S E R V E D
July 23, 2013
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

DOCKET NO. 13-02

LISA ANNE CORNELL and G. WARE CORNELL, JR.

v.

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

INITIAL SUMMARY DECISION ON RESPONDENTS' MOTION TO DISMISS OR FOR SUMMARY DECISION[1]

I. INTRODUCTION AND SUMMARY OF DECISION.

On January 30, 2013, complainants Lisa Anne Cornell and G. Ware Cornell, Jr., a married couple, commenced this proceeding by filing a Complaint with the Secretary. The Complaint alleges that respondents Princess Cruise Lines, Ltd. (Corp) (Princess Cruise Lines or Princess), Carnival plc, and Carnival Corporation are common carriers within the meaning of the Shipping Act of 1984 (Shipping Act or Act). 46 U.S.C. § 40102(6). Section 10(b)(10)[2] of the Act provides that a common

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[1] The 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.

[2] On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill's purpose 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. 109-170, at 2 (2005). The Commission often refers to provisions of the Act by their section numbers in the Act's original enactment, references that are well-known in the industry. *See, e.g., United Logistics (Lax) Inc. – Possible Violations of Sections 10(a)(1) and 10(b)(2) of the Shipping Act of 1984*, FMC No. 13-01 (FMC Jan. 25, 2013) (Order of Investigation and Hearing). I follow that practice in this Initial Decision.

carrier must not "unreasonably refuse to deal or negotiate" (46 U.S.C. § 41104(10)) with a person who wants to use the services of the common carrier. The Complaint alleges that beginning in 2010 when Lisa Cornell settled a lawsuit filed in a Florida court against a corporation related to Respondents, Respondents unreasonably refused to deal or negotiate with the Cornells in violation of section 10(b)(10).

On February 28, 2013, Respondents filed a Motion to Dismiss or Alternatively Motion for Summary Judgment with exhibits. The Cornells filed an opposition with exhibits, and Respondents filed a reply with exhibits. At my request, the parties have filed additional memoranda and exhibits. Although much of the information in the exhibits is not material to the outcome of this proceeding, all exhibits submitted with the parties' filings are admitted into evidence and have been considered in reaching this decision.

On April 29, 2013, the Cornells filed a Motion for Leave to Amend Verified Complaint and lodged an Amended Verified Complaint with the motion. The motion stated that Respondents did not oppose the motion as long as they would be permitted to supplement their pending motion to dismiss or for summary decision to address the new claims. The motion for leave to amend was granted. *Lisa Anne Cornell and G. Ware Cornell, Jr. v. Princess Cruise Lines, Ltd. (Corp), Carnival plc, and Carnival Corporation*, FMC No. 13-02 (ALJ Apr. 30, 2013) (Order Granting Motion for Leave to Amend Complaint). In addition to the allegations in the original Complaint, the Amended Complaint adds claims that Princess Cruise Lines violated section 10(b)(4) of the Act, 46 U.S.C. § 41104(4), by engaging in an unfair or unjustly discriminatory practice in the matter of rates or charges, and that Princess and Carnival plc violated section 10(c), 46 U.S.C. § 41105, by taking concerted action resulting in an unreasonable refusal to deal.

The Commission has limited jurisdiction over cruise line operations. As the Commission states on its website: "[T]he Commission has no authority over: passenger line vessel operations, safety issues, amenities on board vessels, or fare levels." FMC Notice to Cruise Passengers, http://www.fmc.gov/about/notice_to_cruise_passengers.aspx, last visited June 26, 2013.

