

# FEDERAL MARITIME COMMISSION

LISA ANNE CORNELL and G.  
WARE CORNELL,

*Complainants,*

v.

PRINCESS CRUISE LINES, LTD.  
(CORP.), CARNIVAL PLC, and  
CARNIVAL CORPORATION,

*Respondents.*

Docket No. 13-02

Served: August 28, 2014

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**BY THE COMMISSION:** Mario CORDERO, *Chairman*,  
Rebecca F. DYE, Richard A. LIDINSKY, Jr., Michael A.  
KHOURI and William P. DOYLE, *Commissioners*.

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## **Order Reversing Initial Summary Decision In Part, Affirming In Part, and Vacating In Part**

This matter is before the Federal Maritime Commission (Commission) on exceptions filed by both Complainants and Respondents. On January 30, 2013, Lisa Anne Cornell and G. Ware Cornell, Jr. (Complainants) filed a Complaint with the Commission. Complainants alleged that Respondents “Princess

Cruise Lines, Ltd. (Corp)”<sup>1</sup> (Princess), Carnival plc, and Carnival Corporation (Carnival) violated section 10(b)(10)<sup>2</sup> of the Shipping Act (46 U.S.C. § 41104(10)) by unreasonably refusing to deal or negotiate. On February 28, 2013, Respondents filed a Motion to Dismiss or Alternatively Motion for Summary Judgment. On April 29, 2013, Complainants filed an Amended Verified Complaint (Amended Complaint), together with a Motion for Leave to Amend Verified Complaint. The motion was granted by the Administrative Law Judge (ALJ) on April 30, 2013. In addition to section 10(b)(10), the Amended Complaint further alleged Respondents violated section 10(b)(4)(A) (46 U.S.C. § 41104(4)(A))<sup>3</sup> and section 10(c)(1) (46 U.S.C. § 41105(1))<sup>4</sup> of the Shipping Act. On May 13, 2013, Respondents filed a “Supplement to Motion to Dismiss to Address New Issues Raised in the Amended Complaint.”

On July 23, 2013, the ALJ issued an Initial Summary Decision on Respondents’ Motion to Dismiss or for Summary Decision (Initial Summary Decision). The ALJ dismissed most of

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<sup>1</sup> In the Complaint, Complainants identified Princess as “Princess Cruise Lines, Ltd. (Corp).” In their Motion to Dismiss or Alternatively Motion for Summary Judgment filed on February 28, 2013, Respondents showed Princess’s name as “Princess Cruise Lines (Corp).”

<sup>2</sup> The President signed a bill re-codifying the Shipping Act of 1984 as positive law on October 14, 2006. The purpose of the bill was to “reorganiz[e] and restat[e] the laws currently in the appendix to Title 46. It codifies existing law rather than creating new law.” H.R. Rep. No. 109-170, at 2 (2005). The Commission, however, regularly references provisions of the Shipping Act by the section number in the Act’s original enactment.

<sup>3</sup> Section 41104(4)(A) provides that common carriers may not “for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice” in rates or charges.

<sup>4</sup> Section 41105(1) provides that a conference or group of two or more common carriers may not “boycott or take any other concerted action resulting in an unreasonable refusal to deal.”

Complainants' claims, but determined *sua sponte* that Princess unreasonably refused to deal or negotiate with Lisa Cornell in violation of section 10(b)(10). On August 14, 2013, Complainants filed Exceptions to and Appeal of Initial Summary Decision.<sup>5</sup> On August 15, 2013, Respondents filed Exceptions to the ALJ's Initial Summary Decision. Complainants and Respondents filed their responses to the exceptions on September 4, 2013 and September 12, 2013 respectively.

For the reasons discussed below, the Commission reverses the Initial Summary Decision in part, affirms in part, and vacates in part.

## **I. BACKGROUND**

### **A. Factual Background**

This is at least the third forum in which these parties have battled. The instant proceeding - like the other two - arose out of a long-running controversy between Complainants and Respondents that began in early 2007 involving an art purchase on a cruise ship and two ensuing lawsuits in Florida. The ALJ found that the papers filed by Complainants and Respondents during the acrimonious Florida litigation "are fraught with claims of perfidious acts allegedly committed by both sides," and stated that the acrimony continues in this proceeding. Initial Summary Decision at 4.

