is relevant to the determination of *eligibility* for attorney fees. See *Canal+ Image Uk Ltd. v. Lutvak*, 792 F. Supp. 2d 675, 680 (S.D.N.Y. 2011). Here, Complainant filed suit against two Respondents in an individual capacity, and Respondents assert that they "experienced significant personal and emotional tax during the pendency of the proceeding." Petition Supplement at 5. Even if this factor is relevant to determining the eligibility of fees, and accepting that the proceeding was distressing to Respondents, this factor alone is not sufficient to establish an entitlement to attorney fees.

Another consideration is that this case was decided at a preliminary stage, after the filing of a motion to dismiss, and was not appealed. This could weigh against awarding fees as the case was not prolonged but could also weigh in favor of awarding fees as the issue was resolved for failure to meet initial jurisdictional requirements and for being facially insufficient. See *Budget Cinema, Inc. v. Watertower Assocs.*, 81 F.3d 729, 732 (7th Cir. 1996). In this case, this factor is neutral.

Petitioner has not met their burden to establish an entitlement to attorney fees. The purposes of the Shipping Act are met when complainants are able to raise potential violations, even under unusual or unique circumstances, without the chilling impact of having to pay Respondents' attorney fees. There is no evidence that this proceeding was frivolous, improperly motivated, objectively unreasonable, or otherwise appropriate for an award of attorney fees. Accordingly, the petition for attorney fees is denied.

E. Confidentiality

Respondents moved for confidential treatment of attachments to their petition for attorney fees and Complainant did not object to the request. Respondents submitted an appropriately redacted public version as well as the unredacted exhibit, which is available to the Commission. Such information is appropriate for confidential treatment. Accordingly, there is good cause to grant the motion for confidential treatment.

III. Order

For the reasons stated above, it is hereby **ORDERED** that Respondents' petition for attorney fees be **DENIED**. It is further **ORDERED** that Respondents' motion for confidential treatment be **GRANTED**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of the Administrative Law Judges

M/S PARSONS OVERSEAS, *Claimant*

v.

SEVEN SEAS SHIPPING USA, INC., *Respondent*.

DOCKET NO. 1960(I)

Served: February 26, 2020

BEFORE: Theresa DIKE, *Small Claims Officer*.

ORDER GRANTING VOLUNTARY DISMISSAL[1]

[Notice Not to Review served March 30, 2020, decision administratively final.]

On March 6, 2018, Claimant M/S Parsons Overseas ("Parsons") initiated this proceeding by filing a claim with the Federal Maritime Commission ("Commission" or "FMC") against Respondent Seven Seas Shipping USA, Inc. ("Seven Seas"), alleging that Seven Seas "failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property," in violation of the Shipping Act at 46 U.S.C. § 41102(c). Claim at 5. On July 9, 2018, an Initial Decision was issued in this proceeding finding that Seven Seas violated section 41102(c) and awarding reparations to Parsons. *M/S Parsons Overseas v. Seven Seas Shipping USA, Inc.*, Informal Docket No. 1960(I), Decision, (SCO July 9, 2018) ("SCO Decision").

On December 17, 2018, the Commission promulgated an interpretive rule on the scope of section 41102(c). Interpretive Rule, Shipping Act of 1984, 83 FR 64478 (Dec. 17, 2018) ("Final Rule"). On March 7, 2019, the Commission issued an Order vacating the SCO Decision and remanding this proceeding to the undersigned for adjudication of the 41102(c) claim consistent with the interpretive rule. *M/S Parsons Overseas v. Seven Seas Shipping USA, Inc.*, Informal Docket No. 1960(I), Order Vacating and Remanding Decision, (FMC Mar. 7, 2019).

On July 2, 2019, an Initial Decision on Remand was issued finding that Claimant had failed to establish that the unjust and unreasonable acts found to have been committed by Respondent occurred on a normal, customary, and continuous basis, as required to find a section 41102(c) violation and award reparations under the new interpretive rule. *M/S Parsons Overseas v. Seven Seas Shipping USA, Inc.*, Informal Docket No. 1960(I), Initial Decision on Remand, (SCO July 9, 2019) ("SCO Decision on Remand").

[1] Pursuant to 46 C.F.R. § 502.304(g), this decision will become final unless the Commission elects to review it within 30 days of service.

On December 12, 2019, the Commission issued an Order vacating the finding that Claimant failed to demonstrate that Respondent's conduct occurred on a normal, customary, and continuous basis. *M/S Parsons Overseas v. Seven Seas Shipping USA, Inc.*, Informal Docket No. 1960(I), Order Affirming-in-Part and Vacating-in-Part Decision on Remand and Remanding for Discovery, (FMC Dec. 12, 2019) ("Second Commission Remand Order"). The Commission stated that the purpose for this was to "give Claimant a final opportunity to seek discovery regarding whether Respondent or its agent engaged in its unjust and unreasonable conduct with respect to other shipments or shippers." Second Commission Remand Order at 13. The Commission affirmed the SCO Decision on Remand in all other respects. Second Commission Remand Order at 12.

On February 4, 2020, Claimant filed a "Request to Withdraw Complaint and Dismiss Proceeding Without Prejudice Pursuant to 46 C.F.R. § 502.72(a)(3)" ("Request for Dismissal"). Claimant asserts that its request to dismiss the proceeding is not due to a settlement between the parties. Request for Dismissal at 2. Claimant states:

> Complainant herein submits this request because of the expenses incurred to date in pursuing this matter and the uncertainty of further expenses given the trajectory of decision-making in this matter. The Federal Martime Commission's (FMC) decision vacating the July 9, 2018 order of the Small Claims Officer (SCO) which found that Respondent violated 46 U.S.C. § 41102(c) and remanding the case back to the parties to litigate the FMC's new interpretation of 46 U.S.C. § 41102(c) to determine whether Respondent's acts or omissions occurred on a normal, customary, and continuous basis, which Complainant maintains was impermissibly retroactively applied, has rendered it financially infeasible for Complainant to pursue resolution of this matter through FMC procedures, which have unexpectedly changed throughout pendency of this matter to Complainant's detriment.

Request for Dismissal at 1. Claimant asks that this proceeding be dismissed without prejudice pursuant to 46 C.F.R. § 502.72(a)(3). Request for Dismissal at 2.

The Commission's Rule 502.72(a)(3) provides in pertinent part:

> [A]n action may be dismissed at the complainant's request only by order of the presiding officer, on terms the presiding officer considers proper. If the motion is based on a settlement by the parties, the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable. Unless the order states otherwise, a dismissal under this paragraph is without prejudce.

46 C.F.R. § 502.72(a)(3).

Although Rule 72, governing dismissal of Commission proceedings, is not applicable to Subpart S proceedings, the undersigned used the rule as a guide for ruling on Claimant's request for dismissal. Claimant states that it is not seeking a dismissal because the parties have reached a

settlement but rather, because it is not financially feasible for Claimant to continue to litigate this case. Given that Claimant initially prevailed in its claim that Respondent violated section 41102(c) but was subsequently forced to relitigate its claim due to the Commission's new interpretive rule, I find that it is proper to grant Claimant's request to dismiss this proceeding without prejudice based on Claimant's claim that it is not financially feasible for it to continue to litigate this proceeding.

For the reasons stated above, it is hereby

ORDERED that the request to withdraw be **GRANTED** and the Claim be **DISMISSED WITHOUT PREJUDICE**.

Theresa Dike
Small Claims Officer

FEDERAL MARITIME COMMISSION

NGOBROS AND COMPANY NIGERIA LIMITED, *Complainant*

v.

OCEANE CARGO LINK, LLC AND KINGSTON ANSAH, INDIVIDUALLY, *Respondents*.

DOCKET NO. 14-15

Served: March 6, 2020

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's February 4, 2020, Initial Decision Granting Voluntary Dismissal of Proceeding has expired. Accordingly, the decision has become administratively final.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

MARINE TRANSPORT LOGISTICS, INC., *Complainant*

v.

CMA-CGM (AMERICA), LLC, *Respondent*.

DOCKET NO. 18-07

Served: March 20, 2020

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's February 18, 2020, Initial Decision Approving Confidential Settlement Agreement has expired. Accordingly, the decision has become administratively final.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

POSSIBLE REVOCATION OF PASSENGER VESSEL OPERATOR PERFORMANCE CERTIFICATE NO. P1397 GREAT NORTHERN & SOUTHERN NAVIGATION CO., LLC DBA FRENCH AMERICA LINE	**DOCKET NO. 19-08**

Served: March 20, 2020

BY THE COMMISSION: Michael A. KHOURI, *Chairman*, Rebecca F. DYE, Daniel B. MAFFEI, Louis E. SOLA, and Carl W. BENTZEL *Commissioners*.

ORDER REVOKING CERTIFICATE (PERFORMANCE)

On April 10, 2019, the Commission's Bureau of Certification and Licensing (BCL) notified Great Northern & Southern Navigation Co., LLC dba French America Line (Respondent) that it intended to revoke Respondent's Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation (Certificate). Respondent requested a hearing, and, on October 31, 2019, the Federal Maritime Commission (Commission) granted the hearing request and directed Respondent to show cause why its Certificate should not be revoked for failing to respond to lawful inquiries and requests for information (46 C.F.R. § 540.8(b)(3)), providing willfully false information (46 C.F.R. § 540.8(b)(1)), and failing to maintain qualification as financially responsible in accordance with the requirements of 46 C.F.R. Part 540 (46 C.F.R. § 540.8(b)(2)). Order Granting Hearing and Directing Great Northern & Southern Navigation Co. LLC dba French America Line to Show Cause, 84 Fed. Reg. 59809, 59810 (Nov. 6, 2019) (Hearing Order).

For the reasons set forth below, we find that Respondent has failed to respond to lawful inquires and requests for information under § 540.8(b)(3) and that Respondent's repeated failures to adhere to the requirements of its escrow agreement demonstrate it is not financially responsible under § 540.8(b)(2). Consequently, we revoke Respondent's Certificate.

I. BACKGROUND

A. Escrow Agreement and Certificate

The Commission requires that anyone in the United States desiring to arrange, offer, advertise, or provide passage on a vessel first obtain a Certificate (Performance). 46 C.F.R. § 540.3. The Certificate evidences the Commission's finding that a passenger vessel operator (PVO) has adequate financial responsibility to indemnify passengers for nonperformance of water transportation. 46 C.F.R. § 540.7(a). The coverage (e.g., surety bond, insurance, or escrow account) is used to reimburse passengers when there has been a failure to perform cruises as

contracted and no action to refund passengers has taken place.[1]

Respondent is a Louisiana limited liability company, and Mr. Christopher Kyte is the chairman of its board. Kyte Aff. ¶ 3. On October 4, 2016, Respondent entered into an Escrow Agreement with KeyBank, N.A. for the purposes of providing proof of financial responsibility for indemnification of passengers in the event of nonperformance. BOE Ex. G at BOE0152.[2] Upon receipt of the Escrow Agreement, BCL issued Respondent Performance Certificate No. P-1397, effective October 5, 2016. *Id.*

Under an escrow agreement, a PVO is to deposit unearned passenger revenue into an escrow account. *E.g.*, BOE Ex. G at BOE0152. If a cruise is completed, the escrow agent transfers these funds to the PVO. If a cruise is cancelled, the funds in the escrow account are available to reimburse passengers of the cancelled cruise. *E.g.*, *id.* at BOE0155. In this way, passengers have recourse in the event a PVO declares bankruptcy or is insolvent.

In actuality, the process set forth in Respondent's Escrow Agreement is more complicated and involves comparing on a weekly basis the amount of unearned passenger revenue with the funds in the escrow account. *Id.* at BOE0153. The Escrow Agreement requires Respondent to submit to KeyBank and the Commission weekly recomputations of unearned passenger revenue and refunds, called Recomputation Certificates. BOE Ex. G at BOE0153-BOE0154. Respondent is also required to submit audit reports that attest to the veracity of unearned passenger revenue recomputations on a quarterly basis. *Id.* at BOE0154.

B. Vessel Problems and Cancelled Cruises

On October 27, 2016, Respondent's sole vessel, the *Louisiane*, suffered a sanitary system failure. Kyte Aff. ¶ 5. Respondent hoped to have its vessel repaired quickly, but ultimately had to cancel multiple sailings. Resp't Mem. at 1-2. Nonetheless, Respondent continued to advertise and accept deposits until October 2017.[3] *Id.* at 2. Respondent's vessel is currently on charter to the United States Navy as an accommodation vessel. Kyte Aff. ¶ 20. This charter has been extended to March 2020 and may be extended into 2021. *Id.* At present, Respondent has no immediate plans to return to offering cruises, but it nonetheless wishes to retain its Certificate as it may wish to resume operating cruises at some point in the future. *Id.* ¶ 21.

[1] The certificate requirement derives from 46 U.S.C. § 44102(a), which provides that "[a] person in the United States may not arrange, offer, advertise, or provide transportation on a vessel to which this chapter applies unless the person has filed with the Federal Maritime Commission evidence of financial responsibility to indemnify passengers for nonperformance of the transportation."

[2] The Commission permits PVOs to establish adequate financial responsibility for nonperformance by filing evidence of an escrow account for indemnification of passengers. 46 C.F.R. § 540.5(b). The Commission's regulations provide a sample escrow agreement for parties to use. *Id.*

[3] Respondent's website continued to advertise its line and its vessel as recently as August 2019. BOE Ex. I.

C. Compliance-Related Issues

Since receiving its Certificate in October 2016, Respondent has failed to timely submit quarterly audits as required by the Escrow Agreement, failed to respond to BCL requests for information, failed to maintain good standing with the Louisiana Secretary of State, and failed to notify BCL of a change in address.

1. Quarterly Independent Audits

Per the terms of the Escrow Agreement, at the end of each quarter, Respondent is required to have independent auditors examine the weekly recomputation certificates and opine "as to whether the calculations at the end of each fiscal quarter are in accordance with the provisions of Paragraph 6" of the Escrow Agreement. BOE Ex. G at BOE0154. These examinations are to be conducted "in accordance with generally accepted auditing standards" and are to be submitted to Respondent and the Commission within forty-five days after the end of the quarter. *Id.*

The Commission did not receive the first independent audit for the 2016 4th Quarter covering October, November, and December 2016 by the due date of February 14, 2017. BOE Ex. C (Singletary Aff.) ¶ 7. Similarly, none of the quarterly independent audits were received on time for any of the quarters in 2017, 2018 and 2019. *Id.*

On December 22, 2017, Respondent emailed BCL requesting information about the audit process and what was needed for compliance. Singletary Aff. ¶ 14. BCL directed Respondent to paragraph 8 of the Escrow Agreement, which details the requirements for the independent audit. *Id.* ¶ 15. On May 18, 2018, BCL notified Respondent that it was not in compliance with the Escrow Agreement and set a deadline of June 1, 2018, for Respondent to comply and provide BCL with the required audit reports, weekly recomputation certificates, statement of good standing with the state of Louisiana, and Respondent's current operating address. *Id.* ¶ 20. Although the deadline was later extended to June 30, 2018, BCL did not receive the documents. *Id.*

On July 12, 2018, BCL held a conference call with Respondent during which Respondent agreed to submit a final audit report by July 27, 2018. *Id.* ¶ 21. On July 16, 2018, Russell Haynes, an Industry Analyst in BCL, received a phone call from William Toujouse, who stated that he had been employed by Respondent to conduct the quarterly independent audits. BOE Ex. D (Haynes Aff.) ¶ 14. According to Respondent, Mr. Toujouse was told during this call that he met the requirements to perform the audits. Kyte Aff. ¶ 15.

Between July 20 and 24, 2018, at the request of Respondent, BCL emailed Mr. Toujouse copies of Respondent's recomputation certificates. Singletary Aff. ¶ 22-24. On July 26, 2018, Mr. Toujouse told Tajuanda Singletary, the Director of the Office of Passenger Vessels and Information Processing (OPVIP) within BCL, that the delay in the audit reports was due to trying to find documentation stored in a warehouse. *Id.* ¶ 26. BCL did not receive an audit report by July 27, 2018. *Id.* ¶ 21.

On August 27, 2018, Sandra Kusumoto, the Director of BCL, sent Respondent an email regarding its compliance and recapping information from a telephone conversation on August

23, 2018. BOE Ex. A (Kusumoto Aff.) ¶ 28. Ms. Kusumoto noted that fourteen recomputation certificates were outstanding as of August 27, 2018, and although BCL had received Respondent's first audit report covering October-December 2016 on August 23, 2018, six quarterly audit reports remained outstanding. BOE Ex. M at BOE0304.

The audit report received on August 23, 2018, was prepared by Mr. Toujouse. *Id.* Ms. Kusumoto noted, however, that this report and the subsequently received reports did not resemble the audit reports BCL typically receives from other PVOs' CPAs. Kusumoto Aff. ¶ 6. Mr. Toujouse is not a CPA.

Although neither the Escrow Agreement nor the Commission's regulations require that independent audits be conducted by a CPA, BCL was concerned that Mr. Toujouse's reports were not in accordance with generally accepted auditing standards, as required by the Escrow Agreement. *Id.* Consequently, BCL requested an opinion on the audit report from the Commission's Office of the Inspector General (IG). *Id.* The IG opined that the August 2018 audit report "should not be relied on" because under Louisiana state law, only licensed CPAs can perform audits in accordance with general accepted auditing standards. BOE Ex. G at BOE0147-BOE0149.

In a letter dated February 6, 2019, BCL informed Respondent that the financial audit was not in compliance with paragraph 8 of the Escrow Agreement. BCL gave Respondent 60 days to engage an auditor in accordance with Louisiana law and requested that the auditor's corrections to Mr. Toujouse's reports be submitted by April 8, 2019. Alternatively, BCL proposed that Respondent surrender its Certificate. BOE Ex. G at BOE0288.

Respondent claims it engaged John W. Foard, a CPA in New Orleans, to conduct the audits. According to Respondent, Mr. Foard contacted the Commission to obtain guidance or an example of how the FMC wanted the audit information formatted or presented. When Mr. Foard received no example from BCL, Respondent asserts, Mr. Foard told Respondent that he was unwilling to prepare the audit. Kyte Aff. ¶ 16.

BCL has no record, however, of a communication from Mr. Foard, but on April 4, 2019, it did receive a call from Aaron Ready, a CPA who advised that he had been authorized to perform audits for Respondent and wanted to know what the requirements were. Haynes Aff. ¶ 19. Commission staff informed him that the requirements were outlined in the Escrow Agreement, that he should seek the appropriate information from Respondent, and that he needed to have a signed engagement letter. *Id.*

The Commission did not receive any audit reports from Mr. Ready or any CPA by April 8, 2019, or thereafter.

2. January 2018 BCL Review

On January 25, 2018, BCL sent Respondent a letter notifying it of BCL's intent to conduct a remote review of unearned passenger revenue pursuant to 46 C.F.R. Part 540.[4]

[4] Paragraph 23 of the Escrow Agreement provides that "[t]he Commission shall have the right to inspect the books and records of the Escrow Agent and those of the Customer." BOE Ex. G at BOE0159.

Kusumoto Aff. ¶ 5. BCL also requested financial documents commonly maintained by business enterprises such as financial statements and general ledgers. BOE Ex. A at BOE0105.

On January 29, 2018, Respondent requested an extension until February 9, 2018, which BCL granted. When the documents were not received on February 9, BCL emailed Respondent on February 13, 2018, requesting financial statements and general ledgers. At some point, Respondent informed BCL that it did not have the types of documents BCL requested. When BCL asked what financial information Respondent could provide the Commission, Respondent submitted a spreadsheet showing passenger deposits, payments, cancellations, and reimbursements. BOE Ex. A at BOE0105. On February 21, 2018, BCL replied to Respondent advising that they were still awaiting the additional documents requested in their January 25 letter. BOE Ex. M at BOE0292.

BCL has not been provided the books and records supporting the passenger receipts and reimbursements reflected in the spreadsheet provided by Respondent nor any of the additional documents or records requested. BOE Ex. A at BOE0105.

3. Respondent's Address

When Respondent entered into an Escrow Agreement with KeyBank, N.A., for the purposes of providing proof of financial responsibility, it identified its address as 700 Churchill Parkway, Avondale, Louisiana 70094. BOE Ex. G at BOE0152. By email on May 18, 2018, BCL contacted Respondent to, among other things, request Respondent's current operating address. BOE Ex. M at BOE0293. At some point, Respondent provided the Commission with a temporary mailing address of 883 Island Drive, Suite 214, Alameda, CA 94502. Later, on May 31, 2018, Respondent emailed BCL and stated that it remained at the 700 Churchill Parkway address. BOE Ex. M at BOE0296.

On July 16, 2018, Commission Area Representative Eric Mintz visited the 700 Churchill Parkway address and did not find Respondent or any signage or other indication that suggested Respondent maintained a presence at the address. BOE Ex. E (Mintz Aff.) ¶ 2. This address is under the control of the Jefferson Parish Economic Development Commission (JEDCO) and Mr. Mintz spoke with JEDCO's president and CEO, who stated that Respondent had been evicted several months previously. *Id.* ¶¶ 1-3. By correspondence emailed July 17, 2018, Scott Rojas, Director of Facilities and IT at the building located at the 700 Churchill Parkway address, confirmed that Respondent vacated the location the week of November 27, 2017. BOE Ex. F at BOE0131.

On or about February 6, 2019, the Commission sent letters to Respondent about the need to correct audit reports. A letter was sent by courier to the 700 Churchill Parkway address. The letter was returned stating that no one was at that address. BOE Ex. A at BOE0106. Multiple attempts to deliver Commission documents to the 700 Churchill Parkway address on November 1, 4, and 5, 2019, were unsuccessful. BOE Reply at 10.

4. Standing with the Louisiana Secretary of State

When Respondent entered the Escrow Agreement, it warranted and represented that, "it is a Louisiana limited liability company in good standing, and that is qualified to do business in

Louisiana." BOE Ex. G at BOE0156.

By correspondence emailed May 18, 2018, BCL notified Respondent that it was not in compliance with its Escrow Agreement and set a deadline of June 1, 2018, for Respondent to verify that it was in good standing with the Secretary of State of Louisiana. BOE Ex. M at BOE0293. On May 31, 2018, Respondent emailed a letter to BCL in which it stated: "we can verify that the Great Northern & Southern Navigation Co., LLC d/b/a French America Line is in good standing with the Secretary of State of Louisiana." BOE Ex. M at BOE0296.

As of October 9, 2019, FAL was not in good standing with the Louisiana Secretary of State. BOE Ex. K at BOE0257. On November 22, 2019, Respondent renewed its good standing. BOE Reply at 7.

II. DISCUSSION

Although the record does not support revocation under 46 C.F.R. § 540.8(b)(1), grounds for revocation exist under § 540.8(b)(2) and (3). Specifically, Respondent failed to timely submit quarterly audit reports, thereby violating the terms of its Escrow Agreement, and Respondent has failed to respond to numerous inquiries and document requests from Commission staff. Additionally, the Commission finds that revoking Respondent's Certificate is more appropriate than suspending it.

A. Burden and Standard of Proof

While neither Respondent nor BOE addresses the burden of proof or standard of proof in PVO certificate revocation proceedings, in analogous cases involving order-to-show-cause revocation proceedings for ocean transportation intermediary licenses, the Commission held that the burden of proof is on BOE. *In re: Revocation of Ocean Transp. Intermediary License No. 017843 – Washington Movers, Inc.*, 1 F.M.C.2d 5, 8 (FMC 2018). Moreover, the standard of proof in license revocation proceedings is preponderance of the evidence. *Id.* The Commission adopts these standards in certificate revocation proceedings under Part 540 of its regulations.

B. Grounds for Revocation

Section 44102 of Title 46 provides that:

> (a) Filing requirement. A person in the United States may not arrange, offer, advertise, or provide transportation on a vessel to which this chapter applies unless the person has filed with the Federal Maritime Commission evidence of financial responsibility to indemnify passengers for nonperformance of the transportation.
>
> (b) Satisfactory evidence. To satisfy subsection (a), a person must file
> (1) Information the Commission considers necessary; or
> (2) A copy of the bond or other security, in such form as the Commission by regulation may require.

The Commission's regulations implementing the statute provide that "[n]o person in the

United States may arrange, offer, advertise or provide passage on a vessel unless a Certificate (Performance) has been issued to or covers such person." 46 C.F.R. § 540.3. The Commission has held that the purpose of this provision is, "to prevent financial loss and hardship to the American traveling public, who, after payment of cruise passage money, are stranded by the abandonment or cancellation of a cruise." *Terry Marler and James Beasley dba Titanic Steamship Line*, 22 S.R.R. 359, 369 (ALJ 1983), aff'd, 22 S.R.R. 798 (FMC 1984).

The Commission's regulations at 46 C.F.R. § 540.8(b) further provide that a Certificate (Performance)[5] may be denied, revoked, suspended, or modified for any of the following reasons:

> (1) Making any willfully false statement to the Commission in connection with an application for a Certificate (Performance);
>
> (2) Circumstances whereby the party does not qualify as financially responsible in accordance with the requirements of the Commission;
>
> (3) Failure to comply with or respond to lawful inquiries, requests for information, rules, regulations, or orders of the Commission pursuant to the rules of this subpart.

On October 31, 2019, the Commission issued an order granting a hearing and directing Respondent to show cause why its Certificate should not be revoked for four reasons:

> (1) Respondent's false statements regarding its office address establish that revocation is proper under 46 C.F.R. § 540.8(b)(1);
>
> (2) Respondent's failure to timely submit quarterly independent audits for the past three years, as required by the terms of its escrow agreement, establish that Respondent is no longer qualified to hold a Certificate within the meaning of 46 U.S.C. § 44102 and 46 C.F.R. § 540.8(b)(2);
>
> (3) Respondent's failure to remain a Limited Liability Company in good standing with its state's authority, as warranted in its escrow agreement, establish that Respondent is no longer qualified to hold a Certificate within the meaning of 46 U.S.C. § 44102 and 46 C.F.R. § 540.8(b)(2) and
>
> (4) Respondent's failure to comply with information and document requests by Commission staff establish that revocation is proper under 46 C.F.R. § 540.8(b)(3).

Hearing Order, 84 Fed. Reg. at 59810.

[5] This proceeding involves Respondent's Certificate (Performance). It does not implicate Respondent's proof of financial responsibility to meet liability incurred for death or injury to passengers, which involves a Certificate (Casualty). *Compare* 46 C.F.R. § 540.1 *with* 46 C.F.R. § 540.20.

Each of these bases for revocation is discussed below.

1. Section 540.8(b)(1)

Commission regulations state that a performance certificate may be revoked for "[m]aking any willfully false statement to the Commission in connection with an application for a Certificate (Performance)." 46 C.F.R. § 540.8(b)(1). The Hearing Order alleges that Respondent's "false statements regarding its office address" constitute grounds for revocation under this regulation. 84 Fed. Reg. at 59810.

Respondent argues that the Commission is being hyper-technical and insists that its mailing address of 700 Churchhill Parkway never changed. Resp't Mem. at 4. According to Respondent, it physically "relocated because it has no employees other than Christopher Kyte, who is the Chairman of the Board." *Id.* Respondent further contends that it has "always maintained its FMC-approved Escrow Account at KeyBank N.A. and all passengers have been refunded the cancelled cruises." *Id.*

Respondent's only evidence of its address is the affidavit of Mr. Kyte, who avers that the 700 Churchill Parkway address is active and points out that this is the address on the Louisiana Secretary of State website. Kyte Aff. ¶ 17. According to Kyte, Respondent "had no employees working there due to the fact" that the absence of funding "necessitated letting staff go." *Id.* He also states in his affidavit that he gave BCL a temporary physical address, and Respondent's email address has not changed. *Id.* ¶ 18.

BOE counters that Respondent provides no evidence to support the claim that 700 Churchill Parkway is a working mailing address, and it provides evidence that the address is no longer active. Among other things, a Commission Area Representative visited the address and did not find Respondent, there are numerous examples of undelivered mail and failed service, and an email from the director of facilities at 700 Churchill Parkway states that Respondent left the address in November 2017. BOE Reply at 6, 9-10.

Although the preponderance of the evidence favors BOE's argument that 700 Churchill Parkway is not Respondent's mailing address, revocation under § 540.8(b)(1) has not been established. Section 540.8(b)(1) does not say that a certificate can be revoked for making a false statement, but rather for making a "willfully false statement *in connection with an application*." (emphasis added). In the instant matter, BCL records indicate that when Respondent filed its application for a certificate, it listed 700 Churchill Parkway, Avondale, Louisiana 70094 as its address. Resp't Ex. 1. Respondent also entered into the Escrow Agreement using the 700 Churchill Parkway address. BOE Ex. G at BOE0152. There is no allegation or evidence that at the time of the application and at the time of the signing of the Escrow Agreement, 700 Churchill Parkway was not the address of the Respondent. That is, there is no evidence that Respondent made willfully false statements about its address in connection with its application for a certificate.

BOE argues that a business address is a vital piece of information and that the "Commission's regulations require that address information be accurate and updated with every change." BOE Reply at 9 (emphasis added). But revocation under § 540.8(b)(1) must involve

false statements in connection with an application; it says nothing about apprising the Commission about changed information.[6] Further, BOE does not cite any regulation requiring a PVO to notify the Commission if its address changes.[7] Commission regulations do require a PVO to amend an application in the event that there are "material changes" to the facts reflected in an application. 46 C.F.R. § 540.4(g). But the regulations define "material changes" as those which: (1) result in a decrease in the amount submitted to establish financial responsibility to a level below that required to be maintained; or (2) require that the amount to be maintained be increased above the amount submitted to establish financial responsibility. *Id.* A change in address is not a material change that implicates the duty to amend. *Id.*[8]

In sum, while it is likely that Respondent has misled the Commission about the accuracy of its mailing address, a misleading statement is not enough to revoke a certificate under § 540.8(b)(1). Therefore, Respondent's statements regarding its office address do not justify revocation under § 540.8(b)(1).

2. Section 540.8(b)(2)

Under § 540.8(b)(2), the Commission may revoke a Certificate (Performance) for "[c]ircumstances whereby the party does not qualify as financially responsible in accordance with the requirements of the Commission." 46 C.F.R. § 540.8(b)(2). There is little guidance on what these circumstances are, and the regulation is unchanged from its initial adoption in 1967. The regulations themselves, however, provide some context. Section 540.8(a) provides that "[r]egardless of a hearing, a Certificate (Performance) shall become null and void upon cancellation or termination of the . . . escrow account." "[C]ircumstances whereby the party does not qualify as financially responsible," therefore, are not limited to situations where a PVO's escrow account is terminated – otherwise § 540.8(b)(2) would be superfluous in light of § 540.8(a). There must therefore be some circumstances that permit revocation under § 540.8(b)(2) other than termination of the escrow account itself.

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[6] In the Commission's 1966 proposed rule implementing Public L. No. 89-777, the equivalent of § 540.8(b)(1) provided that a certificate could be revoked for making "any willfully false statement to the Commission in connection with an application for a Certificate (Performance) *or its continuance in effect*." NPRM: Security for Protection of Public, 31 Fed. Reg. 15703, 15705 (Dec. 13, 1966) (emphasis added). This italicized language was omitted from the final rule. Final Rule: Security for Protection of the Public, 32 Fed. Reg. 3986, 3989 (Mar. 11, 1967). The removal of this language suggests the intention to limit this ground for revocations to false statements in connection with applications for certificates.

[7] Other regulated entities like OTIs and foreign-based unlicensed NVOCCs are required to notify BCL of changes in addresses, but no similar provision exists in Part 540. *See* 46 C.F.R. §§ 515.20(e), 515.19(f).

[8] Section 540.9(h) requires certificate holders to "submit to the Commission a semi-annual statement of any changes with respect to the information contained in the application or documents submitted in support thereof or a statement that no changes have occurred." This provision, however, is not referenced in any submission by BOE, and there has been no allegation that Respondent failed to comply with it.

a. *Failure to Submit Timely Audit Reports*

The first circumstance alleged to justify revocation under 46 C.F.R. § 540.8(b)(2) is Respondent's "failure to timely submit quarterly independent audits for the past three years, as required by the terms of its escrow agreement." Hearing Order, 84 Fed. Reg. at 59810. Respondent concedes that it was "on occasion" "dilatory in providing information and document[s] to" the Commission, including requested reports. Resp't Mem. at 3-4. It argues, however, that revocation is not justified because: (1) it was dilatory because it was temporarily effectively out of business; (2) it was in regular written and telephonic communication with the Commission; (3) it filed the required recomputation certificates; (4) its quarterly audits are current through June 30, 2018, although the Commission rejected them on technical grounds; and (5) the Commission is aware that there is nothing to audit because there are no passenger deposits, given that Respondent stopped taking them as of October 2017. *Id.* at 4.

BOE counters that Respondent has failed to comply with audit requirements of its Escrow Agreement. BOE Reply at 11. BOE further argues that any audit reports submitted by Respondent could not be relied upon because they were not in accordance with Louisiana law or generally accepted accounting procedures. BOE Reply at 10. BOE also suggests that Respondent should not be able to unilaterally determine which aspects of the Escrow Agreement it follows by stating that it is a dormant PVO. *Id.* at 12.

BOE has established that Respondent's failure to timely submit the audit reports as required by the Escrow Agreement constitute "circumstances whereby the party does not qualify as financially responsible in accordance with the requirements of the Commission" under § 540.8(b)(2). It is undisputed that the Respondent failed to timely file any of its quarterly audit reports, including the 2016 4th Quarter Audit, and all the 2017, 2018, and 2019 quarterly audits. Singletary Aff. ¶ 7.

These are not simply technical failures. Rather, they threaten to thwart the purpose of escrow accounts and undermine the Commission's ability to ensure that Respondent has the resources in place to protect passengers. *See, e.g.*, Royal Venture Cruise Line, Inc., Order of Investigation, 61 Fed. Reg. 58413, 58413 (Nov. 14, 1996) ("When a passenger vessel operator relies upon an Escrow Agreement to establish its financial responsibility, the Commission must have accurate, credible and reliable information concerning the collection of passenger deposits and fares to ensure the protection of passengers and the integrity of the Escrow Agreement."). Unlike surety bonds, which involve a third-party surety guaranteeing compensation to passengers, the escrow account process relies on the PVO itself to ensure that it maintains adequate funds in escrow. This makes it vital for PVOs such as Respondent to comply with the Escrow Agreement. Its repeated failure to do so here demonstrates that it can no longer be considered financially responsible.

Respondent's arguments are unpersuasive. Respondent's justification for its untimely submission of documents – that it was temporarily out of business – is no valid excuse. The passenger vessel responsibility requirements were put in place to protect passengers in situations such as insolvency. *See Wall Street Cruises Inc. – Failure to Qualify for Performance Certificate*, 12 S.R.R. 950, 952 (FMC 1972) ("In enacting PL 89-777, Congress expressed its intent to insure that the traveling public be protected from financial loss at the hands of vessel

owners and operators or other persons booking transportation on oceangoing vessels"). As for Respondent's "constant" communication with the Commission, this is not a mark in Respondent's favor. The communication was necessitated by Respondent's inability to timely submit documents or accurately respond to customers. *See, e.g.,* Singletary Aff. ¶¶ 16, 18, 20, 28; Haynes Aff. ¶¶ 13, 18; Kusumoto Aff. ¶ 7; BOE Ex. B (Johnson Aff.) Aff. ¶¶ 5, 8; BOE Ex. H at BOE0165-BOE0172; BOE Ex. M at BOE0229-BOE0305.

As for the recomputation certificates, Respondent argues that while it was delinquent, they have all been provided. Kyte Aff. ¶ 14. But late compliance is still non-compliance, and it took the repeated efforts of BCL to obtain these and other documents from Respondent. *See, e.g.*, Johnson Aff. ¶8; Singletary Aff. ¶ 20; Haynes Aff. ¶18.

Most concerning is Respondent's contention that it did not need to submit recomputation certificates or quarterly audits to the Commission after it stopped taking passenger deposits in October 2017. Kyte Aff. ¶13 ("As of October 2017, [Respondent] was no longer advertising or taking deposits, ... Accordingly, there was no activity to audit and the weekly recomputations since then have shown no activity."); *id.* ¶ 14 ("In this regard, once [Respondent] stopped marketing and collecting deposits, it stopped preparing recomputation certificates."); Resp't Mem. at 4 ("The Commission is fully aware of the fact that there is nothing for an auditor to review since there are no deposits."). The Escrow Agreement requires submission of these documents, and Respondent cites no authority that would permit it to unilaterally cease compliance.

Further, the Commission has previously required compliance even when operators are not accepting money. In *Wall Street Cruises*, the Commission found that the active collection of fares is not crucial to finding a violation of PL 89-777. 12 S.R.R. at 953. There the operator was advertising for a cruise without a certificate and the Commission found a violation and issued a cease and desist order even though the respondent had not collected any deposits. *Id.* Similarly, Respondent in this case is not freed from its obligation to follow the terms of the Escrow Agreement merely because it is not accepting deposits.

Respondent points out that its "quarterly independent audit reports were current through June 30, 2018," but rejected by the Commission on technical grounds. Resp't Memorandum. Respondent does not challenge BCL's basis for rejecting the audit. But Mr. Kyte, Respondent's chairman, suggests in his affidavit that BCL's rejection of the audit reports was unjustified because: (a) BCL staff told Mr. Toujouse that he could perform the audit and then rejected the audit report because Mr. Toujouse was not a CPA, Kyte Aff. ¶ 15; and (b) when Respondent subsequently engaged a CPA and asked BCL for guidance or an example on how the audit should be formatted, BCL said there was no guidance or example, causing the CPA to decline to prepare a report, Kyte Aff. ¶ 16.

These contentions are unsubstantiated. The only reference to Commission staff approving the use of Mr. Toujouse as auditor is in the affidavit of Mr. Kyte. Kyte Aff. ¶ 15. Respondent did not submit an affidavit from Mr. Toujouse, nor did Mr. Haynes mention the event is his affidavit. Mr. Kyte's statement about what Mr. Haynes told Mr. Toujouse is likely inadmissible hearsay. *See* 46 C.F.R. § 502.204(a); Fed. R. Evid. 802. There is no other evidence substantiating this telephone call. As for Respondent's claim that it had an auditor lined up but the Commission

declined to provide audit guidance, Kyte Aff. ¶ 16, Mr. Haynes's affidavit does not mention this. Rather, he describes a phone call with a different auditor about audit requirements, and Mr. Haynes told the auditor that the requirements were outlined in the Escrow Agreement, that he needed to seek appropriate information from Respondent, and that he needed a signed engagement letter. Haynes Aff. ¶ 19.

Finally, even if BCL should not have rejected the August 23, 2018, audit report, BCL informed Respondent that it was not in compliance on February 6, 2019, and gave Respondent two months to furnish a compliant audit report. BOE Ex. M at BOE0288. Respondent did not comply by the deadline. Additionally, Respondent does not explain how these events are related to or justify its failure to timely file the other quarterly audit reports. Per the terms of the Escrow Agreement, Respondent was required to submit an additional audit report on November 14, 2018, but it failed to do so. Singletary Aff. ¶ 7. This was prior to being told by BCL that the submitted reports were unacceptable. Kusomoto Aff. ¶ 7. As noted above, the Respondent also failed to submit any of the audit reports for 2019. Singletary Aff. ¶ 7.

The Escrow Agreement is evidence of the financial responsibility of Respondent and in the instant matter, Respondent has not complied with the requirements of the Agreement since 2017 and remains out of compliance. As a result, circumstances exist whereby Respondent does not qualify as financially responsible, and grounds for revocation exist under 46 C.F.R. § 540.8(b)(2).

b. *Respondent's Standing with the Louisiana Secretary of State*

The second circumstance alleged to justify revocation under § 540.8(b)(2) is Respondent's "failure to remain a Limited Liability Company in good standing with its state's authority, as warranted in its escrow agreement." Hearing Order, 84 Fed. Reg. at 59810. Respondent does not address this allegation in its memorandum other than to state that "[i]t is a company in good standing with the State of Louisiana." Resp't Mem. at 4. BOE in reply notes that although Respondent was not in good standing with the Louisiana Secretary of State in October 2019, it renewed its good standing on November 22, 2019. BOE Reply at 7. BOE does not otherwise argue that the good-standing issue justifies revocation.

As noted above, compliance with the terms of escrow agreements is vital to escrow accounts serving their purpose under the Commission's PVO financial responsibility program. In the Escrow Agreement, Respondent warranted and represented that it was in good standing. BOE Ex. G at BOE0156. But temporary failure to maintain good standing does not to justify, standing alone, revocation of a PVO certificate. The link between Respondent's conduct – failing to maintain good standing – and its qualification as financially responsible is attenuated, or at least not clear. The record indicates that Respondent lost its good-standing status because it failed to file its annual report after May 29, 2018. BOE Ex. K. There is no clear link between this error and Respondent's financial responsibility within the meaning of 46 U.S.C. § 44102 and 46 C.F.R. § 540.8(b)(2).

3. Respondent's failure to comply with information and document requests

The final ground for revocation alleged in the Hearing Order is Respondent's failure to comply with information and document requests by Commission. 84 Fed. Reg. at 59810. Section 540.8(b)(3) of the Commission's regulations allows for the revocation of a certificate for "[f]ailure to comply with or respond to lawful inquiries, requests for information, rules, regulations, or orders of the Commission pursuant to the rules of this subpart." 46 C.F.R. § 540.8(b)(3).

As noted above, Respondent concedes that it submitted documents in an untimely fashion but asserts that it has been in "continuous written communications and verbal communications with the FMC" and has kept the Commission advised as to its current status. Resp't Mem. at 2-3. In its reply, BOE states that Respondent's equitable arguments do not provide good cause to avoid revocation. BOE Reply at 11. BOE also stresses the importance of the documents requested to the Commission's assessment of Respondent's financial responsibility. *Id.* at 12.

BOE has established that Respondent has failed to "comply with or respond to lawful inquiries, requests for information, rules, regulations, or orders of the Commission." 46 C.F.R. § 540.8(b)(3). Even if one discounts the untimely submission of recomputation certificates, Respondent failed to respond in a timely fashion, or respond at all, to many direct requests and inquires made by the Commission. In January and February 2018, Respondent failed to provide corrections to discrepancies in passenger refund lists as requested by Commission staff. Haynes Aff. ¶ 13. Also, in February 2018, Respondent failed to provide all the requested documents connected with a remote review of Unearned Passenger Revenue. BOE Ex. A at BOE0105. In February 2019, Respondent was advised to submit corrections to its audit reports by April 8, 2019. Respondent has still not submitted these reports. Kusumoto Aff. ¶ 7.

Commission staff also inquired about whether the 700 Churchill Parkway address was a working address on several occasions. Though Respondent continues to assert it is a working mailing address, there exists significant doubt as to whether this remains a mailing address for Respondent. BCL has been unable to send mail to this address for Respondent and the building manager of this address stated that Respondent left the premises in November 2017.

The Commission has previously found that failure to respond to Commission requests for information or documents warrants action under 46 C.F.R. § 540.8(b). In *Royal Venture Cruise Line*, an operator was denied a certificate when it was found, among other issues, that it, "misled and failed to comply with lawful inquires by the Commission's staff." 27 S.R.R. at 1074. In that case, the Commission ultimately denied the operator's application for a certificate. *Id.* at 1073.

Respondent cites communication with the Commission regarding his compliance as a defense. However, communication with the Commission about coming into compliance does not remove the obligation of complying with Commission regulations. The Commission has previously corresponded with parties it believes may be in violation of the Part 540 requirements. *See Royal Venture*, 27 S.R.R. at 1077 (operator received at least three warning letters from Commission staff urging him to come into compliance).

Additionally, while Respondent did respond to some Commission inquires and often

requested extensions of deadlines, many of these deadlines were broken and there remain several outstanding unfilled requests and inquiries from the Commission. The record establishes that Respondent has failed to comply with document requests and inquiries from the Commission, and revocation is proper under 46 C.F.R. § 540.8(b)(3).

C. Appropriate Sanction

Because grounds for revocation exist under 46 C.F.R. § 540.8(b)(2) and (3), the question is whether the Commission should revoke Respondent's Certificate or take some lesser action, or no action. Section 540.8(b) is permissive and contemplates sanctions other than revocation: "A Certificate (Performance) may be denied, revoked, suspended, or modified" if grounds exist. (emphasis added).

Respondent states that its "preference" is "that it not surrender its Performance Certificate" even though its vessel is not engaged in passenger cruises and it is not being marketed or advertised. Resp't Mem. at 4-5; Kyte Aff. ¶ 20 ("At the present time [Respondent] has no intention of offering any cruises, and is not marketing/advertising the Louisiane as a passenger cruise vessel."). According to Respondent, it intends to return the vessel to the river cruise ship market in the future and wishes to remain in good standing with the Commission. Kyte Aff. ¶ 21. At the same time, however, Respondent does not want to be obligated to complete weekly recomputation certificates and quarterly audits when it is not advertising the vessel and it cannot serve as a cruise vessel currently. *Id.*

Respondent asserts that it is and always has been financially responsible. Respondent also points out in its submissions that all passenger monies had been paid into the Escrow Account, and that all passenger deposits were returned after the cruises were cancelled. Resp't Mem. at 2, 5; Kyte Aff. ¶ 9 ("There is not a single passenger who was not refunded.").

BOE does not address the suspension argument directly, but notes that Respondent's desire to not comply with Commission regulations because it is not currently providing passenger services but still keep its Certificate so it can resume services without having to reestablish financial responsibility is "intrinsically contradictory." BOE notes not only Respondent's "numerous and repeated compliance failures," but also points out that:

- BCL had to work with Respondent to correct misrepresentations to passengers about the refund process. BOE Reply at 12 (citing BOE Ex. H at BOE0163-BOE0166);
- At the time of the issuance of the Hearing Order, Respondent's website continued to advertise its line and vessel as a river cruise vessel despite Respondent's claim that it is not advertising. BOE Reply at 13-14 (citing BOE Ex. I); and
- "[M]ultiple complaints" about Respondent have been made to industry advocates, the news media, and the Commission (BOE Reply at 15).

The record establishes that Respondent has engaged in numerous actions and inactions that warrant revocation rather than suspension. As BOE notes, the ultimate purpose of the

financial responsibility regulations is to "ascertain, from past experience and present resources, whether there is a reasonable assurance that future passengers will not be stranded and left without financial recourse in the event of nonperformance of transportation." *Pac. Far East Line*, 17 S.R.R. at 1548. Although Respondent's passengers received their deposits back, doing so required substantial assistance from BCL. Respondent's history of noncompliance with the Escrow Agreement and Commission regulations gives little assurance that it will act appropriately in the future. Finally, nothing prevents Respondent from reapplying for a certificate if it offers cruises again.

III. CONCLUSION

For the reasons set forth above, grounds for revocation exist under 46 C.F.R. § 540.8(b), and we therefore **REVOKE** Respondent's performance certificate.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

M/S. PARSONS OVERSEAS, *Claimant*

v.

SEVEN SEAS SHIPPING USA, INC., *Respondent*.

INFORMAL DOCKET NO. 1960(I)

Served: March 30, 2020

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Small Claims Officer's February 26, 2020 Order Granting Voluntary Dismissal has expired. Accordingly, the decision has become administratively final.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

INTERNATIONAL OCEAN TRANSPORTATION SUPPLY CHAIN ENGAGEMENT

FACT FINDING NO. 29

Served: March 31, 2020

ORDER

Pursuant to the Shipping Act of 1984, 46 U.S.C. 40101 et seq. (Shipping Act), the Federal Maritime Commission (Commission) is charged with regulating the U.S. international ocean transportation system that supports the transportation of goods by water in the foreign commerce of the United States ("liner service"). The purposes of the Shipping Act include the requirements to "provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices," and also "to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace." 46 U.S.C. § 40101.

Maintaining the effectiveness and reliability of the global freight delivery system is critically important to the Nation's continued economic vitality. Unfortunately, congestion and bottlenecks at ports and other points in the Nation's supply chain have become a serious risk to the growth of the U.S. economy, job growth, and to our Nation's competitive position in the world.

In 2016, in response to challenges created by unresolved supply chain issues, the Commission convened teams of industry leaders to develop process innovations that would enhance supply chain reliability and resilience. Each of the teams was composed of members representative of the supply chain, including public port authorities, marine terminal operators, beneficial cargo owners, ocean transportation intermediaries, liner shipping companies, drayage trucking companies, longshore labor representatives, rail officials and chassis providers. The conclusions of these meetings were summarized and developed into a final report issued in December 2017.

Recent global events have only highlighted the economic urgency of responsive port and terminal operations to the effectiveness of the United States international freight delivery system. Given the Commission's mandate to ensure an efficient and economic transportation system for ocean commerce, the Commission has a clear and compelling responsibility to actively respond to current challenges impacting the global supply chain and the American economy. Accordingly, the Commission has determined there is a compelling need to convene new supply chain innovation teams to address these challenges.

THEREFORE IT IS ORDERED, That, pursuant to 46 U.S.C. §§ 41302, 40302, 41101 to 41109, 41301 to 41309, and 40104, and 46 C.F.R. § 502.281 et seq., Commissioner Rebecca F. Dye engage supply chain stakeholders in public or non-public discussions to identify commercial solutions to certain unresolved supply chain issues that interfere with the smooth operation of the U.S. international supply chain;

IT IS FURTHER ORDERED, That, the Commissioner form one or more supply chain innovation teams, composed of leaders from all commercial sectors of the U.S. international supply chain, to develop commercial solutions to port congestion and related supply chain challenges;

IT IS FURTHER ORDERED, That, the Commissioner provide periodic updates to the Commission on the results of efforts undertaken by this Order;

IT IS FURTHER ORDERED, That, the Commissioner have full authority under 46 C.F.R. §§ 502.281 to 502.291, to perform such duties as may be necessary in accordance with U.S. law and Commission regulations. The Commissioner will be assisted by staff members as may be assigned by the Chairman;

IT IS FURTHER ORDERED, That, this Proceeding be discontinued as ordered by the Commission; and

IT IS FINALLY ORDERED, That, notice of this Order be published in the Federal Register.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

TEMPORARY EXEMPTION FROM CERTAIN SERVICE CONTRACT REQUIREMENTS	**DOCKET NO. 20-06**

Served: April 27, 2020

BY THE COMMISSION: Michael A. KHOURI, *Chairman*, Rebecca F. DYE, Daniel B. MAFFEI, Louis E. SOLA, and Carl W. BENTZEL *Commissioners*.

ORDER GRANTING EXEMPTION

The coronavirus disease 2019 (COVID-19) has highlighted the economic significance of maintaining the effectiveness and reliability of the global freight delivery system and has placed increased stresses and burdens on carriers and their customers. The pandemic has also, in some instances, made continued compliance with certain Federal Maritime Commission regulations especially burdensome.

More specifically, an increasing number of businesses have been working remotely as a result of social distancing guidance and stay-at-home orders. The Commission understands that for some entities, this situation, combined with other COVID-19-related disruptions to commercial operations, has made complying with service contract filing requirements difficult.

In particular, 46 C.F.R. § 530.8(a)(1) requires that carriers file original service contracts (as opposed to an amendment) with the Commission "before any cargo moves pursuant to that service contract." In addition, § 530.8(b) requires that each original contract include, among other terms, an effective date that is no earlier than the filing date. *See* §§ 530.3(i) (defining "effective date" for original service contracts and amendments); 530.8(b)(8)(i) (requiring every service contract to include its effective date). Similarly, § 530.14(a) provides that "[p]erformance under an original service contract may not begin before the day it is effective and filed with the Commission."