As discussed more fully below, I find that the Commission does have subject jurisdiction over this proceeding. The Amended Complaint alleges that respondents Princess Cruise Lines, Carnival plc, and Carnival Corporation are common carriers within the meaning of the Shipping Act. 46 U.S.C. § 40102(6). The Amended Complaint alleges that Respondents violated three sections of the Act applicable to common carriers: (1) all Respondents by refusing to permit the Cornells to cruise on their cruise vessels in violation of section 10(b)(10) (46 U.S.C. § 41104(10)); (2) Princess by imposing an unjust rate or charge on Lisa Cornell in violation of section 10(b)(4) (46 U.S.C. § 41104(4)); and (3) Princess and Carnival plc by boycotting or taking concerted action resulting in an unreasonable refusal to deal in violation of section 10(c) (46 U.S.C. § 41105). Accordingly, Respondents' motion to dismiss for lack of subject matter jurisdiction is denied.

The Amended Complaint fails to state a claim that Princess and Carnival plc violated section 10(c) of the Act; therefore, that claim is dismissed.

The material facts as to which there is no genuine dispute demonstrate that despite the allegations in the Amended Complaint, Ware Cornell never sought to book a cruise with Princess Cruise Lines, Carnival plc, or Carnival Corporation. Respondents never refused to deal or negotiate with Ware Cornell because he never sought to book a cruise with them. Summary decision is entered dismissing with prejudice Ware Cornell's section 10(b)(10) claim against Princess, Carnival plc, and Carnival Corporation.

The material facts as to which there is no genuine dispute demonstrate that Lisa Cornell never sought to book a cruise on a ship operated by Carnival plc or Carnival Corporation. Carnival plc and Carnival Corporation never refused to deal or negotiate with Lisa Cornell because she never sought to book a cruise on a Carnival plc or Carnival Corporation ship. Summary decision is entered dismissing with prejudice Lisa Cornell's section 10(b)(10) claim against Carnival plc and Carnival Corporation.

The material facts as to which there is no genuine dispute demonstrate that on June 2, 2010, Princess placed Lisa Cornell on its "Do Not Book" list. Beginning in August 2010, Lisa Cornell attempted to book Princess cruises, but was unable to do so because Princess had issued the "Do Not Book" order. Viewing the inferences to be drawn from the uncontested facts in the light most favorable to Lisa Cornell, Princess refused to deal or negotiate with Lisa Cornell (that is, it refused to permit Lisa Cornell to sail on its cruise ships) after it issued the "Do Not Book" order. Therefore, the motion for summary decision in favor of Princess on Lisa Cornell's section 10(b)(10) claim is denied.

That leaves one question: Was the decision of Princess not to deal or negotiate with Lisa Cornell unreasonable within the meaning of section 10(b)(10)? I am already engaged in determining whether a genuine dispute of material fact exists regarding the alleged section 10(b)(10) violation and the parties have been given an opportunity to present evidence designed either to support or refute the request for the entry of judgment on this issue. Given this record, the opportunity for extensive discovery in litigation in Florida state court, and the material facts as to which there is no genuine dispute, it is appropriate to consider *sua sponte* whether, accepting as true the material facts that Princess claims justify its refusal to permit Lisa Cornell to sail on its cruise ships, its refusal is reasonable within the meaning of section 10(b)(10). Viewing the inferences to be drawn from the uncontested facts in the light most favorable to Princess, I find that the factors on which Princess based its decision not to permit Lisa Cornell to cruise on Princess vessels have "no relation to legitimate transportation-related factors." *New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans*, FMC No. 00-11, 2001 WL 865692, at *8 (ALJ June 27, 2001) (Initial Decision), *aff'd* 2002 WL 33836158 (FMC June 28, 2002). *See also Ceres Marine Term., Inc. v. Maryland Port Admin.*, 27 S.R.R. 1251, 1270-1271 (FMC 1997) (unequal treatment must be "justified by differences in transportation factors"), *aff'd in part, rev'd in part on other grounds sub nom. Maryland Port Admin. v. Federal Maritime Comm'n*, 164 F.3d 624, 1998 WL 716035 (4th Cir. Oct. 13, 1998) (Table). The material facts as to which there is no genuine dispute demonstrate that Princess unreasonably refused to deal or negotiate with Lisa Cornell in violation of section 10(b)(10). 46 U.S.C. § 41104(10). Princess is ordered to cease and desist its violation

of section 10(b)(10). Lisa Cornell has not met her burden of proving that she suffered actual injury caused by the violation. Therefore, she is not entitled to a reparation award or an award of attorney fees.