In February 2007, Lisa Cornell took a cruise on one of Respondents' cruise ships. *Id.* at 5. During the cruise, she purchased two lithographs through an auction conducted by Global Fine Arts, Inc. (GFA),<sup>6</sup> a wholly-owned subsidiary of Respondent

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<sup>5</sup> On September 10, 2013, Complainants filed Corrected Exceptions and Appeal to Initial Summary Decision.

<sup>6</sup> GFA is not a common carrier under the Shipping Act, and Complainants did not include GFA as a respondent in this proceeding.

Carnival. Lisa Cornell paid the purchase price and signed on GFA's two invoices setting forth the terms of the sale and GFA's return policy. The return policy stated, "[i]f an order is cancelled prior to shipping, the full purchase price, less the buyer's premium up to a maximum of \$2,000 USD per piece, will be refunded." *Id.* at 6 (citation omitted). The relevant invoices showed "15% BUYERS PREMIUM (ART ONLY)" as part of the total purchase price. Respondents' Supplement Brief (filed 5/13/13), Exhibits 1 and 2 of Suppl. Decl. of Mona Ehrenreich. When Lisa Cornell returned home from the cruise, she changed her mind and cancelled the purchase. Initial Summary Decision at 6. GFA retained \$292.50 for each of the lithographs for the buyer's premium, totaling \$585, and refunded the balance of the total purchase price. *Id.*

Since GFA refused to refund the buyer's premium, Lisa Cornell commenced a lawsuit against GFA in a Florida circuit court. *Lisa Anne Cornell v. Global Fine Arts, Inc.*, No. 07-07894 (Fla. 17th Jud. Cir.) (Lawsuit One). *Id.* at 6. Ware Cornell, one of the Complainants in this proceeding and Lisa Cornell's husband, represented Lisa Cornell in the case. While trying to recover the buyer's premium retained by GFA, Lisa Cornell also claimed deceptive and unfair trade practices of GFA under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). Lisa Cornell contended that GFA's refusal to refund the buyer's premium constituted a deceptive and unfair practice (the Buyer's Premium Claim). She also contended that GFA's practice of delivering a work of art to the buyer other than the work of art that was displayed at the auction on board the ship was also a deceptive and unfair practice (the Bait and Switch Claim).

Early in the lawsuit, GFA made an offer of judgment of \$2,500 under a Florida procedure that provides if the offer is declined and the plaintiff does not receive a judgment that is at least 25% above the amount offered, the plaintiff is liable for the defendant's attorney's fees and costs incurred after the plaintiff

declined the offer. *Id.* at 7. Lisa Cornell declined the offer, and the parties engaged in extensive discovery. GFA then filed a motion for summary judgment on the Buyer's Premium Claim but not the Bait and Switch Claim. Lisa Cornell argued that GFA's "money back guarantee" statements in the onboard advertising for the sale were contrary to the contract she signed after the sale. Considering the executed contract stated that the buyer's premium is not refunded if the buyer backs out of the contract, the court did not find FDUTPA violation and granted summary judgment for GFA.

GFA filed a motion to recoup its legal fees of more than \$60,000 incurred after Lisa Cornell declined the offer of judgment. Lisa Cornell then moved to modify the judgment so the court could address the Bait and Switch Claim that was not addressed by GFA's motion for summary judgment. The court modified the judgment and ordered briefing on the Bait and Switch Claim. GFA then moved for summary judgment on the Bait and Switch Claim. The parties later engaged in mediation, which led to their settling all claims and signing a Mutual General Release of All Claims and Settlement Agreement (Settlement Agreement). Respondents' Mot. Dismiss or S/J (filed 2/28/13), Exhibit 3. The Settlement Agreement referenced not just GFA but "GFA PARTIES," *Id.*, Exhibit 3 at 1, which included Respondents in this proceeding that were not parties in Lawsuit One. In the Settlement Agreement, GFA, but not Respondents in this proceeding, agreed, "it will not take any action to encourage or entice any cruise line to refuse to grant either Lisa Cornell or Ware Cornell passage on any cruise ship." *Id.*, Exhibit 3 at 2. The Settlement Agreement also stated that "[i]t is expressly agreed and acknowledged by the CORNELL PARTIES that GFA is not a cruise line and does not control the booking policies and practices of any cruise line." The ALJ stated that even though Respondents are included within the definition of "GFA PARTIES" in the Settlement Agreement, the Settlement Agreement does not state Respondents agree to permit the Cornells passage on their cruise ships. Initial Summary Decision at 8. As part of the negotiation to include the provision in the Settlement

Agreement that GFA will not encourage any cruise line to refuse cruises to the Cornells, Lisa Cornell donated \$1,000 to a charity. On October 8, 2010, the court dismissed Lawsuit One with prejudice, reserving jurisdiction to enforce the terms of the Settlement Agreement.