In contrast, the Commission's regulations provide more flexibility to service contract amendments, which can be filed within 30 days after the amendment's effective date. *See* §§ 530.3(i); 530.8(a)(2); 530.8(b)(8)(i); 530.14(a).

The Commission believes that a temporary blanket exemption extending the current filing flexibilities for service contract amendments to original service contracts will allow parties time to adapt to the increased pressures that have been placed upon them by COVID-19 and minimize disruptions to the contracting process.

Exemptions from the requirements of Part 530 are governed by 46 C.F.R. § 530.13(b). Under this authority, the Commission may exempt any specified activity of persons subject to the Shipping Act from the requirements of Part 530 if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce. § 530.13(b) (incorporating 46 U.S.C. § 40103(a) and 46 C.F.R. §§ 502.10, 502.92).

The Commission has previously allowed for exemptions from the service contract regulations in exigent circumstances where the exemption meets the criteria in 46 U.S.C. § 40103(a). *See Pet. of Maersk Line A/S for an Exemption from 46 C.F.R. § 530.8*, Pet. No. P1-17 (FMC July 19, 2017); *Petition of COSCO Container Lines Company Ltd.*, 34 S.R.R. 97 (FMC 2016); *Petition of Crowley Caribbean Servs., LLC*, 33 S.R.R. 1461 (FMC 2016); *Petition of Compañía Sud Americana de Vapores S.A.*, 33 S.R.R. 934 (FMC 2015); *Petition of Hanjin Shipping Co., Ltd.*, 31 S.R.R. 1080 (FMC 2009).

The Commission similarly concludes that a temporary exemption from certain requirements for original service contracts in §§ 530.3, 530.8, and § 530.14, subject to certain conditions, will reduce the filing burdens on the industry and will not result in a substantial reduction in competition or be detrimental to commerce. This temporary exemption is limited to a small subset of the Commission's service contract regulations in order to allow the industry to meet the challenges that the global pandemic has placed upon it. This exemption is subject to the condition that original service contracts continue to be filed with the Commission. As is the case for service contract amendments, however, that filing may now be delayed up to 30 days after the effective date. This exemption is also temporary and will remain in effect only until December 31, 2020.[1] The Commission has determined that these conditions will minimize any potential negative effects on competition or commerce.

Although the Commission's Rules of Practice and Procedure normally require notice and an opportunity for a hearing be afforded to interested parties (including publication in the Federal Register of a notice of the proposed exemption and request for comments), *see* 46 C.F.R. § 502.92(c)-(d); 530.13(b) (cross-referencing § 502.92), the Commission may waive these requirements for regulatory exemptions to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires. *See* 46 C.F.R. §§ 502.10; 530.13(b) (cross-referencing § 502.10). Given the immediate need for regulatory relief in light of the COVID-19 pandemic and its effects on commercial operations, the Commission has determined that waiving the notice and hearing requirements in § 502.92 is necessary to prevent undue hardship and is required for the expeditious conduct of Commission business.

THEREFORE IT IS ORDERED, That a temporary exemption from the requirements of 46 C.F.R. §§ 530.3(i); 530.8(a)(1), (b)(8)(i); and 530.14(a) for original service contracts is GRANTED, provided that:

1. Authorized persons must file with the Commission, in the manner set forth in appendix A of 46 C.F.R. part 530, a true and complete copy of every original service contract no later than thirty (30) days after any cargo moves pursuant to

[1] The Commission may consider extending this exemption as necessary to address the continuing effects of the COVID-19 pandemic.

that service contract amendment;

2. Every original service contract filed with the Commission must include the effective date, which may be no more than thirty (30) calendar days prior to the filing date with the Commission; and

3. Performance under an original service contract may not begin until the day it is effective, provided that the service contract is filed with the Commission no later than thirty (30) calendar days after the effective date.

IT IS FURTHER ORDERED, That this temporary exemption will remain in effect until December 31, 2020.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

COVID-19 IMPACT ON CRUISE INDUSTRY

FACT FINDING NO. 30

Served: April 30, 2020

BY THE COMMISSION: Michael A. KHOURI, *Chairman*, Rebecca F. DYE, Daniel B. MAFFEI, Louis E. SOLA, and Carl W. BENTZEL *Commissioners*.

ORDER

Congress tasked the Federal Maritime Commission (Commission) with administering the Shipping Act of 1984 (Shipping Act), 46 U.S.C. § 40101 *et seq*. The Commission also administers Public Law 89-777, 46 U.S.C. § 44101 *et seq*., to ensure that passenger vessel operators (PVOs) satisfy the financial responsibility requirements related to nonperformance of transportation and death or injury to passengers.

The purposes of the Shipping Act include the provision of "an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices." 46 U.S.C. § 40101. Pursuant to the Shipping Act, the Commission regulates ocean common carriage of the United States. When they are engaged in transportation of passengers between the U.S. and a foreign country, PVOs are common carriers under the Shipping Act. *See* 46 U.S.C. § 40102(7)(A).

PVOs are also subject to the requirements of 46 U.S.C. chap. 441 and regulations promulgated thereunder in 46 C.F.R. part 540. The purpose of that statute is, among other things, "to prevent financial loss and hardship to the American traveling public, who, after payment of cruise passage money, are stranded by the abandonment or cancellation of a cruise." *Terry Marler and James Beasley dba Titanic Steamship Line*, 22 S.R.R. 359, 369 (ALJ 1983), aff'd, 22 S.R.R. 798 (FMC 1984).

The Commission understands that the current pandemic caused by the novel coronavirus (COVID-19) has severely impacted the cruise industry. On March 14, 2020, the Centers for Disease Control and Prevention (CDC) issued a No Sail Order and Suspension of Further Embarkation causing PVOs to cease all operations. Due to the unpredictable nature of this disease, the CDC has extended the term of the order demonstrating the uncertainty associated with this pandemic. Consequently, questions concerning future travel and passengers' ability to obtain refunds of monies remitted for transportation disrupted by COVID-19 are legion.

The cruise industry plays a unique and important role in the U.S. economy. Given the Commission's mandate to: (1) ensure an efficient and economic transportation system for ocean commerce for both goods and passengers under the Shipping Act; and (2) ensure that PVOs maintain adequate financial responsibility to indemnify passengers for nonperformance and meet any liability which may be incurred for death or injury to passengers or other persons under 46 U.S.C. chap. 441, the Commission has a clear and compelling responsibility to actively investigate and respond to the current challenges impacting the cruise industry and the U.S. ports that rely on it.[1]

THEREFORE IT IS ORDERED, That, pursuant to 46 U.S.C. §§ 40104, 41101-41109, 41301-41309, 44104-44106 and 46 C.F.R. § 502.281 *et seq.*, Commissioner Louis E. Sola engage cruise industry stakeholders, including PVOs, passengers, and marine terminal operators, in public or non-public discussions to identify commercial solutions to COVID-19-related issues that interfere with the operation of the cruise industry;

IT IS FURTHER ORDERED, That, the Commissioner form one or more teams, composed of leaders from the cruise industry and other stakeholders, to develop commercial solutions to the challenges created by the COVID-19 pandemic;

IT IS FURTHER ORDERED, That the Commissioner interact with any or all maritime related COVID-19 task forces of which this Commission is affiliated or monitors for the purpose of collecting data related to COVID-19 and its impact on the cruise industry;

IT IS FURTHER ORDERED, That, the Commissioner provide a preliminary report and periodic updates to the Commission on the results of efforts undertaken by this Order;

IT IS FURTHER ORDERED, That, the Commissioner have full authority under 46 C.F.R. §§ 502.281-291 to perform such duties as may be necessary in accordance with U.S. law and Commission regulations. The Commissioner will be assisted by staff members as may be assigned by the Chairman;

IT IS FURTHER ORDERED, That, this Proceeding be discontinued upon the acceptance of a final report and possible recommendations by the Commissioner, unless otherwise ordered by the Commission; and

IT IS FINALLY ORDERED, That, notice of this Order be published in the *Federal Register*.

By the Commission.

Rachel E. Dickon
Secretary

[1] The provisions of the Shipping Act govern proceedings under 46 U.S.C. chap. 441. *See* 46 U.S.C. § 44106.

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

MUHAMMAD RANA, *Complainant*

v.

MICHELLE FRANKLIN, D.B.A. "THE RIGHT MOVE" INC., *Respondent*.

DOCKET NO. 19-03

Served: May 12, 2020

BEFORE: Erin M. WIRTH, *Chief Administrative Law Judge.*

INITIAL DECISION[1]

[Exceptions filed by Respondents, 6/15/2020, Commission final decision pending.]

I. INTRODUCTION

A. Overview and Summary of Decision

Complainant Muhammad Rana filed a complaint in this proceeding alleging violations of the Shipping Act of 1984 ("Shipping Act") for failure to pay shipping fees for a shipment of household goods from the United States to Pakistan. Respondent Michelle Franklin, doing business as The Right Move, Inc. ("The Right Move"), admits that she failed to pay the ocean shipping charges, blaming problems with prior shipments, but disputes that the failure was willful, that she violated the Shipping Act, and the request for damages. Both parties in this proceeding acted *pro se*, representing themselves.

Respondent refused to fully participate in discovery, participating enough to avoid a dismissal or default but not enough to provide meaningful information to Complainant. Because Respondent only selectively responded to discovery requests, Complainant was permitted to rely on her lack of response as factual support for his case. This unique procedural posture distinguishes it from other cases.

As discussed more fully below, the evidence supports a finding that Respondent violated section 41102(a) (formerly 10(a)(1)) of the Shipping Act by utilizing unjust or unfair means to obtain ocean transportation at less than the rates that otherwise would be applicable. Complainant withdrew an additional claim of a violation of section 41102(c) based in part on online complaints regarding Respondent, stating that the "new and revised rules surrounding the

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

elements of 41102(c) make it overly burdensome to overcome, especially for a *pro se* Complainant with no legal background." Motion to Amend at 1.

B. Procedural Background

On May 13, 2019, the Commission's Office of the Secretary served a notice of filing of complaint and assignment which required Respondent to respond to the complaint. A timely response was not received from Respondent.

On June 10, 2019, Complainant filed a motion seeking an entry of default and summary decision on default. On July 25, 2019, an order to show cause was issued. Respondent filed limited responses by email and Complainant filed multiple motions. On October 30, 2019, an order denying motions for default and summary decision, to strike, and to compel; discharging the show cause order; and a scheduling order ("Order Denying Default and Summary Decision") was issued.

On January 6, 2020, an order was issued granting Complainant's second motion to compel and requiring Respondent to answer discovery by January 15, 2020. On January 15, 2020, Respondent filed a response to discovery providing limited information and declining to provide further details for information she deemed "irrelevant." On January 23, 2020, Complainant filed a motion seeking a finding of facts as a discovery sanction and moving for default decision and Respondent filed a response to the motion.

On February 6, 2020, an order was issued denying Complainant's motion for finding of facts and default decision but permitting Respondent's failure to provide documents and answer interrogatories to support an inference that those responses would have been adverse to her interests. On February 12, 2020, an order was issued denying a motion for clarification.

On February 26, 2020, Complainant filed his brief, proposed findings of fact ("CPFF"), appendix ("C. App."), and a motion to amend the complaint. On March 6, 2020, Complainant filed a supplement to the motion to amend the complaint.

On March 17, 2020, Respondent filed her opposition brief and appendix with four exhibits. On March 23, 2020, Respondent filed proposed findings of facts ("RPFF") and an expanded appendix with sixteen exhibits ("R. App.").

On April 9, 2020, Complainant filed his reply brief. On April 9, 2020, Respondent sent an email responding to the reply brief. Although typically not permitted, as Respondent is unrepresented, the email will be treated as a sur-reply and will be admitted into the record. The Office of the Secretary is hereby requested to include this email in the record as a sur-reply.

C. Motion to Amend

The Complainant initially alleged a violation of 46 U.S.C. § 41102(c). On September 10, 2019, Complainant also alleged a violation of 46 U.S.C. § 41102(a). Respondent raised no objections to the new allegation. The October 30, 2019, order granted the request to amend the complaint to add the section 41102(a) claim. Order Denying Default and Summary Decision at 3.

On February 26, 2020, Complainant filed a motion to amend the complaint, which states:

> Complainant hereby requests the Honorable Judge to withdraw Complainant's allegation that the Respondent violated 46 USC 41102(c) from the Complaint. The new and revised rules surrounding the elements of 41102(c) make it overly burdensome to overcome, especially for a pro se Complainant with no legal background.
>
> Furthermore, Respondent's failure to honor Complainant's discovery coupled with the fact that time for discovery is over, the Complainant has decided not to pursue the allegation that the Respondent violated 46 USC 41102(c). However, the Complainant will continue to pursue the claim and allegation in this complaint that the Respondent violated 46 USC41102(a).

Motion to Amend at 1. Respondent did not object to the motion to amend.

Complainant initially argued that online complaints should be sufficient to establish that Respondent's conduct was a pattern or practice. Respondent's refusal to fully participate in discovery made establishing this claim more challenging for Complainant, particularly as one of the few discovery questions she answered was a denial that prior section 41102(c) claims had been filed against The Right Move. In addition, Complainant is aware that the Commission's standard for evaluating section 41102(c) complaints recently changed and that the question of what evidence would be sufficient is developing. Complainant's decision to withdraw his section 41102(c) complaint is reasonable and will be granted.

In the supplemental motion to amend the complaint, the Complainant requests a change to the Respondent's name in the Complaint.

> The Respondent to date has not used her legal name in the Complaint proceedings. The Respondent's legal name is "Michal Franklin," whereas "Michelle Franklin" is a closely spelled alias. Therefore, the Complainant hereby requests that the Respondent's name be revised in the Complaint to reflect "Michal Franklin A.K.A Michelle Franklin D.B.A The Right Move, Inc."

Supplemental Motion to Amend at 1. Respondent did not object to the motion to amend.

According to the New York State Department of State, Division of Corporations, Entity Information, The Right Move, Inc's chief executive officer is "Michal Franklin" and the filing date is listed as Jan. 06, 2011, consistent with her FMC license, obtained in 2011. https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_SEARCH_ENTRY. Michelle Franklin also uses the first name Micah in some of the documents in the file. Respondent's Answer to Complainant's Discovery Request (titled Motion to Compel) at 2. It appears that the different spellings all refer to the same individual and Respondent did not contest that she uses a different spelling of her name. Accordingly, this decision applies to Respondent, who also spells her first name as Michal and Micah.

Complainant's motion to amend the complaint and supplemental motion to amend the complaint are hereby **GRANTED**.

D. Evidence

Under the Administrative Procedure Act ("APA"), an administrative law judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). This initial decision is based on the pleadings, exhibits, briefs, proposed findings of fact and replies thereto, and appendices filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-194 (1959). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

The parties were advised that "OALJ issues decisions based only on the record in the proceeding. *See* 5 U.S.C. § 556(e). If there is information available in a different office at the Commission that a party wants considered, it is the party's obligation to provide that information." Order Denying Complainant's Motion for Finding of Facts and Default Decision at 3.

In addition, as previously explained to the parties:

> Settlement discussions are not admissible under Federal Rule of Evidence 408. This is, in part, because often in a settlement neither side obtains or pays what they believe is the correct amount. Settlements are compromises and external factors such as the likelihood of recovery, risk of an adverse ruling, and costs of continued litigation impact settlement offers. These are not the factors that a judge considers in ruling on the merits of the claim. Therefore, settlement offers are not accurate measures of the value of a case and are generally not admissible. To the extent that settlement offers or actions have been mentioned in filings, those comments are stricken and not considered.

Order Denying Complainant's Motion for Finding of Facts and Default Decision at 2-3.

E. Arguments of the Parties

"Complainant contends that the evidence of record . . . establishes that Respondent knowingly and willfully by means of an unfair device obtained ocean transportation of property at less than the rates or charges that would otherwise [be] applicable." Complainant Brief at 1.

Respondent admits that she failed to pay the ocean transportation costs and states that she "took full responsibility" but claims that it was the Complainant's "lack of knowledge that created unnecessary issues time after time." Respondent Brief at 3-4.

Specific findings of fact are set out in part two, analysis and conclusions of law in part three, and the order in part four.

II. FINDINGS OF FACT

1. Complainant, Muhammad Rana, is an individual shipper who was temporarily relocating his residence from Alexandria, Virginia, to Islamabad, Pakistan. CPFF 1.

2. Respondent Michelle Franklin is the sole owner of The Right Move, Inc. Respondent's Response to Complainant's Motion of January 23, 2020 (titled Motion for Finding of facts alleged by the complainant and default decision- Response) at 3 ("As a sole owner of a closed failed company , I also bare the debt of it .") [2]

3. During this shipment, The Right Move had no other employees. Respondent's Answer to Complainant's Discovery Request (titled Motion to Compel) at 1.

4. The Right Move was licensed by the Commission as an NVOCC (License No. 023229N) in 2011. Respondent's Answer to Complainant's Discovery Request (titled Motion to Compel) at 1; C. App. Ex. 37.

5. Respondent's NVOCC license was revoked by the Commission on July 4, 2019, for failure to maintain a valid bond. C. App. Ex. 37.

6. On February 4, 2019, Respondent provided Complainant a quote for door to port service with self-loading for a total price of $2,595.00. CPFF 2; RPFF 1.

7. On February 6, 2019, Complainant sent Respondent an email accepting the terms and conditions and promising full payment by February 14, 2019. C. App. Ex. 2.

8. Respondent provided Complainant a document titled "The Right Move Inc. ALL AROUND THE WORLD International Moving Service Agreement," ("Shipping Agreement") which Complainant signed and dated February 6, 2019. C. App. Ex. 1.

9. The Shipping Agreement listed the service to be provided as a door to port movement by 20 ft container from Complainant's residence in Alexandria, VA, on February 14, 2019, to the port in Karachi, Pakistan, for $2,500, with free total loss insurance coverage of $5,000 plus $95 documentation fee, totaling $2,595.00. C. App. Ex. 1.

10. According to the Shipping Agreement, the flat rate included shipping or ocean freight charges from Alexandria, Virginia, to Port Qasim, Karachi, Pakistan. The flat rate also included terminal handling or port of loading charges at origin. C. App. Ex. 1.

[2] Irregular spacing, punctuation, and spelling are maintained in quotes where possible throughout the decision.

11. The Shipping Agreement listed the transportation provider as: Right Move Inc., 150 Motor Parkway Suite # 401, Hauppauge, NY 11788; Registration: FMC # 023229N; and Customer Rep: Michelle. C. App. Ex. 1.

12. On February 7, 2019, Respondent sent Complainant an email stating that "your container is booked," identifying the carrier (Maersk), vessel name, voyage number, and indicating that "We are all set for Feb 14 at 11 AM." R. App. Ex. 9.

13. On February 14, 2019, Complainant wire transferred $2595.00 into Respondent's account under the name Michelle Franklin. C. App. Ex. 3.

14. On February 15, 2019, Respondent acknowledged receipt of the wire in an email. C. App. Ex. 4.

15. On February 15, 2019, Complainant loaded the container. RPFF 6.

16. The Right Move Bill of Lading, dated February 27, 2019, listed Complainant as the exporter/shipper and consignee; Right Move as the forwarding agent; CP World Co. Ltd. (Karachi) as the destination agent; port of loading as Baltimore; port of unloading as Port Qasim, Pakistan; and the container number as MSKU277849-7 "Said to contain 48 items of used household goods and used personal effect. Ocean Freight prepaid, Express release" and was signed by "THE RIGHT MOVE, INC., As Carrier." C. App. Ex. 7.

17. The Troy Container Line ("Troy") bill of lading dated February 27, 2019, listed Complainant as the shipper/exporter, consignee, and notify party; Right Move as the forwarding agent; CP World Co. Ltd (Karachi) as the destination agent; port of loading as Baltimore; port of discharge as Port Qasim, Pakistan; the description of packages and goods as 20 ft container with 72 pieces of used household goods and personal effects and the container number as MSKU277849-7. C. App. Ex. 6.

18. Maersk was the vessel operating common carrier that transported Complainant's container from Baltimore to Qasim Port in Karachi, Pakistan. C. App. Ex. 7, 18-20.

19. In an email dated March 13, 2019, the Respondent informed the Complainant that the "shipment is due in Karachi by April 3." C. App. Ex. 38.

20. On March 25, 2019, Respondent sent Complainant an email requesting an inventory list, final address, and local phone number for the bill of lading and stating that "All these details must be on the bill of lading, or it will cause problems for you when the shipment arrives" and indicating that "changing the docs will cost a fee, I am not charging anything, it is the steamship line." R. App. Ex. 4.

21. On March 25, 2019, Complainant responded by asking Respondent to "explain what you meant by 'changing the bill of lading at this time will cost a fee.'" R. App. Ex. 4.

22. On March 30, 2019, Complainant sent an email to Respondent asking "Is the bill of ladding ready?" and then sent another email asking how much free time he would have. C. App. Ex. 16; R. App. Ex. 5.

23. The shipment arrived in Karachi, Pakistan, on March 31, 2019. C. App. Ex. 39.

24. Complainant did not receive a copy of the bill of lading until after the shipment arrived. C. App. Ex. 5, 16, 17.

25. On March 31, 2019, Complainant emailed Respondent saying he needed the Bill of Lading "ASAP." C. App. Ex. 15; R. App. Ex. 5.

26. On April 1, 2019, Complainant again emailed Respondent stating "I need the bill of ladding today. I am leaving for Karachi tomorrow morning, the cargo is arriving day after tomorrow. Please send the bill of ladding." C. App. Ex. 15; R. App. Ex. 5.

27. Later on April 1, 2019, Complainant emailed Respondent again, stating: "It appears you are ignoring my requests. If I don't receive my bill of lading timely, I will in a civil court seek damages and costs incurred by me as a consequence of your company's failure to issue a timely bill of lading . . . . To avoid litigation please send me my bill of lading." R. App. Ex. 5.

28. On April 2, 2019, Respondent sent an email to Complainant stating:

> Sorry, I didn't mean to be silent, I didn't have proper access to the e-mail , I regret to inform you that our company was target to shipping fraud, and as result, we are forced to shut down as it put a huge financial burden on us . Please see the old Bill of lading, I am waiting for them to revise it, but it always takes few days, and because the shipment arrived, they may not be able to do so . You may have to change it from your end, Please send me your agent details, I would need to make sure he can help you ! I can issue a house bill of lading , if that helps with the proper info , Just let me know what your agent wants to do ?

C. App. Ex. 17.[3]

29. On April 2, 2019, Complainant emailed Respondent saying "Sorry to hear about your company troubles. I hope things work out for the best. My agent wants to know if I have any 'free time'? How many days can they keep my cargo without charge?" Respondent's email response filed October 1, 2019, Ex. 3.

30. On April 2, 2019, Complainant traveled to Karachi, Pakistan, from Islamabad, Pakistan, to receive his cargo from Port Qasim, Karachi. The same day, he went to Maersk's shipping office in Karachi to check the status of the shipment and found out that the shipment had arrived at port. He also found out that Troy's delivery agent in Pakistan, CP World, had placed a hold on the cargo because ocean freight/shipping charges had not been paid by Respondent. He explained to the Maersk office that ocean freight was prepaid, but

[3] Paragraph structure in quotes is not maintained throughout this decision.

Maersk's representative asked to see an endorsement from CP World. C. App. Ex. 41 (Affidavit).

31. From April 3, 2019, onwards Complainant was repeatedly informed verbally by Troy's delivery agent that Respondent did not pay ocean freight shipping dues for his cargo and as a result, the cargo could not be released until full payment was received from Respondent. At first, Complainant did not believe the CP World representative and thought that the representative was extorting money from Complainant because he was a United States citizen. C. App. Ex. 41 (Affidavit).

32. On April 4, 2019, Respondent emailed Complainant and stated "Changes to the bill of lading will take a few days, ask your agent if a house bill of lading will help ? I can send that right away at no cost." R. App. Ex. 6.

33. On April 5, 2019, Complainant sent Respondent a series of emails. The first one stated:

> TROY Container Line has placed a hold on my cargo stating that you have not paid them for the shipping and cargo service. They are also saying that you have engaged in "shipping fraud." Until you pay them, MAERSK will not [release] my cargo. Can you please send me a receipt or proof of payment by you to TROY or the third party so I can have MAERSK lift the hold on my cargo? After tomorrow they will start charging me $55 per day for storage. Please assist.

C. App. Ex. 18.

34. Also on April 5, 2019, Complainant sent an email to Respondent stating that "Maersk is asking for payment of delivery and shipping. I already paid you for that, can you please check with them" and an email stating "Please contact MAERSK and let them know that shipping and delivery expenses have been prepaid" and providing his agent's email address. C. App. Ex. 19.

35. On April 5, 2019, Respondent emailed Complainant stating "Troy said I am engaged in a shipping fraud ? Can you please send me that ? Also, as I have advised there was another company involved, I am checking to see why they didn't pay." C. App. Ex. 21.

36. On April 5, 2019, Complainant then sent an email stating:

> Yes, TROY's agent CP World who put a hold [] on the cargo on the direction / behalf of TROY stated that you have engaged in "shipping fraud." Tomorrow morning he will issue a letter in writing that I can forward to you. Also one of the BL you gave me is from TROY. Can you please check or get a receipt or proof of payment to TROY and send it to me so I can receive my cargo?

C. App. Ex. 22.

37. On April 5, 2019, Respondent sent an email stating:

> The Right Move is closing, but we are far from engaged in Shipping fraud. It's actually the opposite, maybe that's what they meant, but regardless, We have paid the shipping costs to a third party to pay the SSL for this shipment, I am checking into it, to see how we can help you release the shipment, Because the company is closed, I am unable to pay it again, and if it comes down to the fact that you may have to pay it directly, We are fully licensed and insured, and you can file a claim against the company bond ! If you need to pay , I will send you the details of how to file a claim and retrieve your money ! But for now, give me an hour or 2 to see why this was not paid, even though we have sent the payment.

C. App. Ex. 23.

38. On April 5, 2019, Complainant sent Respondent an email stating "If you sent the payment, can you please send me proof that you sent the payment, so I can get my cargo released." C. App. Ex. 23.

39. On April 5, 2019, Respondent sent an email to Complainant stating:

> I paid the fees you have to believe me, I talked to the company and they are sending the payment today, but it may take a few days, I think it [will] be released by Tuesday or Wednesday the latest, If you don't want to wait, pay the fees, and I will wire the money to you I will need your bank details to do so !

C. App. Ex. 24.

40. On April 5, 2019, Complainant sent Respondent an email stating:

> Despite everyone telling me that I have been defrauded, I believe you, I always try to see good in people.
>
> Michelle, I do not want to wait, because after tomorrow I will be charged $55 per day for storage. I just want what I paid for, which is my right. Please wire the money to my account today / ASAP otherwise I will be compelled to lodge a complaint with the Federal Trade Commission and FBI's online / email fraud division. TROY will issue a letter to me tomorrow implicating you in shipping fraud. In addition when I am back stateside in a couple of months I will file a claim in a civil court where I will claim damages, expenses, travel / lodge expenses and mental anguish etc.
>
> To avoid all of this please wire the total amount that was due for shipping to my account today, so I can pay it here.

C. App. Ex. 25. The email included Complainant's bank and account number.

41. On April 8, 2019, Respondent sent Complainant an email stating:

> I had every intention of helping you , I really did ! But it seems that you get the wrong advice [from] the wrong people , and I am afraid that this leaves me no choice but to refuse to communicate with you directly ! From now on we either talk through the FMC , or your lawyer ! I will not respond to any of your e-mails if you keep coming up with your redicules accusations! Please e-mail the Federal Maritime commission and they will assist both of us !

R. App. Ex. 3 (also includes the personal email address of an FMC employee in the Commission's Office of Consumer Affairs and Dispute Resolution Service).

42. On April 8, 2019, Complainant sent Respondent an email stating:

> I am the victim here. I did not deserve this, what you did to me is very wrong. I am stuck in a city where I don't know people, I am paying for lodging, my cargo is not being released because you did not pay TROY their dues from the money that I paid you. I kept my end of bargain, but you failed to keep yours. I have all emails and proof of what we agreed upon and what I paid you. You did not deliver the service you agreed to provide.
>
> I am not the one saying you engaged in shipping fraud, it is TROY and CP World who are claiming this and giving me evidence. And yes I am the victim here.
>
> I am not threatening, I am asking you to provide me with evidence that you paid TROY, so I can contest their claim here and receive my cargo. Alternatively you can wire me money to my account, so I dont have to go to court, FMC or FTC. So yes lets resolve this in a civil manner and in good faith. So please either call TROY or CP World and tell them to release my cargo, or give me proof of payment to TROY, so I can contest their claim here without paying. Or just simply wire the money to my bank account.

C. App. Ex. 26 (including Complainant's bank account information).

43. On April 9, 2019, Respondent sent Complainant an email stating:

> Of course I am in touch with them , I have been following up on your shipment the whole time, just didn't know Troy didn't get paid. The booking was done under another company license, because I knew we may get to the point we have to close, We conducted business with a company who shipped donation goods . . . . The person who booked it disappeared and left us with six containers in the port or destination. Needless to say that as you know , port charges accumulate every day , and we were trying to find a solution, eventually we ended up abandoning the shipments, and needed to pay high penalties, which forced us to close.

> Since I didn't want your shipment to be effected in this process, I opened a bank account that was a business account, but had my name on it in order to be not associated it with the The Right Move, Inc financial burden,
>
> Once I received your payment, I paid it to the third party I used to book your shipment from the same bank account, because once again, I didn't want your shipment to get stuck if in case the Right Move Inc license is being revoked while in the process of shipping your goods.
>
> Needless to say that at the time I took your shipment, It was all in good faith that the company will continue to operate and move forward, and this will not effect you.
>
> The third company I booked it with , paid for the trucker costs, and waited until the last minute to pay the ocean, we all do that, but it is after the fact your shipment arrived because according to the booking , the shipment should have been there in few days so they thought they had few more days.
>
> I get that you [are] upset and frustrated, I too, worked very hard for past 10 years, and one bad customer crashed it all down ! This is life, you learn from it and move on … I will help you finish this , but I still think you should pay directly and let me refund you ! it will be faster, easier and cheaper.

C. App. Ex. 27.

44. On April 9, 2019, Respondent sent Complainant an email stating "Please let me know if you have paid the ocean directly ? The company I paid the money to, needs to know if to refund me, so I can refund you , or should they pay the ocean directly ?" C. App. Ex. 28.

45. On April 9, 2019, Complainant sent Respondent an email stating "I have not paid them yet. How soon can that company pay TROY? Please ask and let me know." C. App. Ex. 29.

46. On April 9, 2019, Respondent sent Complainant an email stating "They promised to pay it today or tomorrow, but since you are paying $50 a day , I strongly suggest you pay directly and I will refund you , probably no [later] than Friday." C. App. Ex. 30.

47. On April 9, 2019, Complainant sent Respondent an email stating "Please tell them to pay today ASAP, it is evening here so it should clear by tomorrow. Please send me proof of payment (email or receipt etc) so I can show CP World." C. App. Ex. 31.

48. On April 9, 2019, Respondent sent Complainant an email stating "I have been asking them to pay it for the last 4 days, they should be able to pay it today or tomorrow. I will send you the proof once it was paid." C. App. Ex. 32.

49. In a letter to Complainant bearing a CP World Co. letterhead dated April 9, 2019, CP World stated:

> We hereby inform that we are the active agent of M/S Troy Container Lines in Pakistan. We have been instructed by Troy Container Lines to Hold said Shipment till our Further Instruction due to reason that Forwarding Agent, THE RIGHT MOVE INC (Michelle Franklin) of this Consignment has not paid Port of Loading and Shipping Dues. Meantime they also instructed if Consignee willing to pay POL and Shipping Dues than we are free to Release the Delivery of Goods at here in Karachi. I hope this clarifies our position & fully explains why your cargo is not being released at PORT QASIM.
>
> Yours faithfully
>
> For: CP World CO.
>
> AS Handling Agents

C. App. Ex.8.

50. On April 9, 2019, Complainant, for the first time, agreed to pay ocean and shipping that was owed by the Respondent, only after Troy's agent CP World officially and in writing gave him the option to pay in order to release his cargo. C. App. Ex. 40 (Affidavit).

51. On April 9, 2019, Complainant sent Respondent an email stating "Okay Michelle, I will pay directly tomorrow and you can send me the refund by Friday. CP world will charge me 156,750 rupees in unpaid dues, this comes out to 1,112.00 US dollars. This excludes port costs and other delivery costs. I will send you the receipt. You can mail a cashier's check in my name to my brother's address in Connecticut." Respondent's email response filed October 1, 2019, Ex. 6.

52. On April 9, 2019, Respondent sent Complainant an email stating "The Invoice and payment amount I made was $1025[.] That's what they needs to pay to Troy[.] On Friday you said you will pay it directly, to avoid these additional costs. I will keep following up with them and make sure they pay , but it may take another day , and in the meantime you are paying additional fees. I paid these fees a day after you submitted your payment to me, just so you know !" Respondent's email response filed October 1, 2019, Ex. 5.

53. On April 9, 2019, Complainant paid CP World "with mental reservation and under duress just to get my important documents (birth certificate, citizenship documents, bank documents, tax returns, ownership documents, college degrees, employment documents, awards, etc.) and personal belongings of sentimental value (photos, letters, etc.) released." C. App. Ex. 40 (Affidavit).

54. On April 10, 2019, the Complainant paid CP World 157,000 Pakistani Rupees for shipping charges. C. App. Ex. 9; C. App. Ex. 41 (Affidavit).

55. On April 10, 2019, after payment to CP World, Complainant received a charge calculation breakdown showing that the 7-day free time had ended and requiring an additional $605.00

in container detention charges beyond the regular 7-day free time at a standard rate of $55.00 per day. C. App. Ex. 10.

56. On April 10, 2019, Respondent sent Complainant and email stating, “Perfect, I am also confirming that the money was sent back to me, and I should be able to pay by Friday ! I [will] check how many free days we have , will get back to you shortly !” C. App. Ex. 33.

57. Complainant had brought dollars in cash with him for the customs duty, truck rental, and port charges, but had to use it to pay CP World, after which the Complainant was out of cash and didn’t have money for the container demurrage charges. After this, because the Complainant did not have a bank account in Pakistan; he depended on wire transfers and remittances from his US bank account, which can take from 2 to 3 business days. Plus, all banks and ocean freight shipping related offices were closed over the weekend in Pakistan. Furthermore, Maersk Shipping Company and shipping agents in Pakistan do not accept credit cards. C. App. Ex. 41 (Affidavit).

58. On April 15, 2019, after the weekend and after receiving additional cash, the Complainant paid Maersk’s shipping office in Karachi 85,000 rupees for the container demurrage charges through a shipping agent. C. App. Ex. 41 (Affidavit).

59. After the payment was made Complainant’s cargo was released for customs inspection at Port Qasim. Complaint at 3; C. App. Ex. 41 (Affidavit).

60. On April 15, 2019, Respondent sent Complainant an email stating “Hope you are well, Did you release the container ? Also can you please send me the agent invoice ?” R. App. Ex. 7.

61. On April 16, 2019, through April 19, 2019, the Complainant’s cargo underwent the routine procedural customs inspection, requirements, and paperwork. C. App. Ex. 41 (Affidavit).

62. On April 17, 2019, the Respondent stated, “I will send you a refund shortly I will also check that [Troy’s] agent only charges what he needed, but that’s between them and our company. Also, did you at least get the container ?” C. App. Ex. 34.

63. On April 19, 2019, the Respondent stated that “The payment will be concluded in a day or 2, of course I will try to pay you as much as I am responsible for ! Just wanted to double check all the costs you had paid, and with the holiday in the middle it may take until Tuesday ! I promise we will finish this very very soon !” C. App. Ex. 35.

64. On April 20, 2019, after receiving clearance from Pakistan’s Customs Department, the cargo was not allowed to leave Port Qasim because the ‘No Objection Certificate (NOC)’ that was previously issued by Troy’s agent CP World had expired. The Port Qasim Authority required the renewal of the No Objection Certificate from CP World. Complaint at 4; C. App. Ex. 41 (Affidavit).

65. On Monday, April 22, 2019, when the CP World offices opened after the weekend, the NOC was renewed. During this time, an additional 6 days of container charges (demurrage

and detention) for the Maersk container had accumulated. Complaint at 4; C. App. Ex. 41 (Affidavit).

66. On April 22, 2019, Complainant paid an additional 47,536 rupees to Maersk for container demurrage charges through a shipping agent. C. App. Ex. 12, 13, 41 (Affidavit).

67. On April 23, 2019, Complainant's cargo left Port Qasim, Karachi, for Islamabad. C. App. Ex. 41 (Affidavit).

68. On April 23, 2019, Complainant had to pay 385,000 rupees (PKR) for lodging at a local hotel for 21 nights in Karachi. This was for the duration of time the Respondent had to spend in Karachi while his cargo was held at Port Qasim, Karachi. C. App. Ex. 14, 41 (Affidavit).

69. On May 1, 2019, Respondent sent an email to Complainant stating "Still fighting the Steamship line to get you more free days, as they usually don't grant it after the container arrives. Did you release the shipment ? I was waiting to see what is the total amount and to see if I can help you a little with the additional costs you had occurred." R. App. Ex. 8.

70. On May 30, 2019, after this proceeding was filed but before Respondent filed a response with the Commission, Respondent sent an email to Complainant stating:

> A wire for $1025 was initiated yesterday. You should have the payment by tomorrow in the bank account you have provided. The amount is the ocean cost that we failed to pay in time. You can take all the legal actions you want. The company is closed ! It was closing down and money was tight and therefore the delay ! I had intentions of paying you back all alone , but you were too busy making this something it was not ! I do apologize for the inconvenience and wish you all the best !

C. App. Ex. 36.

71. Respondent admitted that "the Ocean freight was not paid. That is agreeable" in her response to Complainant's discovery. Respondent's Response to Complainant's Discovery.

72. Respondent acknowledged that her company's financial problems stemmed from problems with prior shipments. C. App. Ex. 27 (describing an abandoned shipment); RPFF at 2 ("I was informed that the freight was on hold, and It seems as the payment that was submitted was applied towards an old shipment that was still pending."); Respondent's email response (to order to show cause) at 3.

73. In Respondent's response to the Complaint, the Respondent claimed that "Mr. Rana was one of the last few customers we had to finish before we chose to close the company and surrender our FMC license." Answer at 3.

74. On June 10, 2019, and July 9, 2019, Respondent emailed the FMC stating that her business was in the process of closing. R. App. Ex. 1, 2. Respondent did not include the emails from the FMC about her license in the record.

75. According to the Commission website, in a list of OTI's with licenses revoked or surrendered, the Respondent's license is listed as revoked on July 4, 2019, while this case was pending, because of failure to maintain a valid bond. C. App. Ex. 37; https://www.fmc.gov/oti/revocations-july-12-2019.

76. Respondent stated that the "Complainant is entitle[d] to ocean costs refund + Demurrage of 5 days caused by the delay of releasing the ocean, nothing else if related what so ever to his additional expenses nor should affect the outcome of this case." Respondent's Response to Complainant's Motion of January 23, 2020 (titled Motion for Finding of facts alleged by the complainant and default decision- Response) at 4.

77. Complainant paid the port fees out of pocket and is not asking for the port fees in this complaint. There is no evidence that the Complainant asked for demurrage before this complaint and the Respondent did not offer to pay some of the demurrage prior to settlement discussion in November 2019. C. App. Ex. 40 (Affidavit).

78. From February 2019 to date, Michelle Franklin has been and still is the sole spokesperson, representative, owner, advocate, and employee of The Right Move. Respondent's failure to respond to Complainant's discovery: Request for the Production of Documents 10 through 15.

79. The Right Move has failed to observe corporate formalities in terms of documentation. Respondent's failure to respond to Complainant's discovery: Request for the Production of Documents 10 through 15.

80. The Right Move is not a separate entity from Michelle Franklin, and The Right Move is or was taxed through Michelle Franklin's personal tax returns. Respondent's failure to respond to Complainant's discovery: Request for the Production of Documents 13 through 15.

81. Michelle Franklin treated the funds and assets of the Right Move as her own. C. App. Ex. 3 (shipping charges for Complainant's container were paid into Michelle Franklin's personal account); Respondent's failure to respond to Complainant's discovery: Request for the Production of Documents 13 through 15.

82. The Right Move was being used by Michelle Franklin as a façade for her personal financial dealings and not as a separate corporate entity. C. App. Ex. 3. Respondent's failure to respond to Complainant's discovery: Request for the Production of Documents 10 through 15.

83. Complainant paid an additional $55.00 per day container demurrage / detention charge for 17 days (April 7th through April 23rd), a total of $935.00 (132,536.00 rupees); this was beyond the 7-day free time, because of the delay caused by Respondent's failure to pay

ocean freight. C. App. Ex. 10, 11, 12, 13, 41 (Affidavit); https://www.maersk.com/en/local-information/pakistan/import.

84. Complainant had intended to stay in Karachi for only 3 nights for the customs clearance process. However, due to Respondent's failure to pay the shipping fees, Complainant had to stay at a hotel in Karachi for an additional 18 nights and pay a total of 388,500 rupees in hotel lodging at a rate of 18,500 rupees per night. For the additional 18 nights lodging the total comes out to 333,000 rupees or $2,350.03. C. App. Ex. 14, 41 (Affidavit).

85. Complainant paid taxi charges in the amount of about $7.76 (1100 rupees) per day or $116.40 for 15 days to get to and from the Maersk Office, CP World Office, Western Union, Port Qasim, hotel, etc. C. App. Ex. 41 (Affidavit).

86. Complainant stayed at a hotel in Karachi for an additional 18 days resulting in meals and incidental expenses (M&IE) incurred by Complainant. C. App. Ex. 41(Affidavit). According to the U.S State Department the foreign per diem M&IE rate set for Karachi in April 2019 was $82 per day. The total M&IE comes out to 18 x $82 = $1,476.00. https://aoprals.state.gov/Web920/per_diem_action.asp?MenuHide=1&CountryCode=1166&PostCode=&PublicationDate=20190401.

87. In April 2019, the price of the dollar in the open market against the rupee fluctuated between 141 to 142 rupees per dollar. Therefore, the exchange rate used in this calculation is 141.70 rupees per dollar, which was also the rate used by Maersk shipping company. C. App. Ex. 41 (Affidavit).

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Burden of Proof

To prevail in a proceeding brought to enforce the Shipping Act, a complainant has the burden of proving by a preponderance of the evidence that the respondents violated the Act. 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); 46 C.F.R. § 502.203; *Exclusive Tug Franchises*, 29 S.R.R. 718, 718-719 (ALJ 2001). "[A]s of 1946 the ordinary meaning of burden of proof was burden of persuasion, and we understand the APA's unadorned reference to 'burden of proof' to refer to the burden of persuasion." *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 102 (1981). "[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose." *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman S.S. Corp. v. General Foundries Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994).

B. Discovery Sanctions

The order denying Complainant's motion for finding of facts and default decision states:

> Respondent refuses to answer questions that she believes are not relevant thereby denying Complainant discovery that is relevant and necessary to pursue his claim. Of Complainant's 17 document requests, it does not appear that Respondent provided any documents. She did respond to two of the requests, indicating that no documents exist for document request 12 ("No partnership agreements available") and document request 16 ("None exist" regarding whether there are any complaints, lawsuits, litigation or civil actions against Respondents where a violation of section 41102(c) was alleged."). For the interrogatories, Complainant responded to only three of the thirteen questions, including interrogatories 1 (who answered), 12 (amount of bond), and 13 (a partial answer to why the OTI bond was revoked).

Order Denying Complainant's Motion for Finding of Facts and Default Decision at 1. In addition, the order found that "[i]t is therefore appropriate to find that Respondent's failure to provide documents and answer interrogatories leads to an inference that those responses would have been adverse to her interests. It is noted, in addition, that Respondent repeatedly admits her failure to pay the ocean freight although she denies that there are any other Shipping Act violations." Order Denying Complainant's Motion for Finding of Facts and Default Decision at 2.

The discovery requests submitted by Complainant to Respondent on September 18, 2019, included requests for information about this shipment such as communication with any third party involved, specifically any third party used to make a payment to Troy; proof of payment for the shipping, delivery, and transportation of this cargo; the amount of the OTI surety bond at the time of the shipment and the reason the bond was revoked; business documents including article of incorporation, business license, recent tax returns, stock certificates, operating agreements; and all documents related to complaint, lawsuits, litigation, and civil actions against the Respondent personally or The Right Move business where a violation of 46 U.S. Code § 41102(c) was alleged. Motion for Finding of Facts Alleged by the Complainant and Default Decision, Ex. 2. This discovery request was reasonable and relevant to the issues in this proceeding. Respondent's refusal to provide the information despite repeated requests and an order from the undersigned prevented the discovery of relevant evidence and justified an inference that the responses would have been adverse to Respondent's interests.

Complainant's complaint was notarized and under oath. All of Complainant's pleadings have been signed and certified. Additionally, Complainant submitted a sworn notarized statement with his proposed findings of facts and brief. Complainant requested that Respondent answer the interrogatories under oath and under penalty of perjury; however, none of the Respondent's responses were under oath or under penalty of perjury. The Respondent has not signed her pleadings under oath or under penalty of perjury. This fails to comply with the Commission's requirement that pleadings, documents, or other papers filed with the Commission be signed and verified under oath and undermines the credibility of Respondent's statements and assertions. 46 C.F.R. §§ 502.6, 502.62(b).

C. Discussion

1. Legal Standards

The Shipping Act provides that a "person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part . . . . If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an actual injury to the complainant caused by the violation." 46 U.S.C. § 41301(a).

Complainant alleges that Respondent violated section 41102(a) of the Shipping Act, which states:

> Obtaining Transportation at Less Than Applicable Rates.—A person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.

46 U.S.C. § 41102(a) (formerly section 10(a)(1)).

Section 41102(a) is also similar to section 16 of the Shipping Act, 1916, the predecessor to the 1984 Act. Section 16 stated:

> That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

46 U.S.C. § 815 (1982).

In *Capitol Transportation, Inc.*, the First Circuit reviewed the Commission's imposition of a reparation award based on a violation of section 16. *Capitol Transportation, Inc. v. United States*, 612 F.2d 1312 (1st Cir. 1979). Maritime Service Corporation ("MSC"), a central collection agency for the billing and collection of container demurrage charges owed to ocean carriers, billed Capitol for demurrage charges under commercial bills of lading naming Capitol as consignee, but Capitol did not pay. MSC filed a complaint with the Commission seeking a reparation award for the amount owed. The Commission found that Capitol operated as an NVOCC and as consignee on the shipments and was liable for the demurrage charges. The Commission affirmed the administrative law judge's holding that "by knowingly and willfully refusing to pay demurrage owing under published tariffs, [Capitol] in effect obtained transportation by water at less than the applicable rates and thus violated section 16 of the Shipping Act." *Capitol Transportation*, 612 F.2d at 1317.

Capitol filed a petition with the Court of Appeals for the First Circuit for review of the Commission's decision. The court denied Capitol's petition for review. Regarding section 16, the

court stated that "a carrier's mere stubborn but good faith refusal to pay a disputed rate or charge" does not constitute an "unjust or unfair device or means" within the meaning of section 16 but that a refusal to pay accompanied by an "element of fraud or concealment" would suffice to show an "unjust or unfair device or means." 612 F.2d at 1323. The court agreed with the Commission's finding that the "requisite element of fraud or concealment was established in this case by Capitol's 'unexplained and apparently unjustified avoidance of any payment of the amounts found due and owing.'" *Capitol Transportation*, 612 F.2d at 1323.

> The Commission could properly find on this record that Capitol's refusal to pay had never been based upon a good faith legal defense, but simply reflected a calculated judgment to fight MSC to the end, forcing it to pay in blood, sweat and treasure for every penny eventually collected. On the merits of the demurrage claim, Capitol failed to present a legal defense of any substance, and belatedly raised a variety of ever-changing contentions after the time for discovery or hearing was over. Those facts, coupled with earlier correspondence indicating an adamant and legally unexplained resistance to the notion of MSC's centralized demurrage billing procedure entitled the Commission to conclude that Capitol was not only knowing and willful in its refusal to pay, but that its policies, conducted as they were in bad faith, were tantamount to an unjust or unfair means of obtaining transportation by water at lower than applicable rates. Although it would not be proper to extend this rationale to cases involving refusal to pay based on honest differences, we think the conduct reflected in the present record was sufficiently egregious to support the Commission's finding that the requisite element of fraud or concealment was here established. . . . A calculated effort in bad faith to avoid the payment of demurrage legitimately owing would, if successful, allow shippers and consignees to accomplish what Section 16 was intended to prevent[,] the receipt of carrier service at less than applicable rates and at less than rates charged to competitors. Thus while this case undoubtedly nears the outer limits of Section 16, we uphold the Commission's finding of violation.

Capitol Transportation, 612 F.2d at 1323-1324.

In 1992, the Commission published a proposed interpretive rule intended to clarify jurisdiction in proceedings under section 10(a)(1) of the 1984 Act (the successor to section 16 of the 1916 Act). *See Unpaid Freight Charges*, FMC No. 92-46, 58 Fed. Reg. 7190 (Feb. 5, 1993), 26 S.R.R. 735 (FMC 1993). The Commission promulgated a final interpretive rule based in part on the *Capitol Transportation* decision expressing its conclusion that use of an unjust or unfair device or means is an essential element of a section 10(a)(1) violation.

> Section 10(a)(1) of the Shipping Act . . . states that it is unlawful for any person to obtain or attempt to obtain transportation for property at less than the properly applicable rates, by any "unjust or unfair device or means." An essential element of the offense is use of an "unjust or unfair device or means." In the absence of evidence of bad faith or deceit, the . . . Commission will not infer an "unjust or unfair device or means" from the failure of a shipper to pay ocean freight. An "unjust or unfair device or means" could be inferred where a shipper, in bad faith,

> induced the carrier to relinquish its possessory lien on the cargo and to transport the cargo without prepayment by the shipper of the applicable freight charges.

46 C.F.R. § 545.2.

2. Respondent Acted as an NVOCC

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including two types of ocean transportation intermediaries ("OTI"). "The term 'ocean transportation intermediary' means an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(20). "The term 'ocean freight forwarder' means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(19).

"The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(17). To be an NVOCC, the entity must meet the Shipping Act's definition of "common carrier."

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(7).

The statutory definitions are echoed in the Commission's regulations:

> *Ocean transportation intermediary* means an ocean freight forwarder or a non-vessel-operating common carrier. For the purposes of this part, the term
>
> (1) *Ocean freight forwarder (OFF)* means a person that – (i) In the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (ii) Processes the documentation or performs related activities incident to those shipments; and
>
> (2) *Non-vessel-operating common carrier (NVOCC)* means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

46 C.F.R. § 515.2(m).

> *Common carrier* means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:
>
> (1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and
>
> (2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . . .

46 C.F.R. § 515.2(e).

The Commission promulgated regulations providing examples of NVOCC services performed by OTIs.

> *Non-vessel-operating common carrier services* refers to the provision of transportation by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:
>
> (1) Purchasing transportation services from a common carrier and offering such services for resale to other persons;
>
> (2) Payment of port-to-port or multimodal transportation charges;
>
> (3) Entering into affreightment agreements with underlying shippers;
>
> (4) Issuing bills of lading or other shipping documents;
>
> (5) Assisting with clearing shipments in accordance with U.S. government regulations;
>
> (6) Arranging for inland transportation and paying for inland freight charges on through transportation movements;
>
> (7) Paying lawful compensation to ocean freight forwarders;
>
> (8) Coordinating the movement of shipments between origin or destination and vessel;
>
> (9) Leasing containers;
>
> (10) Entering into arrangements with origin or destination agents;
>
> (11) Collecting freight monies from shippers and paying common carriers as a shipper on NVOCC's own behalf.