The material facts as to which there is no genuine dispute demonstrate that Princess did not engage in an unfair or unjustly discriminatory practice against Lisa Cornell in the matter of rates or charges. Summary decision is entered for Princess on Lisa Cornell's claim that Princess violated section 10(b)(4).

This decision is divided into six parts. Part I is this introduction and summary. Part II sets forth the background. Part III sets forth the controlling authority. Part IV sets forth the ruling on Respondents' motion to dismiss. Part V sets forth the material facts as to which there is no genuine dispute and the ruling on Respondents' motion for summary decision. Part VI sets forth the *sua sponte* summary decision on Lisa Cornell's claim that Princess unreasonably refused to deal or negotiate with Lisa Cornell in violation of section 10(b)(10). 46 U.S.C. § 41104(10).

II. BACKGROUND.

The controversy between the Cornells and Respondents has its genesis in February 2007 (six years before the Cornells filed their complaint) when Lisa Cornell purchased two works of art while on a cruise on a Carnival ship, then changed her mind about her purchases after she returned home. When Global Fine Arts, Inc. (GFA), the auction company that conducted the auction, refunded most of the total price, but declined to refund a portion of the price GFA calls the buyer's premium, Lisa Cornell filed two lawsuits in Florida state courts. Her husband Ware Cornell, who is an attorney licensed by the state of Florida, represented her on the two lawsuits and represents them in this proceeding.

Papers filed by the Cornells and by Respondents are fraught with claims of perfidious acts allegedly committed by both sides during the acrimonious Florida litigation, acrimony that continues in this proceeding. For instance, Respondents' counsel says:

> I spoke personally with Ware Cornell . . . many times during the course of the [Florida] litigation. During these conversations I questioned why Ms. Cornell felt the need to litigate this $585 dispute as [though] it were a multi million dollar complex commercial litigation. Ware Cornell stated to me that GFA would regret the day it refused to return the $585 Buyer's Premium and stated that he intended to litigate this matter "to the end of time."

(Respondents' Motion to Dismiss or Alternatively Motion for Summary Judgment (Resp. Mot. Dismiss or S/J (filed 2/28/13)) Exhibit 1(Declaration of Jeffrey Maltzman [Respondents' counsel] in Support of Motion to Dismiss and Motion for Summary Judgment ¶ 2. Ware Cornell states:

> As the [Florida] litigation continued and we began to finally obtain discovery as to these business practices, Jeffrey Maltzman spoke to my wife during a break in [a] deposition . . . . Maltzman, who had just met my wife, told her that she was very nice, but that "these people (GFA) will never give up and will take this case all the way to the Supreme Court." He also told her in my presence that his client had "very deep pockets and would financially ruin us" because they "would litigate the case until the end of time."

(Memorandum in Opposition to [Respondents'] Motion to Dismiss and Alternative Motion for Summary Judgment (Cornell Opp. (filed 3/25/13)) Exhibit 1 ¶ 30 (Declaration of Ware Cornell).) Most of the documents filed as exhibits with the parties' memoranda in this proceeding concern the Florida cases, as does much of the testimony in the form of affidavits and declarations. Because in part, the Amended Complaint seeks to relitigate the Florida lawsuits in this Commission proceeding, and because Princess contends its decision not to permit Lisa Cornell to cruise on its ships is justified because her conduct in those lawsuits demonstrates that she is a "vexatious litigant" and "is someone who was extortionate, unethical, unreasonable, and whose character and conduct warranted banning [her] from sailing on Princess' ships," it is necessary to have an understanding of those lawsuits and the events that preceded them.