Before the court's order dismissing Lawsuit One, but "[w]ithin a day of the settlement on August 9, 2010," Lisa Cornell attempted to book with Princess a cruise and was denied access. Decl. of Lisa Cornell (filed 5/13/13) at 1. Lisa Cornell experienced repeated denial of access to the booking website and was told "[she] was permanently banned." *Id.* at 3. About five and one-half weeks after the dismissal of Lawsuit One, Lisa Cornell filed another lawsuit, this time in Broward County Court, not the 17th Judicial Circuit where she filed Lawsuit One. Initial Summary Decision at 8-9. Lisa Cornell named as defendants both GFA, the defendant in Lawsuit One, and Princess, one of Respondents in this proceeding but not a defendant in Lawsuit One. *Lisa Anne Cornell v. Global Fine Arts, Inc. and Princess Cruise Lines, Ltd.*, No. 10-17682 COCE 54 (Fla. Broward Cty. Ct.) (Lawsuit Two). *Id.* at 8.

In Lawsuit Two, Lisa Cornell alleged that GFA, and Princess as GFA's agent, breached the mediated settlement agreement that resolved Lawsuit One. Respondents' Mot. Dismiss or S/J (filed 2/28/13), Exhibit 8. Lisa Cornell also sought an injunction "enjoin[ing] Princess from denying carriage to [Lisa Cornell] . . . ." *Id.* The ALJ stated, "Lisa Cornell did not rely on the Shipping Act, but contended that Princess has a common carrier duty to give passage to all persons except those who present a threat." Initial Summary Decision at 9. GFA and Princess filed a motion on December 2, 2010 to transfer Lawsuit Two to the Circuit Court and judge who had approved the settlement in Lawsuit One. GFA and Princess argued in the alternative that Lawsuit Two should be dismissed.

On January 31, 2011, Lisa Cornell filed with the Circuit Court a Motion to Enforce Mediated Settlement Agreement that resolved Lawsuit One. Respondents' Mot. Dismiss or S/J (filed 2/28/13), Exhibit 6. Lawsuit Two was transferred to the Circuit Court without a decision on GFA and Princess's motion to dismiss. Initial Summary Decision at 9. On September 13, 2011, in an order under the Lawsuit One caption, the Circuit Court held that the Lawsuit Two "complaint is not the proper vehicle to achieve enforcement of the settlement agreement" and *sua sponte* dismissed the complaint filed in Lawsuit Two. *Id.* (citations omitted). After a hearing on Lisa Cornell's motion to enforce the settlement agreement, the Circuit Court issued an order on February 7, 2012, stating, "[Lisa Cornell] failed to prove a violation of the settlement agreement" and denied her motion to enforce the mediated settlement agreement. Respondents' Mot. Dismiss or S/J (filed 2/28/13), Exhibit 9.

#### **B. Procedural Background**

On January 30, 2013, Complainants filed a Verified Complaint with the Commission alleging that Respondents Princess, Carnival plc, and Carnival violated section 10(b)(10) of the Shipping Act (46 U.S.C. § 41104(10)) by unreasonably refusing to deal or negotiate. On February 28, 2013, Respondents filed their Motion to Dismiss or Alternatively Motion for Summary Judgment. For their Motion to Dismiss, Respondents claimed: the Commission lacks subject matter jurisdiction; the statutory basis for the Complainants' claim does not apply to them; the Complainants are barred by the doctrines of *collateral estoppel* and *res judicata*; and Princess has a legal right to refuse to sell to Lisa Cornell. For their Motion for Summary Judgment, Respondents alleged: the claims before the Commission have already been released by Complainants by the Settlement Agreement; neither Carnival plc nor Carnival barred Complainants from vacationing on their ships; none of Respondents has ever barred Ware Cornell from vacationing on their ships; and Lisa Cornell's \$100 deposit was refunded.