46 C.F.R. § 515.2(k).

A prior case summarized the Commission's work to ensure that shippers were protected from underfinanced NVOCCs.

> Because the licensed ocean freight forwarder was in a position to harm its shipper-customers and because such forwarders were often underfinanced and negligent in their duties, Congress required that they be bonded so that shipper-customers of the forwarders who were injured by the forwarders' derelictions of duty would have recourse to a surety to ensure that their financial losses would be made good. After May 1, 1999, the effective date of OSRA, the other type of intermediary, the NVOCC located in the United States, was also required to be licensed and bonded. This act of Congress was welcome because even before the passage of OSRA, NVOCCs, like freight forwarders, had engaged in negligent conduct with respect to their handling of shippers' cargoes and like some forwarders, they were underfinanced and disdainful of their duties toward their shipper-customers. See, e.g., *Hugh Symington v. Euro Car Transport, Inc*., 26 S.R.R. 871 (1993); *Adair v. Penn-Nordic Lines*, 26 S.R.R. 11 (I.D., finalized, 1991); *Total Fitness Equipment, Inc. v. Worldlink Logistics, Inc*., 28 S.R.R. 534 (1998), affirmed as *Worldlink Logistics, Inc. v. F.M.C*., 203 F.3d 54 (D.C. Cir. 1999), cases in which NVOCCs took shippers' moneys and failed to make sure that the shipments were carried and delivered timely, causing shippers financial harm.

Crowley Liner Services, Inc. and Trailer Bridge, Inc. v. Puerto Rico Ports Authority, 29 S.R.R. 394, 2001 FMC LEXIS 7 at *71-72 (ALJ 2001) (Respondent PRPA's Motion to Dismiss or for Partial Summary Judgment Denied; Complainants Crowley's and Trailer Bridges Motion to Dismiss Granted for the Most Part; Complaint Dismissed) (Settlement Approved, 29 S.R.R. 971 (ALJ 2002)).

The evidence shows that Respondent issued a house bill of lading for the door to port movement; listed its registration number as FMC # 023229N where N is used to denote an NVOCC; was solely licensed as an NVOCC; and was still licensed when the shipment took place. Further, the Shipping Agreement issued by Respondent contains the terms for movement of the shipment and directs payment to be made to Respondent, consistent with acting as an NVOCC. In addition, the terms of the movement was for door to port movement but Respondent only engaged Troy to ship the container from Port to Port, indicating that Respondent undertook responsibility for shipment and provided transportation from Complainant's door to the port in Karachi while Troy provided transportation from the port in the United States to the port in Karachi. Accordingly, the evidence demonstrates that Respondent acted as an NVOCC on this shipment.

3. Section 41102(a) Elements

a. Knowingly and Willfully

Complainant contends that Respondent acted knowingly and willfully, for example by providing inaccurate information about the failure to pay.

> To justify why Respondent failed to pay ocean freight charges, the Respondent falsely claimed that she paid a third party to pay TROY for ocean and shipping. The Respondent made up this fictitious story to try and convince the Complainant to pay ocean and shipping dues in Karachi, so she could keep the ocean and shipping charges for herself. It is highly unlikely and would have been unreasonable for the Respondent to pay a third party when all she had to do was pay TROY directly. This demonstrates that the Respondent knowingly and willfully acted in bad faith and deceit showing utter disregard for the law.

Complainant Brief at 3. Complainant also asserts that Respondent admitted "that she reasonably suspected that her company would close at the time the booking was done in February 2019" and that she "concealed this information." Reply Brief at 7.

Respondent claims that Complainant has a lack of knowledge of the shipping process, Respondent is a professional "very aware of the outcome of nonpayment of ocean shipment," and that she "never had any intentions of not paying the ocean as she is well aware of her personal liability." Respondent Brief at 1-2.

Section 41102(a) of the Shipping Act prohibits any person from "knowingly and willfully" obtaining or attempting to obtain ocean transportation of property by various false activities, including false billing or classification, or by "any unjust or unfair device or means." A person is considered to have "knowingly and willfully" violated the Shipping Act if the person had knowledge of the facts of the violation and intentionally violated or acted with reckless disregard, plain indifference, or purposeful, obstinate behavior akin to gross negligence. *Rose International, Inc. v. Overseas Moving Network International, Ltd.*, 29 S.R.R 119, 164-165 (FMC 2001); *Portman Square Ltd.*, 28 S.R.R. 80, 84-85 (ALJ 1998) (Admin. final 1998); *Ever Freight Int'l*, 28 S.R.R. 329, 333 (ALJ 1998) (Admin. final 1998). "A calculated effort in bad faith to avoid the payment of demurrage legitimately owing would, if successful, allow shippers and consignees to accomplish what Section 16 was intended to prevent[,] the receipt of carrier service at less than applicable rates and at less than rates charged to competitors." *Capitol Transportation*, 612 F.2d at 1324.

Respondent has not alleged a good faith legal defense for her failure to pay but rather a variety of ever-changing contentions. The evidence includes emails in which Respondent repeatedly blamed the failure to pay on an unnamed third party. For example, Respondent stated:

- "Also, as I have advised there was another company involved, I am checking to see why they didn't pay." C. App. Ex. 21.
- "We have paid the shipping costs to a third party . . . . give me an hour or 2 to see why this was not paid, even though we have sent the payment." C. App. Ex. 23.
- "I paid the fees you have to believe me, I talked to the company and they are sending the payment today, but it may take a few days." C. App. Ex. 24.
- "Once I received your payment, I paid it to the third party I used to book your shipment." C. App. Ex. 27.

- "The company I paid the money to, needs to know if to refund me, so I can refund you , or should they pay the ocean directly ?" C. App. Ex. 28.

- "They promised to pay it today or tomorrow." C. App. Ex. 30.

- "I have been asking them to pay it for the last 4 days, they should be able to pay it today or tomorrow. I will send you the proof once it was paid." C. App. Ex. 32.

- "I will keep following up with them and make sure they pay , but it may take another day , and in the meantime you are paying additional fees. I paid these fees a day after you submitted your payment to me, just so you know !" Respondent's email response filed October 1, 2019, Ex. 5.

However, Respondent no longer claims that a third party was responsible for the failure to pay and Respondent now admits that she failed to make the payment. The statements in the contemporaneous emails regarding a third party are not credible. This type of active misinformation and deceit demonstrates knowledge and willfulness and caused a significant delay in obtaining the cargo.

Respondent knowingly and willfully continued to promise a refund but failed to refund Complainant for the shipping costs he paid to Troy. C. App. Ex. 33 ("I am also confirming that the money was sent back to me, and I should be able to pay by Friday !"); C. App. Ex. 34 ("I will send you a refund shortly"); C. App. Ex. 35 ("The payment will be concluded in a day or 2, of course I will try to pay you as much as I am responsible for !"); C. App. Ex. 36 ("A wire for $1025 was initiated yesterday. You should have the payment by tomorrow in the bank account you have provided. The amount is the ocean cost that we failed to pay in time."). This failure to refund despite repeated promises mirrors Respondent's failure to initially pay the shipping charges, further undermines Respondent's credibility, and demonstrates that her conduct was knowing and willful.

Respondent indicated that she did not know whether Troy had been paid and blamed Complainant for a lack of knowledge of the shipping process, for example, not knowing the shipment's arrival date and for requesting changes to the bill of lading. Respondent Brief at 4; C. App. Ex. 27; RPFF at 2-3. The evidence shows that Respondent did not provide Complainant with a copy of the bill of lading until after his shipment arrived and there is only one bill of lading in evidence. C. App. Ex. 5, 16, 17. The evidence does not support Respondent's argument that changes to the bill of lading were made and even if a change was made, such a change does not excuse Respondent's failure to pay the shipping charges. Moreover, Respondent, as a knowledgeable shipping professional, should have checked on the arrival date, ensured that the bill of lading was provided timely and accurately, and ensured that timely payment was made to Troy.

The evidence demonstrates that when Respondent accepted Complainant's booking, Respondent knew The Right Move might be closing. Although Respondent claims in some emails that The Right Move did not close until March of 2019, the evidence shows that Respondent knew the business might be closing when she accepted this booking in February of 2019. C. App. Ex. 23, 36; R. App. Ex. 1, 2. Respondent acknowledges that her company's

financial problems stemmed from problems with prior shipments. C. App. Ex. 27 (describing an abandoned shipment); RPFF at 2 ("I was informed that the freight was on hold, and It seems as the payment that was submitted was applied towards an old shipment that was still pending."). Financial hardship does not justify the failure to pay shipping charges for subsequent shipments.

Respondent knowingly and willfully opened a personal bank account to accept Complainant's payment for this shipment, with the intent of keeping these funds separate from company funds. In a contemporaneous email, Respondent stated that the "booking was done under another company license, because I knew we may get to the point we have to close." C. App. Ex. 27. She then explains problems with another shipment and says that "[s]ince I didn't want your shipment to be effected in this process, I opened a bank account that was a business account, but had my name on it in order to be not associated it with the The Right Move, Inc financial burden." C. App. Ex. 27; *see also* Complainant Brief at 10; C. App. Ex. 3. Opening a separate bank account to avoid comingling this transaction with her company's funds indicates that she was acting knowingly and willfully.

Respondent asserts that she was an experienced professional and the evidence shows that she was a licensed NVOCC. Respondent deflected Complainant's questions about payment for his shipment with misinformation about a third party and promises to pay, as well as opening a separate account for this transaction. This evidence is sufficient to demonstrate that she acted knowingly and willfully, as required for a violation of section 41102(a).

b. Unjust or Unfair Device or Means

Complainant asserts that Respondent used an unjust or unfair device or means, including fraud and deceit, arguing that:

> There is an abundance of evidence in the record that establishes fraud and deceit by the Respondent. In February 2019, the Respondent knew or reasonably suspected that her company may close soon, but failed to disclose this material information to the complainant when they entered into an agreement. . . . This was a deliberate act of omission by the Respondent who knowingly and recklessly misled the Complainant just to obtain Complainant's business.

Complainant Brief at 4. Complainant also asserts that "Complainant made non-credible, inconsistent and deceitful claims about ocean payment" when she "in bad faith continued to deceitfully claim via email that she had paid the shipping dues albeit via a third party and that the payment should clear soon." Complainant Brief at 5.

Respondent asserts that she was an experienced professional aware of her responsibilities; that she continued to communicate with and try to help Complainant, even suggesting that he contact the FMC; and that she did not know when she accepted the booking that she would be unable to pay the shipping charges. Respondent Brief at 2.

To establish a violation of section 41102(a), "fraud or concealment is a necessary ingredient in the proof of an unjust or unfair device or means." *United States v. Open Bulk Containers*, 727 F.2d 1061, 1064 (11th Cir. 1984); *see also Rose Int'l*, 29 S.R.R. at 163;

Waterman S.S. Corp. v. General Foundries, Inc., 26 S.R.R. 1424, 1429 (FMC 1994). "In the absence of evidence of bad faith or deceit, the Federal Maritime Commission will not infer an 'unjust or unfair device or means' from the failure of a shipper to pay ocean freight." 46 C.F.R. § 545.2. "It is such fraud or concealment that in fact makes the practice unjust or unfair." *Open Bulk Containers*, 727 F.2d at 1064.

The decision in *Nordana Lines* states:

> Complainant acknowledges that the Commission now requires more than a showing that a respondent has failed to pay freight due because of a stubborn but good-faith refusal to pay a disputed rate or charge to support a claim that section 10(a)(1) has been violated. As complainant correctly contends, to support such a charge, complainant must show some element of falsification, deception, fraud or concealment or some evidence of bad faith or deceit. Complainant cites several Commission decisions establishing these principles. Complainant argues that [Respondent] has demonstrated deceit and bad faith by obtaining Nordana's transportation services and thereafter making a series of false promises to Nordana regarding its intention to pay the freight owed.

Nordana Line AS v. Jamar Shipping, Inc., 27 S.R.R. 233, 1995 FMC LEXIS 8 at *7-8 (ALJ 1995) (Notice not to review, April 19, 1995) (footnote omitted).

The First Circuit, in *Capitol Transportation*, accepted the Commission's finding that "the requisite element of fraud or concealment was established in this case by Capitol's "unexplained and apparently unjustified avoidance of any payment of the amounts found due and owing." *Capitol Transportation*, 612 F.2d at 1323.

In this case, there is clear evidence that Respondent used unjust or unfair means. Respondent issued a house bill of lading from Alexandria, Virginia, to Karachi Port, Pakistan, and assumed responsibility for Complainant's shipment. Respondent in bad faith failed to pay Troy, forcing them to collect ocean freight payment from Complainant in Karachi, Pakistan, even though she knew that the freight was prepaid by Complainant. When asked about the shipment, Respondent stated that a third party was handling the payment. C. App. Ex. 21, 23. There is no evidence in the record that a third party was used and it appears that this statement to Complainant was a material misrepresentation. In addition, Respondent misrepresented the status of her business when the shipment was booked and failed to timely disclose to the other common carriers and to Complainant that her business was in the process of closing. C. App. Ex. 23, 36; R. App. Ex. 1, 2. If Complainant had known this information before booking, he would have selected a different ocean transportation intermediary for his shipment.

This case is unusual because none of the Respondent's communications with Troy and Maersk, who handled the shipment, are in the record. Respondent would have copies of these emails in her control and her failure to produce them leads to the inference that they are adverse to her interests. It is a reasonable inference that her communications with Troy were not entirely accurate. For example, Troy would only have shipped the cargo with the expectation of payment. Since CP World required proof from Complainant that he had prepaid the shipment, it is likely that Respondent failed to disclose to Troy that the shipment was prepaid, misleading them to

assume that payment would be made either by Respondent or by Complainant after the shipment arrived in Karachi, Pakistan. C. App. Ex. 18. If, as Respondent states, she made a payment that was applied to a different shipment, that would be evidence that this was not a unique situation but rather that Respondent had failed to pay for prior shipments. RPFF at 2 ("I was informed that the freight was on hold, and It seems as the payment that was submitted was applied towards an old shipment that was still pending."); C. App. Ex. 27 (describing a previous abandoned shipment).

Some of Respondent's arguments are hard to understand, for example, she states that the Complainant does not understand the challenges facing companies that ship household goods (seasonal business and lack of repeat customers) and states that "year after year after year, I have been through this same cycle" and that "it worked for 8 years prior and the business was successful." This implies that the challenges were foreseeable and manageable. However, she also says that "[a]sking the respondent to foresee difficulties is unreasonable" and that "[a]t time of accepting the shipment, the respondent had no way of knowing she is facing harder times than usual." Complainant Brief at 2. In this proceeding, foreseeability is not at issue. Rather, the issue is whether or not Respondent utilized unjust or unfair means or devices.

Failing to pay the ocean shipping charges, hiding the financial state of the company to induce Complainant to book with her, making a series of false promises, and blaming the lack of payment on a fictitious third party while Complainant's goods were in limbo, support the finding that there was fraud or concealment. Accordingly, the evidence demonstrates unjust or unfair means, as required by the Shipping Act to establish a section 41102(a) violation.

c. Obtaining Transportation at Less than Applicable Rates

Complainant asserts that:

> Respondent was required to pay TROY port of loading and ocean freight shipping charges, and by failing to pay TROY; the Respondent in bad faith, breached the shipping agreement between the Complainant and the Respondent. All Respondent had to do was pay $1040.00 to TROY via credit card, money order, cashier's check, money transfer or a regular check. The Respondent had already received $2595.00, so she had the money to pay TROY, but failed to do so in bad faith.

Complainant Brief at 4.

Respondent admits that she failed to make the payment for the ocean transportation. Respondent's Answer to Complainant's Discovery Request (titled Motion to Compel) at 1. Respondent does not contest this element, conceding that the transportation occurred and that she did not make a payment for it. She argues, instead, that she intended to pay for the ocean transportation. Respondent Brief at 5.

Actions speaker louder than words. Although Respondent repeatedly said that she intended to pay the ocean shipping, she did not pay the shipping charge and did not refund Complainant after he paid. Her failure to pay and promises to pay delayed Complainant's ability to obtain his shipment. If her payment was applied to another shipment, RPFF at 2, that just

demonstrates that this violation was not an isolated occurrence, a finding supported by Respondent's acknowledgement of problems with other shipments. Financial problems do not justify the failure to pay for shipping. In addition, Respondent failed to pay the demurrage charges by Maersk that accrued on the container due to her failure to pay freight owed for the shipment. Respondent profited from obtaining transportation of this shipment without making any payment.

Pursuant to the Shipping Act, a shipper may not "obtain or attempt to obtain" transportation for less than applicable charges. As an NVOCC, Respondent was the shipper in relation to Troy. Respondent obtained transportation of the cargo without making any payment for the shipment, instead, keeping the payment for herself. The evidence shows that Complainant paid Respondent for the shipment and then had to pay Troy for the shipment. C. App. Ex. 3, 9, 41. Accordingly, Respondent obtained transportation at less than applicable rates as Respondent has not paid anything to Troy, Maersk, or Complainant for the shipment.

d. Conclusion

Respondent operated as an NVOCC when it issued a bill of lading assuming responsibility for transportation of cargo by water between the United States and a foreign port. For the shipment, Respondent was a shipper in relation to Troy within the meaning of the Act. 46 U.S.C. § 40102(22)(E). Complainant establishes by a preponderance of the evidence that Respondent engaged in fraud or deceit as required to establish use of an unjust or unfair device. In addition, the evidence establishes that Respondent obtained transportation without making any payment and that Respondent acted knowingly and willfully. Therefore, the evidence shows that Respondent knowingly and willfully, by means of an unjust or unfair device or means, obtained transportation by water for property at less than the rates or charges which would otherwise be applicable in violation of section 41102(a) of the Shipping Act. Accordingly, Complainant has established by a preponderance of the evidence that Respondent violated section 41102(a) of the Shipping Act when she shipped Complainant's household goods without making any payment.

4. Reparations

a. Personal Liability

Complainant sued Respondent in her individual name, doing business as The Right Move. Complaint at 1. Complainant argues that the corporate veil should be pierced to find Respondent personally liable for the damages, relying in significant part on Respondent's failure to respond to discovery.

Respondent argues that "the Right Move Inc is a closed company, and that the FMC license was terminated. The only way to compensate the complainant at this point will be through the company bond that was in place at the time of conducting business." Respondent Brief at 5.

The Commission has addressed when it is appropriate to pierce the corporate veil, stating that the "federal common law that has been developed generally recognizes a two-prong test to

determine whether to disregard corporate form: the evidence must show (1) control and domination over the shell corporation, and (2) a federal violation." *Rose Int'l*, 29 S.R.R at 166.

> The factual tests vary from circuit to circuit, but some of the major factors used to determine domination and control, and which we will consider, are as follows: (1) the nature of the ownership and control; (2) failure to maintain corporate minutes or adequate corporate records and failure to follow corporate formalities; (3) commingling of funds and other assets; (4) inadequate capitalization; (5) diversion of the corporation's funds or assets to non-corporate uses; (6) use of the same office or business location by the corporation and its shareholders; (7) overlapping ownership, officers, directors and personnel; (8) the amount of business discretion displayed by the allegedly dominated corporation and (9) whether the corporations are treated as independent profit centers.

Rose Int'l, 29 S.R.R at 167-168. Among the factors the Commission has considered in piercing the corporate veil are: "the nature of the corporate ownership and control, the failure to maintain adequate corporate records and minutes, and the failure to follow corporate formalities, including the approval of stock issues by an independent board of directors." *Ariel Mar. Group, Inc.*, 24 S.R.R. 517, 530 (FMC 1987).

Complainant contends that on "February 13, 2019, Respondent told Complainant to wire transfer payment to her personal bank account which was under her name 'Michelle Franklin.' On February 14, 2019, the money was transferred to Respondent Michelle Franklin's personal account." Complainant Brief at 10; C. App. Ex. 3. Respondent refused to answer Complainant's discovery requests regarding business accounts, information exclusively under the control of Respondent.

Because Respondent failed to provide discovery, there is limited information in the record. Moreover, comments made by Respondent to Complainant lack credibility. However, given that Respondent's contemporaneous statements are the most directly relevant evidence in the record, they are probative. On April 9, 2019, Respondent sent a long email which stated that the "booking was done under another company license, because I knew we may get to the point we have to close." C. App. Ex. 27. She then explains problems with another shipment and says that "[s]ince I didn't want your shipment to be effected in this process, I opened a bank account that was a business account, but had my name on it in order to be not associated it with the The Right Move, Inc financial burden." C. App. Ex. 27. This statement that Respondent used a different, new account for this shipment is consistent with Complainant's allegations. This evidence, coupled with her failure to produce discovery, establishes that this shipment involved Michelle Franklin's personal bank account, separate from her regular company account, and is evidence of commingling of funds and inadequate capitalization.

Respondent's refusal to provide discovery also supports findings proposed by Complainant that: Michelle Franklin is or was the sole owner of The Right Move, Inc.; from February 2019 to date, Michelle Franklin has been and still is the sole spokesperson, representative, owner, advocate, and employee of The Right Move; The Right Move has failed to observe corporate formalities in terms of documentation; The Right Move is not a separate entity from Michelle Franklin; The Right Move is or was taxed through Michelle Franklin's personal

tax returns; Michelle Franklin treated the funds and assets of the Right Move as her own; and, The Right Move was being used by Michelle Franklin as a façade for her personal financial dealings and not as a separate corporate entity. C. App. Ex. 3; Respondent's failure to respond to Complainant's discovery: Request for the Production of Documents and Interrogatories. These factors weigh in support of piercing the corporate veil and finding Michelle Franklin personally liable.

Respondent's argument that the only way to compensate the Complainant is through the company bond addresses the issue of collecting any reparations awarded. The Commission does not assist with collections of reparations awards and the Complainant may seek any available means to obtain compensation, including through the company bond (by contacting the bond company directly), from the Respondent, or other appropriate means. Moreover, Respondent's license was revoked for failure to maintain the bond. It is reasonable to conclude that the bond may not have been in force at the time of the shipment at issue and may not be available to pay the claim.

Although Michelle Franklin was sued in her own name, during the transactions at issue, she acted in the company's name. Therefore, it is necessary to pierce the corporate veil to find her personally responsible for any reparations. As discussed above, the evidence is sufficient to show that the corporate veil should be pierced. Accordingly, Michelle Franklin is liable in an individual capacity in addition to The Right Move for any reparations award.

b. Calculation of Damages

Complainant seeks a reparations award of $5,985.40, including shipping charges, container demurrage charges, and costs incurred while in Karachi obtaining release of his cargo; $73 in costs to file this complaint; and, $2,595 in restitution of fees paid to Respondent. Complainant Brief at 8-9. Complainant has the burden of proving entitlement to reparations.

Respondent objects to the additional costs beyond the ocean freight, arguing that it was Complainant's inexperience which caused delays, and also argues, in contradiction, that the customs clearance process in Pakistan is difficult and 17 to 20 days is a reasonable amount of time to clear customs. Respondent's Response at 4-5.

Pursuant to section 11(g) of the Shipping Act, "[i]f the complaint was filed within the period specified in section 41301(a) of this title, the Federal Maritime Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part." 46 U.S.C. § 41305(b).

Commission case law states that: "(a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation." *Waterman v. Stockholms Rederiaktiebolag Svea*, 3 F.M.B. 248, 249 (FMB 1950); *see also James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist.*, 30 S.R.R. 8, 13 (FMC 2003).

> The statements of the Commission in [*California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213 (FMC 1990)] and the other cited cases are in the mainstream of the law of damages as followed by the courts, for example, regarding the principles that the fact of injury must be shown with reasonable certainty, that the amount can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences, the principle that the damages must be foreseeable or proximate or, in contract law, within the contemplation of the parties at the time they entered into the contract, the fact that speculative damages are not allowed, and that regarding claims for lost profits, there must be reasonable certainty so that the court can be satisfied that the wrongful act caused the loss of profits.

Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co., Inc., 26 S.R.R. 788, 798-799 (ALJ 1992) (Admin. final 1992).

The evidence support's Complainant's argument that the delay in obtaining the cargo and additional costs from the delay were caused by Respondent's failure to pay the shipping charges, which led to a hold on the shipment, and promises to pay, which delayed Respondent from paying the shipping charges earlier. There is not sufficient evidence in the record to support Respondent's claims that the delay was caused by Complainant's inexperience, changes to the bill of lading, or that customs clearance could have started earlier.

Complainant seeks $1,107.97 for the shipping charges that he paid and $935 in container demurrage charges caused by the Respondent's delay. Complainant provides receipts supporting these amounts. C. App. Ex. 9, 10, 11, 12, 13, 41. The container in question was shipped to Pakistan and Complainant is not entitled to receive free shipping for his container. Complainant's request for the shipping charges he paid for his container is therefore denied. However, the evidence shows that the delay in obtaining the cargo was caused by Respondent's actions. Therefore, Complainant has provided sufficient evidence to support his claim for container demurrage charges, totaling $935.

In addition, Complainant seeks costs incurred while in Karachi obtaining release of the cargo, including $116.40 in taxi charges, $2,350 for lodging, and $1,476 for meals and incidentals. Complainant provides receipts for the taxi and lodging charges and refers to government regulations for the meals and incidental charges. C. App. Ex. 14, 41. Respondent's arguments regarding the time spent by Complainant are confusing, as she says both that 17-20 days is reasonable and that the delay was caused by Complainant's lack of knowledge. Her arguments are not convincing. On the other hand, Complainant attaches appropriate documentation and support for the time spent to retrieve his belongings clearly delayed by Respondent's failure to pay the shipping charges. Complainant has provided sufficient evidence to support his claim for costs obtaining release of his cargo, totaling $3,942.40.

Complainant seeks compensation for the $73 in costs to file this complaint. Although attorney fees may be awarded, costs for filing the complaint are generally not awarded as they are not part of the actual injury determination nor the attorney fees. Accordingly, the request for costs to file the complaint is denied.

Complainant also seeks restitution of the $2,595 that he paid the Respondent on February 14, 2019, for this shipment. Complainant Ex. E. In addition to profit, a portion of this fee may have been for trucking from Alexandria, VA, to Baltimore's seagirt terminal or other charges, but because Respondent failed to provide evidence of these costs and refused to answer discovery related to transportation costs for the shipment, they cannot be deducted. C. App. Ex. 5. Complainant has provided sufficient evidence to support his claim for restitution, totaling $2,595.

Complainant has established that his actual injury caused by Respondent's violation of the Shipping Act is in the amount of $7,472.40 ($935 container demurrage charges + $3,942.40 taxi, meals, and lodging + $2,595 shipping charges paid to Respondent). Respondent is ordered to pay reparations in the amount of $7,472.40 to Complainant. The shipment arrived in Karachi, Pakistan, on March 31, 2019. C. App. Ex. 39. Therefore, interest on the reparation award runs from March 31, 2019, to be calculated by the Commission when this decision becomes administratively final. *See* 46 C.F.R. § 502.253.

IV. ORDER

Upon consideration of the record herein, the arguments of the parties, the findings and conclusions set forth above, and the determination that Muhammad Rana established that Michelle Franklin, also known as Michal Franklin or Micah Franklin, doing business as The Right Move, Inc., violated the Shipping Act, 46 U.S.C § 41102(a), it is hereby

ORDERED that Muhammad Rana's complaint for reparations against Michelle Franklin, also known as Michal Franklin or Micah Franklin, doing business as The Right Move, Inc., be **GRANTED**. It is

FURTHER ORDERED that Michelle Franklin and The Right Move, Inc. are jointly and severally ordered to pay Muhammad Rana reparations in the amount of $7,472.40 with interest on the reparations award running from March 31, 2019. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

VERTERRA LTD., *Complainant*

v.

D.B. GROUP AMERICA LTD. AND D.B. GROUP INDIA LTD., *Respondents*.

DOCKET NO. 19-09

Served: June 12, 2020

BEFORE: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION APPROVING CONFIDENTIAL SETTLEMENT AGREEMENT[1]

[Notice Not to Review served 7/14/2020, decision administratively final.]

I. Introduction

On May 26, 2020, Complainant VerTerra Ltd. ("VerTerra") and Respondents D.B. Group America, Ltd. ("D.B. America") and D.B. Group India, Ltd. ("D.B. India") filed a joint petition for approval of settlement and voluntary dismissal ("motion"). The parties attached a copy of the confidential settlement agreement and mutual release. The parties jointly move for approval of the settlement agreement, voluntary dismissal with prejudice, and confidentiality for the settlement agreement.

II. Procedural History

On December 4, 2019, a notice of filing of complaint and assignment was served noting that VerTerra had filed a complaint alleging violations of the Shipping Act including 46 U.S.C. §§ 41104, 41104(a), 41104(a)(2), 41104(a)(3), 41104(a)(4), 41104(a)(5), 40501, and 40502. Complainant alleges that Respondents committed the violations when Respondents coordinated approximately 293 discreet shipping jobs for Complainant from May 2016 through December 2018.

On January 13, 2020, Respondents filed a timely motion to dismiss the proceeding under Rule 12(b)(6) of the Federal Rules of Civil Procedure, or to stay the proceeding during the pendency of a related action filed with the New York state court. On January 28, 2020, Complainant filed a memorandum of law in opposition to Respondents' motion to dismiss or stay. On February 4, 2020, Respondents filed a reply to Complainant's memorandum. On

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227.

February 6, 2020, Complainant filed a motion for leave to file a sur-reply to respondents' motion to dismiss or stay proceedings. On March 5, 2020, an order was issued denying the Respondents' motion to dismiss or stay proceedings and denying Complainant's motion to file a sur-reply.

On March 16, 2020, Respondents filed their answer, denying any violation of the Shipping Act and raising affirmative defenses.

On March 31, 2020, the parties filed an initial joint status report, detailing a proposed schedule for discovery and depositions, and indicating that the parties had scheduled a preliminary mediation session with the Commission's Office of Consumer Affairs and Dispute Resolution Services ("CADRS"). On April 2, 2020, a scheduling order was served.

On May 1, 2020, the parties filed an updated joint status report, indicating that the parties had exchanged discovery requests and that they had conducted a day of mediation with the assistance of CADRS which did not resolve the dispute.

On May 26, 2020, the parties filed a joint petition for approval of settlement and request for confidential treatment.

III. Discussion

Using language borrowed in part from the Administrative Procedure Act,[2] Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole.

[2] "The agency shall give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c).

> Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A American Jurisprudence, 2d Ed., 777-778 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp*., 30 S.R.R. 310, 311 (ALJ 2004)).

The parties state:

> Here. . . . the settlement is the result of more than a year's worth of arm's-length negotiations between two sophisticated entities, both of whom were represented by counsel at all times. The agreed resolution does not contravene any law or public policy. It is not an unjust or discriminatory device, nor will it have any adverse effect on any third parties or on the shipping public. Rather, the settlement is fair and reasonable, and reflects the Parties' desire to resolve their issues without the need for costly and uncertain litigation.

Motion at 3-4. This settlement resolves both this dispute and related litigation in the New York state court.

Based on the representations in the motion and other documents filed in this matter, the parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The parties are represented by counsel and have been discussing settlement over an extended period of time. The proceeding would require potentially expensive additional discovery and briefing. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. There is no evidence of fraud, duress, undue influence, or mistake nor harm to the public. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991).

The full text of the settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

IV. Order

Upon consideration of the motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the petition to approve the settlement agreement between Complainant VerTerra, Ltd. and Respondents D.B. Group America, Ltd. and D.B. Group India, Ltd. be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

ZERO WASTE CHALLENGE, LLC, *Complainant*

v.

WORLDWIDE FREIGHT SERVICES, INC. D/B/A UNITED AMERICAN LINE, *Respondent*.

DOCKET NO. 20-08

Served: June 15, 2020

NOTICE OF VOLUNTARY DISMISSAL

On June 9, 2020, the Complainant provided notice of its voluntary dismissal of its complaint in the above referenced docket pursuant to 46 C.F.R. §502.72(a)(1). Therefore, the above-captioned proceeding is discontinued.

Rachel E. Dickon
Secretary

Issued: June 16, 2020

FEDERAL MARITIME COMMISSION

Docket No. 20-10; Petition No. P1-20

Investigation into Conditions Created by Canadian Ballast Water Regulations in the U.S./Canada Great Lakes Trade

AGENCY: Federal Maritime Commission.

ACTION: Notice of Investigation and Request for Comments.

SUMMARY: The Federal Maritime Commission (Commission) has initiated an investigation into the allegations made in a petition filed by the Lake Carriers' Association (Petitioner) that conditions created by the Government of Canada (Canada) are unfavorable to shipping in the United States/Canada trade.

DATES: Submit comments on or before July 22, 2020.

ADDRESSES: You may submit comments, identified by Docket No. 20-10, by the following method:

• *Email: secretary@fmc.gov*. For comments, include in the subject line: "Docket No. 20-10, Comments on Conditions Created by Canadian Ballast Water Regulations in the U.S./Canada Great Lakes Trade." Comments should be attached to the email as a Microsoft Word or text-searchable PDF document.

Docket: For access to the docket to read background documents or public comments received, go to the Commission's Electronic Reading Room at*:* www2.fmc.gov/readingroom/proceeding/20-10/.

Unless otherwise directed by the commenter, all comments will be treated as confidential under 46 U.S.C. 42105 and 46 CFR 550.104.

FOR FURTHER INFORMATION CONTACT: For questions regarding submitting comments or the treatment of confidential information, contact Rachel E. Dickon, Secretary; Phone: (202) 523-5725; Email: secretary@fmc.gov. For technical questions, contact: Peter J. King, Deputy Managing Director; Phone (202) 523-5800; Email: OMD@fmc.gov.

SUPPLEMENTARY INFORMATION:

I. INTRODUCTION

On March 6, 2020, the Lake Carriers' Association (Petitioner), a trade association made up of U.S. owners and operators of vessels serving the Great Lakes (Lakers), filed a petition

alleging that conditions created by Transport Canada, an agency of the Government of Canada, are unfavorable to shipping in the United States/Canada trade, pursuant to Section 19(1)(b) of the Merchant Marine Act, 1920 (Section 19) codified in 46 U.S.C. 42101. Section 19 authorizes the Federal Maritime Commission (Commission) to investigate these conditions and to adopt regulations to adjust or meet such conditions. In this instance, Petitioner requests that the Commission adopt regulations in order to remedy a condition it alleges will result in irreparable harm to Petitioner's members.

II. SUMMARY OF PETITION

Petitioner argues that Transport Canada's proposed regulations to require the installation of ballast water management systems (BWMS) on Laker vessels will effectively drive out U.S.-flag vessels from the cross-lakes U.S. export trade to Canada. These regulations, which were proposed by Transport Canada on June 8, 2019, would require Canadian vessels and vessels in waters under Canadian jurisdiction to develop and implement a ballast water management plan and comply with a performance standard that would limit the number of organisms discharged, with a compliance date of September 8, 2024. *Ballast Water Regulations*, Canada Gazette, Part 1, Vol. 153, No. 23 at 15.

The proposed regulations would exempt vessels of a non-signatory party to the International Maritime Organization (IMO) International Convention on the Management of Ships' Ballast Water and Sediments, such as the United States, if those vessels operate exclusively within the Great Lakes Basin and do not load ballast water from or release ballast water into Canadian waters. Petitioner alleges that this exemption would not apply to its members' vessels because they need to load ballast water after offloading export cargo at Canadian ports, and that in order for its members' vessels to comply with the proposed regulations, they would need to install a BWMS on each vessel.

Petitioner argues that because of the vessel type and age differences between the Canadian and U.S. fleets, the respective costs of implementing the proposed regulations will be very different. Transport Canada estimates the cost of implementing the requirements on all Canadian vessels currently serving the trade would be approximately 632 million Canadian dollars. Petitioner argues that implementing these same regulations on all U.S. vessels currently serving the trade would cost nearly 1.132 billion Canadian dollars. Ultimately, Petitioner argues the proposed regulations will essentially double the U.S. Laker cost of participating in the trade while Canadian carriers would experience a less than 1 Canadian dollar per ton cost increase.

Petitioner argues that its members cannot comply with the regulations because of the prohibitive cost, and they cannot avoid the regulations and continue to carry United States exports to Canada because they must load ballast water as they offload cargo at Canadian ports. Petitioner also states that its members cannot operate their vessels outside of the Great Lakes and St. Lawrence River because of their ship design and current U.S. Coast Guard certification is restricted to service on the Great Lakes and St. Lawrence River. Should the regulations be finalized and if U.S. vessels were thereby forced out of the trade, Petitioner contends that Canadian vessels would enjoy a monopoly on the cross-lakes U.S. export trade to Canada.

Petitioner argues that prohibiting the loading of ballast water without a BWMS serves no

environmental purpose because, unlike discharging ballast water, loading ballast water in Canadian waters does not result in the potential introduction of nonnative organisms into Canadian waters. Petitioner asserts that the regulations serve no environmental purpose and the cost of compliance is prohibitively high for U.S. vessels, and suggests that the real purpose of the regulations is to drive out U.S. vessels from this trade.

Petitioner is asking the Commission to issue a regulation to meet the unfair competitive conditions created by Transport Canada. Petitioner has provided a proposed regulation that would assess a fee of 300,000.00 U.S. dollars each time a Canadian vessel enters any U.S. port.

III. INVESTIGATION AND INITIAL REQUEST FOR COMMENTS

The Commission has reviewed the Petition and determined that it meets the threshold requirements for consideration under the Commission's regulations. *See* 46 CFR Part 550, subpart D. The Commission has therefore determined to initiate an investigation into whether the proposed Transport Canada regulations create unfavorable conditions to shipping in the foreign trade of the United States. To that end, the Commission has designated the Deputy Managing Director to lead an investigation into the Petitioner's allegations and to prepare a report on the investigation's findings and recommendations for Commission consideration.

As an initial step in the investigation, interested persons are requested to submit views, arguments and/or data on the Petition. Comments may address any aspect of the Petition.

As the Commission proceeds with this investigation, it may determine the need to request additional comment or gather information through other means as authorized under 46 U.S.C. 42104 and 46 CFR part 550.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

LOGFRET, INC., *Complainant*

v.

KIRSHA, B. V., LEENDERT JOHANNESS BERGWERFF A/K/A HANS BERGWERFF, LINDA SIEVAL, *Respondents*.

DOCKET NO. 18-10

Served: June 22, 2020

BY THE COMMISSION: Michael A. KHOURI, *Chairman*, Rebecca F. DYE, Daniel B. MAFFEI, Louis E. SOLA, and Carl W. BENTZEL, *Commissioners*.

ORDER AFFIRMING DENIAL OF ATTORNEY FEE PETITION

This case is before the Commission on Respondents' exceptions to an Administrative Law Judge (ALJ) order denying Respondents' petition for attorney fees. In the underlying proceeding, Complainant alleged that Respondents violated 46 U.S.C. §§ 41103(a) and 41104(a)(1). The ALJ dismissed the complaint, and neither party appealed. Respondents subsequently petitioned for attorney fees as prevailing parties under 46 U.S.C. § 41305(e) and 46 C.F.R. § 502.254. The ALJ denied the petition, and Respondents filed exceptions. Because the ALJ did not err, the Commission affirms the order denying the attorney fee petition.

I. BACKGROUND

A. Allegations

As the ALJ noted, this case is part of a larger dispute between a Dutch common carrier – Logfret B.V. – and its former managing director, Respondent Leendert Johannes Bergwerff. Am. Compl. ¶¶ 1, 6, 7.[1] Mr. Bergwerff, a Dutch national, was the managing director of Logfret B.V. from 2006 until 2017. *Id.* ¶ 7. Mr. Bergwerff is also the owner and managing director of Respondent Kirsha B.V., another Dutch corporation. *Id.* ¶¶ 11-12.[2] Respondent Linda Sieval, a Dutch national, was Logfret B.V.'s sales manager until 2018. *Id.* ¶ 19. Complainant Logfret, Inc., is a Delaware corporation and a licensed non-vessel-operating common carrier (NVOCC)

[1] In ruling on Respondents' motion to dismiss the amended complaint, the ALJ was generally limited to considering the amended complaint and exhibits thereto, and the ALJ was required to accept the well-pleaded factual allegations as true. I.D. at 3. Similarly, in describing the background of this matter, the Commission, unless otherwise noted, will rely on the amended complaint and exhibits thereto.

[2] According to Respondents, Kirsha B.V. is a holding company that owns 27.4% of Logfret B.V. and 50% of Logfret B.V.'s landlord. Exceptions at 11.

and freight forwarder. *Id.* ¶¶ 3, 4. Complainant is a subsidiary of Logfret Group (which is in turn a subsidiary of Logistique Holding SAS) and is an affiliate of Logfret B.V. *Id.* ¶¶ 3, 5. Complainant did not name Logfret B.V. as a respondent in this case.

According to Complainant, Mr. Bergwerff, Ms. Sieval, and Kirsha B.V. "committed numerous unethical and illegal activities with respect to the management and governance of Logfret B.V., including but not limited to improper leasing and refurbishment of new offices, improper accession to a new management agreement, and misappropriation of Logfret B.V. assets." *Id.* ¶ 25. Further, in a letter attached to the Amended Complaint, Logistique Holding SAS accused Mr. Bergwerff of, among other things, "poisoning the personnel of Logfret against its majority shareholder, reaching out to competitors and potentially even sharing company-sensitive information with competitors of LH," "trying to snap up employees from the Logfret-group to start working for one of [his] own companies," and "ask[ing] employees of Logfret to have Logfret enter into transport contracts with competitors of the Logfret-group." Am. Compl. Ex. 6 at 1-2. This latter conduct, the letter states, was impermissible because "[b]eing part of the Logfret-group, Logfret [B.V.] is obliged to grant business – where possible – within the Logfret group." *Id.* at 1.

Regarding granting business outside the Logfret group, Mr. Bergwerff, with Ms. Sieval's assistance, "directed the staff of Logfret B.V. to handle inbound shipments to the United States through Delmar USA rather than [Complainant], for at least two accounts." Am. Compl. ¶ 32.[3] This was allegedly part of a plan whereby Mr. Bergwerff and Ms. Sieval would use the infrastructure, employees, and resources of Logfret B.V. to issue Delmar USA bills of lading for inbound shipments to the United States. *Id.* ¶ 31; *see also id.* ¶ 36. Additionally, Complainant claims, Mr. Bergwerff, Ms. Sieval, and Kirsha B.V. used "Logfret Cargo Line," a "fictitious entity" to issue fraudulent bills of lading. *Id.* ¶¶ 27, 38. In May 2017, Mr. Bergwerff was dismissed as managing director of Logfret B.V. *Id.* ¶ 39.

B. Procedural History

Complainant filed a complaint in November 2018 alleging that Respondents violated 46 U.S.C. § 41103(a), which prohibits a common carrier, marine terminal operator, or ocean freight forwarder from knowingly disclosing, offering, soliciting, or receiving information about a shipment without the consent of shipper or consignee if the information may be used to the detriment of the shipper, consignee, or any common carrier, or if the information would improperly disclose the business transaction to a competitor. Although Complainant alleged generally that the Commission had jurisdiction, Compl. ¶ 9, it did not allege that Respondents were common carriers, marine terminal operators, or ocean freight forwarders subject to § 41103(a). Complainant sought damages of $ 2 million.

Respondents moved to dismiss the complaint for lack of subject matter and personal jurisdiction, arguing that Complainant failed to allege that Respondents were regulated entities. Respondents also argued more generally that Complainant "sought to misrepresent internal

[3] Delmar USA is a licensed NVOCC and freight forwarder and a competitor of Complainant. Am. Compl. ¶¶ 17, 34.

management/employment disputes between Complainant and Respondents as violations of U.S. federal shipping laws." Resp. Mem. Mot. Dismiss at 1.

In response, Complainant moved to amend the complaint and opposed the motion to dismiss. In the amended complaint, Complainant alleged that Respondents were common carriers, Am. Compl. ¶¶ 19-21, and, additionally, that by "arranging and benefiting from the provision of ocean transportation of cargo . . . via the fictitious and unregistered entity 'Logfret Cargo Line,'" Respondents acted as "de facto" common carriers and NVOCCs, *id.* ¶ 30. Complainant reiterated the allegation that Respondents violated 46 U.S.C. § 41103(a) when they routed Logfret B.V. shipments through Delmar USA instead of Complainant. *Id.* ¶¶ 47-51. Complainant also added a new count alleging that Respondents violated 46 U.S.C. § 41104(a)(1)[4] by allowing "the shipper of the cargo moving on the fraudulent [Logfret Cargo Line] bill of lading to obtain transportation for property at less than the rates that would have otherwise applied if the shipper had obtained transportation from the underlying carrier under another rate, such as its tariff rate." *Id.* ¶ 45.

The ALJ granted the motion to amend but allowed the parties to continue to brief the motion to dismiss, including Respondents' arguments that the amended complaint did not cure the jurisdictional defects in the original complaint. On September 17, 2019, the ALJ dismissed the amended complaint with prejudice, finding that Complainant had not adequately alleged that Respondents were common carriers or otherwise subject to §§ 41103(a) or 41104(a)(1). I.D. at 13, 19. Neither party filed exceptions to the ALJ's decision, which became final on October 21, 2019.

Respondents subsequently petitioned for attorney fees. The ALJ permitted Respondents to supplement their petition to address whether they were eligible for and entitled to fees and granted Complainant additional time to respond.[5] On February 20, 2020, the ALJ denied Respondents' petition for attorney fees. The ALJ found that there was no evidence that the proceeding was "frivolous, improperly motivated, objectively unreasonable, or otherwise

[4] Section 41104(a)(1) of Title 46 provides that a "common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . allow a person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or any other unjust or unfair device or means."

[5] Complainant moved to strike the petition for attorney fees as premature, arguing that the Initial Decision was not final because the time to file an appeal with a federal court of appeals had not expired. The ALJ correctly denied the motion to strike. Further, to correct any misunderstanding, the Complainant in this case could not have successfully appealed. A party who fails to file exceptions to an ALJ decision cannot subsequently appeal that decision to a federal court of appeals. Rather, a party must first appeal to the Commission by filing exceptions. If the party disagrees with the Commission decision on exceptions, then the party can appeal to federal court. In other words, a party must exhaust its administrative remedies before going to court. *See* 46 C.F.R. § 502.227(a)(4) ("A decision or order of dismissal by an administrative law judge shall only be considered final for purposes of judicial review if the party has first sought review by the Commission pursuant to this section.").

appropriate for an award of attorney fees. Ord. Denying Pet. at 6. Respondents filed exceptions, which are ripe for Commission review.

II. DISCUSSION

Section 41305(e) of Title 46 provides that the Commission may award the prevailing party reasonable attorney fees. *See also* 46 C.F.R. § 502.254(a). The Commission conducts a two-step inquiry in determining whether to award fees. First, the Commission considers whether a petitioner is eligible for fees, that is, whether it is a "prevailing party." If the answer is yes, the Commission considers whether it should award fees to the petitioner. *See Baltic Auto Shipping, Inc. v. Hitrinov*, Docket No. 14-16, 2017 FMC LEXIS 16, *22-*25 (FMC Oct. 25, 2017); *Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC*, Docket No. 14-04, 2016 FMC LEXIS 58, *12-*14 (FMC Sept. 14, 2016). Here, although Respondents are prevailing parties, the Commission concludes that they are not entitled to attorney fees.

A. Standard of Review

The Commission reviews the ALJ's denial of Respondents' petition for attorney fees de novo. *See* 46 C.F.R. § 502.254(h); 46 C.F.R. § 502.227(a)(6); *see also Edaf Antillas*, 2016 FMC LEXIS 58 at *11. Additionally, Respondents, as the parties seeking an award of attorney fees, bear the burden of establishing that they are eligible for and entitled to fees, documenting the appropriate hours, and justifying the reasonableness of the rates. *Edaf Antillas*, 2016 FMC LEXIS 58 at *11. The standard of proof is preponderance of the evidence. *Cf. Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014) (rejecting clear-and-convincing-evidence standard for fee-shifting in patent cases and noting that preponderance is standard generally applicable in civil actions); *Verisign, Inc. v. XYZ.COM LLC*, 891 F.3d 481, 484-86 (4th Cir. 2018) (adopting preponderance standard for fee-shifting in false advertising case under Lanham Act).

B. Eligibility for Attorney Fees

A respondent is a "prevailing party" for purposes of attorney fees if it has "rebuffed" a complainant's challenge. *Baltic*, 2017 FMC LEXIS 16 at *23 ("A respondent prevails when the complainant's challenge is rebuffed 'irrespective of the precise reason for the court's decision.'") (quoting *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1651 (2016)). The ALJ found that Respondents were prevailing parties because their motion to dismiss was successful and the amended complaint was dismissed with prejudice. Ord. Denying Pet. at 4. Neither party disputes this conclusion, and the Commission agrees that Respondents are eligible for an award of fees.

C. Entitlement to Attorney Fees

In determining whether the Commission should award attorney fees, the primary consideration is "whether such an award is consistent with the purposes of the Shipping Act, and any factors the Commission relies upon in individual cases should be consistent with these purposes." Final Rule: Organization and Functions; Rules of Practice and Procedure; Attorney Fees, 81 Fed. Reg. 10508, 10509 (Mar. 1, 2016). The Commission's analysis considers several factors: frivolousness, objective unreasonableness (in the factual and in the legal components of

a case), motivation, and deterrence and compensation. *Edaf Antillas*, 2016 FMC LEXIS 58 at *14.

1. Objective Unreasonableness

The ALJ determined that while Complainant's claims, particularly regarding whether Respondents were regulated entities, were unsuccessful, they were not frivolous or clearly without merit. Ord. Denying Pet. at 6. The ALJ noted that the factual situation was unusual and there were no similar cases that could have provided clear guidance. *Id.*

On appeal, Respondents argue that Complainant's claims were objectively unreasonable because: (a) Complainant's initial complainant failed to allege that Respondents were regulated entities; (b) Complainant contradicted its allegations that Mr. Bergwerff and Ms. Sieval were common carriers in its opposition to the motion to dismiss; (c) Complainant's counsel made arguments that counsel should have known were meritless; and (d) Complainant's allegations that Kirsha B.V. was a common carrier were based on false statements. Complainant does not address these arguments. Rather, it emphasizes that unlike in *Edaf Antillas*, where the Commission awarded fees based on the complainant failing to prosecute its claims and respond to ALJ orders, Complainant here fully engaged with the administrative process and timely complied with all ALJ orders.

As the ALJ pointed out, "objective unreasonableness" "is generally used to describe claims that have no legal or factual support." *Viva Video, Inc. v. Cabrera*, 9 F. App'x 77, 80 (2d Cir. 2001). It means a claim is "clearly without merit or otherwise patently devoid of a legal or factual basis." *Insurent Agency Corp. v. Hanover Ins. Co.*, Case No. 16-cv-3076, 2020 U.S. Dist. LEXIS 2565, at *10 (S.D.N.Y. Jan. 8, 2020) (internal citations and quotation marks omitted).[6] The mere fact that a respondent has prevailed does not render a complainant's claims objectively unreasonable, otherwise prevailing respondents would be per se entitled to attorney fees, an approach the Commission has rejected. 81 Fed. Reg. at 10509 (noting that "[t]here should be no general presumption for or against awarding attorney fees"); *see also Chivalry Film Prods. v. NBC Universal, Inc.*, Case No. 05-cv-5627, 2007 U.S. Dist. LEXIS 86889, at *6 (S.D.N.Y. Nov. 27, 2007). Further, "the fact that a defendant has prevailed on a motion to dismiss or on summary judgment does not require the court to award fees." *Chivalry Film Prods.*, 2007 U.S. Dist. LEXIS 86889 at *6.