On April 29, 2013, Complainants filed an Amended Verified Complaint (Amended Complaint), together with a Motion for Leave to Amend Verified Complaint. The motion was unopposed and granted by the ALJ. In addition to their section 10(b)(10) claim, Complainants alleged in the Amended Complaint that: Respondents violated section 10(b)(4)(A) (46 U.S.C. § 41104(4)(A)) of the Shipping Act, which prohibits unfair or unjustly discriminatory practice of rates or charges for service pursuant to a tariff; and Respondents violated section 10(c)(1) (46 U.S.C. § 41105(1)), which prohibits a conference or group of two or more common carriers from taking any concerted action resulting in an unreasonable refusal to deal. Complainants further alleged that Ware Cornell incurred in excess of \$33,000 in attorney's fees and costs to enforce the Settlement Agreement. Am. Compl. at 4. On May 13, 2013, Respondents filed a Supplement to their above-referenced motion, which was filed before Complainants' filing of their Amended Complaint, to address the new issues raised by Complainants in the Amended Complaint. Respondents claimed, among other things, that: Lisa Cornell's payment of \$1,000 as part of her settlement with GFA was not a "discriminatory tariff" pursuant to 46 U.S.C. § 41104(4)(A); Respondents did not take any concerted action with respect to Lisa Cornell, and none of Respondents put Ware Cornell on their "Do Not Book" status; and as Princess already returned the full \$100 deposit to Lisa Cornell, she has no claim for interest, and "[t]here is no statutory basis for an award of interest on a refunded vacation deposit." Respondents' Supplement to Mot Dismiss (filed 5/13/13) at 3-9.

On July 23, 2013, the ALJ issued Initial Summary Decision on Respondents' Motion to Dismiss or for Summary Decision. The ALJ dismissed most of Complainants' claims, but determined *sua sponte* (i.e., without a motion for summary determination by the Complainants) that Princess unreasonably refused to deal or negotiate with Lisa Cornell in violation of section 10(b)(10). On August 14, 2013, Complainants filed Exceptions to and Appeal of

Initial Summary Decision.<sup>7</sup> On August 15, 2013, Respondents filed their Exceptions. Complainants and Respondents filed their response to the exceptions on September 4, 2013 and September 12, 2013 respectively.

## II. DISCUSSION

### A. Respondents' Motion to Dismiss

In their Motion to Dismiss filed on February 28, 2013, Respondents claimed that: (1) the Commission lacks subject matter jurisdiction; (2) there is no statutory basis for the Complainants' claims; (3) the Complainants are barred by the doctrines of *collateral estoppel* and *res judicata* since Complainants are re-litigating before the Commission the same issue that was raised in Lawsuit Two; and (4) Princess has a legal right to refuse to sell to Lisa Cornell considering she had demonstrated a repeated pattern of ignoring written contracts and is a proven and documented vexatious litigant. The ALJ granted Respondents' Motion to Dismiss in part and denied in part.

In view of the discussion below, we believe that the ALJ erred in denying Respondents' Motion to Dismiss with respect to Complainants' claims under sections 10(b)(4)(A) and 10(b)(10). The Commission affirms the ALJ's dismissal of Complainants' claims under section 10(c)(1). As the Commission grants Respondents' Motion to Dismiss since there were no cognizable Shipping Act claims, the issues of *collateral estoppel*, *res judicata*, and a legal right to refuse to sell are moot.

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<sup>7</sup> On September 10, 2013, Complainants filed Corrected Exceptions and Appeal to Initial Summary Decision.

### 1. Subject matter jurisdiction

Respondents alleged the Commission lacks subject matter jurisdiction as it does not have the authority to regulate “cruise line operations;” Princess already refunded Lisa Cornell’s \$100 deposit; and Complainants cite no legal authority that they are entitled as damages to the attorney fees incurred by Ware Cornell during the two Florida lawsuits. Respondents’ Mot Dismiss or S/J (filed 2/28/13) at 7-8. In their opposition, Complainants argued that Respondents, as cruise lines operating into ports of the United States, are common carriers. Complainants’ Opposition (filed 3/25/13) at 10.

The ALJ stated that in a factual attack on the Commission’s subject matter jurisdiction, Respondents argue, “they are not common carriers within the meaning of the [Shipping Act].” Initial Summary Decision at 17. After discussing a U.S. Court of Appeals for the D.C. Circuit case (and other federal court cases finding cruise lines are common carriers) which held, “a cruise line is a common carrier within the meaning of [46 U.S.C. § 40102(6)] of the Shipping Act, except insofar as it travels only between foreign ports,” the ALJ concluded that Respondents are common carriers within the meaning of the Shipping Act. *Id.* at 17-21 (citing *American Ass’n of Cruise Passengers, Inc. v. Carnival Cruise Lines, Inc.*, 911 F.2d 786, 792 (D.C. Cir 1990)). The ALJ stated that Respondents clearly meet the Shipping Act’s definition of “common carrier” since they hold themselves out to the general public to provide transportation by water of passengers between the United States and foreign countries for compensation, they assume responsibility for the transportation, and they use for the transportation a vessel between a port in the United States and a port in a foreign country. *Id.* at 20-21.

The Shipping Act provides as part of the definition of “common carrier” that common carrier means a person that “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(6)(A) (emphasis added). Congress included in the Shipping Act’s definition of common carrier not only common carriers of cargo, but also common carriers of passengers. It is one of the basic tenets of statutory interpretation that “when the statute’s language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms.” *Dodd v. United States*, 545 U.S. 353, 359 (2005) (citations and internal editorial marks omitted). The Shipping Act’s definition of common carrier includes common carriers of passengers such as Respondents, and the ALJ correctly denied Respondents’ claim for the Commission’s lack of subject matter jurisdiction.

## **2. Statutory basis for Complainants’ claims**

### **a. The Amended Complaint fails to state a claim of violation of section 10(b)(10)**

Section 10(b)(10) of the Shipping Act prohibits common carriers from “unreasonably refus[ing] to deal or negotiate.” 46 U.S.C. § 41104(10). In evaluating whether a complaint before the Commission states a cognizable claim under the Shipping Act, the Commission has relied on Federal Rule of Civil Procedure 12(b)(6) and the federal caselaw interpreting it. *See Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 2011 FMC LEXIS 12, at \*30-32 (FMC Aug. 1, 2011). On a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), courts will dismiss a claim if the plaintiff’s complaint fails to plead “enough facts to state a claim for relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (retiring the standard from *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *see also In re Sealed Case*, 494 F.3d 139, 145 (D.C. Cir. 2007) (citing *Twombly*). Under this standard, courts focus on the language in the complaint, and whether that language

sets forth sufficient factual allegations to support the plaintiff's claim for relief. *Id.* Indeed, “[w]hile a complaint need not plead ‘detailed factual allegations,’ the factual allegations it does include ‘must be enough to raise a right to relief above the speculative level’ and to ‘nudge . . . claims across the line from conceivable to plausible.’” *Elemary v. Holzmann*, 533 F. Supp. 2d 116, 130 (D.D.C. 2008) (quoting *Twombly*). This “plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 557) (internal quotation marks and citation omitted).

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. *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004) (citing *Kowal v. MCI Commc’ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)). The Commission need not, however, accept any inferences drawn by Complainants that are unsupported by the facts pleaded in the complaint. *Kowal*, 16 F.3d at 1276. Moreover, the Commission need not “accept legal conclusions cast in the form of factual allegations.” *Id.*

Respondents’ Motion to Dismiss on the statutory grounds involving section 10(b)(10) was based on several primary arguments. In addition to defenses of claim and issue preclusion, the Respondents alleged that passenger vessel common carriers can refuse to provide service. Most importantly for the Federal Rule of Civil Procedure 12(b)(6) standard, Respondents averred Complainants had not stated a “plausible theory that the Respondents refused to deal or negotiate with them.” Resp. Mot. Dis. at 9. Respondents also argued at length that they had, in fact, negotiated several times with the Complainants.

Recognizing part of the motion to dismiss standard, the ALJ construed the complaint in the light most favorable to the Complainants, and accepted well-pleaded facts alleged in the complaint as true. Based on these facts, the ALJ found the Amended Complaint alleged a cognizable violation of section 10(b)(10). Initial Summary Decision at 23 (citing *Mitsui O.S.K.*, 2011 FMC LEXIS at \*30-32). The ALJ stated that “[s]ection 10(b)(10) requires more of a common carrier than simply listening to a potential passenger’s request for transportation, then just saying no.” *Id.* at 24. “The common carrier must refrain from ‘shutting out’ any person for reasons having no relation to legitimate transportation-related factors.” *Id.* (citing *New Orleans Stevedoring Co. v. Bd. of Comm’rs of the Port of New Orleans*, FMC No. 00-11, 2001 WL 865692 at \*8). The ALJ further stated that “[t]he issue in this proceeding or any other proceedings alleging a violation of section 10(b)(10) is whether Respondents *unreasonably* just said no.” *Id.*