Although Complainant's allegations and arguments that Respondents were common carriers were unpersuasive, they were not so patently devoid of merit so as to weigh in favor of awarding fees. Complainant alleged that two employees of a common carrier (Logfret B.V.) used their positions with the carrier to arrange ocean transportation to their benefit, and to the detriment of Complainant, a member of their corporate family, in violation of the Shipping Act. Complainant further alleged that these two respondents issued fraudulent bills of lading on

[6] Although courts list "frivolousness" and "objective unreasonableness" as separate factors, they overlap significantly, and the parties have not argued that the Commission should distinguish between the two factors. *See Creazioni Artistiche Musicali, S.R.L. v. Carlin Am., Inc.*, Case No. 14-cv-9270, 2017 U.S. Dist. LEXIS 124082, *9 (S.D.N.Y. Aug. 4, 2017) (noting that frivolous factor "clearly overlaps significantly with the consideration of objective unreasonableness, although the Second Circuit has indicated that the two factors are 'not necessarily coextensive'").

behalf of a nonexistent entity. And Complainant alleged that they did so via Respondent Kirsha B.V. The ALJ found that although Logfret B.V. may have acted as a common carrier, Complainant did not adequately allege that Respondents themselves did. I.D. at 16.

It appears that Complainant's basic argument was that by using a common carrier to pursue their own interests, Respondents acted ultra vires and thus acted as common carriers in their own right. As the ALJ pointed out, there is little Commission caselaw discussing that scenario. Consequently, one cannot characterize the argument as *clearly* without merit. This case is not *Edaf Antillas*, where the complainant wasted the respondents' and Commission's time and resources by failing to prosecute its claims and respond to orders. *Edaf Antillas*, 2016 FMC LEXIS 58 at *15. It is more similar to *Baltic*, where the nonprevailing complainant made colorable arguments. 2017 FMC LEXIS 16 at *28-*31.

Turning to Respondents' specific arguments, it is true that the initial complaint did not allege that Respondents were entities subject to 46 U.S.C. §§ 41103(a) or 41104(a)(1). But this mistake alone is insufficient to justify fee-shifting, especially given that Complainant attempted, albeit unsuccessfully, to amend its complaint to cure the error.

Nor did Complainant "readily, lucidly, and unequivocally" withdraw its allegations that Mr. Bergwerff and Ms. Sieval were common carriers in its opposition to the motion to dismiss, as Respondents claim. Exceptions at 10-11. Respondents point out that Complainant argued that:

> Here Respondents not only participated in the violation of 46 U.S.C. § 41301(a) [sic] but without question also contributed to the harms inflicted on Complainant. As noted, Kirsha B.V. is a common carrier. *The fact that the other two Respondents are not common carriers* is not a magic talisman that absolves them of responsibility—or liability—for the damages that resulted from their actions.

Complaint Opp. at 9-10 (emphasis added). But later in this document, Complainant reiterates its argument that Mr. Bergwerff and Ms. Sieval were "de facto" common carriers. Complainant Opp. at 14. In other words, Complainant did not admit that its allegations were spurious; rather, it made alternative arguments, a relatively common legal strategy. Order Denying Pet. at 5 ("[I]t is common to have alternative theories of legal liability . . . .").

As for Respondent Kirsha B.V., Respondents argue that Complainant formulaically alleged it was a common carrier without adequate factual allegations, and, additionally, that Complainant made false statements about Kirsha B.V. that cannot establish colorable allegations under the Shipping Act. Exceptions at 11-14. Respondents, appear, however, to conflate the pleading standard with the objective unreasonableness factor for attorney fees. The insufficiency of Complainant's allegations is why the ALJ dismissed the complaint. But that does not mean that attorney fees are warranted.

Moreover, Respondents have not established that Complainant made false statements. The statements Respondents rely on come from Complainant's opposition to the motion to dismiss, where Complainant listed examples of conduct that the Commission has deemed "holding out" and "assuming responsibility" for purposes of determining whether an entity is a common carrier. Complainant's Opp. at 7-8. Complainant explained that its "understanding

[was] that Kirsha B.V. performed all of the above unlicensed NVOCC activities when it was in operation and as such is subject to Commission jurisdiction, but, as noted, discovery is needed to reveal additional facts confirming the same." *Id.* at 8. By making this argument, it not clear that Complainant was making false statements, as Respondents' claim. Moreover, the only "evidence" that these statements were false are Mr. Bergwerff's declaration and Respondents' arguments in their exceptions.

More concerning, however, is that Complainant argued in opposing the motion to dismiss that the Commission had jurisdiction over Respondents because they were "any other persons" under §§ 41103(a) and 41104(a)(1). Both statutes prohibit a common carrier, "either alone or in conjunction with any other person," from engaging in specified conduct.[7] The plain language of the statutes indicate that the prohibitions apply to common carriers, not "any other person." Further, in *DNB Exports, LLC v. Barsan Global Lojistiks ve Gumruk Musavirligi A.S.*, the complainant argued that § 41103(a) applied to Respondent Impexia as "any other person." Docket No. 11-07, 2014 FMC LEXIS 2, *82-*86 (ALJ Jan. 24, 2014), *rev'd on other grounds*, 33 S.R.R. 670 (FMC 2014). The ALJ implicitly rejected that argument, holding that § 41103(a) applies only to common carriers, marine terminal operators, and ocean freight forwarders. *Id.* at *93. Complainant should have known that the Commission in *DNB* had rejected the "any other person argument": Complainant's counsel here was counsel for Impexia in the *DNB* case. But that alone does not make Complainant's claims objectively unreasonable.

In sum, Complainant's claims that Respondents were regulated entities subject to §§ 41103(a) and 41104(a)(1) were weak and dismissed accordingly. But the ALJ correctly found that they were not objectively unreasonable. Consequently, this factor does not weigh in favor of an attorney fee award.

2. Motivation

Similarly, the "motivation" factor does not weigh in favor of awarding Respondents fees. A party is improperly motivated where it asserts claims not because of their merit, but because the party "seeks to knowingly gamble[] on an unreasonable legal theory in order to achieve a secondary gain," such as the leveraging of a settlement. *Creazioni*, 2017 U.S. Dist. LEXIS 124082 at *10 (quoting *Agence Fr. Presse v. Morel*, No. 10-cv-2730 (AJN), 2015 U.S. Dist. LEXIS 189008 (S.D.N.Y. Mar. 23, 2015)). The ALJ found that although it was possible that Complainant had an improper motive, there was insufficient evidence to determine Complainant's motivation.

Respondents argue that it is "clear" that Complainant's primary motivation is to harass. Exceptions at 7. According to Respondents, "Complainant amply demonstrates it intended a frivolous suit by consistently alleging facts that underscored management disputes among the owners of Logfret B.V., and by the allegation of Shipping Act violations in strained language which was ultimately found by the ALJ to be legally and factually insufficient." *Id.* at 6-7. Respondents also emphasize that Complainant sought damages of $2 million, which it characterizes as "an amount intended to cause harassment and anguish to the two individual Respondents." *Id.* at 7. Complainant counters that it brought its claims in a "in a good-faith

[7] Section 41103(a) also applies to marine terminal operators and ocean freight forwarders.

attempt to redress, under US federal law and jurisprudence, significant injury inflicted upon it by the Respondents" and that it "was, and remains, protective of its business interests and willing to guard these interests through enforcement of all potentially applicable legal remedies." Complainant Reply to Exceptions at 10.

The ALJ did not err in finding insufficient evidence of improper motivation. That Complainant mentioned the Logfret B.V. management dispute in its complaint does not mean that the complaint was made solely to harass Respondents. That parties (or their affiliates) may be engaged in other litigation in other fora does not make it improper for a party to bring a non-frivolous Shipping Act claim. Nor is the amount of damages sought particularly probative as to Complainant's motive. And there is no evidence that Complainant was using this case to force a settlement or other outcome in the parties' other litigation.

3. Compensation and Deterrence

Both parties suggest that considerations of compensation and deterrence support their preferred outcome. Respondents argue that awarding fees would deter complainants from using Commission facilities for purposes for which they were not intended. Exceptions at 8. Complainant contends that awarding fees would have a chilling effect on those who want to bring good-faith claims before the Commission. Complainant Reply to Exceptions at 7-8.

The Commission agrees with the ALJ that the "purposes of the Shipping Act are met when complainants are able to raise potential violations, even under unusual or unique circumstances, without the chilling impact of having to pay Respondents' attorney fees." Order Denying Pet. at 6. Consequently, this factor weighs against imposing fees.[8]

III. CONCLUSION

For the reasons set forth above, the factors on balance weigh against awarding attorney fees, and the Commission thus affirms the ALJ's denial of Respondents' attorney fee petition.

THEREFORE, IT IS ORDERED, That Respondents' Petition for Attorney's Fees be DENIED.

Finally, IT IS FURTHER ORDERED, That this proceeding be discontinued.

By the Commission.

Rachel E. Dickon
Secretary

[8] The ALJ questioned whether the relative financial strength of the parties is relevant to whether an award of fees is warranted. Order Denying Pet. at 6. Regardless, there is insufficient information about the parties' relative financial strength for this factor to weigh in either direction.

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

EARLEAN EDWARDS DUKART, *Complainant*

v.

OCEAN STAR INTERNATIONAL INC., D/B/A INTERNATIONAL VAN LINES, *Respondent*.

DOCKET NO. 20-03

Served: July 10, 2020

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION GRANTING VOLUNTARY DISMISSAL[1]

[Notice Not to Review served 8/11/2020, decision administratively final.]

I. Introduction

This proceeding arises from a complaint filed with the Federal Maritime Commission ("FMC" or "Commission") in connection with a dispute over a contract to ship household goods from the United States to Belize. Complainant, Earlean Edward Dukart ("ED"), who is *pro se* and representing herself, alleges that Respondent, Ocean Star International Inc. ("Ocean Star"), doing business as International Van Lines, violated sixteen sections of the Shipping Act of 1984, as amended ("Shipping Act").

According to the complaint, Complainant, who was relocating from the United States to Belize, entered into a contract with Ocean Star to ship her household goods by 40 foot container from Denver, Colorado, to Consejo Shores, Belize, for $17,424. Complainant paid Ocean Star a deposit of $3,000 as part of the agreement. Respondent's agent packed, loaded, and transported the shipment to a storage facility to wait for transportation to Belize. Complainant was unhappy with Ocean Star's performance during and after pickup of the household goods and subsequently canceled the contract with Ocean Star. Ocean Star demanded that Complainant pay them for services rendered before the household goods could be released and eventually Complainant paid Ocean Star an additional $2,746 to secure release of her belongings. When Complainant took possession of the shipment, she alleges that many of her items were damaged or missing. Complaint at 2-36.

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

Complainant alleges that Respondent violated 46 U.S.C §§ 41102(a),(b),(c); 41103(a); 41104[2](a)(1), (2)(A), (3), (4)(A), (4)(D), (4)(E), (5), (8), (10); and 41105(1), (2), (4) of the Shipping Act. Complaint at 2. Complainant contends that the Commission has jurisdiction over the complaint pursuant to 46 U.S.C. § 41301 because she suffered injury as a result of Respondent's violation of the Shipping Act and because her dispute falls under the Carriage of Goods by Seas Act ("COGSA"). Complaint at 2. Complainant requests reparations in the amount of $256,241 for lost income, related consequential and incidental damages, actual loss and damage of the shipment, pain and suffering, mental anguish and duress, damage/loss of consortium and associated medical expenses, and punitive damages. Complaint at 38-39. In addition, Complainant requests that the Commission order Respondent to cease and desist from violating the Shipping Act. Complaint at 39.

Ocean Star denied the allegations, asserting in a letter to the Commission in response to the complaint that the shipment was "not an overseas shipment handled by our company," and asked that the complaint be dismissed. Answer/Motion at 2. In response, on March 2, 2020, Complainant filed a document labeled "Response to Respondent's motion" ("Complainant's Response").

On March 30, 2020, an order was served, observing that while *pro se* Respondent had not filed a motion, its answer could be viewed as a motion to dismiss. Order to Brief Motion to Dismiss at 1. The order stated:

> It seems most efficient at this point to treat Respondent's answer as a motion to dismiss and Complainant's response as a response to the motion. However, the parties will be provided an opportunity to file any additional legal or factual arguments and any other exhibits that they would like to be considered regarding the request to dismiss the complaint. The parties should review the issues raised in the initial order and should address whether insurance was purchased for the shipment and whether a claim has been made against the insurance or bond on file with the Federal Maritime Commission.

Order to Brief Motion to Dismiss at 1.

On April 14, 2020, Respondent's new counsel filed a supplemental memorandum in support of motion to dismiss ("Supplemental Motion"). On the same day, *pro se* Complainant filed a document labeled "Status Report" with exhibits attached, in which Complainant addressed statements made in Respondent's answer/motion, recounted challenges impeding her efforts to comply with the orders and to litigate this proceeding, and requested "a continuation of these proceedings." Complainant's Status Report at 1-3.

On April 16, 2020, an Order Granting Extension to Respond to Motion to Dismiss ("Order Granting Extension") was issued in response to Complainant's status report, stating in part:

[2] Complainant incorrectly cites the section 41104 provisions as sections 41104(1), 41104(2)(a), 41104(3), 41104(4)(a)(d)(e), 41104(5), 41104(8) and 41104(10). The correct citations are 41104(a)(1), (2)(A), (3), (4)(A), (4)(D), (4)(E), (5), (8), (10).

> It appears that Complainant's request to continue the proceedings means that she wants the proceeding to continue (not be dismissed) although it could also be read as a request for an extension of time to respond to the motion. In an abundance of caution, Complainant will be granted a short extension of time to file any additional response to the motion to dismiss and supplemental memorandum in support of the motion to dismiss. After this motion is resolved, if the proceeding is not dismissed, a schedule will be issued with time for discovery and briefing of the proceeding. Complainant must file a supplemental response, if any, to the motion to dismiss by April 27, 2020.

Order Granting Extension at 1-2.

On April 27, 2020, Complainant filed her supplemental response, arguing that the Commission has jurisdiction over her complaint and attaching booking confirmations as evidence in support of her contention. In addition, Complainant stated:

> As a full understanding of this matter could not be established within the allotted time frame, Complainant would like to withdraw the current complaint, preventing dismissal, to leave open the opportunity to pursue the matter under the proper jurisdiction unless continuation is deemed appropriate and ordered otherwise.

Complainant's Supplemental Response at 1. A request for withdrawal would be considered under Commission Rule 72(a), which addresses voluntary dismissals. 46 C.F.R. § 502.72(a). It appears that if Respondent's motion to dismiss is denied, then Complainant would like the case to continue, so the request for withdrawal is conditioned on the outcome of the motion. Because the request was filed after service of the answer/motion and is not a stipulation, it is considered under Rule 72(a)(3), which provides in pertinent part that "an action may be dismissed at the complainant's request only by order of the presiding officer, on terms the presiding officer considers proper."

For the reasons set forth below, the Commission has personal and subject matter jurisdiction to adjudicate the Shipping Act violations alleged. However, as discussed below, this complaint is subject to dismissal because it does not state a plausible claim for relief under the Shipping Act. Some of the allegations made by Complainant are not Shipping Act claims that can be adjudicated by the Commission. No finding is made as to the allegations of non-Shipping Act violations. If the motion to dismiss were granted, the dismissal would be without prejudice to provide Complainant an opportunity to consider whether the defects could be cured. In deference to Complainant's request, voluntary dismissal without prejudice is granted instead.

II. Arguments of the Parties

Ocean Star seeks a dismissal with prejudice. Ocean Star avers that it "parted ways with ED in July 2018, and did NOT handle an overseas shipment to Belize for ED, but instead released it to another carrier of ED's choosing." Answer/Motion at 1. Ocean Star maintains that at most it "began a business undertaking for Complainant that may have required Ocean Star, at some future date, to act in its capacity as an OTI." Supplemental Motion at 2. Ocean Star avers that it "never actually arranged ocean transportation, made a booking, issued a house bill of lading, or provided any other regulated services for the Complainant." Supplemental Motion at 3.

Ocean Star asserts that Complainant's claims must be dismissed for lack of personal jurisdiction because the Commission has personal jurisdiction limited only to certain parties involved in oceanborne commerce; Ocean Star did not engage in activities regulated by the Shipping Act; and, Complainant "fails to provide affirmative facts showing that the Commission has personal jurisdiction over Ocean Star." Supplemental Motion at 6-11. Ocean Star argues that even "construing the facts in the most generous light to Complainant, the only services that Ocean Star arguably provided in this case was that of an inland freight broker, when the company arranged for the packing, transportation, and storage of the Complainant's goods in Colorado." Supplemental Motion at 10.

Ocean Star further asserts that Complainant's claims must be dismissed for lack of subject matter jurisdiction. Ocean Star contends that the Commission lacks subject matter jurisdiction over any claims in the complaint that invoke COGSA or breach of contract as a basis for jurisdiction as those claims are not violations of the Shipping Act, noting that the Commission's jurisdiction is limited to violations of the Shipping Act. Supplemental Motion at 3. Ocean Star further asserts that it was not acting as a common carrier for this shipment. Supplemental Motion at 16-17.

Ocean Star states that an "entirely independent and distinct grounds for dismissal is that Complainant's complaint does not plausibly allege facts constituting any violation or violations of the Shipping Act" and therefore Complainant fails to plausibly allege facts constituting a violation of the Shipping Act. Supplemental Motion at 17-26.

Complainant contends that the Commission has subject matter jurisdiction because her dispute falls under COGSA as well as the Shipping Act pursuant to 46 U.S.C. § 41301 because she suffered injury as a result of Respondent's violation of the Shipping Act. Complaint at 2. Complainant states that "[Respondent] and entities are obligated to comply with all applicable rules and regulations of the FMC, including the Shipping Act and COGSA." Complaint at 2.

In response to Respondent's argument that it did not act as an OTI, Complainant observes that the "submitted contract entered was to ship household goods from Denver to Belize, not a haphazard relocation to rodent infested storage 18 miles away." Complainant's Supplemental Response at 1. Complainant asserts that the booking confirmations she received from Respondent are evidence that the parties entered into an overseas shipping contract. Complainant's Supplemental Response at 1. Complainant also requests to withdraw the complaint. Complainant's Supplemental Response at 1.

III. Analysis

A. Motion to Dismiss Standard

Although the Commission's Rules of Practice and Procedure ("Rules") do not explicitly provide for motions to dismiss, Rule 12 of the Commission's Rules states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules, to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. "In evaluating whether a complaint before the Commission states a cognizable claim under the Shipping Act, the Commission has relied on Federal Rules of Civil Procedure 12(b)(6) and the federal case-law interpreting it." *Cornell v. Princess Cruise Lines, Ltd.*, 33 S.R.R. 614, 620 (FMC 2014) (citing *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 126, 136 (FMC 2011)).

Federal Rule of Civil Procedure 12(b) permits a party to raise, by motion, lack of subject matter jurisdiction (12(b)(1)), lack of personal jurisdiction (12(b)(2)), and failure to state a claim (12(b)(6)). F.R.C.P. 12; *see also Mitsui O.S.K. Lines Ltd.*, 32 S.R.R. at 136. "Proper jurisdiction for a federal court is fundamental and necessary before touching the substantive claims of a lawsuit." *Arena v. Graybar Elec. Co., Inc.*, 669 F.3d 214, 223 (5th Cir. 2012). The "party asserting subject-matter jurisdiction, has the burden of proving its existence by a preponderance of the evidence." *Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading, Inc.*, 697 F.3d 59, 65 (2d Cir. 2012).

At this stage, "Rule 12(b)(6) does not require 'the pleading of specific evidence or extra facts beyond what is needed to make the claim plausible.'" *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 34 S.R.R. 35, 58 (FMC 2015) (quoting *Arista Records LLC v. Doe 3*, 604 F.3d 110, 120-21 (2d Cir. 2010)). Instead, the "complaint's factual allegations 'must be enough to raise a right to relief above the speculative level' and must 'nudge claims across the line from conceivable to plausible.'" *Maher*, 34 S.R.R. at 57-58 (quoting *Cornell*, 33 S.R.R. at 620). However, "[m]ere labels and conclusions or a 'formulaic recitation of the elements of a cause of action' will not suffice, nor will 'naked assertions devoid of further factual enhancement.'" *Maher*, 34 S.R.R. at 58. The Commission explained:

> To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, [556 U.S. 662, 678] (2009).

Mitsui O.S.K. Lines Ltd., 32 S.R.R. at 136.

"A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "When there are well-pleaded factual allegations, a court should assume their veracity and then

determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 678. The Commission explained:

> Courts also construe the factual allegations in the complaint in the light most favorable to the plaintiff and must grant the plaintiff the benefit of all inferences that can be derived from the facts as alleged in the complaint. The Commission need not, however, accept any inferences drawn by Complainants that are unsupported by the facts pleaded in the complaint. Moreover, the Commission need not "accept legal conclusions cast in the form of factual allegations."

Cornell, 33 S.R.R. at 620-621 (citations omitted). The Commission has clearly indicated that federal case law interpreting Federal Rule of Civil Procedure 12(b)(6), including *Twombly* and *Iqbal*, continues to apply to motions to dismiss filed in Commission proceedings. *Maher*, 34 S.R.R. at 55; *Cornell*, 33 S.R.R. at 620; *Mitsui O.S.K. Lines Ltd.*, 32 S.R.R. at 136.

B. Discussion

As caselaw provides, before proceeding to the merits of Complainant's allegations, it is first necessary to resolve the question of whether the Commission has jurisdiction to adjudicate this complaint. *See, e.g., Arena*. 669 F.3d at 223-224 (stating that proper jurisdiction is necessary before touching the substantive claims of a case). The party asserting jurisdiction bears the burden to show that jurisdiction is present. *See, e.g., Garanti Finansal*, 697 F.3d at 65.

1. The Commission has Jurisdiction to Adjudicate this Complaint

Ocean Star posits that the Commission lacks jurisdiction over it because it did not act in the capacity of a regulated entity and that at most, it "began a business undertaking for Complainant that may have required Ocean Star, at some future date, to act in its capacity as an OTI." Supplemental Motion at 2. Complainant points to the contract between the parties as evidence that Respondent entered into an agreement with her to ship household goods from Denver to Belize. Complainant's Response at 1.

The Shipping Act provides *inter alia*, that a "person may file with the . . . Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 997-99 (FMC 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co., Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000).

Moreover, Respondent is a common carrier licensed to provide non-vessel operating common carrier ("NVOCC") services and is thus subject to the jurisdiction of the Commission with regard to its activities related to ocean transportation between the United States and a foreign destination.

The Commission has jurisdiction over *matters relating to* transportation by water of cargo between the United States and a foreign country by a common carrier. That jurisdiction begins when a common carrier assumes responsibility for transportation of the cargo and ends when the cargo is delivered to the consignee at the place of destination contemplated by the

contract of carriage. *See, e.g., Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23-27 (2004) (finding that federal maritime law applies to the inland portions of international shipments transported under a through bill of lading). *See also, Kawasaki Kisen Kaisha, Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 108 (2010) (finding that ocean transportation occurring under a through bill of lading cannot be separated into ocean and domestic inland transportation); *accord, Mitsui O.S.K. Lines Ltd. v. Global Link Logistics*, 32 S.R.R. 126, 2011 FMC LEXIS 12, 56 ("legislative history demonstrates that Congress intended that the Commission have jurisdiction over through transportation, including the inland segment of such transportation").

Respondent's argument that it began a business undertaking for Complainant that merely required Respondent to act in its capacity as an OTI at some future date is not persuasive. *See* Supplemental Motion at 2. The characterization of transportation as a through movement to the ultimate destination is reached by looking at "the original and persisting intention of the shippers which was carried out." *Baltimore & O.S. W.R. Co v. Settle*, 260 U.S. 166 (1922). As the Commission has stated, "the intention of the shipper as to the ultimate destination at the time the cargo starts is the test of its character, though broken, transported by more than one carrier, or moving on through or local bills of lading." *Matson Navigation Co., Inc.–Transport. of Cargoes Between Ports and Points Outside Haw. and Islands Within the St. of Haw.*, 24 S.R.R. 979, 988 (1988) (quoting *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 440 (1935)).

Recently, in *Crocus*, the Commission vacated the dismissal of a section 41102(c) claim for lack of jurisdiction because the complainant, which had initially entered into an agreement to ship a Formula boat from the United States to Dubai, subsequently asked that the boat be shipped to Florida instead. *Crocus Investments, LLC v. Marine Transport Logistics, Inc.*, 1 F.M.C.2d 403 (FMC 2019). The Commission stated:

> The relevant inquiry here is not, however, limited to whether there was a contract for overseas shipment. Nor was the ALJ's focus on whether the Formula left the United States or had an agreement for overseas shipment clearly linked to the Shipping Act or precedent, and it unduly narrows the scope of the inquiry to two factors. The approach supported by the text of § 41102(c) and Commission caselaw asks: was the respondent acting as a regulated entity with respect to the conduct at issue?
>
> The inquiry here should have been: was Marine Transport acting as an OTI with respect to the Formula boat from August 2013 (when it was purchased) to February 2014 (when Crocus began to inquire about domestic transportation of the boat). This fact-intensive analysis takes into account the statutory definition of OTI (and in particular, NVOCC), and evidence about the parties' conduct during that time frame.
>
> Whether the Formula was actually transported to a foreign port or the subject of a contract to do so are highly relevant to this analysis, but not necessarily determinative. For instance, the Commission has determined that a broad swath of conduct falls within the scope of NVOCC activities.

Crocus, 1 F.M.C.2d at 415 (internal citations omitted).

The Commission has long relied on three factors – holding itself out, assuming responsibility, and transportation by water – to identify a common carrier:

> As a "common carrier" is defined in the Shipping Act, an NVOCC "holds out" to the "general public to provide transportation by water" and "assumes responsibility for the transportation from the port or point of receipt to the port or point of destination." 46 U.S.C. §1702([7]). The Commission has found that no single factor of an entity's operation is determinative of its status as a common carrier. [*River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751, 763 (FMC 1999); *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 62-65 (FMC 1965)]. Rather, the Commission must evaluate the indicia of common carriage on a case-by-case basis. *Id.*

Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd., 29 S.R.R. 119, 162 (FMC 2001).

Here, Complainant alleges that the parties entered into an agreement for Respondent to ship Complainant's household goods from the United States to Belize. In furtherance of that agreement, Complainant paid a deposit to Respondent and Respondent packed, loaded, and transported the shipment to a storage facility while waiting for a shipping container for transportation to Belize. Therefore, substantial efforts were made towards completion of this arrangement for international oceanborne transportation. The fact that Complainant became dissatisfied with Respondent's performance and terminated the contract before Respondent could complete the transportation does not nullify the fact that the intention of the parties at the time of the agreement was for Respondent to provide international ocean transportation from the United States to Belize. The facts alleged are sufficient to support the allegation that Respondent acted as an NVOCC for this shipment until Complainant terminated its services. Accordingly, the complaint plausibly alleges that the Commission has personal jurisdiction to adjudicate the Shipping Act claims alleged in this complaint.

2. The Commission has no Authority to Adjudicate Contract, Tort, and COGSA Claims

Complainant filed this complaint pursuant to 46 U.S.C. § 41301, which allows any person to file a sworn complaint alleging a violation of the Shipping Act and to seek reparations within three years of the occurrence of the violation for actual injury resulting from the violation.

Complainant alleges that she suffered injury as a result of Respondent's violation of certain enumerated sections of the Shipping Act. Complaint at 2. Complainant asserts that "this matter relates to the contracts for carriage of goods by sea from ports of the United States, and thus comes under . . . COGSA, 46 U.S.C. § 30701." Complaint at 2. Complainant further asserts that "Respondent's failure to maintain contractual obligations along with breach of contract, fraud, forgery, deceptive trade practice, gross negligence and intentional misconduct . . . caused damages/losses to the Complainant." Complaint at 38.

Respondent argues that "Complainant has improperly sought to recast common law state contract and tort claims as violations of federal law" and that "the FMC lacks subject matter

jurisdiction over any and all claims in the complaint which invoke COGSA as a basis for jurisdiction as well as any and all claims in the complaint which allege pure breach of contract which are not violations of the Shipping Act." Supplemental Motion at 1, 3.

Pursuant to COGSA, jurisdiction over loss and damage claims arising from transportation by ocean is vested in the federal district courts. *Nat'l Auto. Publ'n, Inc. v. U. S. Lines, Inc.*, 486 F.Supp. 1094, 1099 (S.D.N.Y. 1980).

Further, the Commission has no authority to hear Complainant's claims alleging failure to maintain contractual obligations, breach of contract, fraud, deceptive trade practice, gross negligence, and intentional misconduct. As has been long articulated in the Commission's caselaw:

> [The] Commission does not exercise the authority of a court of law or of equity. We administer and enforce the requirements of the Shipping Act and related Acts. When pleadings come before us in which violations of the Act are heavily veiled in common law pleadings it becomes difficult to distill the activities alleged to be in violation of the Act from those which indicate the possible violations of some common law obligation.

European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc., 19 F.M.C. 148, 151 (FMC 1976). *See also Western Overseas Trade and Dev. Corp. v. ANERA*, 26 S.R.R. 874, 884 (FMC 1994) (stating that the Shipping Act prevents the Commission from "hearing those claims, which although couched in terms of alleged violations of the 1984 Act, seek remedies that would otherwise be available in a breach of contract action if the matter were brought before a court."). Accordingly, only claims based on the Shipping Act can be adjudicated by the Commission.

3. Complainant Does Not State a Claim for Relief under the Shipping Act

Respondent asserts as an independent basis for dismissal that "Complainant also fails to allege facts that would constitute violations of the Shipping Act." Supplemental Motion at 17. Complainant does not appear to directly address this portion of the motion to dismiss.

For a number of the complaint's allegations, Complainant misunderstands legal terms, including the types of contracts and relationships necessary to establish a Shipping Act violation. In addition, because a "pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do" (*Iqbal*, 556 U.S. at 678), where the Complainant simply recites the Shipping Act sections she alleges Respondent violated, without alleging actual conduct by Respondent corresponding to the conduct proscribed by those sections, her Shipping Act claims fail to state a plausible claim for relief under the Shipping Act. A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. As explained more fully below, Complainant's sixteen Shipping Act claims could be dismissed for failure to state a claim for relief.

a. Section 41102(a)

Although Complainant's arguments are not always entirely clear, in the complaint, she appears to focus on the agreement and rates charged to her by Respondent, arguing:

> (1) as Respondents were incapable of executing service provisions, solicitation of the Service Contract itself is an attempt to obtain ocean transport for property at less than rates that would otherwise apply; Respondents method of execution required intermediate movers and storage that were excluded when negotiating the agreement.
> (2) based on internal invoices and incriminating correspondence, lower rates previously presented by Respondents attempted to obtain transportation contract at rates they later confirm to have been lower than what was applicable, Respondents additionally imposed other unlisted charges, stated to apply, as they extorted unjust charges and fees for cancellation
> (3) improper classification of merchandise being transported, inaccurate or unavailable inventory listing, an accurate Bill of Lading was not generated
> (4) false measurements were presented to obtain transport, Respondents subcontracted with Cobra Van Lines represented by Jesse Larrea, under false pretenses; Mr. Larrea arrived with a copy of the Service Contract that had service lines omitted. Mr. Larrea stated that his company was contacted for a simple load and delivery to storage
> (5) unfairly and unjustly, the subcontractor obligations were falsely reported; three men and a 26 ft. truck were inadequate, materials for wrapping and packing were not available, this did not coincide with services contracted for; accessibility for a 40' container was not even possible for future loading, neither multiple moves nor storage were discussed or agreed upon.

Complaint at 36-37. Although the complaint as a whole is long and detailed, other sections including the detailed chronological statement of facts does not further clarify the argument.

Respondent contends:

> Complainant's arguments evidently center around Ocean Star's estimate for charges provided to the Complainant and additional charges for packing, inland moving and storage fees, which were allegedly subsequently revised by Ocean Star from the original estimate. *See* Compl. Section IV.A.1(a). Complainant's assertions are a clear misunderstanding of 46 U.S.C. § 41102(a), which prohibits persons from obtaining ocean transportation for property at less than the rates or charges that would otherwise apply. There are no facts alleged to indicate that Ocean Star was attempting to "obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply" from a NVOCC or an ocean common carrier.

Supplemental Motion at 17-18.

Section 41102(a) states:

> A person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.

46 U.S.C. § 41102(a). The Commission has clarified in its Rules that:

> An essential element of the offense is use of an "unjust or unfair device or means." In the absence of evidence of bad faith or deceit, the . . . Commission will not infer an "unjust or unfair device or means" from the failure of a shipper to pay ocean freight. An "unjust or unfair device or means" could be inferred where a shipper, in bad faith, induced the carrier to relinquish its possessory lien on the cargo and to transport the cargo without prepayment by the shipper of the applicable freight charges.

46 C.F.R. § 545.2.

Complainant does not allege that through an unjust or unfair device or means Respondent obtained or tried to obtain ocean transportation for property at less than the rates or charges that would normally apply for the ocean transportation. Rather, the complaint identifies problems with the initial estimate, the failure to provide all of the services promised, unpreparedness and lack of competence of the movers, conflicts between what Complainant ordered and what the movers provided, discrepancies in the inventory list of household items, failure to bring a large enough truck or enough movers, and other problems with the execution of the pickup of goods. Complaint at 6-15.

The initial estimate was for a flat rate fee. Scheduling issues led to an inability to pack and ship the household goods overseas in the short timeframe available. Therefore, Complainant reluctantly agreed to move the items into storage. Complaint at 5-7. Eventually, Complainant cancelled the agreement and Respondent charged a lower fee for services rendered. Complaint at 13-19. The Respondent did not transport the cargo overseas and no bill of lading was issued. Although the Complainant alleges significant problems with the shipment, the problems are not related to obtaining ocean transportation at lower rates than would normally apply. Indeed, it appears that Complainant believes she was overcharged for the services provided.

Because Respondent did not ship the cargo overseas, no bill of lading was generated, and it did not obtain ocean transportation for the shipment. Complainant does not allege what rates should have been paid by Respondent for ocean transportation as opposed to what rates were paid (and could not, as the relationship ended prior to that point). Thus, the complaint does not allege sufficient factual matter to state a plausible section 41102(a) claim.

b. Section 41102(b)

Complainant alleges that section 41102(b) was violated because "(1) services that were executed were not in accordance to the original Service Contract, nor the second altered version presented by the subcontractor (2) second contract is a violation by [its] existence; omissions,

deletions and changes of service provisions are not in accordance to the Service Contract." Complaint at 37.

Respondent asserts that:

> Even construing Complainant's factual allegations in the most sympathetic light, not only did Ocean Star not operate as a common carrier, but Ocean Star did not operate under any agreements required to be filed under section 40302 or 40305 of the Shipping Act. In her arguments, Complainant appears to reference a contractual agreement between the parties as evidence of a violation, which she incorrectly refers to as a "Service Contract." *See* Compl. Section IV.A.1(b). Yet the "agreements" cited in § 41102(b) are ocean common carrier agreements and MTO agreements, and the Complaint fails to provide any factual basis to allege a violation of the same.

Supplemental Motion at 18-19.

Although *pro se* Complainant entered into an agreement with Ocean Star, that agreement was not a service contract as defined by the Shipping Act.

> The term "service contract" means a written contract, other than a bill of lading or receipt, between one or more shippers, on the one hand, and an individual ocean common carrier or an agreement between or among ocean common carriers, on the other, in which – (A) the shipper or shippers commit to providing a certain volume or portion of cargo over a fixed time period; and (B) the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features.

46 U.S.C. § 40102(21).

Section 41102(b) provides that a "person may not operate under an agreement required to be filed under section 40302 or 40305." 46 U.S.C. § 41102(b). Sections 40302 and 40305 govern agreements "between or among ocean common carriers," "between or among marine terminal operators, or between or among one or more marine terminal operators and one or more ocean common carriers," and assessment agreements. *See* 46 U.S.C. § 40301. Neither Complainant nor Respondent is an ocean common carrier (vessel-operating-common carrier) or marine terminal operator. *See* 46 U.S.C. § 40102(18). The service contract referred to in this section is not the contract between individual consumers and NVOCC for a specific shipment but rather the contract between common carriers. Therefore, the provisions of section 41102(b) do not apply to the parties. Complainant's section 41102(b) allegation thus does not state a plausible claim for relief.

c. Section 41102(c)

Complainant asserts a violation of section 41102(c) based on: "(a) storage was neither desired nor contracted (b) property was severely mishandled by subcontractors that were no more than three men and a rental truck (c) items were improperly stored at a public storage

facility in a shared space resulting in damages and loss of property (d) property not delivered; Complainant retrieval was demanded." Complaint at 37.

Respondent contends:

> Complainant has not presented any facts that indicate that Ocean Star's alleged conduct was "normal, customary, often repeated, systematic, uniform, habitual, and continuous." Instead, the Complaint describes a single nexus of events between Complainant and Ocean Star. Moreover, the Complainant's lengthy recounting of alleged facts about storage and handling issues focus on deficient storage and handling practices of the third-parties, not the conduct of Ocean Star. *See* Compl. Section IV.A.1(c).

Supplemental Motion at 19.

Section 41102(c) provides that a "common carrier, ocean transportation intermediary or marine terminal operator may not fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

One of the required elements under section 41102(c) is that "[t]he claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis." *See* 46 C.F.R. § 545.4. Complainant does not allege, and there is nothing in the record to suggest, that any of the alleged acts by Respondent are "occurring on a normal, customary, and continuous basis," as opposed to something that occurred solely on this shipment, so this element is not met. More information would be needed to adjudicate the other elements, such as whether the conduct was unreasonable. Accordingly, Complainant's section 41102(c) claim does not state a plausible claim for relief.

d. Section 41103(a)

Complainant asserts:

> (a) upon mandate for property retrieval, Respondents demanded coordination with a professional team, this information was utilized detrimentally preventing transportation via a different company. i) dates are "scheduled" without coordination or communication with ED ii) failure to appear to release items on more than one scheduled date iii) false invoices are submitted, payment options are change[d], policies regarding release are altered creating undue delays (1) ACH payment for deposit was made on 4.30.2018, it cleared and was accepted on 5.1.2108 to commence scheduling services to be rendered; the cancellation ransom ACH submitted pended 5 to 7 days to clear. iv) failed to advise they were using public storage that could not accommodate access for a 40' container demanding extra services for release and loading.

Complaint at 37.

Respondent alleges:

> While it is patently unclear what exactly the Complainant is alleging, these allegations generally appear to relate to scheduling issues, alleged changes in payment options and invoices, and the alleged failure to advise the Complainant of the ownership of warehouse facilities. None of these allegations relate to the improper disclosure or receipt of information by Ocean Star, as a violation of § 41103(a)(1) would require. Further, it remains entirely unclear and implausible how Ocean Star requesting coordination with its employees, and/or with the transportation companies with which it has arranged freight, would disclose information "used to the detriment or prejudice of the shipper."

Supplemental Motion at 20 (citation omitted).

Section 41103(a)(1) states that:

> (a) A common carrier, marine terminal operator or ocean freight forwarder either alone or in conjunction with any other person, directly or indirectly, may not knowingly disclose, offer, solicit, or receive any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier, without the consent of the shipper or consignee, if the information – (1) may be used to the detriment or prejudice of the shipper, the consignee, or any common carrier;

46 U.S.C. § 41103(a)(1).

Successful ocean shipments require coordination with employees, agents, and contractors. There are no allegations here that there was information disclosed to Complainant's competitor or someone who might reasonably be expected to act to the detriment or prejudice of Complainant. Indeed, in reading the complaint, the lack of coordination between the Respondent's local movers, storage facility, and new movers appears to be one of the concerns. The objection, here, seems to focus on the handling of the shipment, not the sharing of information. Complainant's section 41103(a)(1) claim thus does not state a plausible claim for relief.

e. Section 41104

Complainant merely recites the provisions of the nine section 41104 allegations, for example by stating that "allow[ing] a person to obtain property transportation at less than established rates by means of false billing, classification, weighing, measurement or any unfair or unjust means. All were violated to obtain contractual agreements with ED as well as respective subcontractors." Complaint at 37-38.

Respondent asserts that "Ocean Star did not arrange for ocean transportation at all with respect to Complainant;" "Ocean Star did not act in the capacity as a common carrier, provide ocean transportation, or charge the Complainant any ocean freight at all;" "Ocean Star's attempts to provide services to Complainant were delayed repeatedly by Complainant's own delays and failure to coordinate;" and that there are no allegations that Ocean Star violated the cited provisions. Supplemental Motion at 21-22.

Section 41104 governs operations by common carriers. The section 41104 provisions Complainant alleges Respondent violated provide as follows:

> (a) A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not –
>
> > (1) allow a person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or any other unjust or unfair device or means;
> >
> > (2) provide service in the liner trade that is –
> > (A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title; . . .
> >
> > (3) retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason;
> >
> > (4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of –
> > (A) rates or charges; . . .
> > (D) loading and landing of freight; or
> > (E) adjustment and settlement of claims;
> >
> > (5) for service pursuant to a service contract, engage in any unfair or unjustly discriminatory practice in the matter of rates or charges with respect to any port; . . .
> >
> > (8) for service pursuant to a tariff, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage; . . .
> >
> > (10) Unreasonably refuse to deal or negotiate.

46 U.S.C. § 41104.

Complainant provides a formulaic recitation of the elements of these 41104 sections but does not identify specific conduct by Respondent that violated the sections, except for allegations of a failure to deal or communicate. However, it is clear from the detailed complaint that there was fairly regular communication, including many misunderstandings and missed calls, but not a refusal to deal.

As an example, in the chronological recitation of facts, Complainant alleges that Respondent "failed to communicate in any manner." Complaint at 14. However, the complaint also outlines many and continuing instances of communication, for example that she "is

ultimately connected to someone identified as the department supervisor," and a few days later "many exchanges ensue." Complaint at 14, 16. At another point, Complainant states that she "abruptly terminates the exchange" and "refuses to communicate outside of written word at this point" although "[e]mail exchanges begin again." Complaint at 19. This does not demonstrate a failure to communicate but rather unhappiness with the means of communication and the content of communication.

As another example, the parties talk past each other when Complainant is seeking the return of her goods and Respondent is seeking payment. Complainant reports that on June 20, 2018, Respondent's representative indicates that "[w]e have been trying to call you and it goes straight to voicemail. Please confirm you are paying the invoice. Once payment is received we can orchestrate a time & date to meet at the storage unit." Complaint at 19. Complainant asserts that "attempts to communicate, deal or negotiate are refused." Complaint at 19. However, Complainant then states that she received correspondence from Respondent asking if she had made payment and the following day Respondent requests confirmation of payment. Complaint at 19.

Later in June 2018, Complainant is staying at a location with limited cellular and internet access as she attempts to coordinate the removal of her belongings from storage. Complaint at 21. On June 28, 2018, she alleges "unjust and unreasonable refusal to deal or negotiate in the matter of release of said shipment" but acknowledges that on June 29, 2018, she and Respondent's representative "attempt to exchange phone calls. Poor reception interferes." Complaint at 21. Accepting the factual allegations in the complaint, Respondent continued to communicate and deal with Complainant until her goods were released to her. The facts asserted do not plausibly allege a failure to deal under the Shipping Act.

The other sections of 41104 do not appear to apply either. The complaint does not indicate how Respondent allowed any person to obtain ocean transportation at less than the applicable tariff rates, such that the prohibitions under 41104(a)(1) apply; how Respondent provided service in the liner trade that was not in accordance with its tariff provisions, such that the prohibitions under 41104(a)(2)(A) apply; how Respondent retaliated against Complainant with regard to cargo space accommodations or discriminated against her in any way, such that the prohibitions under 41104(a)(3)and (4) apply; that the shipment moved under the terms of a service contract, such that the prohibitions under 41104(a)(5), which govern service contracts, apply in this case; or how Respondent accorded a preference or advantage or imposed a prejudice or disadvantage to anyone, in violation of 41104(a)(8). Because Complainant fired Respondent prior to any ocean transportation occurring, there are no allegations regarding whether this would have been transported via tariff or service contract because the transportation ended prior to that point. The complaint does not allege a plausible claim for relief under section 41104.

f. Section 41105

Complainant merely recites the three 41105 sections alleged without providing any detail. Complaint at 38. Respondent asserts that "Complainant's allegations entirely misconstrue [and] misunderstand the behavior that is prohibited under § 41105." Supplemental Motion at 25.

Section 41105 prohibits a "conference or group of two or more common carriers" from engaging in certain enumerated conduct. Respondent is the only entity alleged in this complaint to have committed the Shipping Act violations. Complainant does not allege that a conference or a group of two or more common carriers engaged in the alleged conduct. Thus, the prohibitions under section 41105 do not apply to the allegations and the complaint does not state a plausible claim for relief under section 41105.

C. Conclusion

For the reasons discussed above, it is found that the Commission has personal and subject matter jurisdiction over the Shipping Act violations alleged in this complaint, but that the complaint fails to state a plausible claim for relief under the Shipping Act.

Complainant has not requested an amendment to her pleadings and does not assert any grounds for permitting an amendment. Given that most of Complainant's claims are based on Respondent's alleged failure to perform under the parties' agreement, it is not clear that an amendment would cure the deficiency in her pleadings. Therefore, the complaint could be dismissed without prejudice for failure to state a claim under the Shipping Act.

It is noted that Complainant requests reparations in the amount of $256,241 for lost income, related consequential and incidental damages, actual loss and damage of the shipment, pain and suffering, mental anguish and duress, damage/loss of consortium and associated medical expenses, and punitive damages as well as a cease and desist order. Complaint at 38-39. As explained in the initial order, pursuant to the Shipping Act, reparations may be awarded for actual damages. 46 U.S.C. § 41305(b). "Actual damages" means "compensation for the actual loss or injuries sustained by reason of the wrongdoing." *Tractors & Farm Equip. Ltd. v. Cosmos Shipping Co., Inc.*, 26 S.R.R. 788, 798 (ALJ 1992) (citing *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213, 1230 (FMC 1990)). "It exclude[s] punitive or exemplary damages." *Tractors & Farm*, 26 S.R.R. at 798. The parties have been advised that damages from pain and suffering, mental anguish and duress, damage/loss of consortium, and punitive damages are generally not available in Commission proceedings. *Lima v. Fastway Moving and Storage, Inc.*, 34 S.R.R. 1097, 1101 (ALJ 2018) *aff'd in part and vacated-in-part* 1 F.M.C.2d 400, 400 (FMC 2019).

D. Voluntary Dismissal

The request to withdraw, filed after the motion to dismiss had been fully briefed, was conditioned on the motion to dismiss being granted. Therefore, it was most efficient to consider the motion to dismiss and then address the withdrawal request. This decision clarifies for the parties that the Commission has jurisdiction over the Shipping Act allegations in the complaint and identifies the challenges to moving forward on these claims before the Federal Maritime Commission. Given the findings above, the request to voluntarily dismiss the claim without prejudice is granted. The motion to dismiss for failure to state a claim would be an alternate basis to dismiss the proceeding without prejudice.

Although Complainant's complaint here at the FMC has been dismissed, no position is taken as to the substantive merits of Complainant's claims or her ability to pursue those claims in

another forum. It is merely found that a proceeding filed at the Federal Maritime Commission alleging Shipping Act violations does not provide redress for the allegations in the complaint.

IV. Order

Upon consideration of the record herein, the arguments of the parties, and the conclusions and findings set forth above, it is hereby

ORDERED that Complainant Earlean Edwards Dukart's request to withdraw or voluntarily dismiss the proceeding be **GRANTED**. The complaint is hereby **DISMISSED WITHOUT PREJUDICE**. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

VERTERRA LTD., *Complainant*

v.

D.B. GROUP AMERICA LTD. AND D.B. GROUP INDIA LTD., *Respondents*.

DOCKET NO. 19-09

Served: July 14, 2020

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's June 12, 2020, Initial Decision Approving Confidential Settlement Agreement has expired. Accordingly, the decision has become administratively final.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

REVOCATION OF OCEAN TRANSPORTATION INTERMEDIARY LICENSE OF DIP SHIPPING COMPANY, LLC.	**DOCKET NO. 20-04**

Served: July 29, 2020

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION REVOKING OCEAN TRANSPORTATION LICENSE[1]

[Notice Not to Review served 8/31/2020, decision administratively final.]

I. INTRODUCTION

A. Background and Summary

Respondent Dip Shipping Company, LLC ("Dip Shipping") is licensed as an ocean transportation intermediary ("OTI") by the Federal Maritime Commission ("FMC" or "Commission"). On February 19, 2020, the Commission's Bureau of Certification and Licensing ("BCL") notified Dip Shipping that the Commission intended to revoke Dip Shipping's ocean transportation license.

Dip Shipping requested a hearing on the proposed revocation of its license pursuant to the Commission's Rules at 46 C.F.R. § 515.17 and 46 C.F.R. Part 502, Subpart X. The Secretary then assigned this proceeding to the Office of Administrative Law Judges for adjudication in accordance with the provisions of Subpart X's Rule 702(a). 46 C.F.R. § 502.702(a).

As required under Subpart X, BCL and the Commission's Bureau of Enforcement ("BOE") were notified of Dip Shipping's hearing request and BOE was ordered to serve a copy of the revocation notice and materials supporting the revocation notice. In addition, Dip Shipping was informed that it had the right to file a response within 30 days of BOE's submission. All required submissions have been received and this proceeding is now ripe for decision.

Respondent Dip Shipping is a Louisiana limited liability company incorporated in 2004. It has been licensed with the Commission as an OTI since 2004. Roberto Dip was Dip

[1] This initial decision will become final within 22 days of service in the absence of exceptions filed by either party or review by the Commission. 46 C.F.R. § 502.708(c).

Shipping's president, qualifying individual ("QI"), and owner from 2004 to 2018. Ex. 1, FMC115-128; Ex. 6, FMC191; Ex. 7, FMC194.

In November 2018, Roberto Dip and Jason Handal, a Dip Shipping manager, pleaded guilty and were convicted of conspiracy to fix ocean transportation intermediary prices, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1, in a proceeding brought by the United States Department of Justice, Antitrust Division ("DOJ"). Following his guilty plea, Roberto Dip resigned his position with Dip Shipping and divested his shares to part owners, Margie Guadalupe Dip ("Margie Dip") and Maria D. Dip. In July 2019, Margie Dip replaced Roberto Dip as QI for Dip Shipping. Dip Shipping, which had also been charged with engaging in the price fixing conspiracy, pleaded guilty in October 2019. After learning of Dip Shipping's guilty plea, BCL notified Dip Shipping that the Commission intended to revoke its OTI license. Dip Shipping requested a hearing on the proposed revocation.

As discussed below in greater detail, the evidence supports a finding that Dip Shipping is not qualified to provide intermediary services and Dip Shipping's ocean transportation license is revoked.

B. Procedural History

On March 16, 2020, the Secretary issued a Notice of Hearing Request and Assignment noting that on February 19, 2020, BCL had notified Dip Shipping by letter that the Commission intended to revoke Dip Shipping's OTl license. The Secretary also noted that on March 5, 2020, Dip Shipping had requested a hearing on the proposed revocation pursuant to the Commission's Rules at 46 C.F.R. § 515.17 and 46 C.F.R. Part 502, Subpart X.