Close scrutiny of the Amended Complaint demonstrates the Complainants have not stated a cognizable claim under section 10(b)(10). As an initial matter, we note that although Respondents qualify as common carriers under the Shipping Act, we have not located a single case where a passenger vessel operator has been found to have violated any prohibited act under subsection 10(b) of the Shipping Act, including section 10(b)(10). Indeed, all prohibited acts in subsection 10(b) - with the exception of 10(b)(10) and arguably 10(b)(6) – explicitly apply only to common carriers who transport cargo. Most prohibited acts in subsection 10(b) are applicable only to services under tariff or service contract. In fact, it is quite likely Congress never intended passenger vessel common carriers to be subject to section 10(b)(10) when it modified subsection 10(b) in the Ocean Shipping Reform Act of 1998. Had Congress intended to subject every cruise passenger’s voyage to a special statutory duty reasonably to negotiate and deal, it likely would have acknowledged the change from the original enactment of the Shipping Act of 1984 (and for

that matter, the Shipping Act, 1916). Nevertheless, Complainants have made a good faith argument that section 10(b)(10) applies to all statutory common carriers, and the Commission must therefore evaluate the claims in the Complaint to determine whether the allegations have stated enough factual heft to propel the claim beyond the line separating the theoretically possible from the plausible.

Viewed in the light most favorable to the Complainants, the Complaint indicates that Ms. Cornell purchased two pieces of art on a Carnival cruise, and “[a] dispute arose over these purchases . . .” Am. Compl. ¶ 8. Ms. Cornell then sued Global Fine Arts, a wholly-owned subsidiary of Carnival Corp. *Id.* at ¶ 7. In August 2010, the parties settled that lawsuit. *Id.* at ¶ 11. At some point after the settlement, Ms. Cornell attempted to book a cruise on Princess, a subsidiary of Carnival Corp., but could not successfully book a cruise. *Id.* at ¶¶ 9, 13. Complainants “attempted to enforce provisions of the mediated settlement agreement” by a second lawsuit against GFA and Princess. *Id.* at ¶¶ 15-17. Complainants alleged that “[Princess’s General Counsel] has given a sworn admission she issued this ban solely because of the suit filed against GFA, and not because of any misconduct towards PRINCESS or CARVINAL plc.” *Id.* at ¶ 22. Complainants also stated that “[Lisa Cornell’s] action was brought against GFA which is owned by CARNIVAL CORPORATION and is not owned by PRINCESS or CARNIVAL plc.” *Id.* at ¶ 26. Complainants allege that Princess banned Lisa Cornell because of her dispute and lawsuit against GFA, but the Amended Complaint also indicates that the Complainants later sued not only GFA, but also Princess in a second lawsuit.

Based on these allegations, it appears that a dispute arose between contractual parties. The disputes were litigated twice in courts before arriving at the Commission. One party, Princess, made the decision not to engage in any more transactions with a party who had filed what appeared to be a baseless claim against

its related company. Contrary to the Complainants' allegations that Respondents have acted unreasonably in refusing to negotiate or deal, we believe the facts of the case demonstrate that Respondents acted reasonably. As the Commission has noted when addressing the obligation of Marine Terminal Operators to negotiate and deal reasonably, "[the] Commission [has] recognized that it is proper to give deference to a port's discretionary business decisions." *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 899 (FMC 1993) (citing *Petchem, Inc. v. Canaveral Port Authority*, 23 S.R.R. 974 (1986), *aff'd* 853 F.2d 958 (D.C. Cir. 1988)).

The allegations in the Amended Complaint indicate that the refusal to book cruise passages is related to previous litigation conduct of the Complainants. On the face of the Amended Complaint, Princess appears to have made the business decision to limit any future interactions with the Complainants. If passenger vessel operators had a statutory duty to negotiate individually every dispute to the mutual satisfaction of every cruise passenger or risk administrative complaints before the Commission, the Commission could expect all manner of claims – from those who think the ticket price is too high, to those who are disappointed with amenities or dining experiences, to those who are just plain disappointed. The ALJ erred in denying the Respondents' motion to dismiss the section 10(b)(10) complaint for failure to state a claim, and the Commission reverses that portion of the Initial Summary Decision.

- b. The ALJ erred in determining that the Amended Complaint states a claim of violation of section 10(b)(4)

Section 10(b)(4) of the Shipping Act provides that a common carrier may not "**for services pursuant to a tariff**, engage in any unfair or unjustly discriminatory practice in the matter of – (A) rates or charges . . . ." 46 U.S.C. 41104(4)(A) (emphasis added). In the Amended Complaint, Complainants

claimed that their \$1,000 payment to Broward Adopt-A-Stray as part of their settlement with GFA in Lawsuit One was to “insure an uninterrupted right to deal with PRINCESS and other Carnival Corporation cruise lines.” Am. Compl. at 6. Complainants further asserted that their donation to the charity is tantamount to Princess’s “demanding and receiving a discriminatory tariff in violation of 46 [U.S.C.] § 41104(4).” *Id.*

As Respondents had filed their Motion to Dismiss before Complainants’ filing of their Amended Complaint, Respondents filed, on May 13, 2013, their Supplement to Motion to Dismiss to Address New Issues Raised in the Amended Complainant (Respondents’ Supplement). Respondents claimed that Lisa Cornell’s donation to an animal charity was “in consideration for GFA’s waiver of its potential right to seek significant attorneys fees due to Lisa Cornell’s refusal to accept the \$2,500 Offer of Judgment GFA made at the outset of [Lawsuit One].” Respondents’ Suppl. at 3. Respondents asserted, among other things, that “[t]here is nothing in the newly cited 46 U.S.C. § 41104(4)([A]), or any other provision in the Shipping Act, applying tariff to Passenger Vessel Operators (PVO’s).” *Id.*

The ALJ stated, “[a]ccepting as true all relevant factual allegations in the Amended Complaint, drawing inference from these allegations in the light most favorable to Lisa Cornell, and considering only the facts alleged in the Amended Complaint . . . the Amended Complaint states a claim that Princess violated section 10(b)(4) of the Act.” Initial Summary Decision at 29. Thus, the ALJ denied Respondents’ Motion to Dismiss Complainants’ section 10(b)(4) claim. *Id.*

After denying Respondents’ Motion to Dismiss Complainants’ section 10(b)(4) claim and as “[t]he parties have been given an opportunity to present all the material that is pertinent to the motion,” the ALJ stated that this issue would be discussed again in the ALJ’s summary judgment discussion. *Id.* In

the discussion of summary judgment, the ALJ entered a summary decision for Princess on this claim and dismissed Complainants' section 10(b)(4) claim with prejudice.

Although we agree with the ALJ's dismissal of this claim, we believe the ALJ erred in determining that the Amended Complaint stated a section 10(b)(4) claim, thereby denying Respondents' Motion to Dismiss this claim. Even if we accept as true all the allegations in the Amended Complaint, the Commission cannot find a violation of this section by Respondents.

While requiring common carriers to publish tariffs showing rates or charges, the Shipping Act also requires with respect to the contents of tariffs as follows:

- (b) CONTENTS OF TARIFFS.—A tariff under subsection (a) shall—
- (1) state the places between which **cargo** will be carried;
  - (2) list each classification of **cargo** in use;
  - (3) state the level of compensation, if any, of any ocean freight forwarder by a carrier or conference;
  - (4) state separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules that in any way change, affect, or determine any part or the total of the rates or charges;
  - (5) include sample copies of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement; and
  - (6) include copies of any loyalty contract, omitting the shipper's name.

46 U.S.C. § 40501(b) (emphasis added). As the Shipping Act's tariff contents section makes it clear, the Shipping Act's tariff publication requirement can apply only when common carriers

provide transportation of **cargo**. Although Princess is a common carrier, the Shipping Act's tariff publication requirement does not apply to Princess as it is a common carrier of **passengers**, not a common carrier of **cargo**.