On March 18, 2020, in keeping with Rule 702(b), a Notice and Initial Order ("initial order") was issued, notifying BCL and BOE of Dip Shipping's hearing request and instructing BOE to file a copy of the notice given to Dip Shipping and BCL's materials supporting the notice of revocation by April 20, 2020. 46 C.F.R. § 502.702(b). The initial order also stated that "BOE may file a brief with legal arguments, proposed findings of fact, or additional information, and any requests for confidential treatment as well as an appendix with supporting documents." Initial Order at 1. In addition, the initial order stated:

> Dip Shipping requests an oral hearing on this matter under 46 C.F.R. § 502.706. Pursuant to Rule 706, "[i]n the usual course of disposition of matters filed under this subpart, no oral hearing or argument will be held, but the administrative law judge, in their discretion, may order such hearing or argument." 46 C.F.R. § 502.706(a). At this point in the proceeding, it is not clear that there is reason to alter the usual course of proceeding. However, in their briefs, the parties may address whether an oral hearing is necessary for the adjudication of this proceeding. Accordingly, Dip Shipping's request for oral hearing is **DENIED WITHOUT PREJUDICE**.

Initial Order at 1-2.

On April 2020, BOE filed its submissions titled "Bureau of Enforcement Submission of Materials Supporting Notice of Revocation," comprising the Notice of Revocation issued to Dip

Shipping by BCL and an appendix of materials supporting the Notice of Revocation. On April 21, 2020, a Notice of Right to Respond was issued pursuant to Rule 703. 46 C.F.R. § 502.703. The Notice of Right to Respond stated:

> Pursuant to Rule 703, Dip Shipping is hereby notified of its right to file a response to the April 20, 2020, filing. 46 C.F.R. § 502.703. Dip Shipping may file a brief with legal arguments, proposed findings of fact, additional information, and any requests for confidential treatment as well as an appendix with supporting documents. Dip Shipping's response is due on May 21, 2020. 46 C.F.R. § 502.703(a).
>
> Pursuant to Rule 704, BOE may file a reply brief within twenty days of Dip Shipping's filing. 46 C.F.R. 502.704. This notice serves as notice of BOE's right to file a reply.

Notice of Right to Respond at 1.

On May 21, 2020, Dip Shipping filed its response. In the response, Dip Shipping argued that its license should not be suspended, urged that an oral hearing be granted for the proceeding, and requested "limited discovery" on individuals at the FMC and DOJ. Response by Dip Shipping ("Dip Shipping Response") at 4.[2]

Also, on May 21, 2020, the United States Department of Justice, Antitrust Division filed a Motion to File a Submission as *Amicus Curiae*, accompanied by an *amicus curiae* letter brief. On May 22, 2020, an Order on Motion to File a Submission as *Amicus Curiae* and Request for Hearing ("*Amicus Curiae* Order") was issued, stating:

> On May 21, 2020, a motion to file a submission as *amicus curiae* was received from the United States Department of Justice, Antitrust Division. Subpart X, which governs this proceeding, does not include a rule regarding *amicus curiae* submissions. 46 C.F.R. §§ 502.701-502.709. In addition, Subpart X lists Commission rules that are applicable to this Subpart but does not include the rule regarding *amicus curiae* briefs, Commission Rule 73, in the list. 46 C.F.R. §§ 502.709, 502.73.
>
> The deadline for parties to respond to a motion to file an *amicus curiae* submission is not specified in the Commission's rules. The Final Rule in Docket 19-04, which created Subpart X, noted that "the Commission has encountered issues with regards to expediency and clarity of process" and that the "new procedure will provide additional structure while ensuring a low-burden and efficient process." Hearing Procedures Governing the Denial, Revocation, or Suspension of an OTI License, 85 Fed. Reg. 5581 (Jan. 31, 2020) ["Hearing Procedures"].

[2] Dip Shipping did not number the pages in its briefs. For ease of reference, each page is treated as numbered chronologically, starting from the first page, through the attached exhibits.

> To provide structure and ensure an efficient process, it is requested that the Bureau of Enforcement ("BOE") incorporate any arguments regarding the *amicus curiae* submission, including what standard it thinks would be appropriate to review such motions in Subpart X proceedings, in BOE's reply brief, due on June 10, 2020.
>
> Also on May 21, 2020, Dip Shipping Company, LLC ("Dip Shipping") filed its response which included a request for discovery and another request for oral hearing. Both requests are denied at this time. However, Dip Shipping may file a sur-reply on or before June 22, 2020, addressing the motion to file an *amicus curiae* submission, the appropriate standard for reviewing such motions, the need for additional discovery or a hearing, and any other arguments raised by BOE in their reply brief.

Amicus Curiae Order at 1.

On June 10, 2020, BOE filed a reply brief, including its response to the motion by the DOJ to file an *amicus curiae* submission. On June 19, 2020, Dip Shipping filed a sur-reply on the issue of the DOJ's motion to file an *amicus curiae* submission.

C. Arguments of the Parties

1. Dip Shipping's Arguments

Dip Shipping asserts that it did not violate any provisions of the Shipping Act or the Commission's regulations and did not make any materially false or misleading statements. Dip Shipping Response at 1. Dip Shipping opines that BCL's conclusion that Dip Shipping is no longer qualified to render OTI services "is self-serving, vague, and not supported by the submissions of the Bureau of Enforcement, and not supported by the history of the Bureau of Enforcement in other cases regarding licensees which have maintained their licenses after a Federal guilty plea to a felony." Dip Shipping Response at 1.

Dip Shipping notes that BCL investigated Margie Dip prior to approving her as replacement QI and argues that because the illegal activities by Dip Shipping occurred from 2010 to 2015, whereas the FMC's approval of Margie Dip as the new QI of Dip Shipping did not occur until September 3, 2019, the illegal activities of Roberto Dip and Dip Shipping under his ownership "should in no way be connected to the activities of Dip Shipping Company LLC under the new ownership and management." Dip Shipping Response at 1. Dip Shipping observes that there are no allegations that it committed any other illegal acts after transfer of its ownership to Margie Dip and Maria D. Dip, and contends that a revocation based on acts five years prior to the current ownership and management of the company "is not supported by any legal precedent cited by the Bureau of Enforcement." Dip Shipping Response at 1.

Dip Shipping states that it disagrees with the contention in paragraphs 21, 22, and 23 of BOE's "Attachment A" (materials supporting the notice of intent to revoke), which states as part of the basis for the intent to revoke, that Dip Shipping failed to notify the Commission that the company was charged with a felony, failed to notify the Commission that it pleaded guilty to that felony, and failed to notify the Commission that a criminal monetary penalty had been imposed

against it. Dip Shipping Response at 2. Dip Shipping asserts that the declarations it submitted from its criminal defense counsel and from Margie Dip state that BOE "was advised through regular and constant communications regarding the criminal investigation and prosecution including the guilty plea and sentencing, of both Roberto Dip and Dip Shipping Company LLC, by representatives of the U.S. Department of Justice (DOJ)." Dip Shipping Response at 2.

Dip Shipping maintains that BOE has not revoked a license in similar situations and maintains that a revocation of its license would constitute a "death sentence" for it as it cannot legally operate without an OTI license and would have to lay off its employees, who would not be able to find new employment. Dip Shipping Response at 3-4. Dip Shipping contends that BOE has "failed to allege that any actions less severe than revocation (temporary suspension or warning) would be [in]sufficient." Dip Shipping Response at 4. Citing press releases from the FMC website, Dip Shipping contends that BOE and the FMC generally have been inconsistent in responding to similar offences and have not sought to revoke a license in the case of other companies that committed identical illegal acts. Dip Shipping Response at 4. Dip Shipping asserts that a revocation is unwarranted. Dip Shipping Response at 4.

2. BOE's Arguments

BOE contends that the "Commission has a strong policy interest in revoking an OTI license to protect the shipping public from those who choose not to comply with the Shipping Act's requirements and to underscore the ongoing and continuous obligation to demonstrate the necessary character to obtain, and retain, an OTI license." BOE Reply at 7-8. BOE asserts that longstanding Commission precedence supports denial or revocation of a license when the entity has been found guilty of federal crimes or conduct implicating moral turpitude, and that "perpetration of federal offenses rises to the level of the most egregious circumstances warranting revocation." BOE Reply at 8 (citing *G.R. Minon – Freight Forwarder License*, 12 F.M.C. 75, 82 (FMC 1968); *In the Matter of Ocean Transportation License in the Name of Apparel Logistics, Inc., Petition for Appeal from Staff Action or in the Alternative for Initiation of an Investigation*, 30 S.R.R. 567, 570 (FMC 2004)). BOE posits that in recent cases the Commission has found that revocation is appropriate when the Commission can no longer rely on the honesty and integrity of the licensee or its principals to the extent necessary to ensure future conduct complies with the Shipping Act and the Commission's regulations. BOE Reply at 9.

BOE argues that the Commission has revoked an OTI license for conduct less egregious than the felony violation of a federal statute, pointing to cases where the Commission revoked an OTI license for failure to maintain an active QI and for failure to report the resignation of its QI and to file an application to replace the QI. BOE Reply at 10. BOE asserts:

> Most of the relevant facts in this case are not in dispute and the governing law is settled. In view of the magnitude of Commission precedent on the issue, it is clear that Dip Shipping's guilty plea in federal court to the crime of participating in a price fixing conspiracy constitutes violations of a statute related to carrying on OTI business, and therefore, establishes that Dip Shipping is no longer qualified to provide intermediary services within the meaning of § 40903 of the Shipping Act and 46 C.F.R. § 515.16(a)(4).

BOE Reply at 10.

Responding to Dip Shipping's argument that the conduct leading to its plea agreement occurred five years ago, BOE states that the Notice of Intent to Revoke was triggered by Dip Shipping's guilty plea on October 25, 2019, admission of guilt, and criminal sentencing on December 8, 2019. BOE Reply at 10-11. BOE posits that "[t]he impact of Dip Shipping's illegal activity is very serious," noting that Dip Shipping's sales of freight forwarding services to the United States customers impacted by the price fixing scheme totaled $6,497,487. BOE Reply at 11 (citing BOE Ex. 12, FMC214-215).

BOE points to paragraph 16(a) of Dip Shipping's plea agreement with the DOJ which grants immunity from prosecution to Margie Dip and Maria D. Dip for Dip Shipping's price fixing conspiracy. BOE opines that "[i]f Ms. Margie Dip and Ms. Maria Dip were indeed uninvolved in the prior illegal acts of Mr. Roberto Dip and Dip Shipping as is contended in Respondent's filing, then presumably there would likewise be no need to immunize them from criminal prosecution." BOE Reply at 11-12.

Addressing Dip Shipping's allegation that the Commission has been inconsistent in its treatment of entities that similarly violated federal statutes and did not revoke their licenses, BOE notes that the Commission entered into plea agreements with K-Line and CSAV but asserts that those violations "are irrelevant to this proceeding because neither K-Line nor CSAV is an OTI or subject to licensing." BOE Reply at 12-13. BOE notes in addition, that "both VOCCs paid substantial sums in criminal fines including one instance of CSAV paying $625,000 in civil penalties to the Commission for violations of the Shipping Act," while this proceeding seeks to revoke Dip Shipping's license, not to impose civil penalties. BOE Reply at 13.

Citing the Commission's regulations at 46 C.F.R. § 515.16(a), BOE asserts that a license may be revoked for violation of any provision of a Commission order or regulation. BOE Reply at 15. BOE states that Dip Shipping and its QI, Margie Dip, failed to notify the Commission of Dip Shipping's guilty plea to the price fixing charge and subsequent judgment imposing a criminal monetary penalty against it. BOE Reply at 15. BOE asserts that the failure to notify the Commission violates the Commission's regulation at 46 C.F.R. § 515.12(e), which requires an applicant for an OTI license to notify the Commission within 30 days of any changes in material facts submitted in the application, and 46 C.F.R. § 515.20(e), which requires licensees to notify the Commission within 30 days of any changes in material facts, including a criminal indictment or conviction of a licensee. BOE Reply at 15. BOE dismisses as an "exercise in finger pointing," the statement by Margie Dip that based on discussions with Dip Shipping's criminal defense counsel she was not aware that she had to personally notify the Commission, as well as Dip Shipping's criminal defense counsel's statement that he believed the DOJ had relayed the information to the Commission. BOE Reply at 15-16. BOE opines that Margie Dip's claim is "disingenuous" as she was aware of the requirements. BOE Reply at 16. BOE maintains that because of Dip Shipping's failure to provide the required notification the Commission only learned about Dip Shipping's plea deal and conviction months later through the DOJ press releases. BOE Reply at 17.

D. Controlling Authority

1. New Subpart X Procedures

This proceeding is being adjudicated under the procedures set forth at Subpart X of the Commission's Rules of Practice and Procedure, 46 C.F.R. part 502. On January 31, 2020, the Commission issued a Final Rule "modifying the hearing procedures governing the denial, revocation, or suspension of an ocean transportation intermediary (OTI) license" in order to "ensure a more streamlined process, and fulfill the need for more detailed procedural requirements." Hearing Procedures, 85 Fed. Reg. 5579. Previously, the hearing procedures for denial, revocation, or suspension of an OTI license were conducted under the procedures at 46 C.F.R. § 515.17. The new hearing procedures under the Final Rule were incorporated into part 502 as Subpart X and are intended to "provide additional structure while ensuring a low-burden and efficient process." 85 Fed. Reg. at 5581.

2. Authority Governing OTI Activities

> A person in the United States may not advertise, hold oneself out, or act as an ocean transportation intermediary unless the person holds an ocean transportation intermediary's license issued by the Federal Maritime Commission. The Commission shall issue a license to a person that the Commission determines to be qualified by experience and character to act as an ocean transportation intermediary.

46 U.S.C. § 40901(a). *See also* 46 C.F.R. § 515.14 ("The Commission will issue a license if it determines, as a result of its investigation, that the applicant possesses the necessary experience and character to render ocean transportation intermediary services . . . ."). An applicant seeking an OTI license must demonstrate through its qualifying individual that it has the necessary experience by showing that "its qualifying individual has a minimum of three years' experience in ocean transportation intermediary activities in the United States, and the necessary character to render ocean transportation intermediary services." 46 C.F.R. § 515.11(a)(1).

The Commission specifies requirements for an application for a license, including:

> (c) *Failure to provide necessary information and documents.* In the event an applicant fails to provide documents or information necessary to complete processing of its application, notice will be sent to the applicant identifying the necessary information and documents and establishing a date for submission by the applicant. Failure of the applicant to submit the identified materials by the established date will result in the closing of its application without further processing. In the event an application is closed as a result of the applicant's failure to provide information or documents necessary to complete processing, the filing fee will not be returned. Persons who have had their applications closed under this section may reapply at any time by submitting a new application with the required filing fee.

(d) *Investigation.* Each applicant shall be investigated in accordance with § 515.13.

(e) *Changes in fact.* Each applicant shall promptly advise the Commission of any material changes in the facts submitted in the application. Any unreported change may delay the processing and investigation of the application and result in rejection, closing, or denial of the application.

46 C.F.R. § 515.12(c)-515.12(e).

The Commission shall conduct an investigation of the applicant's qualifications for a license. Such investigations may address:

(a) The accuracy of the information submitted in the application;

(b) The integrity and financial responsibility of the applicant;

(c) The character of the applicant and its qualifying individual; and

(d) The length and nature of the qualifying individual's experience in handling ocean transportation intermediary duties.

46 C.F.R. § 515.13.

The Shipping Act grants authority to revoke an OTI's license under certain conditions.

The Federal Maritime Commission, after notice and opportunity for a hearing, shall suspend or revoke an ocean transportation intermediary's license if the Commission finds that the ocean transportation intermediary –

(1) is not qualified to provide intermediary services; or

(2) willfully failed to comply with a provision of this part or with an order or regulation of the Commission.

46 U.S.C. § 40903(a).

A license may be revoked or suspended for any of the following reasons:

(1) Violation of any provision of the Act, or any other statute or Commission order or regulation related to carrying on the business of an ocean transportation intermediary;

(2) Failure to respond to any lawful order or inquiry by the Commission;

(3) Making a materially false or misleading statement to the Commission in connection with an application for a license or an amendment to an existing license;

(4) A Commission determination that the licensee is not qualified to render intermediary services; or

(5) Failure to honor the licensee's financial obligations to the Commission.

46 C.F.R. § 515.16(a).

Licensees are required to notify the Commission of changes in an existing licensee's organization; death of a sole proprietor; retirement, resignation, or death of a QI; or acquisition of one or more additional licensees. 46 C.F.R. § 515.20(a)-515.20(d). In addition:

> (e) *Other changes.* Other changes in material fact of a licensee shall be reported within thirty (30) days of such changes, in writing by mail or email (*bcl@fmc.gov*) to the Director, Bureau of Certification and Licensing, Federal Maritime Commission, Washington, DC 20573. Material changes include, but are not limited to: Changes in business address; any criminal indictment or conviction of a licensee, QI, or officer; any voluntary or involuntary bankruptcy filed by or naming a licensee, QI, or officer; changes of five (5) percent or more of the common equity ownership or voting securities of the OTI; or, the addition or reduction of one or more partners of a licensed partnership, one or more members or managers of a Limited Liability Company, or one or more branch offices. No fee shall be charged for reporting such changes.

46 C.F.R. § 515.20(e).

The Commission recently affirmed the revocation of the ocean transportation license of Washington Movers, finding that Washington Movers violated Commission regulations when its president and QI used the OTI in an attempt to smuggle weapons outside the United States. *Revocation of Ocean Transportation Intermediary License No. 017843 – Washington Movers, Inc.*, 1 F.M.C. 2d 5, 21 (FMC 2018) ("*Washington Movers*"). Washington Movers' QI was convicted of unlawful export and smuggling and sentenced to 18 months in prison, probation, and a fine. *Washington Movers*, 1 F.M.C. 2d at 6. Before starting his sentence, Washington Movers' QI transferred ownership and control of the company to his wife. *Washington Movers*, 1 F.M.C. 2d at 6. There was no indication that the wife was involved in her husband's criminal activity and she used life insurance, children's tuition money, and proceeds from selling personal property to ensure that cargo *en route* was released. *Washington Movers*, 1 F.M.C. 2d at 6. The Commission found that because the original QI "was acting within the scope of his employment with the intent to benefit Washington Movers when he violated 18 U.S. C. § 554 and 22 U.S.C. § 2778, Washington Movers is liable for violating these statutes as well." *Washington Movers*, 1 F.M.C. 2d at 15. Although mitigating circumstances existed, including that the wife and replacement QI was not involved in the criminal activity, the Commission found that license revocation was the appropriate remedy. *Washington Movers*, 1 F.M.C. 2d at 22.

II. FINDINGS OF FACT

1. Dip Shipping is a limited liability company domiciled in Kenner, Louisiana. BOE Ex. 6, FMC150.

2. In 2003, Roberto Dip was the 100% owner and Margie Dip was a manager of Dip Shipping. BOE Ex. 2, FMC125.

3. Dip Shipping filed its charter and qualified to do business in the State of Louisiana on February 4, 2004. BOE Ex. 6, FMC150.

4. Dip Shipping has been licensed to operate as an OTI pursuant to FMC license number 018752 since March 9, 2004. BOE Ex. 7, FMC194.

5. Dip Shipping also operates in Miami, Florida; Houston, Texas; and Atlanta, Georgia. BOE Ex. 6, FMC159.

6. Roberto Dip was the president and QI of Dip Shipping from November 17, 2003, through July 16, 2019. BOE Ex. 2, FMC115-128.

7. Margie Dip has been involved with Dip Shipping since 2003 and has served as a manager, vice president, and part owner. BOE Ex. 2, FMC125; BOE Ex. 4, FMC133-134; BOE Ex. 6, FMC152.

8. As part of the duties she performed for Dip Shipping from 2005 to 2017, Margie Dip reported directly to Roberto Dip and "[c]oordinated logistics and documentation for containers shipped from the USA to Honduras and other Central American countries, and from Honduras to the USA. Issued masters for bills of lading, prepared loading manifests, completed Shipper's Export Declarations (SEDs), prepared vehicle export forms for Customs, made bookings, provided customer service, financing and administration, hazmat certified, submitted IMOs to the vessel lines for validation." BOE Ex. 6, FMC142.

9. On October 2, 2018, Roberto Dip entered into an agreement with the DOJ to plead guilty to a charge of participating in a conspiracy with other ocean transportation intermediaries to fix prices for international freight forwarding services. BOE Ex. 15, FMC238-251.

10. The illegal acts connected to the DOJ charges and guilty pleas by Roberto Dip and Dip Shipping occurred from at least September 2010 until at least March 2015. BOE Ex. 9, FMC198-199.

11. On November 30, 2018, the DOJ issued a press release stating that Roberto Dip and Jason Handal, a manager at Dip Shipping at the time, had pleaded guilty that day to orchestrating a nationwide conspiracy to fix prices for international freight forwarding services. Verified Statement of Clifford Johnson ¶¶ 6-7.

12. BCL learned of Roberto Dip's guilty plea in the price fixing scheme through a DOJ press release issued November 30, 2018. Verified Statement of Clifford Johnson ¶ 7.

13. On December 13, 2018, BCL sent a letter to Roberto Dip requesting that he provide the Commission with information and documents relating to the price fixing scheme. Verified Statement of Clifford Johnson ¶ 7.

14. On January 7, 2019, BCL received an email from Roberto Dip acknowledging the December 13, 2018, letter from BCL and inquiring whether a change in the presidency of Dip Shipping would prevent the revocation of the company's OTI license. Verified Statement of Clifford Johnson ¶ 7; BOE Ex. 4, FMC133-134.

15. Roberto Dip proposed replacing himself as president of Dip Shipping with Margie Dip, the vice president of Dip Shipping. BOE Ex. 4, FMC133-134.

16. On January 29, 2019, Representatives of the Commission had a telephone conference with Roberto Dip and his counsel to discuss responsive documents and the potential for revocation of Dip Shipping's OTI license. Verified Statement of Clifford Johnson ¶ 9.

17. On or about February 26, 2019, Clifford Johnson participated in a telephone conference between representatives of the Commission and an attorney with DOJ's Antitrust Division, "regarding Dip Shipping" in which Mr. Johnson explained that licensing is based on character and experience of the applicant and the DOJ attorney confirmed that Roberto Dip had pleaded guilty to price fixing and sentencing would follow later in the year. Verified Statement of Clifford Johnson ¶ 10.

18. During this discussion, in response to the DOJ attorney's inquiry as to the criteria for OTI licensing, Mr. Johnson provided an explanation that licensing was based on character and experience of the applicant. Verified Statement of Clifford Johnson ¶ 10.

19. On April 2, 2019, counsel for Roberto Dip and Dip Shipping sent an email to BCL and Mr. Johnson providing the documents requested by BCL, including documentation showing Roberto Dip was no longer an officer of Dip Shipping and that Margie Dip and Maria D. Dip were the sole managers. Verified Statement of Clifford Johnson ¶ 7; BOE Ex. 5, FMC136-137.

20. The April 2, 2019, communication to BCL and Mr. Johnson by Roberto Dip and Dip Shipping's counsel stated in pertinent part:

> Greetings. By letter date[d] December 13, 2018, the BCL of the FMC advised my client, Dip Shipping Company, LLC, that it was aware that the company and its President, Robert Dip, had been criminally charged in Federal Court, and had entered pleas of guilty to price fixing. The company is licensed as an OTI as a forwarder and NVOCC.

BOE Ex. 5, FMC136. The email advised that Roberto Dip was cooperating with DOJ in their continuing investigation and the sentencing had been deferred. BOE Ex. 5, FMC136.

21. In an April 9, 2019, meeting between Dip Shipping's counsel and representatives of the Commission, Dip Shipping's counsel "was advised that Mr. Roberto Dip's involvement with Dip Shipping, in any capacity including as an owner, was problematic for the Commission," but "that the Commission would consider an application proposing Ms. Margie Dip as the replacement QI" and such application should be submitted after the sentencing of Roberto Dip. Verified Statement of Clifford Johnson ¶ 12.

22. On June 25, 2019, the U.S. District Court for the Southern District of Florida sentenced Roberto Dip to prison for 18 months and imposed a $20,000.00 fine against him for conspiracy to restrain trade in violation of the Sherman Antitrust Act pursuant to 15 U.S.C. § 1. BOE Ex. 15, FMC198, FMC252-258.

23. On July 16, 2019, Dip Shipping submitted a Form FMC-18 application proposing Margie Dip as the replacement QI for Dip Shipping effective August 12, 2019. BOE Ex. 6, FMC139-192.

24. In 2019, Roberto Dip held an 80% share of Dip Shipping while Margie Dip and Maria D. Dip each held a 10% share of Dip Shipping. BOE Ex. 6, FMC191.

25. On August 12, 2019, Roberto Dip transferred the entirety of his interest equally between Margie Dip and Maria D. Dip, leaving each manager with 50% ownership interest in Dip Shipping. BOE Ex. 6, FMC146, 163, 187, 191-192.

26. On September 3, 2019, BCL approved Margie Dip as the QI for Dip Shipping. BOE Ex. 8, FMC196.

27. On September 17, 2019, the DOJ issued a press release announcing that Dip Shipping had agreed to plead guilty to an antitrust charge for its role in a conspiracy to fix prices of freight forwarding services sold to customers. BOE Ex. 9, FMC198-199.

28. On October 25, 2019, Margie Dip entered into an agreement on behalf of Dip Shipping with the DOJ in which Dip Shipping agreed that it would waive indictment and plead guilty to a one-count charge in the U.S. District Court for the Southern District of Florida, of participating in a conspiracy to suppress and eliminate competition by agreeing to increase, fix, stabilize, and maintain prices charged to customers for freight forwarding services provided in the U.S. and elsewhere, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1. BOE Ex. 12, FMC212-231.

29. On December 8, 2019, the U.S. District Court for the Southern District of Florida issued an amended judgment imposing a criminal monetary penalty of $488,250.00 against Dip Shipping for its role in the Sherman Act conspiracy. BOE Ex. 13, FMC233-236.

30. The illegal acts connected to the DOJ charges and guilty pleas by Roberto Dip and Dip Shipping occurred from at least September 2010 until at least March 2015. BOE Ex. 9, FMC198-199.

31. The factual basis listed in the plea agreements with Roberto Dip and Dip Shipping are the same except that

- in the plea agreement with Roberto Dip, he is listed as the "Chief Executive Officer of Company A," he "was an organizer or leader in the conspiracy, which involved at least five participants," and acts were carried out "within the Eastern District of Louisiana," BOE Ex. 14, FMC240-242, and

- in the plea agreement with Dip Shipping, it is identified as "a corporation organized and existing under the laws of Louisiana," it "employed ten or more employees," and acted "through its officers and employees," BOE Ex. 13, FMC212-216.

32. Margie Dip was never a defendant in the criminal proceedings against Roberto Dip or Dip Shipping Company. Declaration of Joel Denaro, attached to Dip Shipping Response at 29.

33. In the Antitrust Division's investigation, both Dip Shipping and its owner, Roberto Dip, promptly accepted responsibility for their conduct. DOJ *Amicus Curiae* Letter Brief at 1.

34. Dip Shipping cooperated fully with the investigation, including by providing evidence not available to the Antitrust Division through other sources. Ultimately, its cooperation significantly contributed to the Antitrust Division's efforts to bring additional co-conspirators to justice. DOJ *Amicus Curiae* Letter Brief at 1.

35. Dip Shipping is obligated under its plea agreement to continue cooperating with the DOJ antitrust investigation. DOJ *Amicus Curiae* Letter Brief at 1.

36. The plea agreement recommended "a downward departure from the [Sentencing] Guidelines" for the fine "because of the defendant's substantial assistance in the government's investigation and prosecutions of violations of federal criminal law in the freight forwarding industry." BOE Ex. 12, FMC220.

37. The plea agreement requires that Dip Shipping pay a criminal fine of $488,250 over the course of five years and that amount and pay plan were "premised on the parties' efforts to ensure that the criminal case would not put Dip Shipping out of business, as contemplated by the criminal sentencing guidelines and accepted by the District Court in imposing sentence." DOJ *Amicus Curiae* Letter Brief at 2.

38. Dip Shipping has only paid one of the six payments required under the sentence and may be unable to pay the criminal fine if the Commission were to revoke its license. DOJ *Amicus Curiae* Letter Brief at 2.

39. As part of the plea agreement Margie Dip entered into on October 25, 2019, with the DOJ on behalf of Dip Shipping, the DOJ agreed that it would "not bring criminal charges against any current director, officer, or employees of the defendant for any act or offense committed before the date of signature of this Plea Agreement and while that person was acting as a director, officer, or employee of the defendant that was undertaken in furtherance of an antitrust conspiracy in the United States and elsewhere [except for Robert Dip and Jason Handal]." BOE Ex. 12, FMC225.

40. Margie Dip and Dip Shipping sought legal advice regarding their obligations to the FMC and followed that advice, which was provided with the knowledge that the DOJ attorneys were in contact with the FMC attorneys. Declaration of Joel Denaro ¶¶ 18-20, attached to Dip Shipping Response at 29.

III. ANALYSIS

A. Pending Motions

1. The DOJ Antitrust Division's *Amicus Curiae* Submission

The DOJ Antitrust Division filed a motion seeking leave to submit an *amicus curiae* submission in this proceeding. In the motion, the DOJ states in pertinent part:

> The Division, through the undersigned attorneys, both conducted the investigation of, and negotiated the criminal plea agreements with, Mr. Dip and Dip Shipping.
>
> Pursuant to its plea agreement with Dip Shipping . . . the Division committed to "advise the appropriate officials of any governmental agency considering [suspension or debarment] of the fact, manner, and extent of the cooperation of the defendant and its related entities as a matter for that agency to consider before determining what action, if any to take." Because OTI licensure revocation would have the same effect as suspension or debarment, to adhere to its commitments pursuant to the plea agreement, the Division in part seeks to apprise the Commission of Dip Shipping's cooperation with its investigation.
>
> Beyond this, however, the proposed submission is desirable to the Commission because it provides information uniquely in the Antitrust Division's possession regarding the underlying criminal investigation and resolution with Dip Shipping. Additionally, the Commission's action in this matter may impact the plea agreement as accepted by the federal district court, and interfere with Dip Shipping's ability to pay the criminal fine that has been imposed on it. It is desirable that the Commission understand fully these legal and policy issues before rendering its decision.
>
> In the alternative, should the Commission receive this submission as a motion for permissive intervention, the Division submits that the basis for the Bureau of Enforcement's proposed revocation flows directly from the Division's investigation, rendering its expertise relevant to an issue involved in the proceeding and likely to assist the Commission in its consideration of this matter. 46 C.F.R. 502.68(c)(ii). Further the Division's limited intervention will not unduly delay or expand the scope of the proceeding, but it will assist the Commission in compiling a more complete – and therefore more sound – record on which to base its decision. The Division's submission is limited to issues that are neither on the record in this matter nor in dispute.

Amicus Curiae Motion at 2-3.

The DOJ states that both Dip Shipping and Roberto Dip promptly accepted responsibility for their conduct and cooperated fully with the investigation, including providing evidence that could not be obtained from other sources, which "significantly contributed" to the DOJ's efforts to bring additional co-conspirators to justice. DOJ *Amicus Curiae* Letter Brief at 1. According to the DOJ, the plea agreement between Dip Shipping and the DOJ requires that Dip Shipping pay a criminal fine of $488,250 over the course of five years and that amount and pay plan were "premised on the parties' efforts to ensure that the criminal case would not put Dip Shipping out of business, as contemplated by the criminal sentencing guidelines and accepted by the District Court in imposing sentence." DOJ *Amicus Curiae* Letter Brief at 2. The DOJ asserts that Dip Shipping has only paid one of the six payments required under the sentence and may be unable to pay the criminal fine if the Commission were to revoke its license. DOJ *Amicus Curiae* Letter Brief at 2.

Addressing the *amicus curiae* submissions by the DOJ, Dip Shipping contends that the "Rules of the FMC would seem to encourage such an amicus curiae submission." Dip Shipping Sur-Reply at 2 (citing 46 C.F.R. §§ 502.1 and 502.12). Dip Shipping asserts that "[a]lthough the Federal Rules of Civil Procedure do not address amicu[s] curiae participation in district courts, district courts possess the inherent authority to accept amicus briefs" and that "Rule 29 of the Federal Rules of Appellate Procedure explicitly allow for the submission of briefs of an amicus curiae . . . ." Dip Shipping Sur-Reply at 1 (citing *Bayshore Ford Truck Sales, Inc. v. Ford Motor Co.*, 471 F.3d, 1233, 1249 n.34 (11th Cir. 2006)).

BOE notes that Subpart X does not contain a provision for consideration of *amicus curiae* filings. BOE Reply at 14. "BOE contends that the Division's *amicus* filing should be given no weight inasmuch as DOJ's support for Dip Shipping is equivocal and the result of a deal made by DOJ with the criminal respondent, to which the Commission was not a party." BOE Reply at 14. Should the DOJ's *amicus* filing be accepted, BOE urges that the filing be "viewed in the context it was presented, as a fulfillment of a term in the plea agreement to primarily provide information regarding Dip Shipping's level of cooperation and criminal fine." BOE Reply at 14. BOE avers that licensing falls strictly within the Commission's purview and its interest in protecting the shipping public and that "[t]he *amicus* filing by the Division does not supersede that oversight and regulatory responsibility." BOE Reply at 14.

Subpart X does not specifically include the *amicus curiae* rule in the list of rules applicable to Subpart X proceedings, although there is no indication in the Final Rule as to why. 46 C.F.R. § 502.709. Commission Rule 73 provides in pertinent part that a motion for leave to file an *amicus curiae* brief must identify the interest of the applicant and must state the reasons why such a brief is desirable. 46 C.F.R. § 502.73. Although not binding, this rule provides guidance about how to review *amicus curiae* requests in Subpart X proceedings.

The Commission recently discussed why leave to file an *amicus* brief was granted in a proceeding, stating that the "amicus motion identifies the Amici's interest in filing and meets the Commission's for amicus filing spelled out in Commission Rule 73. Further, the Amici are uniquely situated to offer a broader perspective" on the issue in question. *In re: Vehicle Carrier Services*, 1 F.M.C. 2d 175 (Order Granting Motion for Leave to File Amicus Brief) (FMC 2019). In addition, the "Commission has broad discretion in deciding whether to grant leave for an amicus brief." *In re: Vehicle Carrier Services*, 1 F.M.C. 2d at 17 (citing *Cobell v. Norton*, 246 F.

Supp. 2d 59, 62 (D.D.C. 2003) (control over amicus curiae filings is committed to the court's "sole discretion")).

The DOJ motion for leave to file an *amicus curiae* submission satisfies the Rule 73 criteria and Commission caselaw. DOJ has an interest in the proceeding as this determination will impact Dip Shipping's ability to pay their fine. DOJ is uniquely situated to provide information about the antitrust violations, investigation, and plea agreement of Dip Shipping and its officers as well as the cooperation provided by Dip Shipping. Indeed, Dip Shipping's cooperation with the DOJ may be the most significant difference between this case and the facts in *Washington Movers*. The *amicus curiae* submission provides a more complete and therefore more sound record for this decision. The *amicus curiae* submission is therefore accepted.

2. DIP Shipping's Request for Discovery and Oral Hearing

Dip Shipping requests that it be allowed to conduct discovery of FMC and DOJ personnel. Dip Shipping argues that discovery in this case is necessary "as it goes to the essence of the defense of the Licensee that the FMC was well aware of the nature and scope of the illegal activity to which Dip Shipping pleaded guilty and was sentenced" and that the cross-examination under oath of FMC and DOJ officials would help bring to light the extent of communications between the DOJ and FMC regarding Dip Shipping. Dip Shipping Response at 3.

Dip Shipping also requests an oral hearing. Dip Shipping contends that only through an oral hearing "where the information can be elicited from the only persons who have relevant and material information can the extent of the communications to the FMC by the Licensee through its criminal defense counsel to the DOJ attorneys and by the DOJ attorneys to the FMC be known." Dip Shipping Response at 3.

BOE opposes Dip Shipping's request for oral hearing and to conduct discovery on FMC and DOJ Antitrust Division staff. Noting that Subpart J of the Commission's regulations governing discovery is not applicable to Subpart X, BOE posits that this is consistent with the Commission's stated intent to make Subpart X proceedings more streamlined than typical part 502 hearings. BOE Reply at 17.

The evidence of record contains all information necessary to adjudicate this matter and there does not appear to be any need for discovery or an oral hearing. Moreover, as BOE notes, discovery is generally not applicable to Subpart X proceedings and Dip Shipping's arguments that discovery or an oral hearing is necessary are not persuasive given the written evidence in the record. Dip Shipping's requests for discovery and for oral hearing are, therefore, denied.

B. Burden of Proof

Under the Administrative Procedure Act ("APA"), an Administrative Law Judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). "In order-to-show-cause revocation proceedings, the burden of proof is on BOE" and the "standard of proof is preponderance of the evidence." *Washington Movers*, 1 F.M.C. 2d at 8. This decision is based on

the briefs, exhibits, proposed findings of fact and conclusions of law, and replies thereto, filed by the parties.

In addition, this initial decision addresses only material issues of fact and law. BOE submitted proposed findings of fact in its reply brief. Proposed findings of fact not included in this decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

The evidence of record includes the notice of intent to revoke and the materials supporting the notice, Dip Shipping's Response and supporting evidence, DOJ's *amicus curiae* letter brief, BOE's Reply, including its proposed findings of fact, and Dip Shipping's sur-reply.

C. Discussion

1. Notice under 46 C.F.R. §§ 515.12(e) and 515.20(e)

BOE alleges that Dip Shipping and its QI, Margie Dip, failed to notify the Commission of the felony charge against the company, the company's guilty plea, and the company's subsequent criminal conviction, in violation of sections 515.12(e) and 515.20(e) of the Commission's regulations. BOE Reply at 15.

Dip Shipping denies these allegations and avers that:

> [a]s stated in the attached Declaration by criminal defense attorney Joel Denaro, on behalf of both Mr. Roberto Dip and Dip Shipping Company LLC, and the attached Declaration of Ms. Margie Guadalupe Dip, the Bureau of Enforcement was advised through regular and constant communications regarding the criminal investigation and prosecution including the guilty plea and sentencing, of both Roberto Dip and Dip Shipping Company LLC, by representatives of the U.S. Department of Justice (DOJ).

Dip Shipping Response at 2. Margie Dip states in relevant part as follows:

> 8. I was unaware that I, personally, as the Manager of Dip Shipping Company LLC, had to advice the FMC that Dip Shipping Company LLC had [pleaded] guilty to a criminal charge.
>
> 9. I was under the assumption that the FMC was fully informed of the status of the plea negotiations and criminal resolution of the case through the United States Department of Justice attorneys who were prosecuting the criminal case against both Roberto Dip and Dip Shipping Company LLC.

> 11. My belief was based in part upon Joel Denaro advising me that the DOJ attorneys advised him that they were in contact with the appropriate representatives from the FMC regarding the FMC OTI License of Dip Shipping Company LLC.

Declaration of Margie Guadalupe Dip, attached to Dip Shipping Response at 23.

In addition, Respondent's criminal attorney, Joel Denaro, Esq., filed an affidavit stating:

> 22. I was under the assumption that the FMC was fully informed of the status of the plea negotiations and criminal resolution of the case through the United States Department of Justice attorneys who were prosecuting the criminal case against both Roberto Dip and Dip Shipping Company LLC.

Declaration of Joel Denaro, attached to Dip Shipping Response at 28.

Section 515.12(e)[3] provides that "[e]ach applicant shall promptly advise the Commission of any material changes in the facts submitted in the application. Any unreported change may delay the processing and investigation of the application and result in rejection, closing, or denial of the application." 46 C.F.R. § 515.12(e). Section 515.20(e) states that "changes in material fact of a licensee shall be reported within thirty (30) days of such changes, in writing by mail or email (bcl@fmc.gov) to the Director, Bureau of Certification and Licensing, Federal Maritime Commission, Washington, DC 20573" and that "[m]aterial changes include, but are not limited to: . . . any criminal indictment or conviction of a licensee, QI, or officer." 46 C.F.R. § 515.20(e).

BCL's concern about notification of the case against Dip Shipping raises the question of whether the proceedings against Dip Shipping and Roberto Dip constituted different cases. On the surface, they have different case names and docket numbers, although the same judge. BOE Ex. 13, FMC233; BOE Ex. 14, FMC253. The plea agreement with Dip Shipping was signed almost a year after the plea agreement with Roberto Dip, possibly to ensure continued cooperation with the ongoing investigation. However, the substance of the factual allegations is essentially the same and it appears that they arose out of the same DOJ investigation. Margie Dip was never a defendant in the criminal proceedings against Roberto Dip or Dip Shipping Company. Declaration of Joel Denaro, attached to Dip Shipping Response at 29. Certainly, BCL could have inquired further if it had any concerns.

Dip Shipping's contention that the Commission was aware of the criminal case against Dip Shipping is supported by correspondence between Dip Shipping and Commission staff, included in BOE's submission. On April 2, 2019, in an email to BCL staff, Dip Shipping's counsel states in pertinent part:

> Greetings. By letter date[d] December 13, 2018, the BCL of the FMC advised my client, Dip Shipping Company, LLC, that it was aware **that the company and its President**, Robert Dip, had been criminally charged in Federal Court, and had

[3] It is not clear that section 515.12(e), which states that an unreported change may "delay the processing and investigation of an application" or result in its "rejection, closing, or denial," applies to Dip Shipping, whose application had already been approved.

> entered pleas of guilty to price fixing. The company is licensed as an OTI as a forwarder and NVOCC.

BOE Ex. 5, FMC136 (emphasis added).

By the time Dip Shipping's counsel sent this email, Commission staff were already in communication with the DOJ regarding Dip Shipping (*see* Verified Statement of Clifford Johnson ¶ 10 (stating that there was a telephone conference between representatives of the Commission and a DOJ attorney "regarding Dip Shipping")). The above email suggests that BCL was aware that Dip Shipping was being charged along with its president, Roberto Dip. If BCL was not aware that the corporation was charged, then this email from Dip Shipping's counsel disclosed that fact and put BCL on notice that the price fixing charges also included Dip Shipping.

The evidence shows that BCL had discussions with both the DOJ attorneys and with Dip Shipping's counsel in the criminal proceeding. Because Dip Shipping's request for discovery from DOJ and BCL is denied, the record contains only limited information about these conversations. However, DOJ states that the "criminal fine amount and payment plan were premised on the parties' efforts to ensure that the criminal case would not put Dip Shipping out of business." DOJ *Amicus Curiae* Letter Brief at 2.

> To ensure that Dip Shipping is able to pay its criminal fine in full, Antitrust Division staff contacted FMC officials in the course of their investigation to inquire about licensure issues. To date, Dip Shipping has paid only one of the six payments required by its criminal judgment. Should the company cease to operate as a result of losing its ocean transportation intermediary license, the Antitrust Division anticipates that Dip Shipping will be unable to pay the fine imposed by the District Court.

DOJ *Amicus Curiae* Letter Brief at 2. DOJ's contact with the Commission regarding whether Dip Shipping could keep its license and pay a criminal fine was only necessary if DOJ intended to charge and fine Dip Shipping.

Moreover, BCL had seen Roberto Dip's plea agreement, which has the same factual basis as Dip Shipping's plea agreement except that:

- in the plea agreement with Roberto Dip, he is listed as the "Chief Executive Officer of Company A," he "was an organizer or leader in the conspiracy, which involved at least five participants," and acts were carried out "within the Eastern District of Louisiana," BOE Ex. 14, FMC240-242, and

- in the plea agreement with Dip Shipping, it is identified as "a corporation organized and existing under the laws of Louisiana," it "employed ten or more employees," and acted "through its officers and employees," BOE Ex. 13, FMC212-216.

Therefore, BCL should have been aware of the criminal allegations against Dip Shipping even if BCL may not have been aware of the final determination regarding the amount and payment plan for Dip Shipping's criminal fine.

Clearly, there was a misunderstanding. The attorneys for DOJ and Dip Shipping were well aware that Dip Shipping was being criminally charged, as well as Roberto Dip, but this information was not understood by BCL. The responsibility for this misunderstanding should not fall exclusively on the least sophisticated entity involved. Indeed, Margie Dip and Dip Shipping sought legal advice regarding their obligations to the FMC and followed that advice, which was provided with the knowledge that the DOJ attorneys were in contact with the FMC attorneys. Declaration of Joel Denaro ¶¶ 18-20, attached to Dip Shipping Response at 29. It was reasonable for Margie Dip, Dip Shipping, and their counsel to assume that BCL had asked any questions pertinent to the DOJ antitrust investigation and anticipated sentencing of Dip Shipping prior to granting Margie Dip the license to act as replacement QI.

In *Washington Movers*, the Commission stated "Washington Movers' failure to notify the Commission of [the QI's] conviction would not likely, taken alone, warrant revocation. By the time of his conviction, the Commission was well aware of [the QI's] legal troubles." *Washington Movers*, 1 F.M.C. 2d at 21. Here, as well, by the time of the plea agreement with Dip Shipping, the Commission was well aware of the criminal activity of both Roberto Dip and Dip Shipping from 2010-2015.

In his affidavit, Clifford Johnson states that "[a]t no time on or after September 17, 2019, did Dip Shipping notify the Commission that the company was charged with a felony," that the "company pleaded guilty to a felony," or that judgement was entered imposing a criminal monetary penalty. Verified Statement of Clifford Johnson ¶¶ 21-23. However, as noted above, BOE received an email dated April 2, 2019, and had conversations with relevant attorneys on January 29, 2019, February 26, 2019, and April 19, 2019. It is not clear why Dip Shipping would be required to advise BCL of the charges after the date of the DOJ press release if BCL was aware of the criminal activity prior to that date.

The cited regulation requires that changes in material fact be disclosed in writing to BCL by email or by mail, not that changes be disclosed by a specific person within the company. *See* 46 C.F.R. § 515.20(e). The April 2, 2019, email by Dip Shipping's counsel satisfies the disclosure requirement. BCL was in communication with DOJ and Respondent's criminal attorney and could have inquired further regarding any anticipated plea agreements or fine. Because additional discovery is denied, the record contains very limited information about these conversations. The evidence does not support the allegations that Dip Shipping failed to notify the Commission of the DOJ's criminal investigation and prosecution of Dip Shipping. Accordingly, BOE has not met its burden to show that Dip Shipping failed to notify the Commission as required by sections 515.12(e) and 515.20(e).

2. Character of the QI

Dip Shipping notes that BCL investigated Margie Dip in 2019, prior to approving her as QI, well after the illegal activities by Dip Shipping, which occurred from 2010 to 2015. The FMC's approval of Margie Dip as the new QI of Dip Shipping did not occur until September 3, 2019. Dip Shipping Response at 1. Dip Shipping argues that therefore, the illegal activities of Roberto Dip and Dip Shipping under his ownership "should in no way be connected to the activities of Dip Shipping Company LLC under the new ownership and management." Dip Shipping Response at 1.

BOE, on the other hand, argues that there is "longstanding Commission precedent supporting denial or revocation of a license where the entity has been found guilty of federal crimes" and notes that Dip Shipping's plea agreement with the DOJ grants immunity from prosecution to Margie Dip and Maria D. Dip for Dip Shipping's price fixing conspiracy. BOE Reply at 8-9. BOE argues that if Margie Dip had not been involved in the illegal conduct by Roberto Dip and Dip Shipping, there would have been no need to immunize her from criminal prosecution." BOE Reply at 11-12. BOE does not specifically request a finding as to whether Margie Dip's character is sufficient to meet the Commission's requirements of a QI.

Section 515.11 states that a QI must have at least three years' experience in OTI activities in the United States "and the necessary character to render ocean transportation intermediary services." 46 C.F.R. § 515.11(a)(1). "In addition to information provided by the applicant and its references, the Commission may consider all information relevant to determining whether an applicant has the necessary character to render ocean transportation intermediary services . . . ." 46 C.F.R. § 515.11(a)(2).

As Dip Shipping correctly notes, BCL investigated Margie Dip prior to approving her as QI. Dip Shipping Response at 1. The materials submitted by Margie Dip in her application to replace Roberto Dip as QI for Dip Shipping provide the following information:

- Margie Dip has been involved with Dip Shipping since 2003 and has served as a manager, vice president, and part owner. BOE Ex. 2, FMC125; BOE Ex. 4, FMC133-134.

- Prior to Roberto Dip's transfer of 40% ownership interest in Dip Shipping to Margie Dip on August 12, 2019, Margie Dip held 10% ownership interest in Dip Shipping. BOE Ex. 6, FMC191.

- As part of the duties she performed for Dip Shipping from 2005 to 2017, Margie Dip reported directly to Roberto Dip and "[c]oordinated logistics and documentation for containers shipped from the USA to Honduras and other Central American countries, and from Honduras to the USA. Issued masters for bills of lading, prepared loading manifests, completed Shipper's Export Declarations (SEDs), prepared vehicle export forms for Customs, made bookings, provided customer service, financing and administration, hazmat certified, submitted IMOs to the vessel lines for validation." BOE Ex. 6, FMC142.

In addition, the evidence of record provides the following information:

- The illegal acts connected to the DOJ charges and guilty pleas by Roberto Dip and Dip Shipping occurred from at least September 2010 until at least March 2015. BOE Ex. 9, FMC198-199.

- As part of the plea agreement Margie Dip entered into on October 25, 2019, with the DOJ on behalf of Dip Shipping, the DOJ agreed that it would "not bring criminal charges against any current director, officer, or employees of the defendant for any act or offense

> committed before the date of signature of this Plea Agreement and while that person was acting as a director, officer, or employee of the defendant that was undertaken in furtherance of an antitrust conspiracy in the United States and elsewhere [except for Robert Dip and Jason Handal]." BOE Ex. 12, FMC225.

The record contradicts Dip Shipping's contention that the illegal activities by Roberto Dip and Dip Shipping under Roberto Dip's ownership "should in no way be connected to the activities of Dip Shipping Company LLC under the new ownership and management." Dip Shipping Response at 1. The record shows that Margie Dip has served as a manager, vice president, and part owner of Dip Shipping. The record does not indicate, however, when Margie Dip became a part owner, vice president, or officer of Dip Shipping. Compare FMC191 with FMC125. In addition, the evidence does not indicate whether or not Margie Dip was aware of or involved in the price fixing conspiracy.

The plea agreement between DOJ and Dip Shipping immunizes Margie Dip from criminal charges by DOJ. BOE Ex. 12, FMC225. BOE's argument that this immunization is evidence of guilt is not supported by any evidence and appears to be conjecture. Margie Dip's culpability would have been an appropriate area of inquiry, however, in the Commission's conversations with the DOJ prior to approving her as QI of Dip Shipping.

DOJ has an explicit policy of seeking jail time for officers at corporations engaged in illegal conduct in addition to fines imposed against corporations. DOJ also has policies guiding when they reserve the right to prosecute a corporate officer. "A decision about who to prosecute or whether to reserve the right to prosecute a corporate official always involves a careful, individualized assessment of one's culpability based on evidence." Brent Snyder, *Individual Accountability for Antitrust Crimes*, at 14 (2016), www.justice.gov/opa/file/826721/download. Here, Margie Dip was a manager, and possibly an officer and/or owner, of Dip Shipping during the illegal activity. DOJ's decision not to charge her but rather to provide her with immunity does not support BOE's argument that she was aware of or involved in Roberto Dip's illegal activity. Of course, DOJ's burden of proof to establish a criminal antitrust violation is higher than the Commission's burden of proof to revoke a license. In addition, different legal issues are involved in establishing an antitrust conspiracy as opposed to character under the Shipping Act.

The evidence of record is not sufficient to determine whether or not Margie Dip has the "necessary character to render ocean transportation intermediary services" required at 46 C.F.R. § 515.11 for a QI. Ideally, more information would be available before finding that being a manager at a company where illegal activity occurs disqualifies someone from having sufficient character to act as a QI. The Commission's staff investigated and approved Margie Dip as QI for Dip Shipping with knowledge of the factual allegations supporting the plea agreement with Roberto Dip and may have relied on information not in the record to make that determination. Subpart X proceedings are designed to ensure "a low-burden and efficient process." Hearing Procedures, 85 Fed. Reg. at 5581. Therefore, to avoid delay, additional information will not be ordered because a determination of this issue is not explicitly requested and is not necessary for the adjudication of whether Dip Shipping's license should be revoked.

3. DIP Shipping is Not Qualified to Render Ocean Transportation Intermediary Services

BOE argues that longstanding Commission precedence supports denial or revocation of a license when the licensee has been found guilty of federal crimes or conduct implicating moral turpitude. BOE Reply at 8. However, Dip Shipping dismisses the conclusion that it is no longer qualified to render OTI services as "self-serving, vague, and not supported by the submissions of the Bureau of Enforcement, or other cases in which licensees have maintained their licenses after a Federal guilty plea to a felony." Dip Shipping Response at 1.

Dip Shipping argues that because the illegal activities by Dip Shipping occurred from 2010 to 2015, whereas the FMC's approval of Margie Dip as the new QI of Dip Shipping did not occur until September 3, 2019, the illegal activities of Roberto Dip and Dip Shipping under his ownership "should in no way be connected to the activities of Dip Shipping Company LLC under the new ownership and management." Dip Shipping Response at 1. Dip Shipping contends that a revocation based on acts five years prior to the current ownership and management of the company "is not supported by any legal precedent cited by the Bureau of Enforcement." Dip Shipping Response at 1.

Section 515.16(a)(4) provides that an OTI license may be revoked based on a Commission determination that the licensee is not qualified to render intermediary services. It is undisputed that Dip Shipping committed a felony by engaging in a conspiracy to fix prices for ocean intermediary transportation services, and that a criminal fine was imposed against it for the felony. BOE Ex. 12, FMC212-231; BOE Ex. 13, FMC233-236.

In *Washington Movers*, the Commission found that the character of the OTI's owner and QI, who had committed crimes involving smuggling and attempted unlawful export of defense articles, was imputable to the OTI and related to OTI services, thus the OTI's conduct rendered the OTI unqualified to render OTI services under Commission precedent. *Washington Movers*, 1 F.M.C. 2d at 18 (citing *Falcon Shipping Inc. – Application for a License as an Ocean Transportation Intermediary*, 32 S.R.R. 382, 384 (FMC 2012) (the Commission found that it was appropriate to deny the OTI's application for lack of requisite character because, among other things, the owner violated the Shipping Act and was involved in an illegal scheme and deceptive practice); *Stallion Cargo, Inc. – Possible Violations of the Shipping Act of 1984*, 29 S.R.R. 665, 683-684 (FMC 2001) (the Commission found that the licensee lacked necessary character due to Shipping Act violations); *Independent Freight Forwarder License E.L. Mobley, Inc.*, 21 F.M.C. 845, 847 (FMC 1979) (the Commission found that forgery reflected on fitness); *Independent Ocean Freight Forwarder Application Lesco Packing Co.*, 19 F.M.C. 132, 137 (FMC 1976); and *Harry Kaufman – Independent Ocean Freight Forwarder License No. 35*, 16 F.M.C. 263, 271, 276-277 (Examiner 1972)). Here, Dip Shipping was specifically charged with a felony and agreed to pay a fine in the plea agreement, therefore, it is even more clear that the OTI is responsible for the illegal conduct.

The case law demonstrates that there is an adequate basis to conclude that due to Dip Shipping's guilty plea to the charge of price fixing in violation of the Sherman Antitrust Act, and subsequent plea agreement, Dip Shipping lacks the necessary character to render ocean transportation intermediary services and thus that Dip Shipping is not qualified to render

intermediary services. Moreover, "a licensed OTI is 'strictly responsible' for the acts or omissions of any of its employees or agents rendered in connection with the conduct of its business" so that Dip Shipping is responsible for the criminal acts of Roberto Dip and Jason Handal. *Washington Movers*, 1 F.M.C. 2d at 13 n.12. Even if Margie Dip was not aware of or involved in Dip Shipping's criminal activity, like the replacement owner and QI of *Washington Movers*, who was not implicated in the criminal conduct, Dip Shipping's license can still be revoked.

In mitigation, Roberto Dip and Dip Shipping cooperated with the DOJ investigation and provided valuable information. This type of cooperation benefits the shipping industry and is a mitigating factor. In addition, the DOJ's concern that Dip Shipping may not be able to pay the remainder of its monetary penalty should its license be revoked is well taken. However, the Commission has revoked the licenses of other companies convicted of felonies, even where there are mitigating factors. *See, e.g.*, *Washington Movers*, 1 F.M.C. 2d at 12. Although the Commission could choose to impose a lesser sanction such as a civil penalty, warning, or temporary suspension of the license, there is sufficient evidence to support the notice to revoke the license. Accordingly, the evidence supports a revocation of Dip Shipping's ocean transportation license.

D. Conclusion

Based on the foregoing, it is found that the evidence does not support a finding that Dip Shipping violated the Commission's regulations at 46 C.F.R. §§ 515.12(e) and 515.20(e) regarding notice of material changes. However, the evidence supports the revocation of Dip Shipping's ocean transportation license number 018752 based on Dip Shipping's conviction of conspiracy to fix ocean transportation intermediary prices in violation of the Sherman Antitrust Act, and that Dip Shipping is not qualified to render intermediary services.

IV. ORDER

Upon consideration of the evidence and arguments submitted by the parties, the findings of fact and conclusions of law, and for the reasons stated above, it is hereby

ORDERED that the Department of Justice, Antitrust Division's motion seeking leave to file an *amicus curiae* submission be **GRANTED**. It is

FURTHER ORDERED that Dip Shipping's request for discovery and an oral hearing be **DENIED**. It is

FURTHER ORDERED that Dip Shipping Company, LLC's ocean transportation license number 018752 be **REVOKED** pursuant to 46 C.F.R. § 515.16(a)(4) and 46 U.S.C. § 40903(a)(4). It is

FURTHER ORDERED that Dip Shipping Company, LLC cease and desist all ocean transportation intermediary activities.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

MAC INDUSTRIES, INC. D/B/A MAC CONTAINER LINE,
Complainant

v.

COSCO SHIPPING LINES CO., LTD., *Respondent*.

DOCKET NO. 20-09

Served: July 29, 2020

BEFORE: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION APPROVING CONFIDENTIAL SETTLEMENT AGREEMENT[1]

[Notice Not to Review served 8/31/2020, decision administratively final.]

On June 5, 2020, Complainant MAC Industries, Inc. d/b/a MAC Container Line ("MAC Industries") filed a complaint alleging violations of the Shipping Act including that Respondent COSCO SHIPPING Lines Co., Ltd. ("COSCO") violated 46 U.S.C. § 41104(3) by denying MAC Industries access to shipping rates normally available to volume shippers. The complaint states that volume "VIP Partner" rates were denied as retaliation for a prior complaint by MAC Industries regarding other rate-setting policies.

On July 6, 2020, Respondent filed a motion seeking a one-week extension of time to respond to the complaint, asserting that the parties were engaged in good faith negotiations to resolve the dispute. On July 7, 2020, an order was issued granting an extension to July 13, 2020, for COSCO to respond to the complaint.

On July 10, 2020, MAC Industries and COSCO filed a joint petition for approval of settlement ("motion") and attached a copy of the confidential settlement agreement. On July 16, 2020, the parties submitted a confidential settlement agreement attachment, which had been inadvertently omitted. The parties jointly move for approval of the settlement agreement, voluntary dismissal of the proceeding with prejudice, and confidentiality for the settlement agreement.

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227.

Using language borrowed in part from the Administrative Procedure Act,[2] Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A American Jurisprudence, 2d Ed., 777-778 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided

[2] "The agency shall give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c).

that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp*., 30 S.R.R. 310, 311 (ALJ 2004)).

The parties state:

> In the instant case, the settlement is the result of arm's-length negotiations between two sophisticated entities, both of whom have been represented by counsel during the negotiation process. The proposed agreement does not contravene any law or public policy, nor is it unjust or discriminatory in any way. Additionally, this agreement will not result in any adverse effects to any third parties or on the shipping public. The proposed settlement is fair and reasonable, and reflects the Parties' desire to resolve their issues without the need for costly and uncertain litigation.

Motion at 2-3.

Based on the representations in the motion and other documents filed in this matter, the parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The parties are represented by counsel and have engaged in settlement discussions. The proceeding was filed recently and would require potentially expensive additional discovery and briefing. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. There is no evidence of fraud, duress, undue influence, mistake, or harm to the public. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991).

The full text of the settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

Upon consideration of the motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the petition to approve the settlement agreement between MAC Industries, Inc. and COSCO SHIPPING Lines Co., Ltd. be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

EARLEAN EDWARDS DUKART, *Complainant*

v.

OCEAN STAR INTERNATIONAL INC., D/B/A INTERNATIONAL VAN LINES, *Respondent*.

DOCKET NO. 20-03

Served: August 11, 2020

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's July 10, 2020, Initial Decision Granting Voluntary Dismissal has expired. Accordingly, the decision has become administratively final.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

DIP SHIPPING COMPANY, LLC., *REVOCATION OF OCEAN TRANSPORTATION INTERMEDIARY LICENSE NO. 018752*

DOCKET NO. 20-04

Served: August 31, 2020

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's July 29, 2020, Initial Decision Revoking Ocean Transportation License has expired. Accordingly, the decision has become administratively final.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

MAC INDUSTRIES, INC. D/B/A MAC CONTAINER LINE,
Complainant

v.

COSCO SHIPPING LINES CO., LTD., *Respondent*.

DOCKET NO. 20-09

Served: August 31, 2020

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's July 29, 2020, Initial Decision Approving Confidential Settlement Agreement has expired. Accordingly, the decision has become administratively final.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

HANGZHOU QIANWANG DRESS CO., LTD., *Complainant,* v. RDD FREIGHT INTERNATIONAL INC., *Respondent.*	**Docket No. 17-02**

Served: September 1, 2020

BY THE COMMISSION: Michael A. KHOURI, *Chairman*, Rebecca F. DYE, Louis E. SOLA, and Carl W. BENTZEL, *Commissioners*; Daniel B. MAFFEI, *Commissioner*, dissenting.

ORDER AFFIRMING INITIAL DECISION ON REMAND

On November 7, 2019, the Administrative Law Judge (ALJ) issued an Initial Decision on Remand (I.D.R.) dismissing Complainant's complaint, dismissing Respondent's counterclaim, and discontinuing this proceeding. The Commission determined to review this decision, and, for the reasons set forth below, affirms the Initial Decision on Remand.

I. BACKGROUND

A. Factual Background

This case involves a dispute between a garment manufacturer, an ocean transportation intermediary, and a consignee. Complainant Hangzhou Qianwang Dress Co. Ltd. manufactures apparel, such as hats and gloves, and sells it to retailers in the United States. I.D.R. at 8. In May 2016, Complainant entered into an agreement with Respondent RDD Freight International, Inc., under which Respondent would transport Complainant's apparel from China to New York. Complainant's Prop. Finding of Fact (CFF) at 2; I.D.R. at 8. Respondent is a non-vessel-operating common carrier (NVOCC) and ocean freight forwarder licensed by the Commission.

I.D.R. at 8. For the three shipments at issue in this case, the purchaser of the apparel and consignee of the shipments was SWAK Kids, Inc. I.D.R. at 8; CFF at 3.[1]

As to the first shipment, the invoice is dated August 22, 2016, the bill of lading is dated August 25, 2016, and the value of the apparel is listed as $57,273. I.D.R. at 8, 9. As to the second shipment, the invoice is dated August 28, 2016, the bill of lading is dated August 31, 2016, and the value of the apparel is listed as $54,137. *Id.* at 9.[2] As to the third shipment, the invoice is dated February 13, 2016, the bill of lading is dated September 15, 2016, and the value of the apparel is listed as $22,797. *Id.*

It appears that the shipments arrived in New York in September and October 2016. Complainant's Remand Br. at 1 (noting that three containers "were released three separate times in the month of September and October 2016"). Respondent released the shipments to SWAK Kids without receiving the original bills of lading or permission from Complainant. I.D.R. at 9; CFF at 3; Resp. Prop. Finding of Fact (RFF) at 1-2. At the time of release, SWAK Kids had not yet paid Complainant for the apparel, and Complainant would not have authorized release of the apparel until SWAK Kids paid for it. CFF at 3.

According to Respondent, it mistakenly released the shipments due to assurances from SWAK Kids that it had contacted Complainant, with whom it had a long relationship. Respondent also claimed that SWAK Kids urged Respondent to release the shipments to avoid incurring demurrage:

> Above Cargo was released because Victor of S.W.A.K. Indicated he had spoken with Shipper regarding payment. Victor also mentioned that he had taken care of payment with shipper and has known them for over 15 years and tricked me into thinking and believed that he was trust worthy base on previous shipment never missed payment to us, and he confirmed it will be no problem in releasing cargo. I also threatened force over the phone from him by shouted and yelled to get his cargo released from terminal so they wouldn't have to pay approximately $450 per day in demurrage charges. I released a container on three different occasions based on above. Victor created the problem with his words, and lies that he did contacted and clear with shipper. When I mentioned victor over the phone to clear with his shipper he shout back to me that (this is not your problem just released the cargo because I sent you money already) that's the reason why I released cargo to him. And later I found out he did not get the telex released because he failed to make the payment to shipper.

I.D.R. at 10-11 (quoting Respondent's Appendix. at 16); *see also* RFF at 1-2 (asserting that Respondent was defrauded and misled by SWAK Kids into releasing the shipments).

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[1] According to Complainant, there were several intermediaries between it and the consignee: Complainant – Zhejiang Handsome International Logistics Co. – Eumex Line Ningbo Limited – Respondent – SWAK Kids, Inc. Complainant's Appendix at 21. Due to the nature of the claims, this order focuses on the relationships between Complainant, Respondent, and SWAK Kids.

[2] The ALJ noted that an email listed the value of this apparel as $53,338. I.D.R. at 9.

After learning that the containers should not have been released, Respondent attempted to work with SWAK Kids to ensure that it paid Complainant for the apparel. I.D.R. at 10. Respondent invited Complainant to file a lawsuit against it, with the understanding that Respondent would then hale SWAK Kids into court and make it pay. *Id.* ("We told him we did not mind to let him file the law suit against us and then we can put the consignee into the court as the defendant as well . . .") (quoting Complainant's Appendix at 18). SWAK Kids eventually paid $10,000 for the apparel in the three shipments, leaving an outstanding balance of $123,408. *Id.* at 11.

B. Procedural History

On February 17, 2017, Complainant filed a complaint alleging that Respondent violated 46 U.S.C. § 41102(c). Complainant alleged that it sustained damages of $134,207.70, and it also sought a cease-and-desist order. Respondent denied the allegations and counterclaimed, alleging that Complainant conspired with SWAK Kids to defraud Respondent by failing to alert Respondent to the problems with SWAK Kids and by failing to pursue or collect monies for the apparel from SWAK Kids. Ans. ¶¶ 12-13.

On August 29, 2018, the ALJ issued an Initial Decision finding that Respondent violated § 41102(c) by releasing cargo without a bill of lading or Complainant's permission. *Hangzhou Qianwang Dress Co., Ltd. v. RDD Freight International Inc.*, 1 F.M.C.2d 158, 173 (ALJ 2018). The ALJ rejected Respondent's counterclaim and its argument that Complainant had waived its claims via a settlement agreement. *Id.* at 169-170, 171-72.[3] The ALJ awarded Complainant reparations of $61,704 and ordered Respondent to cease and desist from releasing cargo without presentation of an original bill of lading. *Id.* at 173.

The Commission determined to review the decision, and, on March 7, 2019, the Commission vacated the Initial Decision and remanded the case for consideration in light of the Commission's revised interpretation of 46 U.S.C. § 41102(c). *Hangzhou Qianwang Dress Co. v. RDD Freight Int'l, Inc.*, 1 F.M.C.2d 262, 263 (FMC 2019). The ALJ subsequently ordered the parties to state whether additional discovery would be required, but neither party requested such discovery.[4] On November 7, 2019, the ALJ issued the Initial Decision on Remand and dismissed

[3] While the Commission case was proceeding, Complainant and intermediary Zhejiang Handsome International Logistics Co. Ltd. filed lawsuits against each other in Ningbo Maritime Court in China. Complainant's claims there, like its Shipping Act claims, resulted from Respondent's release of shipments without the original bills of lading. *See* CFF at 3; Respondent's Appendix Ex. 7; Complainant's Appendix at 22. The cases settled in May 2018 via a settlement agreement that listed Complainant, Respondent, and Zhejiang as parties. I.D.R. at 11; Respondent's Appendix Ex. 7. Because Complainant has not established a § 41102(c) violation, the Commission need not address whether Complainant's claims are barred by the settlement agreement.

[4] The Commission's rules allow parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense" using tools such as depositions, interrogatories, document requests, and requests for admission. 46 C.F.R. §§ 502.141(e), 502.143, 502.145, 502.146, 502.147. A party may use subpoenas to obtain evidence from nonparties. 46 C.F.R. § 502.131.

the complaint and counterclaim. No exceptions were filed, and the Commission determined to review the decision.

II. DISCUSSION

In the Initial Decision on Remand, the ALJ found that Complainant failed to establish that Respondent's conduct occurred on a normal, customary, and continuous basis for purposes of 46 U.S.C. § 41102(c) and 46 C.F.R. § 545.4. The ALJ also found that Respondent's counterclaim did not make out a Shipping Act violation. The Commission agrees.

A. Standard of Review and Burden of Proof

Under 46 C.F.R § 502.227(a)(6), the Commission has the same powers on review of an initial decision that it would have in making the initial decision. The Commission thus reviews the Initial Decision on Remand *de novo*.[5] The Complainant has the burden of proof on its claims. 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); 46 C.F.R § 502.203; *Exclusive Tug Franchises – Marine Terminal Operators Serving the Lower Mississippi River*, 29 S.R.R. 718, 719 (ALJ 2001) ("The Commission's rule, consistent with the Administrative Procedure Act (APA), provides quite clearly that 'the burden of proof shall be on the proponent of the rule or order.'") (citation omitted). Respondent bears the burden of establishing its counterclaim. *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 33 S.R.R. 821, 855 (FMC 2014).

B. Complainant's § 41102(c) Claim

Section 41102(c) of Title 46 provides that "[a] common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." To establish a claim for reparations under § 41102(c), a complainant must prove that:

(a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;

(b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;

(c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;

(d) The practice or regulation is unjust or unreasonable; and

(e) The practice or regulation is the proximate cause of the claimed loss.

[5] The ALJ made 26 findings of fact in the I.D.R. These facts are supported by the record, and the Commission adopts them.

46 C.F.R. § 545.4; *see also* Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478 (Dec. 17, 2018); Notice of Proposed Rulemaking: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 45367 (Sept. 7, 2018).

The focus of the inquiry on remand was whether Respondent's conduct occurred on a normal, customary, and continuous basis. *Hangzhou*, 1 F.M.C.2d at 262. Complainant contended that releasing three shipments that were transported on three different vessels on three separate occasions without the original bills of lading or its permission was sufficient to satisfy the normal, customary, and continuous element. Complainant's Remand Br. at 1 ("The fact that they released three of our shipments on different dates from different vessels without our knowledge should speak for itself."); *see also id.* ("They were not released together as a group which would indicate 1 action. They were released separately, 3 separate times.").

The ALJ on remand was not persuaded. I.D.R. at 14-15.[6] The ALJ reasoned that:

> As the entity who filed this complaint, Hangzhou Qianwang has the burden to establish that the unjust and unreasonable acts in question occurred on a normal, customary, and continuous basis and thus was a "regulation or practice" by RDD Freight. However, the record does not support a finding that RDD "releases freight without original bills of ladings on a regular basis," as alleged by Hangzhou Qianwang. The evidence shows that Hangzhou Qianwang entered into a contract with RDD Freight calling for RDD Freight to transport cargo to an identified consignee in three separate shipments and that RDD Freight unjustly and unreasonably delivered the cargo to that consignee without obtaining the original bills of lading for the cargo or Hangzhou Qianwang's permission to do so. As such, the evidence solely demonstrates unjust and unreasonable actions by RDD Freight with regard to the delivery of the cargo in these three shipments, not unjust and unreasonable acts on other occasions involving different transportation agreements, shippers, or consignees. Thus, the evidence of unjust and unreasonable acts by RDD does not rise to a level constituting a "regulation and practice" as described by the Commission.

Id.

The ALJ also pointed out that Complainant's speculation that Respondent might have acted similarly regarding "other clients past and present" was insufficient to prove normal, customary, and continuous conduct. *Id.* The ALJ noted that there was "no evidence of other instances in which cargo was released without the original bill of lading or consent of the shipper." *Id*. Similarly, the ALJ found, there was "no evidence that the practice continued once RDD Freight was alerted to the problem." *Id.* The ALJ ultimately concluded that Complainant had "not established that there was a practice as opposed to an incident limited to these particular shipments between this shipper and this consignee." *Id.*

[6] Although the ALJ determined that Complainant had not established "normal, customary, and continuous" conduct, the ALJ found that Complainant had proved the other four elements of a § 41102(c) claim for reparations. I.D.R. at 13-17. The Commission affirms the findings on these elements.

The ALJ correctly found that the conduct here did not satisfy the "normal, customary, and continuous" element of § 41102(c). Complainant demonstrated that over the course of two months, Respondent released three of Complainant's shipments to the same consignee without obtaining the original bill of lading or Complainant's consent. The conduct occurred over two months (September and October 2016), with respect to three shipments, under one contract, and involved one shipper and one consignee.

The evidence does not establish that it was "normal" for Respondent to release cargo without the original bill of lading or Complainant's consent. Rather, Respondent's employee was induced into releasing the shipments by an employee of SWAK Kids. I.D.R. at 10. Although there is no intent requirement for § 41102(c), *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261, 281 (1968) ("[T]he question of reasonableness under § 17 does not depend upon unlawful or discriminatory intent."), that Respondent was apparently misled is relevant to whether its conduct was "normal."

Additionally, releasing three shipments of one shipper to one consignee over two months does not appear to be "customary" or "continuous" conduct, at least as those words are typically understood. Nor is there evidence that Respondent's conduct was "often repeated," "systematic," "uniform," and "habitual." *See* Final Rule, 83 Fed. Reg. at 64479. The absence of evidence that Respondent unreasonably released the shipments of other shippers is also significant. *See* 83 Fed. Reg. at 64479 (noting that the Commission's interpretation of § 41102(c) in the Final Rule "returns the Commission's focus and priorities to the activities of maritime regulated entities that negatively affect the broader shipping public"); *Whitam v. Chicago, R.I. & P.R. Co.*, 66 F. Supp. 1014, 1017 (N.D. Tex. 1946) (finding significant, in interpreting the term "practice," that plaintiff alleged "an individual matter between himself and the defendants");[7] *see also id.* ("As far as plaintiff's pleadings go, no other shipper was mentioned or involved.").[8]

Commission precedent also indicates that the conduct here falls short of violating § 41102(c). In interpreting § 41102(c), the Commission looks to several pre-2010 cases for guidance. 83 Fed. Reg. at 64478-79; 83 Fed. Reg. at 45370 ("In the future, the Commission intends to follow the reasoning in *Intercoastal Investigation*, *Altieri*, *Stockton Elevators*, *European Trade Specialists*, *Deringer*, and *Kamara* which offer precedent as to what properly applies the full meaning and purpose of 'establish, observe, and enforce just and reasonable regulations and practices' under the Shipping Act and a violation of § 41102(c).").

Investigation of Certain Practices of Stockton Elevators, 8 F.M.C. 187 (Examiner 1964) aff'd 8 F.M.C. 181 (FMC 1964) ("*Stockton Elevators*"), is particularly relevant. In that case, Stockton Elevators, a grain elevator that operated terminal facilities, in one instance charged a customer wharfage at less than the tariff rate. 8 F.M.C. at 193. Additionally, with respect to five shipments in the spring and fall of 1961, Stockton Elevators charged the same customer the wharfage as set forth in the tariff but subsequently paid the customer an "allowance," effectively

[7] The Commission cited *Whitam* with approval in the interpretive rule on § 41102(c). 83 Fed. Reg. 64479 n. 10.

[8] The *Whitam* court also noted that the plaintiff did not allege a "practice" even between himself and the defendants. 66 F. Supp. at 1017.

defraying the wharfage. *Id.* at 194-196. This conduct occurred in several months in the spring and fall of 1961, and all the shipments were transported in different voyages. *Id.* at 202.

The Commission not only found that this conduct was not unjust or unreasonable, but it also held that Stockton Elevators had not engaged in a "practice" within the meaning of section 17 of the Shipping Act of 1916, the predecessor of § 41102(c).[9] *Id.* at 200-01 ("The essence of a practice is uniformity. It is something habitually performed and it implies continuity . . . the usual course of conduct."). Rather, these six total instances amounted, in the Commission's view, to an "occasional transaction." *Id.* at 201.

Given that six instances of alleged unreasonable conduct occurring over several months was not uniform or continuous enough to make out a violation in *Stockton Elevators*, it follows that Respondent's conduct, which occurred less frequently and within a shorter time frame, does not either. As the ALJ noted, there is no evidence that Respondent released the containers of other shippers without original bills of lading. And there is no evidence that Respondent continued this conduct once Complainant alerted it to the problem. I.D.R. at 15. Consequently, Complaint has not established that Respondent violated 46 U.S.C. § 41102(c).

As the ALJ noted, 46 C.F.R. § 545.4 describes the elements required to prove "a successful case for reparations" under § 41102(c), but it is silent regarding cease-and-desist relief. I.D.R. at 18. To clarify, regardless of the relief sought, for a regulated entity to have violated § 41102(c), it must have engaged in unjust or unreasonable conduct related to or connected with receiving, handling, storing, or delivering property on a normal, customary, and continuous basis. 83 Fed. Reg. at 64478. In other words, a complainant must establish elements (a)-(d) of 46 C.F.R. § 545.4 to prove a § 41102(c) violation. To obtain reparations, a complainant must also prove that the practice or regulation is the proximate cause of the claimed loss. 46 C.F.R. § 545.4(e). Because Complainant failed to establish the "normal, customary, and continuous" element, it has not proved a violation and thus is not entitled to a cease-and-desist order or reparations.[10]

C. Respondent's Counterclaim

In its counterclaim, Respondent alleged that "Complainant has conspired with its counterparts in a scheme to defraud the Respondent out of monies bonded with the FMC." Answer ¶ 12; Respondent's Br. at 2 ("RDD has counterclaimed that the Complainant had conspired with the said consignee to make RDD pay out of its surety bonds."). As evidence of "collusion," Respondent noted that "Complainant never tried to collect the said sum of money from the Consignee SWAK Kids, nor to even contact them to collect the same." Respondent's Br. at 2. The ALJ dismissed the counterclaim in both the Initial Decision and the Initial Decision on Remand. *Hangzhou*, 1 F.M.C.2d at 169-170; I.D.R. at 18-20.

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[9] Section 41102(c) derives from the second paragraph of section 17 of the Shipping Act of 1916. *See* 83 Fed Reg. at 45368.

[10] Further, there is no evidence that Respondent is continuing to release cargo without obtaining the original bill of lading, making a cease-and-desist order inappropriate. *See* I.D.R. at 18; *In re Vehicle Carrier Servs.*, 1 F.M.C.2d 440, 466 (FMC 2019) (noting that cease-and-desist relief typically requires a showing that unlawful conduct is ongoing or likely to resume).

The ALJ did not err in dismissing the counterclaim. Under 46 C.F.R. § 502.62(b)(4), a counterclaim "must allege and be limited to violations of the Shipping Act." *Cf. Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, Docket No. 09-01, 2011 FMC LEXIS 12, at *33-*34 (FMC Aug. 1, 2011) (holding that the Commission lacked authority to adjudicate crossclaims that did not allege violations of the Shipping Act). Respondent does not allege a Shipping Act violation. Fraud, collusion, and conspiracy claims that are not linked to the Act or a Commission regulation are not within the Commission's purview.

III. CONCLUSION

For the reasons set forth above, the Commission affirms the Initial Decision on Remand. **THEREFORE, IT IS ORDERED** that Complainant's complaint be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that Respondent's counterclaim be **DISMISSED WITH PREJUDICE**.

Finally, **IT IS FURTHER ORDERED** that this proceeding be **DISCONTINUED**.

By the Commission.

Rachel E. Dickon
Secretary

Commissioner MAFFEI, Dissenting:

I agree with the outcome of the Commission's majority opinion, but I follow a different reasoning to reach that outcome. The case should be dismissed with prejudice and discontinued, but not for a failure to state a claim under § 41102(c). The settlement agreement reached by the parties provides a more compelling reason to dismiss this case.

I. Settlement Agreement

During the pendency of this case, the Complainant initiated another case involving these shipments in China which was disposed of through a jointly negotiated settlement that purported to resolve all disputes between Complainant and Respondent over the shipments, but did not specifically mention the Federal Maritime Commission proceeding. By delegating its treatment of the settlement agreement reached by the parties to a footnote, the majority overlooks what should have been the determinative issue in this case.

The ALJ considered whether the settlement agreement should apply in this proceeding, barring the Complainant from continuing to pursue the case against the Respondent. In both the

Initial Decision, and the Initial Decision on Remand, she determined that because the agreement had not been reviewed and approved by the Commission, it was not applicable and did not resolve the case. However, in the Initial Decision, she offset the reparations award by the amount of the Chinese settlement, to avoid resulting in "double damages." 1 F.M.C.2d 158, 172 (ALJ 2018). If there was sufficient evidence to consider the award as a factor when calculating damages, it seems that it should be sufficient to consider it to resolve the case.

The situation is no different than if litigants in federal court settled their claims, included a general release in the settlement agreement, and filed the settlement agreement with the federal court such that the federal court retained jurisdiction to enforce the settlement agreement. In *Baltic Auto Shipping, Inc. v. Hitrinov*, Docket No. 14-15, 2015 FMC LEXIS 26 (ALJ Sept. 15, 2015), the Commission allowed such a settlement to be raised as a defense. There, the complainant filed a complaint in federal district court in New Jersey alleging violation of the Shipping Act and other causes of action. Id. at *4-*6, *9-*17. The case settled shortly thereafter. Id. at *17-*19. The settlement agreement contained a general release and provided that the federal court would retain jurisdiction over it. Id. at *68-*69. In a later Shipping Act proceeding, the ALJ found that by signing the settlement agreement, the complainant released or waived its claim for reparations under the Shipping Act. Id. at *110, *116-*118.

There appears no reason to treat settlement agreements that settle foreign disputes and are filed with a foreign court any differently than their federal court equivalent for purposes of determining whether a complainant has released or waived its claims via the settlement.

Typically, when parties settle, they move jointly to dismiss the Shipping Act proceeding before the Commission and submit their settlement agreement for approval; and in fact, the Commission's regulations require Commission approval when a complainant moves to dismiss a case based on a settlement agreement. 46 C.F.R. § 502.72(a)(3). The presiding officer considers "whether the settlement appears to violate any law or policy" and ensures it is "free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." *Id.*

The case law and regulations do not address what happens when the parties do not jointly seek dismissal of a case, but rather a respondent argues as a defense that a complainant has released its Shipping Act claims in a settlement that has not previously been submitted and approved by the Commission. Failure to submit a settlement for Commission approval does not necessarily render it invalid, unenforceable, or otherwise irrelevant as part of a release or waiver defense in Commission proceedings.

In cases where a respondent raises a release of claims as a defense, the appropriate approach is to first determine whether the settlement agreement or release applies to the complainant's Shipping Act claims. If it does not, the inquiry ends. If the settlement agreement or release covers Shipping Act claims, the Commission can then make the determination it would have made had the parties submitted the settlement under § 502.72: whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects. It is true that the latter task is made more difficult when one party argues the settlement is not applicable, but it is not impossible.

In this case, the evidence indicates that the settlement agreement is applicable to the claims brought in the present case, and that it does not violate any law or policy and appears to be free of fraud, duress, undue influence, mistake, or other defects. Accordingly, the Complainant has waived the Shipping Act claims raised in this case.

Failing to give effect to releases in settlement agreements when parties do not jointly submit the agreement for Commission review gives a complainant the incentive to settle, receive payment, and then renege on the agreement and continue pursuing Shipping Act claims. It is important that the Commission avoid this absurd result and make clear that settlement agreements can be raised as a defense in Commission proceedings. By delegating this issue to a footnote and not reaching the issue, the majority misses an important opportunity to clarify how the Commission will consider settlement agreements in this situation.

II. Interpretive Rule

Because the case can be resolved on the settlement agreement issue, the Commission should not reach the § 41102(c) issue. However, because the majority opinion centers on this issue, I must take this opportunity to address it.

My disagreement with the interpretive rule on unjust and unreasonable regulations and practices is well-documented (particularly in the concurrence I authored in *Gruenberg-Reisner v. Overseas Moving Specialists*, Docket No. 1947(I), 2017 FMC LEXIS 9 (FMC 2017). While I believe the Commission need not revisit the issue of the interpretation of § 41102(c) in this case, it does illustrate some of the practical concerns I have regarding the Commission's current interpretation.

Respondent released cargo without a proper bill of lading or Complainant's permission on three separate instances. These three separate instances could be evidence of unreasonable conduct that is occurring on a normal, customary, and continuous basis in violation of § 41102(c). However, that is not how the ALJ and the majority currently see it. This brings up several questions: If three separate instances are not enough then how many will be? Is there a requirement (not fulfilled by Complainant in this case) that there be more than one shipment? If so, how many shipments and over how long a duration of time? Is there a requirement that the unreasonable conduct affect more than one of the respondent's customers? Is demonstrating two aggrieved parties enough or is that still not sufficient to show unreasonable conduct is occurring on a normal, customary, and continuous basis? If not two, three?

The point is that, in short order, the burden on a complainant of proving that unreasonable conduct is occurring on "a normal, customary, and continuous basis," becomes excessive. As noted by Complainant, and those in other Commission cases, engaging in discovery to prove a respondent mistreated other parties in a similar way may not be feasible and is often cost- prohibitive. Complainant noted in their remand brief that they have no access to Respondent's books and records to assist in proving the normal, customary, and continuous nature of Respondent's behavior or even to assist in formulating lines of inquiry to pursue through discovery. Similarly, in the recently dismissed small claims case brought by M/S Parsons Overseas, the complainant sought a voluntary dismissal because the expense of

continuing to litigate the case in order to prove the unreasonable contact occurred on a normal, customary, and continuous basis was too onerous. *M/S Parsons Overseas v. Seven Seas Shipping USA, Inc.*, Docket No. 1960(I), Order Granting Voluntary Dismissal, slip op., at 2. (ALJ Feb. 26, 2020).

The interpretive rule indicates that the Commission's goal was to return its "focus and priorities to the activities of maritime regulated entities that negatively affect the broader shipping public." Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018). I concur with this goal but, at the same time, I am concerned that the normal, customary, and continuous standard, as applied in the majority opinion, creates a substantial deterrent for parties to ever bring a claim under § 41102(c).

While my disagreement with the interpretive rule is well-known, I have voted with the majority when the interpretive rule is applied to a case in order to ensure consistent handling of cases so long as the interpretive rule remains in effect. The challenge in this case, as stated above, is that the interpretive rule gives insufficient guidance as what circumstances constitute an action performed on a "normal, customary, and continuous basis." By determining this case on the basis of whether a claim was stated under § 41102(c), the majority declares that three instances is not enough to be "normal, customary, and continuous basis" but does nothing to clarify what would meet that standard or how a Complainant would ever move forward in discovery to obtain evidence of more instances if they did exist. In my view, this order does not merely apply the interpretive rule, it further narrows the definition of "normal, customary, and continuous basis" in a manner I cannot support and in a manner unnecessary for determining this case.

I urge the Commission to consider changing or clarifying the interpretive rule on § 41102(c) in the near future. In any event, Congress should also consider revising the awkward language contained in § 41102(c) that has led to such confusion about how to interpret it.

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

AENEAS EXPORTING LLC, *Complainant*

v.

CARLO SHIPPING INTERNATIONAL, INC., *Respondent*.

DOCKET NO. 20-11

Served: September 29, 2020

BEFORE: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

I. Introduction

On August 11, 2020, Complainant Aeneas Exporting LLC ("Aeneas Exporting") filed a request for dismissal ("motion") pursuant to settlement of the complaint filed against Respondent Carlo Shipping International, Inc. ("CSI"). Complainant attached a copy of a July 28, 2020, email outlining settlement terms. Complainant requested approval of the settlement terms and dismissal with prejudice, although Complainant noted that the parties were "unable to reach an agreement regarding the outstanding demurrage charges and related penalties," so that "no final settlement agreement with releases was signed." Motion at 2.

In response to an order, on September 9, 2020, the parties filed a joint status report ("JSR") which stated that the 24 containers at issue had been released to Complainant and that the payment identified in the settlement had been made to Respondent although some demurrage charges remained and mutual releases between the parties had not been signed. JSR at 1-4.

As discussed below, the parties presented an enforceable settlement agreement upon which both parties relied and substantially performed. It is not necessary for mutual releases to be signed or for issues not raised in a settlement agreement to be resolved before a settlement agreement can be approved. Accordingly, the settlement agreement will be approved.

II. Procedural History

On July 22, 2020, Aeneas Exporting filed a complaint alleging violations of the Shipping Act, including that CSI violated 46 U.S.C. §§ 41102(c) and 41104(a)(3), and seeking damages accrued due to an increase in shipping rates and subsequent detention of 24 of Aeneas Exporting's shipping containers in Benghazi, Libya. *See* Complaint at 6-7.

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227.

On August 11, 2020, Complainant filed a request for dismissal pursuant to settlement and stated that in order to ensure the release of its 24 containers, Aeneas agreed to dismiss this proceeding along with a related federal lawsuit filed in the District of New Jersey. Motion at 1. Attached to the motion was an email dated July 28, 2020, outlining an agreement between the parties, which stated:

> 1. CSI will release the 24 containers listed below (from the previous agreement) and provide copies of the Sea Way bills within 72 hours of the acceptance of this agreement. [List of 24 vehicles included.]
>
> 2. Aeneas will release $20,000 from the escrow today and the remaining $20,000 when CSI has provided Aeneas with Sea Waybills for the remaining fourteen containers on the list and assurances from Hapag-LLoyd and CMA CGM that all USA special charges have been satisfied on these containers.
>
> 3. CSI is responsible for paying any special charges, including demurrage, etc. owed in the USA.
>
> 4. Aeneas will remove the untitled vehicles from the CSI facility in Elizabeth, NJ within a week, and agrees to pay $20 a day storage fee for any vehicles still present more than seven days after this agreement is finalized.
>
> 5. Aeneas will dismiss the federal maritime complaint it filed against CSI and the case filed in the New Jersey District Court with prejudice upon completion of CSI's obligations as laid out in paragraphs 1 and 2, within 48 hours of such completion.
>
> 6. When both sides perform their obligations, they will exchange mutual releases so there can be no further claims about any pending claims Aeneas has against CSI has with Aeneas [sic] or involving the vehicles.

Motion, Exhibit A at 1-2.

On August 24, 2020, an Order was issued requiring the parties to submit a joint status report addressing the status of the 24 containers, whether Complainant had paid outstanding charges to Respondent, whether the parties had reached agreement regarding the outstanding demurrage charges and penalties, as well as whether mutual releases had been exchanged and signed, and if not, whether dismissal without prejudice would be more appropriate. Order Requiring Joint Status Report at 2.

On September 9, 2020, the parties submitted a joint status report which stated that the 24 containers at issue had been released to Complainant and that the payment identified in the settlement had been made to Respondent. However, the parties indicated that there remained a dispute regarding demurrage charges and whether or not a global settlement had been reached. JSR at 1-3. Mutual releases between the parties have not been signed. JSR at 4.

III. Discussion

A. Relevant Law

Using language borrowed in part from the Administrative Procedure Act,[2] Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A AM. JUR. 2D *Compromise and Settlement* § 3 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18

[2] "The agency shall give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c).

S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

When presented with a settlement and asked to enforce it, a court must first determine if a binding agreement was actually reached and, if so, what that contract provides. *Wood v. Virginia Hauling Co.*, 528 F.2d 423, 425 (4th Cir. 1975). "A settlement agreement is treated as any other contract for purposes of interpretation." *United Commercial Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992). The determination of whether parties have entered into a binding settlement agreement is governed by the general principles of contract law. *Schwartz v. Florida Bd. of Regents*, 807 F.2d 901, 905 (11th Cir. 1987). "Thus, there must be an offer, acceptance, and consideration, as well as a meeting of the mind on all essential terms." *PNC Bank, N.A. v. Rolsafe Int'l, LLC*, 477 B.R. 884, 902 (Bankr. M.D. Fla. 2012).

> Among the most reliable indicators of intent is performance. The court will be more willing to find that an apparently incomplete agreement was in fact complete where the parties have already rendered some substantial performance or have taken other material action in reliance upon their existing expressions of agreement. The fact that they have so acted is itself a circumstance bearing upon the question of completeness of their agreement.

1 Corbin on Contracts § 2.9 n.5 (2020) citing *Fontainebleau Hotel Corp. v. Crossman*, 286 F.2d 926 (5th Cir. 1961).

B. Arguments of the Parties

In the motion requesting approval of the settlement agreement, Complainant states:

> In order to ensure the release of its 24 containers, continued detention of which threatened to put Aeneas out of business, Aeneas agreed to dismiss this proceeding, as well as a related federal lawsuit filed in the District of New Jersey (the "Federal Suit"), and to pay Respondent a sum of $40,000. . . . Because the parties were unable to reach an agreement regarding the outstanding demurrage charges and related penalties, no final settlement agreement with releases was signed. As a result, the parties have not agreed to fully release each other from all potential claims, allegations, or causes of action.

Motion at 1-2.

Attached to the motion was an email dated July 28, 2020, from Complainant's counsel to Respondent outlining the settlement terms. The email identified the 24 vehicles to be released and the terms of payment. The email stated that "[w]hen both sides perform their obligations, they will exchange mutual releases so there can be no further claims about any pending claims Aeneas has against CSI has with Aeneas [sic] or involving the vehicles." Exhibit A at 2. Neither the motion nor the exhibit was signed by Respondent.

The joint status report indicates that the vehicles at issue have been released and that the negotiated compromise payment was made but that there is not an agreement as to demurrage charges in Libya. Complainant states:

> As a result of Respondent's months-long detention of Claimant's 24 containers, approximately $60,000 in demurrage charges and penalties has been incurred in Benghazi, Libya. On or about July 28, 2020, Respondent committed to making a "good-faith effort" to have those charges reduced or waived. However, on August 6, 2020, Respondent, through its attorney, informed Claimant that it would no longer make any efforts to have those charges reduced or waived and that Claimant would have to deal with the charges itself. The amount of the Libyan charges and penalties exceeds the entire settlement payment Claimant made to Respondent for release of the 24 containers.

JSR at 2-3. Regarding mutual releases, Complainant asserts:

> No, mutual releases have not been exchanged or signed. While Claimant did agree to dismiss this action-along with a related federal case in New Jersey-with prejudice in exchange for release of the 24 containers, Claimant expressly reserved its right to bring suit for Respondent's breach of the July 17 Settlement Agreement. Because Respondent refused to include carve-out language in the releases for breach of the July 17 Settlement Agreement, the parties were not able to finalize or execute mutual releases. Nevertheless, Claimant sought dismissal of this action with prejudice in accordance with the July 28, 2020 Settlement Terms. Claimant does not intend to waive or release its right to seek damages for Respondent's breach of the July 17, 2020 Settlement Agreement.
>
> While Claimant would agree to dismiss this action without prejudice and concurs that such dismissal would be appropriate, the July 28, 2020 Settlement Terms require it to seek dismissal with prejudice. In any event, Claimant intends to initiate a new proceeding at some future date based on Respondent's breach of the July 17 Settlement Agreement.

JSR at 4.

> Respondent asserts:
>
> Before the motion to dismiss this case was filed, we reached an agreement and later reached a revised agreement that also included the removal of several unregistered vehicles that Aeneas had left at my warehouse for several months without paying any storage fees. I asked Hapag-Lloyd to waive or reduce their

> Libyan fees for the Aeneas cargo. I agreed to pay all charges in the US, and Aeneas agreed to pay the charges in Libya. This is all I agreed to do about the demurrage charges and related penalties under either agreement.
>
> As part of the revised agreement, we were both supposed to sign a release so there would be no further litigation about any pending claims between us or involving the vehicles. After I signed the release, Aeneas claimed for the first time that he would not sign the release unless he could keep the right to sue me based on the original settlement. I would not have released the Aeneas cargo or let Aeneas remove the vehicles from my warehouse if I knew Aeneas planned to sue me again. This case should be dismissed and Aeneas should be barred from raising any claims about the 24 containers or destination fees. Aeneas would not have owed so many fees if it had paid me what it owed me back in February. We agreed on a global settlement and this case should be dismissed.

JSR at 3. Regarding mutual releases, Respondent states:

> No. Respondent signed a proposed settlement agreement with mutual releases. Complainant seeks to retain certain [sic] a claim arising out of an alleged breach of a settlement agreement, and will not sign unless he retains the right to pursue that claim. Respondent relied on Complainant's representation that global mutual releases would be signed when he performed under the revised settlement agreement. A dismissal with prejudice is appropriate.

JSR at 4.

C. Analysis

The settlement terms attached to the motion in an email were not signed or clearly acknowledged by both parties. However, it appears that the July 28, 2020, email lists the terms to which both sides agreed and neither side has raised any objections to the accuracy of the terms listed in the email. So, the lack of signature or more formal written agreement does not pose a bar to approving the settlement.

It appears that both parties agreed to the terms of the July 28, 2020, email. Moreover, it appears that both parties acted in reliance on the agreement and performed their obligations under the agreement, except for the failure to exchange mutual releases. Specifically, the email indicates that Respondent must provide assurances “that all USA special charges have been satisfied on these containers” and that Respondent “is responsible for paying any special charges, including demurrage, etc. owed in the USA.” Motion, Exhibit A at 1. The July 28, 2020, email does not address demurrage charges in Libya, which is the subject of the current dispute, which suggests that resolution of that issue was not an essential term of the settlement. In addition, it is not clear that there was a meeting of the minds necessary for the July 17, 2020, terms and those terms were not part of the settlement motion.

The filings demonstrate that the parties agreed to the July 28, 2020, terms and that the parties have substantially completed their obligations under that agreement. Both parties benefited from the settlement agreement and both parties support the request for dismissal of the proceeding. While the settlement appears appropriate, out of an abundance of caution, the dismissal will be without prejudice.

Accordingly, the parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The proceeding is at an early stage and would require potentially expensive additional discovery and briefing. The parties have determined that the settlement reasonably resolves the primary issues raised in the complaint without the need for costly and uncertain litigation. There is no evidence of fraud, duress, undue influence, or mistake nor harm to the public. Accordingly, the settlement agreement is approved.

IV. Order

Upon consideration of the motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the request to approve the July 28, 2020, settlement between Aeneas Exporting LLC and Carlo Shipping International, Inc. be **GRANTED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITHOUT PREJUDICE**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

NOTICE OF INQUIRY – VESSEL-OPERATING COMMON CARRIER DEFINITION AND APPLICATION OF THE TERM "MERCHANT" IN BILLS OF LADING

DOCKET NO. 20-16

Issued: October 7, 2020

AGENCY: Federal Maritime Commission

ACTION: Notice of Inquiry

SUMMARY: The Federal Maritime Commission ("FMC" or "Commission") is issuing this Notice of Inquiry ("NOI") to solicit public comment on the practice of vessel-operating common carriers (VOCCs or carrier) defining "Merchant" in their bills of lading to apply to persons and entities with whom the VOCCs may not be in contractual privity. Generally, the Commission seeks public comment as to 1) how VOCCs apply the term "Merchant" in their bills of lading; 2) whether the definition, as applied, subjects third parties who are not in contractual privity with the carrier to joint or several liability; and 3) whether carriers have enforced the definition of merchant against third parties that have not consented to be bound by, or otherwise accept, the terms and conditions of the bill of lading.

DATES: Submit comments on or before November 6, 2020.

ADDRESSES:

Submit comments to:
Rachel E. Dickon, Secretary
Federal Maritime Commission
secretary@fmc.gov
(email comments at attachments preferably in MS Word or PDF)
800 North Capitol Street, N.W. Room 1046
Washington, D.C. 20573-0001
Phone: 202-523-5725

FOR FURTHER INFORMATION CONTACT:

Benjamin K. Trogdon, Director, and
Cory Cinque, Trial Attorney
Bureau of Enforcement
Federal Maritime Commission
800 North Capitol Street, N.W
Washington, D.C. 20573-0001
Phone: 202-523-5783
E-mail: btrogdon@fmc.gov and ccinque@fmc.gov

SUPPLEMENTARY INFORMATION:

Submit Comments: Comments may be submitted by e-mail as an attachment (preferably in Microsoft Word or PDF) addressed to secretary@fmc.gov on or before November 6, 2020. Include in the subject line: "Response to FMC NOI – Merchant Clause." The Commission will provide confidential treatment for comments received to the extent permitted by law and will not post comments to the public docket. Questions regarding filing or treatment of confidential responses to this inquiry should be directed to the Commission's Secretary, Rachel E. Dickon, at the telephone number or e-mail provided above. This NOI will be made available via the Federal Register and on the Commission's web-site at www.fmc.gov.

Background:

The Commission has received information from shipping industry participants that VOCCs have defined "merchant" in their respective bills of lading to include persons or entities who have no beneficial interest in the cargo, but rather are providing service as third parties on behalf of someone specifically identified on the bill of lading. The concerns expressed indicate that VOCCs may be enforcing the terms of the bill of lading (including, without limitation, collection of freight rates and charges, equipment charges, detention and demurrage charges) jointly and severally against entities that are not party to, and have not agreed to be bound by the bill of lading. The Commission has been advised by third-party logistics providers, harbor truckers, stevedores, customs brokers and freight forwarders, many of whom have no connection to the cargo or the shipment, other than providing service to entities that may own or have a proprietary interest in the cargo covered by a VOCC bill of lading, that VOCCs seek payment from such third parties for rates and charges pursuant to the terms and conditions of the bill of lading. Allegations have also been received that VOCCs threaten to discontinue allowing such third parties to provide service for future shipments unless amounts due on current shipments are paid.

This issue was raised in Docket No. 19-05, *Interpretive Rule on Demurrage and Detention Under the Shipping Act* by several commenters, including the New York New Jersey Freight Forwarders and Customs Brokers, the National Customs Brokers and Freight Forwarders Association, the Agricultural Transportation Coalition, as well as other industry participants since the issuance of the Final Rule. As noted in the Final Rule, "the Commission's emphasis in the NPRM that ocean carriers bill the correct party reflected concerns raised by truckers that they were being required to pay charges that were more appropriately charged to others." 85 FR. 29638, at 29662 (May 18, 2020). Several commenters reiterated these concerns. AgTC

contended that ‘‘carriers should impose detention and/or demurrage on the actual exporter or importer customer with whom the carrier has a contractual relationship.’’ The New York New Jersey Foreign Freight Forwarders & Brokers Association asserted that VOCCs define the term ‘‘merchant’’ in their bill of lading too broadly, resulting in parties being billed for demurrage and detention ‘‘regardless of whether they are truly in control of the cargo when the charges were incurred.’’ Id.