The Shipping Act also states that “[t]he Commission shall by regulation prescribe the requirements for the accessibility and accuracy of automated tariff systems established under this section.” 46 U.S.C. § 40501(g). Pursuant to the Shipping Act, the Commission prescribed its tariff regulations at 46 C.F.R. part 520. The Commission's rules provide that its tariff publication regulations “cover the transportation of property” by common carriers. 46 C.F.R. § 520.1(a). The Commission's regulations with respect to tariffs define common carrier as “a person holding itself out to the general public to provide transportation by water of **cargo** between the United States and a foreign country for compensation . . . .” 46 C.F.R. § 520.2 (emphasis added). Consistent with the Shipping Act's tariff contents requirement, the Commission's regulation excludes common carriers of **passengers** from the definition of common carrier in its regulations for tariff publication. Common carriers of **passengers** are not subject to the Commission's tariff publication regulations prescribed pursuant to the Shipping Act. Therefore, common carriers of **passengers** do not file FMC Form-1, required under 46 C.F.R. § 520.3(d), notifying the Commission of their tariff publication since they are not common carriers of **cargo**.

Even if we view all the facts and allegations in the Amended Complaint in the light most favorable to Complainants, the Commission cannot find for Complainants with respect to their section 10(b)(4) claim because section 10(b)(4) of the Shipping Act is not applicable to any of Respondents, none of whom is a common carrier of cargo. The services Respondents provided or may provide to Complainants are not services pursuant to a tariff.

Therefore, the Commission reverses the ALJ's denial of Respondents' Motion to Dismiss with respect to Complainants' section 10(b)(4) claim.

c. The Amended Complaint does not state a claim of violation of section 10(c)(1)

Section 10(c)(1) of the Shipping Act provides that “[a] conference or group of two or more common carriers may not - (1) boycott or take any other concerted action resulting in an unreasonable refusal to deal.” 46 U.S.C. § 41105(1). Complainants alleged that Carnival plc and Princess “took concerted action to refuse to deal with Complainants.” Am. Compl. at 6. Complainants stated Princess was an agent of Carnival plc. *Id.* at 7. Complainants further asserted that as Carnival plc took no action to require its agent Princess to act in conformity with the Shipping Act, Carnival plc thus ratified Princess's violation of the Shipping Act. *Id.*

Respondents claimed that Carnival plc “has taken no action whatsoever to ban Complainants from their ships.” Respondents' Suppl. at 6. Respondents stated that “[t]he fact Princess acts as Carnival plc's sales agent in the U.S. therefore does not bar Lisa Cornell from vacationing on [Carnival plc] and thus this claim fails factually at the outset.” *Id.* at 7-8.

Viewing all the facts and allegations in the light most favorable to Complainants, the ALJ determined that “the Amended Complaint fails to state a claim that two common carriers operating as common carriers took concerted action to refuse to deal with Complainants in violation of section 10(c),” and thus dismissed Complainants' section 10(c)(1) claim. Initial Summary Decision at 30. As the ALJ correctly stated, section 10(c)(1) prohibits a group of two or more common carriers from boycotting or taking other concerted action resulting in an unreasonable refusal to deal. *Id.* The fact that Princess may sell cruises on its own vessels and act as

a common carrier for those cruises on its own vessels does not change the fact that if we accept as true all the allegations in the Amended Complaint, Princess acted not as a common carrier but as a sales agent with respect to the cruises on Carnival plc's vessels. As there was not "a group of two or more common carriers," Carnival plc and Princess could not have violated section 10(c)(1). The ALJ properly dismissed Complainants' section 10(c)(1) claim.

### **III. REMAINING ISSUES MOOT**

As the Commission grants Respondents' Motion to Dismiss Complainants' claims under sections 10(b)(10), 10(b)(4), and 10(c)(1), the remaining issues in the ALJ's Initial Summary Decision are moot. The Commission vacates the remainder of the ALJ's Initial Summary Decision as moot.

### **IV. CONCLUSION**

For the reasons discussed above,

IT IS ORDERED, That the ALJ's denial of Respondents' Motion to Dismiss Complainants' section 10(b)(10) claim is reversed, and Respondents' Motion to Dismiss Complainants' section 10(b)(10) claim is granted.

IT IS ORDERED, That the ALJ's denial of Respondents' Motion to Dismiss Complainants' section 10(b)(4) claim is reversed, and Respondents' Motion to Dismiss Complainants' section 10(b)(4) claim is granted.

IT IS ORDERED, That the ALJ's grant of Respondents' Motion to Dismiss Complainants' section 10(c)(1) claim is affirmed.

IT IS FURTHER ORDERED, That the remainder of the ALJ's Initial Summary Decision is vacated.

FINALLY, IT IS ORDERED, That the Complaint is dismissed with prejudice and this proceeding is discontinued.

By the Commission.

Karen V. Gregory  
Secretary