The Commission clarified that one of its goals for the Interpretive Rule "was to emphasize the importance of ocean carriers and marine terminal operator bills aligning with contractual responsibilities." Id. In doing so, the Commission noted that it "does not believe it is appropriate in this interpretive rule to prescribe" specific billing practices, or to address the application of the merchant definition as it related to such practices. Id. The Commission further noted it would address such issues in the context of particular facts, considering all relevant arguments. Although the Commission incorporated reference to certain billing practices and regulations in the Final Rule, it declined to prescribe specific billing practices or regulations which would be deemed reasonable under 46 U.S.C. 41102(c).

General contract law principles provide that one party cannot enforce a contract against another who did not assent to be bound by its terms and conditions. This can include situations where one party attempts to bind another party with unilaterally defined terms. Accordingly, the Commission has determined to request public comment on the manner in which VOCCs are defining the term "Merchant" and enforcing that definition in their bills of lading.

The purpose of the inquiry is to determine whether such carrier enforcement (i.e., seeking to collect freight and other charges) is unfairly or unjustly wielded against third parties who have not directly contracted with the VOCC nor assented to be bound by the contract of carriage. The Commission encourages all interested parties, including VOCCs, shippers, ports, maritime terminal operators, ocean transportation intermediaries, truckers, stevedores or customs brokers to submit comments or to identify information relevant to the manner in which VOCCs have applied their respective definitions of "Merchant." As part of this NOI, the Commission will also be contacting certain VOCCs to provide information about the manner in which they have defined and applied their definition of a "Merchant."

The Commission will consider relevant comments submitted by any party. Along with comments, commenters should provide their name, title/position, contact information (e.g., telephone number and/or e-mail address), name and address of the company or other entity and the type of company or entity (e.g., carrier, exporter, importer, trade association, etc.).

Responses to the NOI will help the Commission ascertain more precisely the practices of VOCCs, including whether they may be imposing liability on entities who may not have assented to be bound to the terms and conditions of a VOCC's bill of lading, and in determining whether additional analyses or action by the Commission may be necessary.

By the Commission.

Rachel Dickon
Secretary

FEDERAL MARITIME COMMISSION

PETITION OF CMA CGM S.A., AMERICAN PRESIDENT LINES, LLC, APL CO. PTE. LTD. AND ANL SINGAPORE PTE LTD FOR A TEMPORARY EXEMPTION FROM STANDARD TARIFF & SERVICE CONTRACT FILING REQUIREMENTS

Petition No. P2-20

Served: October 20, 2020

BY THE COMMISSION: Michael A. KHOURI, Chairman, Rebecca F. DYE, Daniel B. MAFFEI, Louis E. SOLA, Carl W. BENTZEL, Commissioners.

ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR EXEMPTION

The CMA Group[1] filed a petition with the Commission seeking an exemption from certain service contract filing and tariff publishing requirements because of a recent cyberattack on their information technology systems. For the reasons described below, the Commission grants the request for exemption from the relevant service contract filing requirements subject to certain conditions. The Commission also grants the request for exemption from the relevant tariff publishing requirements, subject to certain conditions, with respect to cargo received on or after the date of this order. But because the Commission's exemption authority is limited to prospective relief, the Commission denies the request for exemption from the relevant tariff publishing requirements for cargo received prior to the date of this order. Instead, the CMA Group may use other procedures provided by the Shipping Act that allow them to refund or waive collection of freight charges for these shipments due to failure to publish a tariff.

I. BACKGROUND

The petitioners are all ocean common carriers under the Shipping Act of 1984, 46 U.S.C. § 40101 *et seq.* (Shipping Act). *See* 46 U.S.C. § 40102(18). The CMA Group states that it suffered a malicious cyberattack that began affecting its information systems on September 27, 2020. Pet. at 2. The CMA Group discovered the attack on September 28, 2020. *Id.* The attack has impacted the CMA Group's ability to timely file service contracts and amendments and to timely publish tariff rates and rules. *Id.* The CMA Group provided several examples of these impacts.

[1] The petitioners include CMA CGM S.A., American President Lines, LLC, APL Co. Pte. Ltd., and ANL Singapore Pte Ltd, collectively referred to as "the CMA Group."

Specifically, American President Lines, LLC and APL Co. Pte. Ltd. (collectively "APL") and CMA CGM S.A. have new service contracts and amendments effective October 1, 2020. *Id.* at 3. In addition, APL has been unable to update the rates and rules in its self-published tariff,[2] and although CMA CGM S.A. and ANL Singapore Pte Ltd use a third-party tariff publisher that was not impacted by the cyberattack, the carriers are unable to access quotes given to customers in order to convert them into tariff line items so that customers can book shipments under the quoted rates. *Id.* at 2-3.

On October 7, 2020, the CMA Group petitioned the Commission for an exemption from the service contract filing and tariff publishing requirements. With respect to service contracts, the CMA Group requests exemption from 46 C.F.R. §§ 530.3(i), 530.8(a), and 530.14(a) to allow them to apply service contract rates and terms agreed to with their customers but not yet filed with the Commission, provided those service contracts and amendments are filed by November 26.[3] *Id.* at 1, 3.

With respect to tariffs, the CMA Group requests exemption from 46 C.F.R. §§ 520.7(c), 520.8(a)(1), and 520.8(a)(4)[4] to apply tariff rates, charges, and rules communicated to customers but not yet published, provided that these tariff changes are published by November 26, 2020. *Id.* at 1-3. The CMA Group states that they would not implement any increases to tariff rates or charges under the exemption absent an alternate form of written 30-day notice clearly communicated to customers. *Id.* at 2.

The CMA Group requests that the exemption apply to cargo received on or after September 27, 2020. *Id.* at 1, 3. The CMA Group asserts that this flexibility will allow them to apply service contract rates agreed upon with customers and tariff terms offered to customers for shipments received before service contract filing or tariff publication can be accomplished, instead of requiring customers to pay higher tariff rates due to the CMA Group's inability to timely file service contracts and publish tariffs. *Id.* The CMA Group states that granting this exemption would support the flow of U.S. commerce by allowing them to honor rates, charges, and rules offered to their customers. *Id.*

The CMA Group indicates that they are using their currently functional systems to track their commitments to customers and to mitigate any negative impacts of the cyberattack, and the

[2] As an example, the CMA Group describes how APL wanted to revise the effective date of a general rate increase (GRI) from October 1, 2020, to November 1, 2020, but was unable to do so because it could not access its tariff. According to the CMA Group, once access is obtained, withdrawing the October 1 GRI would result in APL not being able to apply a November 1 GRI due to the 30-day notice requirement for tariff rate increases.

[3] The CMA Groups requests that the Commission permit them to make all required service contract filings and tariff publications "within 60 days following September 27, 2020," which is November 26, 2020. *See* Pet. at 3.

[4] The petition requests an exemption from section "520.8(4)." The Commission assumes this is a typo and that the CMA Group is seeking an exemption from § 520.8(a)(4), which permits tariff changes that result in a decrease in cost to shipper to become effective on publication.

requested exemption is necessary to reduce potential burdens on customers. *Id.* at 3. The CMA Group asserts that the requested exemption will not reduce competition or be detrimental to commerce and would instead have the opposite effect by allowing them to continue offering sustainable transportation to U.S. customers. *Id.*

The Commission issued a notice of the CMA Group's petition and requested comments from interested parties on October 8, 2020. The notice was published in the Federal Register on October 14, 2020. No comments were received.

II. DISCUSSION

A. Service Contract Filing

The Commission's regulations require that carriers file original service contracts (as opposed to amendments) with the Commission "before any cargo moves pursuant to that service contract." 46 C.F.R. § 530.8(a)(1). In addition, § 530.8(b) requires that each original contract include, among other terms, an effective date that is no earlier than the filing date. *See* §§ 530.3(i) (defining "effective date" for original service contracts and amendments); 530.8(b)(8)(i) (requiring every service contract to include its effective date). Similarly, § 530.14(a) provides that "[p]erformance under an original service contract may not begin before the day it is effective and filed with the Commission."

In contrast, the Commission's regulations provide more flexibility to service contract amendments, which can be filed within 30 days after the amendment's effective date. *See* 46 C.F.R. §§ 530.3(i); 530.8(a)(2); 530.8(b)(8)(i); 530.14(a).

On April 27, 2020, the Commission issued a temporary exemption allowing carriers to file original service contracts up to 30 days after they go into effect, mirroring the delayed filing requirements applicable to service contract amendments. *Temporary Exemption from Certain Service Contract Requirements,* 2 F.M.C.2d 65 (FMC 2020). The exemption was originally set to expire December 31, 2020, but the Commission recently extended the exemption until June 1, 2021. *Temporary Exemption from Certain Service Contract Requirements,* Docket No. 20-06, 2020 FMC LEXIS 206 (FMC Oct. 1, 2020).

The CMA Group requests further exemption from §§ 530.3(i), 530.8(a) and 530.14(a) with respect to original service contracts to permit them to be filed more than 30 days after they go into effect, but not later than November 26, 2020. The CMA Group is also requesting a similar exemption from the current regulatory requirements with respect to service contract amendments to permit them to be filed more than 30 days after they go into effect, but not later than November 26, 2020. The requested exemption would extend to service contracts and amendments applicable to cargo received by the CMA Group on or after September 27, 2020.

Exemptions from the requirements of part 530 are governed by 46 U.S.C. § 40103(a) and the Commission's Rules of Practice and Procedure, specifically 46 C.F.R. §§ 502.10 and 502.92. 46 C.F.R. § 530.13(b). Under 46 U.S.C. § 40103(a), the Commission may grant

prospective exemptions from Shipping Act requirements, "if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce."

The CMA Group states that the service contract terms at issue have already been agreed to by the parties, but that the recent cyberattack has affected their ability file these service contracts and amendments with the Commission within 30 days. The CMA Group asserts that the requested exemption will not reduce competition or be detrimental to commerce and would instead have the opposite effect by allowing them to continue offering sustainable transportation to U.S. customers. *Id.*

We agree. The CMA Group seeks additional time to file certain service contracts and amendments because of their current inability to make such filings. These contracts and amendments have already been agreed to and would normally need to be filed beginning October 27, 2020 (30 days after September 27, 2020), but the CMA Group is requesting an additional 30 days for filing.

This exemption is even more limited than the 2017 exemption granted to another carrier, Maersk, following a cyberattack. *Petition of Maersk Line A/S for an Exemption from 46 C.F.R. § 530.8*, Pet. No. P1-17, slip op. (July 19, 2019). In that case, the Commission granted Maersk's request for an exemption allowing the carrier to agree to service contracts with shippers and apply those terms to cargo received *before* the date agreement was reached on the contractual terms. In this case, the CMA Group and their customers have already agreed on the affected service contract terms, but the CMA Group is currently unable to file the contracts with the Commission, and failure to grant the exemption could result in shippers being charged higher rates or subject to other unfavorable terms. Given these potential harms, the length of the requested filing extension (i.e., an additional 30 days), and the limited number of service contracts that would be affected, the Commission finds that the requested exemption will not result in substantial reduction in competition or be detrimental to commerce.

Based on the foregoing, the Commission is granting the CMA Group's request for exemption from the relevant service contract regulations provided that service contracts and amendments applicable to cargo received on or after September 27, 2020, must be filed by November 26, 2020, or 30 days after the effective date, whichever is later.[5]

B. Tariff Publication

The Shipping Act and the Commission's regulations require that common carriers publish tariffs showing all their rates, charges, classifications, rules, and practices between all points or ports on their own routes and on any through transportation route that has been established. *See* 46 U.S.C. § 40501; 46 C.F.R. § 520.3. Changes in rates, charges, rules,

[5] The exemption is not intended to reduce the normal filing deadlines applicable to service contracts and amendments. A service contract that goes into effect after October 27, 2020, may be filed after November 26, 2020, so long as it is filed not later than 30 days after the effective date.

regulations, or other tariff provisions that result in a decrease in cost to the shipper may become effective on publication. *See* 46 U.S.C. § 40501(e)(2); 46 C.F.R. § 520.8(a)(4). On the other hand, new or initial rates, charges, or changes in existing rates that result in an increased cost to a shipper may go into effect no earlier than 30 days after publication. 46 U.S.C. § 40501(e)(1); 46 C.F.R. § 520.8(a)(1). Commission regulations also provide that the applicable rates for any given shipment are those in effect on the date the cargo is received by the carrier.[6] 46 C.F.R. § 520.7(c).

The CMA Group requests exemption from these provisions so that it can apply tariff rates, charges, and rules communicated to customers but not yet published, provided that these tariff changes are published by November 26, 2020. The requested exemption would apply to tariff rates, charges, and rules that, but for the CMA Group's inability to publish, would have been effective with respect to cargo received on or after September 27, 2020.

Exemptions from the statutory requirements in 46 U.S.C. § 40501 and the regulatory requirements in 46 C.F.R. part 520 are governed by 46 U.S.C. § 40103 and the Commission's Rules of Practice and Procedure (46 C.F.R. part 502). *See* 46 C.F.R. § 520.13(a).[7] As discussed above, § 40103(a) provides that the Commission may grant prospective exemptions from Shipping Act requirements, "if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce."

The CMA Group notes that if relief is not granted, shippers making bookings against the quoted rates will instead be invoiced at the higher published rates (e.g., general commodity, N.O.S. or Cargo N.O.S. rates). The CMA Group further states that they will not use this flexibility to apply higher tariff rates or charges absent an alternative form of written 30-day notice clearly communicated to shippers. The CMA Group asserts that the requested exemption will not reduce competition or be detrimental to commerce and would instead have the opposite effect by allowing them to continue offering sustainable transportation to U.S. customers.

We agree. The CMA Group seeks permission to apply tariff rates, charges, and rules that have been communicated to shippers but not published due to the cyberattack. Without an exemption, shippers would be invoiced based on the applicable published tariff rates and charges, which could be higher than the quoted terms. And although the CMA Group suggests that they may also use this authority to implement tariff changes that would result in increased rates to shippers prior to or less than 30 days after publication, they have acknowledged the concerns such conduct might raise and committed to providing an alternative form of written 30-day notice to shippers before applying such changes. In short, the CMA Group is trying to approximate the status quo had the cyberattack never occurred.

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[6] Although the petition only requests exemption from Commission regulations, because 46 C.F.R. § 520.8(a)(1) and (4) implement the requirements in 46 U.S.C. § 40501(e), the Commission interprets the request to extend to those statutory provisions as well.

[7] This regulation incorporates 46 U.S.C. § 40103 as well as "46 C.F.R. § 502.67." Rule 67, however, has been moved twice, first to § 502.74, and now to § 502.92.

Given the potential harm to shippers that could be charged higher rates without the exemption, the limited duration and number of shipments subject to the exemption, and the CMA Group's commitment to providing alternative written 30-day notice to shippers before applying any tariff changes that would result in increased rates or charges, the Commission finds that the requested exemption will not result in substantial reduction in competition or be detrimental to commerce, subject to certain conditions.

Specifically, the CMA Group must provide written notice to shippers at least 30 days in advance of applying tariff changes that result in increased rates or charges, and such notice must be given in a manner that is likely to be seen by shippers. Acceptable forms of notice include: (1) emails to all of the CMA Group member's customers; (2) prominent posting on the CMA Group's websites; or (3) other forms of notice determined to be acceptable by the Director of the Bureau of Trade Analysis. In addition, given that the CMA Group intends to publish all affected tariff changes by November 26, 2020, the exemption is limited to unpublished increases that are set to go into effect on or before December 25, 2020 (i.e., less than 30 days after November 26, 2020). Any increases set to go into effect on or after December 26, 2020, must comply with the publication and 30-day notice requirements in 46 U.S.C. § 40501(e) and 46 C.F.R. § 520.8(a).

Despite the determination that the requested exemption meets the standard set forth in § 40103, the Commission lacks the authority to provide the CMA Group with all the relief requested. Under § 40103, the Commission may "*exempt for the future* any specified activity of" regulated entities from Shipping Act requirements. The Commission's authority under this provision is therefore limited to prospective relief; the Commission cannot exempt past activities from the requirements of the Shipping Act. The Shipping Act and the Commission's regulations require that carriers apply published tariff rates, charges, and rules in effect on the date cargo is received. *See* 46 U.S.C. § 40501(e); 46 C.F.R. §§ 520.7(c); 520.8. The CMA Group is seeking not only a prospective exemption that would allow them to apply unpublished tariff rates, charges, and rules to future shipments, but also an exemption that would permit them to apply unpublished tariff rates, charges, and rules retroactively to cargo that has already been received. Section 40103 does not permit the latter type of relief. Accordingly, the Commission is granting an exemption from the relevant tariff requirements only with respect to cargo that is received on or after the date of this order.

For cargo received prior to the date of this order, the Shipping Act provides an alternative process by which carriers may seek permission from the Commission to refund or waive collection of freight charges if "there is an error in a tariff, a failure to publish a new tariff, or an error in quoting a tariff, . . . the refund or waiver will not result in discrimination among shippers, ports, or carriers," and the carrier has published a new tariff setting forth the rate on which the refund or waiver would be based." 46 U.S.C. § 40503. The Commission's regulations at 46 C.F.R. part 502, subpart Q, describe the application requirements and the decision-making process. Such applications must be filed within 180 days from the date of sailing of the vessel from the port at which the cargo was loaded. 46 U.S.C. § 40503(3); 46 C.F.R. § 502.271(b).

The situation described by the CMA Group appears to be the type § 40503 is intended

to address. The CMA Group has communicated tariff rate, charge, and rule changes to shippers but failed to publish those changes in its tariffs due to the cyberattack. Providing refunds or waiving charges in these circumstances would not appear to result in discrimination among shippers, ports, or carriers. Accordingly, for cargo received prior to the date of this order, the CMA Group may use the process in § 40503 and the Commission's regulations in order to refund or waive collection of freight charges to reflect the tariff rates, charges, and rules previously communicated to shippers once it is able to publish those tariff items.[8] To the extent that flexibility is needed with respect to the procedural requirements in 46 C.F.R. part 502, subpart Q, the Commission is willing to consider requests for waiver in accordance with 46 C.F.R. § 502.10.

III. CONCLUSION

For the reasons discussed above, the Commissions grants in part and denies in part the petition, subject to the conditions stated below.

THEREFORE IT IS ORDERED, that the CMA Group's request for an exemption from 46 C.F.R. §§ 530.3(i), 530.8(a) and 530.14(a) is GRANTED provided that:

1. All service contracts and amendments applicable to cargo received by the carrier on or after September 27, 2020, must be filed with the Commission in the manner set forth in 46 C.F.R. part 530 by November 26, 2020, or 30 days after the effective date of the service contract or amendment, whichever is later; and

2. The exemption expires November 26, 2020.[9]

IT IS FURTHER ORDERED, that the CMA Group's request for exemption from 46 U.S.C. § 40501(e) and 46 C.F.R. §§ 520.7(c), 520.8(a)(1), and 520.8(a)(4) is GRANTED with respect to cargo received by the CMA Group on or after the date of this order, provided that:

1. All tariff rates, charges, and rules subject to the exemption must be published in accordance with the requirements of 46 C.F.R. part 520 no later than November 26, 2020.

2. The CMA Group must provide written notice to shippers at least 30 days in advance before applying any new or initial rate, charge, or change in an existing rate that results in an increased cost to a shipper, and such notice must be given in a manner that is likely to be seen by shippers. Acceptable forms of notice include: (a) emails to all of the CMA Group member's customers; (b) prominent posting on the CMA Group's websites; or (c) other forms of notice determined to be acceptable by the Director of the Bureau of Trade Analysis.

2. The exemption from 46 C.F.R. §§ 520.7 and 520.8(a)(4) expires on November 26, 2020.[10]

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[8] Relief under § 40503 is limited to refunding or waiving collection of freight charges. Section 40503 does not allow the CMA Group to apply unpublished increases retroactively.

[9] November 26, 2020, is the last day on which the exemption applies. *See* 46 C.F.R. § 502.101.
[10] November 26, 2020, is the last day on which the exemption applies. *See* 46 C.F.R. § 502.101.

3. The exemption from 46 C.F.R. § 520.8(a)(1) is limited to tariff changes effective on or before December 25, 2020.

IT IS FURTHER ORDERED, that the CMA Group's request for exemption from 46 U.S.C. § 40501(e) and 46 C.F.R. §§ 520.7(c), 520.8(a)(1), and 520.8(a)(4) is DENIED with respect to cargo received by the CMA Group before the date of this order.

FINALLY, IT IS ORDERED, that this proceeding be discontinued.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

MAVL CAPITAL INC., IAM AL GROUP INC., AND MAXIM OSTROVSKIY, *COMPLAINANTS*

v.

MARINE TRANSPORT LOGISTICS, INC. AND DMITRY ALPER, *RESPONDENTS*.

Docket No. 16-16

Served: October 29, 2020

BY THE COMMISSION: Michael A. KHOURI, Chairman, Rebecca F. DYE, Daniel B. MAFFEI, Louis E. SOLA, Carl W. BENTZEL, Commissioners.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This case is before the Commission on Complainants' exceptions to the Administrative Law Judge's (ALJ) sua sponte dismissal of claims alleging that Respondents Marine Transport Logistics, Inc. (MTL) and Dmitry Alper violated 46 U.S.C. §§ 41102(c) and 41104(a)(3) and (10). The dismissed claims relate to a 2006 Mercedes stored in MTL's New Jersey warehouse and three motorcycles stored by a competitor non-vessel-operating common carrier (NVOCC). Complainants allege that Respondents converted the Mercedes by surreptitiously shipping it to Dubai, United Arab Emirates, where they intended to sell it and keep the proceeds. Complainants further allege that Respondents interfered with Complainants' arrangements to have a competitor NVOCC ship the motorcycles overseas.

The ALJ addressed the Mercedes and motorcycle claims in an Initial Decision Partially Dismissing the Complaint (Initial Decision or I.D.). The ALJ dismissed the § 41102(c) claim regarding the Mercedes for lack of jurisdiction and failure to state a claim. The ALJ dismissed the § 41104(a)(3) claim regarding the motorcycles for failure to state a claim. The ALJ dismissed all remaining claims regarding the Mercedes and motorcycles as abandoned because Complainants did

not address those claims in responding to the ALJ's show cause order. Complainants filed exceptions to some, but not all, of the ALJ's findings.

Complainants also petition the Commission for leave to supplement the record with a bill of lading for the Mercedes and a declaration offered to show that MTL assumed responsibility for transporting the Mercedes. MTL opposes the petition, and Complainants seek leave to file a reply.

For the reasons discussed below, the Commission: (1) reverses the ALJ's dismissal of the § 41102(c) claim regarding the Mercedes and remands that claim for further proceedings; (2) affirms the dismissal of the § 41104(a)(10) claim regarding the Mercedes; and (3) affirms the dismissal of the § 41104(a)(3) claim regarding the motorcycles. The Commission denies the petition to submit additional evidence and Complainants' motion for leave to file a reply in support of that petition.

II. BACKGROUND

A. Factual Background

1. Parties

Complainant MAVL Capital Inc. (MAVL) is a New York corporation that imports, repairs, and sells vehicles in the overseas market. Compl. ¶ 1.[1] Complainant IAM & AL Group, Inc. (IAM) is an Indiana corporation that contracted with MTL to transport a 2011 Porsche to a buyer in Kotka, Finland. *Id.* ¶¶ 2, 37-38. Complainant Maxim Ostrovskiy is a principal of both MAVL and IAM and resides in Moscow, Russia. *Id.* ¶ 3. Respondent MTL is a New York corporation and a licensed NVOCC (FMC License No. 018709). *Id.* ¶¶ 4, 6, 9. Respondent Dmitry Alper serves as MTL's Director of Operations and oversees daily operations. *Id.* ¶¶ 5, 7-8.

2. 2006 Mercedes SL65

In December 2012, MAVL imported a 2006 Mercedes SL65 from Germany, retained MTL as the "receiving agent," and had the vehicle delivered to MTL's New Jersey warehouse. *Id.* ¶¶ 27-29.[2] Complainants imported the Mercedes "so that maintenance could be performed on the vehicle after which it would subsequently be shipped overseas." *Id.* ¶ 27. Mr. Ostrovskiy informed MTL of this plan when MAVL stored the Mercedes in December 2012, but he did not specify a timeline or proposed shipping date at that time. *Id.*

[1] The facts recited in this memorandum opinion are taken from the complaint and from documents incorporated by reference in or integral to the complaint, documents subject to official notice under 46 C.F.R. § 502.226(a), and documents treated as an amendment to the complaint. Those documents include a declaration from Mr. Ostrovskiy (Ostrovskiy Certif.) and MTL's tariff

[2] MTL did not arrange the Mercedes' transportation from Germany to the United States, and that transportation is not at issue. I.D. at 13.

29; Ostrovskiy Certif. ¶¶ 7-10. Mr. Ostrovskiy provided MTL with the certificate of title which is required for export. Ostrovskiy Certif. 9.

MTL charged MAVL for storage of the Mercedes pursuant to MTL's NVOCC tariff. *Id.* ¶ 4. The storage charges that MTL imposed were consistent with MTL's tariff charges for cargo earmarked for export. *Id*. ¶¶ 4, 11. For example, MAVL received 30 days free storage allowed under the MTL tariff for vehicles "received for US export shipment." *Id*; Complainants' Show Cause Resp. App. A (MTL Tariff, Rule 2-140). "Beyond 30 days," MTL's tariff establishes rates of $10.00 per day for vehicles stored at its Bayonne, New Jersey facility. *Id*. The MTL tariff also links 30 days free storage to the need to provide the carrier with the vehicle title without which the "vehicle will not be loaded into a container." *Id.* Following the initial 30-day period, MTL discounted the storage rates for the Mercedes by fifty percent, which Mr. Ostrovskiy attributed to the "parties' ongoing business relationship." Ostrovskiy Certif. ¶ 12.

Six months after the Mercedes arrived in MTL's New Jersey facility, Mr. Ostrovskiy asked MTL to produce the Mercedes for his inspection, but MTL failed to do so. *Id.* ¶ 13. Whereupon Mr. Ostrovskiy directed MTL to release the Mercedes and ship it to Dusseldorf, Germany. *Id.* ¶¶ 14-15. Several months later, Mr. Ostrovskiy learned that MTL had not followed these instructions, but had in fact shipped the Mercedes to Dubai without his knowledge or consent for the purpose of selling it and keeping the proceeds. *Id.* ¶¶ 16-17. According to Complainants, MTL has refused to provide them with documents verifying the sale of the Mercedes or confirming the details of the alleged sales transaction. Compl. ¶¶ 31-35. MTL claimed that the Mercedes was seized and sold consistent with its house bill of lading under a maritime lien for outstanding charges. Ostrovskiy Certif. ¶¶ 5-6.

3. Harley Davidson Motorcycles

MAVL purchased three Harley Davidson motorcycles in June/July 2013 and received the original titles. Compl. ¶¶ 47-48. Having lost confidence in MTL by this time, MAVL/Mr. Ostrovskiy hired Unitrans-PRA, another NVOCC, to ship the motorcycles overseas, and the motorcycles were stored in Unitrans' facility awaiting shipment. *Id*. ¶ 49. According to Complainants, Mr. Alper fraudulently contacted Unitrans and directed it to "hold" the motorcycles and not to ship them abroad, causing Complainants to incur an additional $22,920 in storage fees. *Id*. ¶¶ 50-51.[3]

B. Procedural History

Complainants filed this action in August 2016 seeking over $180,000 in reparations for alleged violations of 46 U.S.C. §§ 41102(c) and 41104(a)(3) and (10). After Respondents answered the complaint, the ALJ issued a show cause order on September 15, 2016. The ALJ directed Complainants to show cause why the claims regarding the Mercedes and the three

[3] Complainants also allege that Respondents shipped a Porsche to Dubai without Complainants' consent. Compl. ¶¶ 37-46. The ALJ did not dismiss the claims regarding the Porsche. Rather, those claims are stayed pending the present appeal.I.D. at 28

motorcycles should not be dismissed for lack of jurisdiction or failure to state a claim because the allegations did not appear to involve ocean-borne transportation of those vehicles between the United States and a foreign port, and in fact the allegations supported a contrary inference. Show Cause Order at 6-7. According to the facts alleged, the ALJ stated, Respondents "unlawfully converted" the Mercedes by removing it from storage in the U.S. and shipping it to Dubai without Complainants' consent. *Id*. at 6. Further, the ALJ stated, the complaint "does not appear to allege a Shipping Act violation by MTL or [Mr.] Alper," because "Complainants do not allege that they hired or paid Respondents to ship Complainants' motorcycles overseas or that Unitrans . . . was Respondents' agent for transporting the motorcycles." *Id*. at 7.

Complainants filed a brief in response to the show cause order supplemented with supporting documents. Complainants' additional submissions included: (1) Mr. Ostrovskiy's declaration; (2) excerpts from MTL's tariff; (3) a Maersk bill of lading for transportation of the Mercedes from the U.S. to Dubai; (4) discovery and other documents from *MAVL Capital Inc. v. Marine Transport Logistics Inc*., Docket No. 13-cv-7110 (E.D.N.Y. Dec. 12, 2013);[4] and (5) various documents reflecting fees charged and other dealings/communications between the parties. MTL filed a brief in support of the show cause order and an appendix of supporting documents. MTL's appendix includes: (1) the docket sheet and the complaint filed in the related federal court action; and (2) email communications. Mr. Alper also filed a brief in support of the show cause order.

On January 17, 2017, the ALJ dismissed the § 41102(c) claim regarding the Mercedes with prejudice for lack of jurisdiction, finding that MAVL did not have a contract of carriage with MTL for that vehicle. I.D. at 20-21. The ALJ also determined that Complainants failed to state a claim under § 41104(a)(3) with respect to the motorcycles. *Id.* at 26-27. The remaining claims regarding the Mercedes and the motorcycles were dismissed as abandoned. *Id*. at 3.

In timely-filed exceptions, Complainants argue that the Commission has jurisdiction over the § 41102(c) claim regarding the Mercedes because the parties had an implied contract of carriage. Complainants' Br. in Support of its Exceptions to Initial Decision (Exceptions) at 13-20. Complainants also assert that they have a cause of action regarding the Mercedes under § 41104(a)(10) because Respondents refused to negotiate an unspecified debt and sold the Mercedes to satisfy it. *Id*. at 9-12, 16. Complainants do not challenge the ALJ's ruling dismissing the § 41104(a)(3) claim regarding the motorcycles. Respondents filed separate briefs opposing Complainants' exceptions and argue that the ALJ's decision should be affirmed in all respects. Reply to Complainants' Exceptions to the January 17, 2017

[4]Almost three years before filing the present Shipping Act complaint, MAVL filed a related action against MTL in federal district court alleging that MTL and other parties violated various federal and state laws by unlawfully asserting a lien against the Mercedes and the Porsche as part of a comprehensive scheme to deprive Complainants of their property and collect bogus payments. The court ultimately dismissed the action. *See MAVL Capital, Inc. v. Marine Transp. Logistics, Inc.*, 130 F. Supp. 3d 726 (E.D.N.Y. 2015).

Initial Decision (Exceptions Reply); Respondent Dmitry Alper's Br. in Opposition to Complainants' Exceptions to Initial Decision.

Complainants also petitioned the Commission to reopen the proceedings to allow additional evidence proving they had an implied contract of carriage for the Mercedes. Respondents oppose reopening the proceedings, and Complainants seek leave to file a reply to Respondents' brief opposing their petition.

III. DISCUSSION

A. Legal Standards

1. Standard of Review and Burden of Proof

When the Commission reviews exceptions to an ALJ's Initial Decision, it has "all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). The Commission reviews the ALJ's findings de novo and can make additional findings, including in cases where, as here, the ALJ dismissed claims for lack of jurisdiction or failure to state a cause of action. *Id.; see also Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.* (*Maher II*), FMC Docket No. 12-02, 2015 FMC LEXIS 43, *110-*11 (FMC 2015). Complainants bear the burden of proving by a preponderance of the evidence that the Commission has jurisdiction to adjudicate their claims. *River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 188, 201, 1998 FMC Lexis 16, *66-67 (ALJ 1998), *aff'd* 28 S.R.R. 751, 1999 FMC Lexis 32, *67 (FMC 1999); *see also* 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Maher Terminals, LLC v. Port Auth of N.Y. & N.J.* (*Maher I*), FMC Docket No. 12-02, 2014 FMC LEXIS 35, *41 (FMC 2014).

2. Standards for Dismissal

The ALJ sua sponte ordered Complainants to show cause why the allegations in the complaint regarding the Mercedes and three motorcycles should not be dismissed for lack of subject matter jurisdiction or for failure to state a claim. In the Initial Decision, the ALJ noted that the Commission looks to Federal Rule of Civil Procedure 12(b)(1) when considering dismissals based on lack of subject matter jurisdiction, and to Rule 12(b)(6) when considering dismissals based on failure to state a claim. I.D. at 5.

The ALJ also acknowledged that under Rule 12(b)(1), there are two different types of jurisdictional attacks. In a factual attack, a court may consider matters outside the pleadings. I.D. at 5; *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) ("In a factual challenge, the defendant argues 'that the jurisdictional allegations of the complaint [are] not true,' providing the trial court the discretion to 'go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations.'" (quoting *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). In that situation, the presumption of truthfulness normally

granted allegations does not apply. *Id.*

In a facial attack on subject matter jurisdiction, the court examines whether the complaint has sufficiently alleged subject matter jurisdiction. *See id.* Consequently, complainants have the same procedural protection afforded under Rule 12(b)(6). *Beck*, 848 F.3d at 270. In other words, all well-pleaded allegations are accepted as true and interpreted in the light most favorable to the complainant. *See Erby v. United States*, 424 F. Supp. 2d 180, 182 (D.D.C. 2006).

The ALJ correctly considered the show cause order as a challenge to the pleadings, i.e., a facial challenge. I.D. at 5-6. The jurisdictional and pleading issues were raised sua sponte before any discovery in this case. And the jurisdictional question at issue – whether MAVL was acting as a regulated entity with respect to the conduct at issue – overlaps with the merits of a claim under 46 U.S.C. §§ 41104 and 41102(c), both of which have as elements that the respondent is a regulated entity. When, as here, jurisdictional facts are intertwined with facts central to the merits of a claim, the Rule 12(b)(6) standard applies. *See Kerns v. United States*, 585 F.3d 187, 192-93 (4th Cir. 2009).

Under Fed. R. Civ. P. 12 (b)(6), the facts alleged are taken as true and all reasonable inferences are drawn in the complainant's favor. *Maher II*, 34 S.R.R. at 54, 2015 FMC LEXIS 43 at *36. The Commission may consider not only factual allegations within the complaint but also documents attached to the complaint, incorporated by reference, or integral to the claims alleged, and matters subject to official notice. *Maher II*, Docket No. 12-02, 2015 FMC LEXIS 43, *36, *110-*111 (FMC 2015).[5] The Commission's Rules of Practice and Procedure allow it to take "[o]fficial notice of such matters as might be judicially noticed by the courts, or of technical or scientific facts within the general knowledge of the Commission as an expert body." 46 C.F.R. § 502.226(a).

The facts alleged must "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics*, 32 S.R.R. 126, 136 (FMC 2011). The facts alleged must allow the Commission to reasonably infer that respondent may be liable for the conduct alleged and provide "fair notice" of the nature of the claims and bases for asserting them. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009); *Twombly*, 550 U.S. at 555.

B. Section 41102(c) Claim Regarding the Mercedes

Complainants allege that Respondents violated 46 U.S.C. § 41102(c) by shipping the Mercedes to an unauthorized foreign port where they intended to sell it

[5] Like the ALJ, in ruling on Complainants' exceptions, the Commission considers the Ostrovskiy certification as an amendment to the complaint. *See* 46 C.F.R. § 502.66(a) ("Amendments or supplements to any pleading (complaint . . .) will be permitted or rejected, either in the discretion of the Commission or presiding officer.").

and keep the proceeds. Compl. ¶¶ 27-30. Section 41102(c) provides that common carriers, marine terminal operators, and ocean transportation intermediaries (including NVOCCs) "may not fail to establish, observe, and enforce just and reasonable regulations and practices related to or connected with receiving, handling, storing or delivering property." 46 U.S.C. § 41102(c).

The ALJ dismissed Complainant's § 41102(c) claim regarding the Mercedes because "Complainants do not state facts that would support a finding that they entered into a contract of carriage to transport the Mercedes." I.D. at 3, 14, 15, 20. The ALJ found the complaint devoid of facts showing that MAVL had a contract with MTL to ship the Mercedes overseas as distinguished from a contract to store it in the United States. *See id*. at 14-15, 20-21. The ALJ was not persuaded by Complainants' circumstantial evidence or their theory that Respondents' alleged assertion of a maritime lien against the Mercedes demonstrated a contract of carriage. *See id*. at 15-20. The ALJ's reasoning in this regard is premised on the notion that parties' arrangement for storage of the Mercedes was not connected to international ocean transportation.

Because the ALJ premised dismissal largely, if not exclusively, on the absence of a contract of carriage, the parties' arguments on appeal focus primarily on whether there was an express or implied contract of carriage to ship the Mercedes to overseas. In that vein, they discuss whether MTL had a maritime lien against the Mercedes and whether the alleged conversion occurred in the United States or after the Mercedes arrived in Dubai.

The ALJ erred, however, in framing the question as whether the parties had a contract to ship the Mercedes overseas. Rather, as the Commission explained in *Crocus Investments, LLC v. Marine Transport Logistics, Inc.*, 1 F.M.C. 2d 403, 415 (FMC 2018), the jurisdictional question in § 41102(c) cases is whether the respondent was acting as a regulated entity when it allegedly violated the Shipping Act. In *Crocus*, the Commission held that "[t]he relevant inquiry here is not . . . limited to whether there was a contract for overseas shipment" and stated that focusing on the existence of a contract or whether the cargo actually left the U.S. for a foreign port "unduly narrows the scope of the inquiry to two factors." *Id.* "Whether the [cargo] was actually transported to a foreign port or the subject of a contract to do so is highly relevant to this analysis, but not necessarily determinative." *Id.* The Commission noted that a broad swath of conduct falls within the scope of NVOCC activities. *Id.* (citing 46 C.F.R. 515.2(k)).

Properly framed, the question is whether Respondent MTL was a common carrier with respect to the allegations regarding the Mercedes.[6] *See Tienshan, Inc. v.*

[6] Section 41102(c) applies to common carriers, marine terminal operators, and ocean transportation intermediaries. There are two types of ocean transportation intermediary: ocean freight forwarders and NVOCCs. 46 U.S.C. § 40102(20). Because an NVOCC is a type of common carrier, and because there is no indication that MTL is a marine terminal operator or ocean freight forwarder, the "regulated entity" question here involves the definition of common carrier.

Tianjin Hua Feng Transport Agency Co., Ltd., FMC No. 08-04, 2011 FMC LEXIS 9, *39 (ALJ Mar. 9, 2011). Common carriers are defined by three traits; they: (1) hold themselves out to the general public as providing transportation by water for passengers or cargo between the United States and a foreign country; (2) assume responsibility for transporting the passengers or cargo from the port or point of receipt to the port or point of destination; and (3) use, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a United States port and a foreign port. 46 U.S.C. § 40102(7) and (17); 46 C.F.R. § 515.2(e) and (k).

When dealing with alleged common carriers or NVOCCs under § 41102(c), the Shipping Act's common carrier definition forms the basis for a "fact-intensive analysis" that considers the parties' conduct and actual arrangements during the relevant time frame. *Crocus*, 1 F.M.C. 2d. at 415 (citing *Worldwide Relocations—Possible Violations of the Shipping Act*, 32 S.R.R. 495, 503, 2012 FMC LEXIS 23, *13-*14 (FMC 2012). The Commission's well- defined methodology for deciding common carrier status considers the totality of circumstances and their combined effect. *Worldwide*, 32 S.R.R. at 503, 2012 FMC LEXIS 23, *13-*14.

Here, MTL's alleged actions regarding the Mercedes meet all criteria that define a common carrier. MTL unquestionably held itself out as a common carrier; it is registered with the Commission as a licensed NVOCC and publishes an NVOCC tariff.[7] I.D. at 3-5; MTL Tariff at 1; *see also Crocus*, 1 F.M.C. 2d at 410; *Tienshan*, 2011 FMC LEXIS 9, at *39-*42.

Taking Complainants' allegations as true, MTL also assumed responsibility for the Mercedes when it agreed to store it and tacitly understood that MAVL would eventually have the Mercedes shipped abroad. Compl. ¶¶ 27-29. When MTL accepted delivery of the Mercedes in early December 2012, Mr. Ostrovskiy told MTL that MAVL would eventually have the car shipped back to Germany after inspecting it and ordering repair parts. *Id*. MTL acknowledged that the Mercedes was earmarked for export by granting MAVL the same 30 days free storage it allows cargo destined for export under its NVOCC tariff. MTL's tariff allows "30 days free storage starting from the date of arrival of the vehicle at the warehouse, in order to allow time to provide the Carrier with the vehicle title, absent which the vehicle will not be loaded into a container." MTL Tariff, Rule 2-140. According to Mr. Ostrovskiy, MAVL had an on-going business relationship with MTL Ostrovskiy Certif. ¶ 12, so MTL presumably knew that MAVL is in the vehicle export/import business and likely to ship the Mercedes abroad at some point.

Further support for MTL having assumed responsibility for transportation comes from the undisputed allegations and evidence that MTL actually shipped the Mercedes overseas as an NVOCC. Complainants allege that MTL shipped the

[7] Marine Transport Logistic Inc. (Org. No. 018709) is listed on the Commission's website as a registered NVOCC. (https://www2.fmc.gov/oti/NVOCC.aspx, last visited October 14, 2020).

Mercedes to Dubai. *See* Compl. ¶¶ 27-31. A bill of lading issued by Maersk for the Mercedes' shipment[8] shows MTL listed as the shipper, which would be consistent with it acting as an NVOCC.[9] *See* 46 U.S.C. § 40102(7) and (17).

As for the third element of the common carrier definition, Complainants allege that the Mercedes was transported between a United States port and a foreign port. Compl. ¶ 31; Ostrovskiy Certif. ¶¶ 16-17. This is further demonstrated by the Maersk bill of lading for the Mercedes.

In sum, at this stage of the proceedings, Complainants have adequately alleged that MTL was acting as an NVOCC with respect to the Mercedes. The Commission therefore reverses the ALJ's dismissal of the § 41102(c) claim regarding the Mercedes and remands it for further proceedings, during which Complainants would need to prove all the elements of their § 41102(c) claim under the Commission's interpretative regulations at 46 C.F.R. § 545.4.[10]

C. Section 41104(a)(3) Claim Regarding the Motorcycles

Complainants also allege that Respondents retaliated against them in violation of 46 U.S.C. § 41104(a)(3) by directing another NVOCC (Unitrans) not to ship Complainant's motorcycles. Section 41104(a)(3) provides that a

> common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason.

The ALJ noted that under this section, the "unfair or unjustly discriminatory methods" at issue refer to practices designed to stifle outside competition. I.D. at 16. The ALJ dismissed the 46 U.S.C. § 41104(a)(3) claims regarding the motorcycles with prejudice for failure to state a claim because, according to the ALJ, the

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[8] The Commission may consider the Maersk bill of lading because it is referenced in the Complaint, Compl. ¶ 34, and the Commission can also take official notice of information printed on the Maersk bill of lading. *See* 46 C.F.R. § 502.226(a). A copy of the Maersk bill of lading was filed as an exhibit to Complainants' Show Cause Resp., Ex. B

[9] Respondents argue that their alleged role in shipping the Mercedes is not relevant because if they committed conversion (which they deny), the unlawful act occurred while the car was still stored in New Jersey. *See* Respondent Marine Transport Logistic Inc.'s Br. in Support of the Order to Show Cause, 3-5, Oct. 17, 2016. Whether and where the alleged conversion occurred might be relevant to the merits of the § 41102(c) claim but is less relevant to whether MTL acted as an NVOCC with respect to the Mercedes.

[10] On remand, the ALJ may also need to address whether and on what basis the Complainants can pursue a § 41102(c) claim against Mr. Alper. Section 41102(c) governs the conduct of regulated entities, not individuals. Complainants allege that Mr. Alper acted as MTL's alter ego, that their actions are one and the same, and that it would be unjust not to pierce the corporate veil and hold him accountable for alleged Shipping Act violations. Compl.¶¶ 12-16

allegations did not implicate such competition. *Id.* at 26-27.

Complainants did not, however, challenge the dismissal of the § 41104(a)(3) claims regarding the motorcycles in their exceptions. *See* Exceptions at 9-28. Nor do they mention the motorcycles in any of their numerous additional filings subsequent to the Initial Decision. Because Complainants did not challenge this dismissal in their exceptions, the Commission affirms this aspect of the Initial Decision. *See* 46 C.F.R. § 502.227(a)(1), (3).

D. Claims Dismissed as Abandoned

In the Initial Decision, the ALJ dismissed several claims as abandoned because Complainants did not address them in response to the order to show cause. I.D. at 3. The ALJ correctly dismissed as abandoned any 46 U.S.C. §§ 41104(a)(10) and § 41102(c) claims regarding the motorcycles because Complainants did not allege violations of those statutory prohibitions vis-à-vis the motorcycles. *See id*. at 8, 25. Moreover, Complainants did not challenge these dismissals in their exceptions.

The ALJ also dismissed as abandoned Complainants' claim that Respondents violated § 41104(a)(10) with respect to the Mercedes. I.D. at 3, 8. On appeal, Complainants argue that the ALJ erred in dismissing this claim. According to Complainants, the complaint together with the Ostrovskiy certification sufficiently alleges that "MTL refused to deal or negotiate with respect to any monies that were purportedly due and owing to MTL for reasons unrelated to the Mercedes, and unilaterally decided to sell the Mercedes to satisfy an alleged debt." Exceptions at 16. Complainants also argue that the Ostrovskiy certification alleges that MTL refused to offer any explanation as to the whereabouts of the vehicle." *Id.*

Given that the ALJ's show cause order focused on subject matter jurisdiction and Complainants may have thought that the show cause order was limited to jurisdictional concerns, the Commission will assume that Complainants did not intentionally abandon the § 41104(a)(10) claim. The result, however, is the same because Complainants failed to state a § 41104(a)(10) claim with respect to the Mercedes. Section 41104(a)(10) prohibits common carriers from "unreasonably refus[ing] to deal or negotiate." 46

> U.S.C. § 41104(a)(10). Proving unlawful refusal to negotiate under § 41104(a)(10) requires the complainant to show that: (1) the respondent is a common carrier; (2) who actually refused to deal or negotiate; and (3) in doing so acted unreasonably. *Canaveral Port Auth. -- Possible Violations of Section 10(b)(10*), *Unreasonable Refusal to Deal or Negotiate,* 29 S.R.R. 1436, 1448 (FMC 2003).

The complaint, however, merely recites the statutory language of § 41104(a) without alleging facts suggesting that MTL refused to deal or negotiate and that any such refusal was unreasonable. Compl. ¶¶ 18, V.B. At most, Complainants allege that MTL failed to follow the legal prerequisites for a sale and did not provide sale

documentation to Complainants. Even drawing inferences in Complainants favor, these allegations do not suggest an unreasonable refusal to deal. The Ostrovskiy certification provides additional detail about MTL's alleged refusal to provide the vehicle for inspection, but taking this as true, it is not at all clear that Mr. Ostrovskiy was alleging an unreasonable refusal to deal.

Moreover, neither the allegations in the complaint nor the Ostrovskiy declaration match Complainant's new § 41104(a)(10) argument in their Exceptions, which is that it was an unreasonable refusal to deal for MTL to sell the Mercedes to satisfy an unrelated debt. Exceptions at 16. But Complainants already made this allegation in their complaint as part of their § 41102(c) claim. Compl. ¶ V.C ("MTL and Alper have violated 46 U.S.C. 41102(c) by exercising a purported maritime lien for monies allegedly owed to third parties, and by detaining, misdelivering, and converting Complainants' automobiles in order to sell them overseas for a profit."). In short, Complainants allegations and their shifting theories in their Exceptions are insufficient to provide Respondents with fair notice of the nature and basis for their § 41104(a)(10) claim.

Moreover, the Commission agrees with the ALJ that dismissal of this claim should be with prejudice. Although the Commission typically allows amendments liberally, *Maher II*, 2015 FMC LEXIS 43 at *115, Complainants have already had an opportunity to correct the deficiencies in their § 41104(a)(10) claim but failed to do so. The ALJ allowed Complainants to supplement their complaint with the Ostrovskiy certification filed in response to the Show Cause Order. Despite that opportunity, Complainants failed to include factual allegations supporting their § 41104(a)(10) claim. Additionally, Complainants litigated the underlying events in district court for several years before bringing the Shipping Act claims before the Commission and thus had ample opportunity to develop the factual basis for their claims.

For all these reasons, the Commission affirms the ALJ's dismissal with prejudice of the § 41104(a)(10) claim regarding the Mercedes for failure to state a claim.

E. Complainants' Rule 230 Petition

After the exceptions were briefed, Complainants petitioned the Commission under Rule 230 to reopen the proceedings so they could submit an MTL bill of lading for the Mercedes. According to Complainants, the bill of lading contradicts some of Respondents' arguments that the Commission lacks jurisdiction under § 41102(c). Respondents oppose reopening the proceedings to allow this additional evidence and argue that the evidence is not new and is irrelevant in any event. Reply to Complainants' Pet. for Leave to Supplement Exceptions, 3-4, Mar. 9, 2017.

Because the Commission finds that Complainants have sufficiently alleged that MTL is an NVOCC with respect to the Mercedes, the proffered bill of lading is

not necessary for the Commission to decide this appeal. The Commission therefore denies Complainants' Rule 230 petition as moot. Insofar as the bill of lading may be relevant to MTL's NVOCC status or any other issue, Complainants will have the opportunity to offer it as evidence in future proceedings before the ALJ. Finally, the Commission denies Complainants' motion for leave to submit a reply in support of their petition because the Commission did not request a reply and Complainants have not shown extraordinary circumstances. 46 C.F.R. § 502.71(c).

IV. CONCLUSION

The Commission hereby:

(1) reverses the dismissal of the § 41102(c) claim regarding the Mercedes and remands that claim for further proceedings;

(2) affirms the dismissal with prejudice of the § 41104(a)(3) claim regarding the motorcycles;

(3) affirms the dismissal with prejudice of the § 41104(a)(10) claim regarding the Mercedes;

(4) denies Complainants' Rule 230 petition as moot; and

(5) denies Complainants' motion to file a reply in support of the Rule 230 petition.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

AENEAS EXPORTING LLC, *Complainant*

v.

CARLO SHIPPING INTERNATIONAL, INC., *Respondent*.

DOCKET NO. 20-11

Served: November 5, 2020

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's September 29, 2020 Initial Decision Approving Settlement Agreement has expired. Accordingly, the decision has become administratively final.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

INTERNATIONAL OCEAN TRANSPORTATION SUPPLY CHAIN ENGAGEMENT - POSSIBLE VIOLATIONS OF 46 U.S.C. § 41102(C)	**Fact Finding No. 29**

Issued: November 19, 2020

SUPPLEMENTAL ORDER

On March 31, 2020, in an effort to respond to growing concerns about challenges impacting the global supply chain and the American economy, the Federal Maritime Commission (Commission) issued an order establishing Fact Finding 29. Order: *International Ocean Transportation Supply Chain Engagement*, 85 Fed. Reg. 19146 (April 6, 2020). The primary purpose of the Fact Finding was to identify operational solutions to cargo delivery system challenges related to recent global events.

The Order designated Commissioner Rebecca F. Dye as the Fact Finding Officer pursuant to 46 U.S.C. §§ 41302, 40302, 41101 to 41109, 41301 to 41309, and 40104, and 46 C.F.R. § 502.281 et seq. The Order also granted her full authority under 46 C.F.R. §§502.281 to 502.291 to perform such duties as may be necessary in accordance with U.S. law and Commission regulations.

The initial focus in Fact Finding No. 29 was on commercial solutions. Based on information obtained in the fact finding, the Commission is concerned that vessel-operating common carriers in alliances who call on the Port of New York and New Jersey or who call on the Port of Long Beach and the Port of Los Angeles may be employing practices and regulations that violate 46 U.S.C. § 41102(c). As one example, stakeholders who participated in discussions in Fact Finding No. 29 shared problems they are experiencing with policies regarding the return of empty containers. *See* Press Release, *Commissioner Dye Announces Findings of San Pedro Bay Discussions* (June 17, 2020); Press Release, *Commissioner Dye Completes Work in NY & NJ, Turns Attention to New Orleans* (Aug. 4, 2020). In follow up conversations with the Fact Finding Officer, stakeholders have reiterated these concerns, and articles in the trade press have also highlighted questionable practices.

Because of these stakeholder concerns, the Commission now has a clear and compelling responsibility to investigate the practices and regulations that are having an unprecedented negative impact on congestion and amplifying bottlenecks at these ports and other points in the Nation's supply chain. This is a serious risk to the growth of the U.S. economy, job growth, and to our Nation's competitive position in the world.

Therefore, the Commission fully endorses efforts by the Fact Finding No. 29 Officer, Commissioner Rebecca F. Dye, under the authority existing in the March 31, 2020 Order, to investigate whether alliance carriers who call on the Port of New York and New Jersey or who call on the Port of Long Beach and the Port of Los Angeles are employing practices or regulations in violation of § 41102(c). This includes, but is not limited to, practices and regulations related to demurrage and detention, empty container return in light of 46 C.F.R. § 545.5, and practices related to the carriage of U.S. exports.

The Fact Finding Officer's authority includes the ability to issue a Notice of Inquiry (NOI) and/or compulsory information demands under 46 U.S.C. § 40104 to alliance carriers who call on the Port of New York and New Jersey or who call on the Port of Long Beach and the Port of Los Angeles.

THEREFORE IT IS ORDERED, That, pursuant to her existing authority under 46 U.S.C. §§ 41302, 40302, 41101 to 41109, 41301 to 41309, and 40104, and 46 C.F.R. § 502.281 et seq., Commissioner Rebecca F. Dye investigate whether alliance carriers who call on the Port of New York and New Jersey or who call on the Port of Long Beach and the Port of Los Angeles are employing practices or regulations in violation of 46 U.S.C. § 41102(c);

IT IS FURTHER ORDERED, That, the Fact Finding Officer provide periodic updates to the Commission on the results of efforts undertaken by this investigation;

IT IS FINALLY ORDERED, That, notice of this Order be published in the Federal Register.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

CROCUS INVESTMENTS, LLC AND CROCUS, FZE,
Complainants,

v.

MARINE TRANSPORT LOGISTICS, INC. AND ALEKSANDR SOLOVYEV A/K/A ROYAL FINANCE GROUP INC.,
Respondents.

DOCKET NO. 15-04

Served: December 9, 2020

BEFORE: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION ON REMAND[1]

I. INTRODUCTION

A. Overview and Summary of Decision

On May 27, 2015, Complainants Crocus Investments, LLC ("Crocus Investments") and Crocus, FZE (collectively "Crocus") commenced this proceeding by filing a complaint alleging that Respondents Marine Transport Logistics, Inc. ("MTL" or "Marine Transport") and Aleksandr Solovyev a/k/a Royal Finance Group, Inc. ("RFG"), violated section 41102(c) of the Shipping Act of 1984 ("Shipping Act" or "Act") with regard to three boats. Respondents' answer denied the allegations.

On June 17, 2016, an initial decision dismissed the claims regarding all three boats and found "that the third boat never left the United States; therefore, the third boat never entered into international commerce, the Shipping Act does not apply, and the Commission does not have jurisdiction to resolve disputes regarding its handling." Initial Decision ("I.D.") at 1-2. On July 16, 2019, the Commission vacated and remanded the claim regarding the storage or other arrangements for the third boat, the Formula, and affirmed the initial decision in all other respects. Memorandum Opinion and Order ("Commission Order") at 22. Therefore, the focus of this remand decision is only on the section 41102(c) claim against MTL regarding the Formula boat.

[1] This initial decision on remand will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

The Crocus Complainants, both owned and operated by Alexander Safonov, are in the business of buying used boats that they repair and resell overseas through an affiliated company, Middle East Asia Alfa, FZE ("Middle East Asia"), which has facilities in Dubai, United Arab Emirates. Commission Order at 2. Safonov retained the services of Respondent Aleksandr Solovyev, acting on behalf of his companies, and Respondent MTL to make arrangements to purchase, store, and transport boats that Crocus intended to resell overseas. *Id.* Under their arrangement, Safonov and Solovyev would typically view boats online and Safonov would decide which boats to purchase. *Id.* at 3. Solovyev would then arrange for the purchase of the boats, and, prior to overseas shipment, their storage in a New Jersey warehouse operated by World Express & Connection, Inc. ("World Express"), a company which Solovyev also owns. *Id.* at 2-3. Transportation of Crocus's boats to Dubai was arranged by Solovyev acting as an agent for MTL, a licensed non-vessel operating common carrier ("NVOCC") owned by Mr. Solovyev's estranged wife, Alla Solovyeva. *Id.* at 3.

As discussed below, although the Commission has jurisdiction over the claims related to the Formula boat, Complainants have not established by a preponderance of the evidence that Respondent MTL violated the Shipping Act with respect to the Formula boat. Therefore, the complaint is dismissed.

B. Procedural History

1. Initial Decision

Complainants filed their complaint on May 27, 2015, and Respondents filed their answer on July 10, 2015. The parties engaged in discovery. Briefing on the merits was completed on February 25, 2016.

On June 17, 2016, the initial decision was issued dismissing the complaint and finding that Complainants "have not proved by a preponderance of the evidence that Respondents Marine Transport Logistics, Inc., and Aleksandr Solovyev a/k/a Royal Finance Group, Inc., violated section 41102(c) of the Shipping Act of 1984, 46 U.S.C. § 41102(c) or that Respondent Aleksandr Solovyev a/k/a Royal Finance Group, Inc., violated section 40901(a)." The initial decision stated:

> As set forth more fully below, in separate shipments, MTL operated as an NVOCC when it transported by water two of the boats at issue from the United States to Dubai, United Arab Emirates, and delivered them to the consignee without problem. Complainants do not claim that Respondents violated the Act on these shipments. The boats were then returned to the United States and delivered to MTL as consignee. Complainants contend that MTL operated as an NVOCC on this shipment, but the evidence does not establish that MTL operated as an NVOCC. The evidence establishes that the third boat never left the United States; therefore, the third boat never entered into international commerce, the Shipping Act does not apply, and the Commission does not have jurisdiction to resolve disputes regarding its handling. Complainants have not proved by a preponderance of the evidence that Respondents violated the Act. Therefore, the complaint is dismissed.

I.D. at 2.

The initial decision discussed the third boat, the Formula, stating:

> On August 7, 2013, Safonov instructed Solovyev to purchase a 2010 Formula boat 34PC, VIN TNRD7870C010 with the intention of sending the boat to Dubai for repair and resale. Solovyev, through Car Express, purchased the Formula for a total of $56,280. The Formula required a trailer for ocean shipment. The record contains three different RFG invoices with the same number for this purchase. On August 7, 2013, RFG issued invoice #1189AT to Alexander Safonov, Crocus Investments in the amount of $56,280 for purchase of the Formula and $3,500 for delivery, a total of $59,780. Also on August 7, 2013, RFG issued invoice #1189AT to Andrey Tretyakov, Dubai, UAE, Middle Asia Alfa in the amount of $56,280 for purchase of the Formula, $3,500 for delivery, $12,000 for loading/shipping to Dubai, $500 for commission, $500 for documentation, and $4,500 for a trailer, a total of $77,280. Then on August 8, 2013, RFG issued invoice #1189AT to Crocus FZE in the amount of $56,280.00 for purchase of the Formula, $3,500 for delivery, $12,000 for loading and shipping the Formula to Dubai, $500 for commission, $500 for documentation, and $4,500 for a trailer, a total of $77,280. On August 9, 2013, Crocus Investments wired $59,780 to RFG to pay the $56,280.00 for the Formula and the $3,500 for delivery to the port of loading. Complainants did not pay the $12,000 for loading and shipping the Formula to Dubai, $500 for commission, $500 for documentation, or $4,500 for a trailer. (ALJFF 83-89.)
>
> In November 2013, Solovyev told Safonov that he had found a trailer for the Formula but Safonov did not like the trailer. In December 2013, Solovyev offered what Safonov found to be a suitable trailer. The record contains three different RFG invoices with number 1204AS issued on December 3, 2013. The first is to Crocus FZE in the amount of $12,000 for loading and shipping the Formula to Dubai, $500 for commission, and $500 for documentation. (CX 028.)[2] The second invoice is to Crocus FZE in the amount of $4,950 for boat trailer 2005 NTTRL VIN LW95151. (CX 035.) The third invoice is to Crocus FZE in the amount of $4,950 for boat trailer 2005 NTTRL VIN LW95151, $12,000 for loading/shipping the Formula to Dubai, $500 for commission, and $500 for documentation. (CX 038.) On December 4, 2013, Crocus FZE wired $4,950 to RFG to pay for boat trailer 2005 NTTRL VIN LW95151. The record does not contain any evidence that Complainants paid the $12,000 for loading/shipping the Formula to Dubai, $500 for commission, or $500 for documentation.
>
> Safonov reached the conclusion that Tretyakov, the Middle East Asia employee in Dubai, "started to become a crook" and decided that he did not want to deal with "crooks." On February 14, 2014, Safonov sent an email to Solovyev stating: "I am sending you the name of the company in Florida – from which you

[2] "CX" followed by a number refers to a page in Complainants' original appendix, "RX" followed by a number 1-89 refers to a page in Respondents' original Appendix, "RX" followed by a number 90-95 refers to Respondents' notice of filing dated May 4, 2016. I.D. at 10 n.5.

> have received the money for Formula-34 – please prepare all documents for the boat reflecting this company's information and send me all copies, ok? Do you know if copies of the documents will be enough to transfer Formula to Florida? It is good that we did [not] have time to send it to Dubai." (CX 055.) Solovyev did not send the Formula to Florida.

I.D. at 5.

Regarding the Formula boat claims, the initial decision concluded:

> The record shows that Complainants originally intended to ship the Formula to Dubai for repair and resale. On August 7, 2013, RFG sent invoice 1189AT for payment in the amount of $77,280 to Complainants' employee in Dubai, Andrey Tretyakov, reflecting $56,280 for the Formula, $3,500 for delivery, $12,000 for loading/shipping to Dubai, UAE, $500 for commission, $500 for documentation, and $4,500 for a trailer to load the boat. (FF 75 (CX 031)). Complainants wired $59,780 on August 9, 2013, to RFG to pay for the Formula ($56,280.00) and the cost of the delivery to the port of loading ($3,500), and $4,950 on December 4, 2013, to pay for the boat trailer. Complainants never paid the $12,000 for loading and shipping the Formula to Dubai or the $500 for Commission and $500 for documentation. (ALJFF 76, 85, 92.) Safonov subsequently reached the conclusion that Tretyakov, the Middle East Asia employee in Dubai, "started to become a crook," and on February 2014, instructed Solovyev to ship the Formula to Miami instead. (ALJFF 86, 87.) Therefore, Complainants and Respondents (MTL, Solovyev, or any of Solovyev's companies) never entered into an agreement to transport the Formula by water from the United States to a foreign port.
>
> As discussed above, an agreement to transport the Formula from New Jersey to Florida is not an agreement to "provide transportation by water of . . . cargo between the United States and a foreign country." Therefore, any controversy about an alleged agreement to ship the Formula to Florida is not subject to the Shipping Act or the Commission's jurisdiction.

I.D. at 26 (footnote omitted).

2. Commission Order

The Commission Order, issued on July 16, 2019, (1) vacated "the ALJ's dismissal of Crocus's 46 U.S.C. § 41102(c) claim with respect to storage or other arrangements for the Formula from August 2013 to February 14, 2014" and remanded that claim "to the ALJ for further consideration consistent with the Final Rule issued by the Commission on December 12, 2018;" (2) affirmed "the Initial Decision in all other respects and dismisse[d] all other claims against Respondents with prejudice;" and (3) denied "Crocus's petition to reopen the proceedings and all relief requested in that petition." Commission Order at 26.

The Commission discussed the Formula boat, stating:

With respect to the Formula boat, Crocus's claims relate to arrangements regarding: (1) the Formula prior to intended Florida transportation in February 2014; and (2) transporting the boat to Florida. With a limited exception with respect to (1), we affirm the ALJ's dismissal of Crocus's § 41102(c) claims regarding the Formula.

Crocus alleged that Marine Transport violated § 41102(c) by mishandling its responsibilities and overcharging it for arrangements related to the Formula. *See* Exceptions at 1-2, 6-10. The Formula was stored in a New Jersey warehouse from August 2013 through at least July 2014. I.D. at 17-18. The ALJ dismissed this claim because "[t]he evidence establishes that the third boat never left the United States; therefore, the third boat never entered into international commerce, the Shipping Act does not apply, and the Commission does not have jurisdiction to resolve disputes regarding its handling." *Id.* at 1-2. The ALJ further found that the parties "never entered into an agreement to transport the Formula by water from the United States to a foreign port." *Id.* at 26. The ALJ did not otherwise address the merits of Crocus's claims about the Formula. *See id.*

The parties' arguments before the ALJ, and on appeal, focused on whether there was an express or implied contract to transport the Formula overseas. In particular, in its exceptions, Crocus argues that there was an implied contract, and Respondents dispute that assertion. Exceptions at 2, 7-13; Reply at 3-12. The parties thus assume (and the I.D. could be read to hold) that the existence of a contract is critical to § 41102(c) liability.

The relevant inquiry here is not, however, limited to whether there was a contract for overseas shipment. Nor was the ALJ's focus on whether the Formula left the United States or had an agreement for overseas shipment clearly linked to the Shipping Act or precedent, and it unduly narrows the scope of the inquiry to two factors. The approach supported by the text of § 41102(c) and Commission caselaw asks: was the respondent acting as a regulated entity with respect to the conduct at issue? *See supra* at 13-14.

The inquiry here should have been: was Marine Transport acting as an OTI with respect to the Formula boat from August 2013 (when it was purchased) to February 2014 (when Crocus began to inquire about domestic transportation of the boat). This fact-intensive analysis takes into account the statutory definition of OTI (and in particular, NVOCC), and evidence about the parties' conduct during that time frame. *See*, *e.g.*, *Worldwide Relocations—Possible Violations of the Shipping Act*, 32 S.R.R. 495, 503, 2012 FMC LEXIS 23, *23-27 (FMC 2012); *Tienshan*, [*Inc. v. Tianjin Hua Feng Transport Agency Co., Ltd.*, 31 S.R.R. 1831, 1842-43, 2011 FMC LEXIS 9, *39-42 (ALJ 2011)].

Whether the Formula was actually transported to a foreign port or the subject of a contract to do so are highly relevant to this analysis, but not necessarily determinative. For instance, the Commission has determined that a

> broad swath of conduct falls within the scope of NVOCC activities. *See* 46 C.F.R. § 515.2(k). This determination is made more difficult where, as here, the parties seem to operate without much documentation and/or respect for corporate or other formalities.
>
> Because the ALJ did not clearly apply this analytical approach, the Commission vacates the ALJ's dismissal of the § 41102(c) claim regarding the Formula boat with respect to the time period from August 2013 to February 14, 2014, and remands so that the ALJ can determine whether Marine Transport was acting as an OTI or otherwise address the elements of § 41102(c).

Commission Order at 20-22 (heading omitted).

On July 22, 2019, the proceeding was reassigned to the undersigned and a remand scheduling order was issued. On August 9, 2019, at Crocus's request, a revised remand scheduling order was issued. Crocus's remand brief and appendix were filed on September 27, 2019. MTL's remand opposition brief and exhibits were filed on October 28, 2019. Crocus's remand reply brief and appendix were filed on November 14, 2019. The parties timely filed their remand briefs and did not request any additional discovery.

C. Arguments of the Parties

Complainants allege that MTL acted as an OTI with regard to the Formula boat and that while acting as an OTI, MTL violated section 41102(c) with respect to storage or other arrangements for the Formula boat during the relevant time period. Remand Brief at 2-55. In their reply, Complainants contend that MTL's failure to follow the remand scheduling order instructions to address only the narrow issue remanded by the Commission concedes the issue; the Commission's use of precedent does not bar Crocus from seeking relief; MTL's unjust and unreasonable practices, which occurred on a normal, customary, and continuous basis, are self-evident; MTL's arguments regarding causation do not address the evidence and issues raised in Crocus's remand brief; Crocus established that MTL acted as an OTI and that Solovyev's actions as agent bind MTL as principal; and that MTL's proffered invoice should be summarily disregarded. Remand Reply at 2-17.

MTL asserts that the allegations in the complaint fall after the time period under consideration in this remand; Crocus failed to delineate an unjust or unreasonable practice and failed to allege that such practice was normal, customary, and continuous; Crocus failed to establish proximate cause; and MTL never acted as an OTI for the Formula boat as MTL did not deal with Crocus. Remand Opposition at 1-9.

D. Evidence

Under the Administrative Procedure Act ("APA"), an Administrative Law Judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). This initial decision on remand is based on the pleadings, exhibits, letter briefs, briefs, proposed findings of fact and

conclusions of law, and replies thereto, as well as the remand briefs and exhibits filed by the parties.

This initial decision on remand addresses only material issues of fact and law. Proposed findings of fact not included in this decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

Many facts in this proceeding are disputed and it is not necessary to resolve disputes regarding facts that are not determinative. In addition, all relevant evidence is considered, even if the evidence is outside of the time period at issue. Communication, including invoices, sent after February 14, 2014, may be relevant to the intent of the parties during the time period at issue and are given due consideration. Specific findings of fact on remand are in section two, prior to the analysis and conclusions of law in part three, and the order in part four.

II. REMAND FINDINGS OF FACT

The Commission affirmed the initial decision in all respects except for the section 41102(c) claim against MTL regarding the Formula boat and did not vacate any of the findings of fact in the initial decision. Commission Order at 2. Therefore, the findings of fact in the initial decision ("ALJFF") are adopted. The findings relevant to the issues on remand, including whether MTL was acting as an OTI with respect to the Formula boat from August 2013 to February 14, 2014, are restated in this decision for ease of reference. New findings are included in subsection C below ("ALJFFR").

A. General Findings of Fact

1. Alexander Safonov (Safonov) is the 100% owner of complainants Crocus Investments, LLC and Crocus FZE. ALJFF 2, 4.

2. Safonov is the co-owner of Middle East Asia Alfa, FZC ("Middle East Asia"), not a party to this proceeding, and had decision-making rights for the company. ALJFF 5.

3. Safonov formed Middle East Asia with Oleg Bortsov to purchase used boats in the United States and ship the boats overseas for repair and sale in Dubai. ALJFF 6.

4. "[T]here was agreement between Crocus FZE and company, Middle East Asia Alfa, that I [Safonov], as Crocus FZE, invest my money into Middle East Asia Alfa." ALJFF 8.

5. Middle East Asia employed Andrey Tretyakov ("Tretyakov") as an associate in Dubai and Tretyakov also owned an interest in Middle East Asia. ALJFF 9-10.

6. In business situations, Safonov sometimes acts as Crocus Investments, sometimes as Crocus FZE, and sometimes as Middle East Asia. ALJFF 13.

7. Middle East Asia sold seven boats in Dubai that had been purchased in the United States. ALJFF 11.

8. Respondent MTL is licensed by the Commission as a non-vessel-operating common carrier, license number 018709. ALJFF 14.

9. Alla Solovyeva is the owner of MTL. ALJFF 16.

10. At the time the relevant events occurred, Respondent Aleksandr Solovyev and Alla Solovyeva were husband and wife, but separated. ALJFF 17.

11. Solovyeva is the sole owner, officer, and director of Car Express & Import, Inc. ("Car Express"). ALJFF 20.

12. At the request of customers, Car Express purchases automobiles and boats from auctions and arranges on behalf of that customer for the transportation of the automobile or boat from the United States to a foreign country. ALJFF 21.

13. Solovyeva is the sole owner, officer, and director of Respondent Royal Finance Group, Inc. ("RFG"). ALJFF 22.

14. Solovyeva is the owner, officer, and director of World Express & Connection, Inc. ("World Express"). ALJFF 23.

15. World Express is a warehouse company providing loading and storage services for vehicles, boats, and other cargo, including for ocean transportation from the United States to foreign ports. ALJFF 24.

16. World Express is located at 63 New Hook Road, Bayonne, NJ 07002. ALJFF 25.

17. MTL's tariff provides that MTL's container freight station/container yard ("CFS/CY") "may be a designated warehouse. Shipper at its own expense, will deliver its vehicle to [MTL's] designated warehouse for loading into the container for movement to the U.S. load port." ALJFF 26.

18. MTL uses World Express as its CFS/CY. ALJFF 27.

19. At times, Solovyev or one of his companies acts as agent for MTL. ALJFF 28.

20. Safonov engaged Solvyev and his three companies to perform services for Safonov and his three companies to purchase used boats in the United States and ship the boats to Dubai for repair and resale. ALJFF 29.

21. Safonov and Solyvyev would view boats together online and Safonov would decide which boats to purchase. ALJFF 31.

22. All of the boats were purchased from the auction company Copart, a company that conducts Internet auctions of vehicles and boats in part by posting photographs and descriptions of the vehicles and boats online. ALJFF 30 and 32.

23. Car Express was a member of Copart and was able to purchase boats from Copart on behalf of buyers. ALJFF 33.

24. When Safonov wanted Solovyev to purchase a boat, RFG would often pay for the boat and incur other fees related to the purchase. ALJFF 34.

25. Safonov purchased about ten boats using Solovyev's services. ALJFF 39.

26. After purchase from Copart, the boats would be transported to the World Express warehouse. ALJFF 41.

27. Solovyev/Car Express, as agent for MTL, would arrange for the shipment of the boats to Dubai. ALJFF 42.

28. Other than the three boats at issue in this proceeding, Complainants did not have any problems with boats purchased and shipped to Dubai using Solovyev and his companies. ALJFF 43.

29. MTL's tariff states: "Carrier provides 30 calendar days free storage prior for vehicles, trucks and boats received for US export shipment at its CFS/CY as listed herein. Beyond 30 days, storage charges per day apply as follows: A. STORAGE CHARGES AT BAYONNE, NJ . . . Boats: USD 20 per day." ALJFF 103.

B. Findings Related to the Formula Boat

30. On August 7, 2013, Car Express purchased a 2010 Formula boat 34 PC, VIN TNRD7870C010, for Safonov for a total of $56,280. ALJFF 74.

31. Safonov bought the Formula boat with the intention of sending it to Dubai for repair and resale. ALJFF 75.

32. On August 7, 2013, RFG sent invoice 1189AT to Alexander Safonov, Crocus Investments, for the purchase of a Formula boat 34 PC, VIN TNRD7870C010. ALJFF 76.

33. The RFG invoice indicates that Alexander Safonov, Crocus Investments, was charged $56,280 for the Formula and $3,500 for delivery, a total of $59,780. ALJFF 77.

34. On August 7, 2013, RFG sent invoice 1189AT to Andrey Tretyakov, Dubai, UAE, Middle East Asia for the purchase of the Formula. ALJFF 78.

35. The RFG invoice indicates that Andrey Tretyakov, Dubai, UAE, Middle East Asia, was charged $56,280 for the Formula, $3,500 for delivery, $12,000 for loading/shipping to

Dubai, $500 for commission, $500 for documentation, and $4,500 for a trailer, a total of $77, 280. ALJFF 79.

36. On August 9, 2013, Crocus Investments wired $59,780 to RFG to pay for the Formula ($56,280.00) and the delivery to the intended port of loading ($3,500). ALJFF 80.

37. The Formula required a trailer for ocean shipment. ALJFF 81.

38. In November 2013, Solovyev told Safonov he found a trailer for the Formula but Safonov did not like the trailer. ALJFF 83.

39. In December 2013, Solovyev found another trailer for the Formula that Safonov found acceptable. ALJFF 84.

40. On December 3, 2013, RFG issued invoice #1204AS to Crocus FZE in the amount of $12,000 for loading and shipping the Formula to Dubai, $500 for commission, and $500 for documentation, a total of $13.000. ALJFF 85.

41. On December 3, 2013, RFG issued invoice #1204AS to Crocus FZE in the amount of $4,950 for a boat trailer 2005 NTTRL VIN LW95141 for the Formula. ALJFF 86.

42. On December 4, 2013, Crocus FZE wired $4,950 to RFG to pay for boat trailer 2005 NTTRL VIN LW95141. ALJFF 89.

43. Safonov reached the conclusion that Tretyakov, the Middle East Asia employee in Dubai, "started to become a crook." ALJFF 90.

44. Safonov decided that he did not want to deal with "crooks," so in February 2014 he instructed Solovyev to ship the Formula to Miami. ALJFF 91.

45. On February 14, 2014, Safonov sent an email to Solovyev stating: "I am sending you the name of the company in Florida – from which you have received the money for Formula-34 – please prepare all documents for the boat reflecting this company's information and send me all copies, ok? Do you know if copies of the documents will be enough to transfer Formula to Florida? It is good that we did [not] have time to send it to Dubai." ALJFF 92 (citation omitted).

46. On July 17, 2014, Safonov sent an email to Solovyev stating: "Aleksandr – please from you to Ft. Lauderdale – Formula-34 PC, + 2 boats that arrived from Dubai." ALJFF 93.

47. On August 13, 2014, Solovyev sent Safonov an email stating:

> Alexander, your attention to unpaid invoices for your boats! [Unfortunately] because of non-payment, we are not able to hold your boats anymore in our storage facility and have to cover all expenses of their storage, not later than Monday, 18th of August of year 2014! Your boat Formula has been stored in our storage facility for more than a year? This will not work! Therefore,

> immediately I request to cover all your expenses! If you need help delivering the boats to Miami, our prices are as follow: Monterey and Chaparral – for $3,500 each! Boat Formula to Miami - $17,000.

ALJFF 96.

48. On August 13, 2014, Solovyev (RFG) sent an invoice to Crocus Investments for $38,859.39 for 369 days of storage of the Formula. ALJFF 97.

C. New Findings of Fact

49. The Formula boat was purchased and transported to the World Express warehouse, owned by Solovyev, for storage. *See* CX 256.

50. MTL issued an invoice to RFG for storage charges in the amount of $39,409.93. Remand Brief at App. H.

51. RFG issued an invoice to Crocus Investments totaling $39,409.93 with $38,859.39 for 369 days of storage of the Formula boat and $550 for unloading from the trailer. The storage fee for the Formula boat was based on storage charges of $105.31 per day ($9.60 for 1 linear meter per day x 10.97 linear meters). CX 106 (duplicate at Remand Brief at App. G).

52. The daily storage charged by RFG for MTL exceed the storage charges listed in MTL's tariff for boats received for U.S. export shipment. *See* ALJFF 103, CX 106.

53. All payments by Complainants related to the Formula boat were made to RFG, as the billing agent for Solovyev and MTL. *See* ALJFF 34, 80, 89.

54. MTL did not issue any shipping documents for transportation of the Formula boat to Dubai. *See* ALJFF 92, 96.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

The Shipping Act provides that a "person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 997-99 (FMC 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co.*, 28 S.R.R. 1635, 1645 (FMC 2000). Complainant alleges a violation of the Shipping Act within the Commission's jurisdiction.

2. Burden of Proof

To prevail in a proceeding to enforce the Shipping Act, a complainant has the burden of proving by a preponderance of the evidence that the respondent violated the Act. 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); 46 C.F.R. § 502.203; *Exclusive Tug Franchises – Marine Terminal Operators Serving the Lower Mississippi River*, 29 S.R.R. 718, 718-19 (ALJ 2001). "[A]s of 1946 the ordinary meaning of burden of proof was burden of persuasion, and we understand the APA's unadorned reference to 'burden of proof' to refer to the burden of persuasion." *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. at 102. When the evidence is evenly balanced, the party with the burden of persuasion must lose. *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman S.S. Corp. v. General Foundries Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994).

B. Relevant Law

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including two types of ocean transportation intermediaries. "The term 'ocean transportation intermediary' means an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(20). "The term 'ocean freight forwarder' means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(19).

"The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(17). To be an NVOCC, the entity must meet the Shipping Act's definition of common carrier.

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(7).

The statutory definitions are echoed in the Commission's regulations:

> *Ocean transportation intermediary* means an ocean freight forwarder or a non-vessel-operating common carrier. For the purposes of this part, the term

(1) *Ocean freight forwarder (OFF)* means a person that – (i) In the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (ii) Processes the documentation or performs related activities incident to those shipments; and

(2) *Non-vessel-operating common carrier (NVOCC)* means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

46 C.F.R. § 515.2(m).

Common carrier means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:

(1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and

(2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . . .

46 C.F.R. § 515.2(e).

The Commission promulgated regulations providing examples of NVOCC services performed by OTIs.

Non-vessel-operating common carrier services refers to the provision of transportation by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:

(1) Purchasing transportation services from a common carrier and offering such services for resale to other persons;

(2) Payment of port-to-port or multimodal transportation charges;

(3) Entering into affreightment agreements with underlying shippers;

(4) Issuing bills of lading or other shipping documents;

(5) Assisting with clearing shipments in accordance with U.S. government regulations;

(6) Arranging for inland transportation and paying for inland freight charges on through transportation movements;

(7) Paying lawful compensation to ocean freight forwarders;

(8) Coordinating the movement of shipments between origin or destination and vessel;

(9) Leasing containers;

(10) Entering into arrangements with origin or destination agents;

(11) Collecting freight monies from shippers and paying common carriers as a shipper on NVOCC's own behalf.

46 C.F.R. § 515.2(k).

The complaint alleges that Respondent violated section 41102(c) of the Shipping Act, which states: "A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

On September 7, 2018, the Commission issued a notice of proposed rulemaking "to obtain public comments on clarification and guidance regarding the Commission's interpretation of the scope of 46 U.S.C. 41102(c) (section 10(d)(1) of the Shipping Act of 1984)." Notice of Proposed Rulemaking: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 45367 (Sept. 7, 2018) ("NPRM"). In the notice of proposed rulemaking, the Commission stated *inter alia*:

> Specifically, the Commission is considering an interpretive rule consistent with Commission precedent . . . that would restore the scope of § 41102(c) to prohibiting unjust and unreasonable *practices* and *regulations*. These decisions require that a regulated entity engage in a practice or regulation on a *normal, customary,* and *continuous* basis and a finding that such practice or regulation is unjust or unreasonable to violate that section of the Shipping Act.

NPRM, 83 Fed. Reg. at 45368 (emphasis in original, internal citations omitted).

On December 17, 2018, the Commission issued a final rule adopting the September 7, 2018, notice of proposed rulemaking without change. Final Rule, 83 Fed. Reg. 64478. Rule 545.4, states:

> 46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:
>
> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
>
> (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;

(c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;

(d) The practice or regulation is unjust or unreasonable; and

(e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4; *see also* Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478 (Dec. 17, 2018) ("Final Rule").

C. Discussion

1. Whether Respondent Acted as a Regulated Entity

The Commission remand requires the determination of whether Respondent MTL was acting as a regulated entity with regard to the Formula boat. To be a regulated entity under section 41102(c), MTL must have been acting as a common carrier, marine terminal operator, or ocean transportation intermediary. There is no allegation that MTL was an ocean common carrier or a marine terminal operator. Ocean transportation intermediaries may be ocean freight forwarders or NVOCCs. The initial decision found that for the first two boats at issue, MTL acted as an NVOCC when exporting the boats.

Crocus alleges that MTL acted as an OTI with regard to the subject Formula boat. Remand Brief at 2-18. MTL asserts that it never acted as an OTI with respect to the Formula boat during the subject time period as MTL did not deal with Crocus and did not perform the OTI activities enumerated by the Commission in Rule 515.2(k) with regard to the Formula boat. Remand Opposition at 7-9.

To conclude that an entity operated as an NVOCC, the entity must meet the Shipping Act's definition of a common carrier; that is, it must hold itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation, assume responsibility for the transportation from the port or point of receipt to the port or point of destination, and use for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102(7); *see also MAVL Capital Inc. v. Marine Transport Logistics and Dmitry Alper*, 2020 FMC LEXIS 216, *8, FMC Docket No. 16-16, Memorandum Opinion and Order ("FMC Order") at 11 (FMC Oct. 29, 2020).

The Commission has long relied on these three factors – holding itself out, assuming responsibility, and transportation by water – to identify a common carrier:

> As a "common carrier" is defined in the Shipping Act, an NVOCC "holds out" to the "general public to provide transportation by water" and "assumes responsibility for the transportation from the port or point of receipt to the port or point of destination." 46 U.S.C. §1702(6). The Commission has found that no single factor of an entity's operation is determinative of its status as a common carrier. [*River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751, 763 (FMC 1999); *Activities, Tariff Filing Practices and Carrier Status of*

> *Containerships, Inc.*, 9 F.M.C. 56, 62-65 (FMC 1965) ("*Containerships*")]. Rather, the Commission must evaluate the indicia of common carriage on a case-by-case basis. *Id.*

Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd., 29 S.R.R. 119, 162 (FMC 2001); *see also Worldwide Relocations*, 32 S.R.R. at 503. Each element will be discussed in turn.

a. Holding Itself Out

The first factor in determining whether an entity operated as an NVOCC is whether the entity "holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation." 46 U.S.C. § 40102(7)(A)(i). The Commission explained:

> The most essential factor is whether the carrier holds itself out to accept cargo from whoever offers to the extent of its ability to carry, and the other relevant factors include the variety and type of cargo carried, number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and the method of establishing and charging rates.

Rose Int'l, Inc., 29 S.R.R. at 162 (citation omitted).

"The absence of solicitation does not determine that a carrier is not a common carrier." *Transp. by Mendez & Co., Inc.*, 2 U.S.M.C. 717, 720 (1944). Holding out can also be demonstrated by a course of conduct. *Containerships*, 9 F.M.C. at 62. It is sufficient if an entity "held out, by a course of conduct, that they would accept goods from whomever offered to the extent of their ability to carry." *Transp. by Southeastern Terminal & S.S. Co.*, 2 U.S.M.C. 795, 796-797 (1946). Moreover, "the common carrier status depends on the nature of what the carrier undertakes or holds itself out to undertake to the general public rather than on the nature of the arrangements which it may make for the performance of its undertaken duty." *Bernhard Ulmann Co., Inc. v. Porto Rican Express Co.*, 3 F.M.B. 771, 778 (1952).

> Addressing the element of holding out to provide transportation by water between the United States and a foreign country for compensation, the Commission stated in *Worldwide Relocations (FMC 2012)* that an entity may hold out to the public "'by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise.'" *Worldwide Relocations (FMC 2012)*, 32 S.R.R. at 503 (citing *Common Carriers by Water – Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 1 S.R.R. 292 (FMC 1961)). The Commission noted that it "has previously found that advertising and solicitations to the public are important factors in determining the issue of 'holding out' by an entity." *Id*.

EuroUSA Shipping, Inc. – Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations, 32 S.R.R. 1906, 1913, 2013 FMC LEXIS 44, *13-14 (FMC 2013).

In this case, MTL was a licensed NVOCC which held itself out to provide transportation by water of cargo between the United States and foreign countries for compensation. The record shows a course of conduct between the parties wherein MTL acted as an NVOCC for the overseas shipment of Crocus's boats, including the two other boats identified in the complaint. Although MTL argues that it did not deal directly with Crocus, the evidence shows that Solovyev was acting as MTL's agent when shipping Safonov's boats overseas, including arranging for transportation to the port of loading and coordinating the purchase of a trailer so that MTL could ship the Formula boat overseas.

The evidence shows that when MTL first received the Formula boat in August of 2013, the intent of the parties was for it to be shipped to Dubai, as the other boats had been. ALJFF 74-75. RFG sent invoices to Safonov at Crocus Investments for the purchase and delivery and to Tretyakov at Middle East Asia for the purchase, delivery, and shipping. ALJFF 76-79. In August of 2013, Crocus Investments wired $59,780 to RFG to pay for the Formula and its delivery to the intended port of loading. ALJFF 80. On December 4, 2013, Crocus, FZE wired $4,950 to RFG to pay for a boat trailer which was required for ocean shipment of the Formula. ALJFF 81, 89. It was not until February 14, 2014, when Safonov decided not to ship the Formula overseas, that the planned shipment changed from an international ocean shipment to a domestic shipment. Accordingly, the factor of holding out is established.

b. Assumes Responsibility

The second factor is whether the entity "assumes responsibility for the transportation from the port or point of receipt to the port or point of destination." 46 U.S.C. § 40102(7)(A)(ii).

> In *Common Carriers by Water*, [6 F.M.B. 245, 250 (1961)], the Federal Maritime Board noted that an entity may be considered a common carrier even if it attempts to disclaim liability because liability may be imposed by operation of law. 6 F.M.B. at 256. However, "[a]ctual liability as a common carrier over the entire journey including the water portion is essential" to determine NVOCC status. *Id.* Although the Commission has not focused on this aspect of common carrier status, favoring the "holding out" analysis, it remains an essential element of the "common carrier" definition in the Shipping Act. 46 U.S.C. § 40102([7])(A)(ii).

In the Matter of the Lawfulness of Unlicensed Persons Acting as Agents for Licensed Ocean Transp. Intermediaries, 31 S.R.R. 185, 199 (FMC 2008) (Dye, dissent (favorably cited by reversing court)) (*rev'd Landstar Express Am., Inc. v. FMC*, 569 F.3d 493 (D.C. Cir. 2009)). The Commission's jurisdiction over matters relating to transportation by water of cargo between the United States and a foreign country by a common carrier essentially begins when a common carrier assumes responsibility for transportation of the cargo and ends when the cargo is delivered to the consignee at the place of destination contemplated by the contract of carriage. *See, e.g., Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23-27 (2004); *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 108 (2010); *Mitsui O.S.K. Lines Lid. v. Global Link Logistics*, 32 S.R.R. 126, 2011 FMC LEXIS 12, *56 (FMC 2011).

Issuing bills of lading may demonstrate a course of conduct sufficient to establish assumption of responsibility.

> Barbour's course of conduct of issuing the seventy-four bills of lading to his customers proves that he held out to members of the general public that he provides transportation of cargo by water between the United States and foreign countries for compensation. The Barbour Shipping bills of lading also prove that Barbour assumed responsibility for the transportation of the cargo, and with the Liberty Global bills of lading, prove that the shipments were transported by water between the United States and a foreign port.

Barbour – Possible Violations of Sections 8 and 19, 34 S.R.R. 959, 972, 2016 FMC LEXIS 1, *37-38 (ALJ 2016).

The question here is whether MTL assumed responsibility for transporting the Formula boat overseas. The evidence shows that even though shipping documents to Dubai had not yet been issued, MTL assumed responsibility for the Formula boat when it accepted the Formula boat for overseas shipment, consistent with the course of conduct between the parties. In this case, the destination was changed prior to the Formula being shipped overseas but after MTL coordinated the delivery of the Formula to the port, billed Complainants through RFG, and Crocus Investments paid for the purchase and delivery to the port of loading. ALJFF 76-80. MTL assumed responsibility for the Formula boat when it accepted delivery of the boat in anticipation of shipping the Formula to Dubai. Accordingly, Complainants have established that MTL assumed responsibility for the Formula boat.

c. International Transportation by Water

The third factor is whether the entity "uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country." 46 U.S.C. § 40102(7)(A)(ii). As the Commission has stated, "the intention of the shipper as to the ultimate destination at the time the cargo starts is the test of its character, though broken, transported by more than one carrier, or moving on through or local bills of lading." *Matson Navigation Co., Inc.–Transport. of Cargoes Between Ports and Points Outside Haw. and Islands Within the St. of Haw.*, 24 S.R.R. 979, 988 (1988) (quoting *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 440 (1935)).

Here, Safonov bought the Formula with the intention of sending it to Dubai for repair and resale. ALJFF 75. The evidence demonstrates that the intent of the parties from August 2013 to February 2014 was to ship the Formula from the United States to Dubai by water as had been done without issue for the other two boats. That intent changed on February 14, 2014, when Safonov changed the destination for the transportation to Florida. In an email communicating the change in plans for the boat to Solovyev, Safonov stated in pertinent part: "It is good that we did [not] have time to send it to Dubai." ALJFF 92. Had the transportation to Dubai taken place as originally intended, MTL would have used a vessel operating on the high seas to perform the transportation from the United States to Dubai. Accordingly, the factor of international transportation by water is established.

Complainants have established that from August 2013 to February 2014, MTL was acting as an ocean transportation intermediary, an NVOCC, for the Formula boat. MTL, through Solovyev and RFG, dealt with Safonov and Crocus and performed OTI activities for the Formula

boat. Therefore, MTL was a regulated entity and the Commission has jurisdiction over this claim.

2. Section 41102(c) Elements

To establish a violation of section 41102(c), a complainant must demonstrate that the respondent is a regulated entity; the claimed acts or omissions occurred on a normal, customary, and continuous basis; the practice or regulation is connected with receiving, handling, storing, or delivering property; the practice or regulation is unjust or unreasonable; and the practice or regulation is the proximate cause of the claimed loss. 46 C.F.R. § 545.4. Each element is discussed in turn.

a. MTL Acted as an OTI

Because section 41102(c) governs the activities of common carriers, marine terminal operators, and ocean transportation intermediaries, to violate it, an entity must be a common carrier, marine terminal operator, or an ocean transportation intermediary within the meaning of the Shipping Act. As discussed above, the evidence shows that MTL acted as an NVOCC – a type of ocean transportation intermediary – for the Formula boat, a required element to demonstrate a section 41102(c) violation.

b. Normal, Customary, and Continuous Basis

The Commission adopted an interpretive rule explaining what constitutes regulations and practices under the Shipping Act:

> In drafting the 1916 Act, and through its revisions and reenactment in 1984, Congress chose the word 'practice' and the phrase, 'establish, observe, and enforce just and reasonable regulations and practices,' to describe actions or omissions engaged in on a normal, customary, and continuous basis. From its origin and as recently as 2001, § 41102(c) was interpreted in line with this understanding. To find a violation of § 41102(c), the Commission consistently required that the unreasonable regulation or practice was the normal, customary, often repeated, systematic, uniform, habitual, and continuous manner in which the regulated common carrier was conducting business. This understanding as to what constitutes 'regulations and practice' under the Shipping Act is supported by multiple accepted rules of statutory construction.

Final Rule, 83 Fed. Reg. at 64479 (internal citations omitted).

Complainants have the burden to establish that the unjust and unreasonable acts in question occurred on a normal, customary, and continuous basis and thus were a "regulation or practice" by Respondent. As explained below, the record does not support a finding that MTL unlawfully withheld property, committed conversion, charged unreasonable storage rates, or otherwise committed unjust or unreasonable acts on a normal, customary, and continuous basis.

There is limited evidence regarding MTL's normal and customary policies regarding storage rates and policies for boats. The record contains evidence regarding the three boats

initially at issue in this proceeding and shipments in a few other FMC proceedings. Regarding the other two boats at issue in this proceeding, there is no evidence of unjust or unreasonable acts prior to shipping the boats overseas as discussed in the initial decision and commission order. The appropriate charges for storage of these boats is also the subject of the related case currently pending in New Jersey federal court.

Crocus points to two previous cases alleging that MTL violated section 41102(c): *Best Way USA, Inc. v. Marine Transport Logistics* and *Samir Abusetta d/b/a Sammy's Auto Sales v. JAX Auto Shipping and Marine Transport Logistics*. Crocus also contends that this element is "self-evident." Remand Reply at 6-7. MTL asserts that Crocus fails to allege that an unreasonable practice occurred on a normal, customary, and continuous basis. Remand Opposition at 3-6. Two other pending cases against MTL, Docket No. 16-16 and Docket No. 20-12, have not yet decided the question of whether MTL violated section 41102(c).

In *Best Way*, the Commission affirmed a Settlement Officer's finding that MTL violated section 41102(c) for a 2007 shipment, in part based on unlawful storage charges at origin as well as en route. *Best Way USA, Inc. v. Marine Transport Logistics*, 33 S.R.R. 13, FMC Docket No. 1901(I), Order Affirming Settlement Officer Decision ("FMC Order") at 9 (FMC Nov. 8, 2013). The *Best Way* decision was issued prior to the 41102(c) Interpretive Rule and stands for the proposition that the NVOCC is responsible for increases in shipping costs after agreeing to transport goods. *Best Way*, FMC Order at 3-4. In *Best Way*, it does appear that there was a violation of section 41102(c) based, in part, on unreasonable storage charges assessed prior to a vehicle being exported. *Best Way*, FMC Order at 3. The *Best Way* case, decided prior to the interpretive rule, does not suggest that this was part of MTL's business model or that it occurred on a normal, customary, and continuous basis.

In *Samir Abusetta*, Jax Auto Shipping was found liable for violating the Shipping Act. *Samir Abusetta d/b/a Sammy's Auto Sales v. Jax Auto Shipping and Marine Transport Logistics*, FMC Docket No. 1932(I), Order Reversing, In Part, Decision of the Settlement Officer and Issuing Reparations ("FMC Order") (FMC Oct. 18, 2016). The Commission stated that "to determine whether Jax violated § 41102(c), the Commission must analyze whether it acted as an OTI in connection with Claimant's shipment." *Samir Abusetta*, FMC Order at 6. However, the Commission also found that the claimant hired Jax, not MTL, to ship the cargo and therefore that MTL did not violate the Shipping Act. *Samir Abusetta*, FMC Order at 7. In addition, this case was decided prior to the interpretive rule and the issue of normal, customary, and continuous basis is not addressed.

Therefore, there is only one other similar violation identified and that was for a shipment in 2007, many years prior to the shipment in this case. The finding in *Best Way* that the storage charge for the one shipment was unreasonable and the finding below that the storage charge for this one shipment was unreasonable are not sufficient to establish that MTL's storage rates were unreasonable on a normal, customary, and continuous basis. Indeed, it is clear from the course of conduct between these parties that this shipment was not the normal and customary arrangement because of the delay in finding an appropriate trailer, the delay in shipping the boat, and the change in destination. Thus, the evidence of unjust and unreasonable acts by Respondent does not rise to a level constituting a "regulation and practice" as described by the Commission.

The evidence of record does not support a finding that any unjust and unreasonable acts by Respondent extended beyond these two instances involving one car in *Best Way* and the boat at issue in this proceeding. Accordingly, Complainants fail to meet their burden to demonstrate that the unjust and unreasonable acts by MTL occurred on a normal, customary, and continuous basis, a prerequisite for a successful claim for reparations under the section 41102(c) interpretive rule. 46 C.F.R. § 545.4; Final Rule, 83 Fed. Reg. at 64479.

c. Connected with Receiving, Handling, Storing, or Delivering Property

The evidence demonstrates that when the Formula boat was purchased in August of 2013, the intent was to ship it to Dubai but there were delays, in part due to finding a suitable trailer which was required for ocean shipment. ALJFF 74-75, 81, 83-84. While the Formula awaited shipment, MTL put it in storage. In February of 2014, Safonov decided to change the destination from Dubai to Florida, stating "It is good that we did [not] have time to send it to Dubai." ALJFF 92 (quoting CX 055). On August 13, 2014, Solovyev sent Safanov an invoice for 369 days of storage of the Formula and an email regarding unpaid invoices for three boats, stating "because of non-payment, we are not able to hold your boats anymore in our storage facility and have to cover all expenses of their storage." ALJFF 96 (quoting CX 103). Accordingly, the evidence shows that the alleged violation was connected to receiving, handling, storing, or delivering property.

d. Unjust and Unreasonable

The complaint alleges that section 41102(c) was violated because MTL unlawfully withheld "Complainant's property (boats) and/or commit[ed] conversion against the Complainant's property." Complaint at 5. Complainant points to the similarity between this case and *Best Way* to argue that MTL assessed unlawful storage charges. Remand Brief at 50. In their remand brief, Crocus alleges that MTL "held complainant's cargo based on unlawful charges for storage," MTL knowingly failed to inform Complainants as to the accrual of storage charges for the boat, and Respondent "failed to complete some of their duties to secure delivery of claimants' property such as finding a suitable trailer so that the Formula boat could be exported." Remand Brief at 29, 45.

MTL contends that the invoices for storage charges were not issued until August of 2014, well after the subject time period, and therefore occurred after the shipping aspect of the transaction had been completed. Remand Opposition at 1-3. Moreover, MTL asserts that "Crocus has not delineated an unjust and unreasonable practice on the part of MTL before this transaction turned to a domestic one." Respondent Remand Opposition at 3.

In this case, Respondent stored the Formula boat from August 2013, when it was purchased, though at least July 2014. Approximately half of that time was while the parties anticipated international shipment. The storage fee was for the entire 365 days of storage, encompassing both the time when international export was anticipated and when domestic transportation was anticipated. Only the time until February 14, 2014, would be under the jurisdiction of the Commission.

The evidence also shows that the tariff rate for storage of boats was $20, which is significantly below the $105.31per day charged to Crocus. ALJFFR 50-52. MTL's tariff states: "Carrier provides 30 calendar days free storage prior for vehicles, trucks and boats received for US export shipment at its CFS/CY as listed herein. Beyond 30 days, storage charges per day apply as follows: A. STORAGE CHARGES AT BAYONNE, NJ . . . Boats: USD 20 per day." ALJFF 103 (quoting CX 178). The Formula boat was received for export shipment. No justification is provided for the higher charge and there is no indication that Complainants were provided notice of the charge before receiving the storage bill. While MTL is not expected to store the boat for free, the record supports a finding that the $105.31per day charge, imposed without notice after a year, is unreasonable. If the other elements of section 41102(c) were met, then this element would be met as well, as Complainants have established that the storage charge was unjust and unreasonable.

e. Proximate Cause of Loss

Crocus alleges in the complaint that the boats were never delivered to Crocus and are presumably in MTL's possession. Complaint at 5. In their brief filed prior to the initial decision, Crocus asserted that they are entitled to the amount paid for the Formula boat ($59,780) and its trailer ($4950). Initial Brief at 9 (filed Jan. 14, 2016). If the other elements of section 41102 were met, then this element would be met as well as the failure to deliver the Formula boat and the storage charges assessed were the proximate cause of the loss claimed by Crocus.

3. Conclusions

The Commission has jurisdiction over this claim because MTL was acting as a regulated entity when it assumed responsibility for the Formula boat from August 2013 to February 2014. Because Crocus fails to establish that the conduct by MTL occurred on a normal, customary, and continuous basis, Crocus fails to demonstrate all of the interpretive rules' required elements for successfully establishing a section 41102(c) claim for reparations. Complainants' claim for reparations must therefore be denied and dismissed.

IV. ORDER

Upon consideration of the record herein, the arguments of the parties, and the conclusions and findings set forth above, it is hereby

ORDERED that Crocus's complaint be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED**.

Erin M. Wirth
Chief Administrative Law Judge