A. Lisa Cornell's 2007 Voyage and Purchase of Works of Art.

In February 2007, Lisa Cornell took a cruise on the Carnival cruise ship *Imagination*. While at sea, she attended an auction conducted by GFA, a wholly-owned subsidiary of respondent Carnival Corporation.[3] She bid on and purchased two lithographs for a total of $2,337.50[4] for each lithograph, a figure that includes a 15% buyer's premium and an additional amount for shipping and handling. For Lisa Cornell's purchases, the buyer's premium came to $292.50 for each lithograph, a total of $585. (Resp. Supp. (filed 5/15/13), Composite Exhibit 1 (Invoice IM10990); Exhibit 2 (Invoice IM10991).)

As part of finalizing the sale, Lisa Cornell signed GFA invoices IM10990 and IM10991 setting forth the terms of the sale, including GFA's return policy. "Art purchases may be returned

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[3] GFA, a corporation related to Respondents, but not a common carrier, is not a respondent in this proceeding. The Cornells do not claim that GFA is a common carrier within the meaning of the Act. (*See* Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 3 at 2 "It is expressly agreed and acknowledged by the CORNELL PARTIES that GFA is not a cruise line . . . .").)

[4] Respondents' brief in support of their motion to dismiss or summary judgment at 2 and Mona Ehrenreich, general counsel for Princess (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 4 ¶ 1), in her supplemental declaration filed 5/15/13 ¶ 16, state the lithographs were "$2,422.05 each." Invoices IM10990 and IM10991 state $2,337.50 each. (Supplemental Declaration of Mona Ehrenreich (filed 5/13/13) (Supp. Dec. Ehrenreich (filed 5/13/13)) Exhibit 1 (Invoice IM10990); Exhibit 2 (Invoice IM10991).)

(or cancelled if not yet shipped) for any reason within 90 days following the cruise. . . . If an order is cancelled prior to shipping, the full purchase price, less the buyer's premium up to a maximum of $2000 USD per piece, will be refunded." (*Id.*)

It is GFA's practice that the art work delivered to the purchaser after an auction at sea is not necessarily the specific piece that was on display at the auction. The invoices signed by Lisa Cornell state: "Images used for the purpose of sale or display on a vessel may not be the actual piece Purchaser receives unless so stated on this invoice." (*Id.*)

When Lisa Cornell returned home after the voyage, she changed her mind about her purchases as permitted by GFA's contract. Before the two prints were framed and delivered ("prior to shipping"), Ware Cornell contacted GFA on behalf of Lisa Cornell and "spoke with a [GFA representative] who agreed to cancel the purchase." (Cornell Opp. (filed 3/25/13), Exhibit 1 ¶ 17.) GFA retained the $292.50 buyer's premium and refunded the balance of the $2,337.50 total price of for each lithograph. According to Ware Cornell:

> Later [the GFA representative] emailed me that the cancellation was subject to a 15% penalty, which in this case amounted to $585. I immediately objected to her, advising that the art program advertising in the shipboard newspaper and the words of the auctioneer at the auction had promised a "money back guarantee" of satisfaction. In response I was directed to some fine print of the order form relating to this so-called 15% premium.

(Cornell Opp. (filed 3/25/13), Exhibit 1 ¶ 18.)

B. The Florida Lawsuits.

Because GFA refused to refund the buyer's premium, Lisa Cornell commenced her first action against GFA in a Florida circuit court. *Lisa Anne Cornell v. Global Fine Arts, Inc.*, No. 07-07894 (Fla. 17th Jud. Cir.) (*Cornell v. GFA* or Lawsuit One). Ware Cornell represented her on the case. Lisa Cornell was not only trying to get back the $585 buyer's premium retained by GFA, but to correct what she contends are deceptive and unfair trade practices of GFA. Lisa Cornell asserted two claims under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). First, she contended that GFA's refusal to refund the buyer's premium of $585 is a deceptive and unfair practice (the buyer's premium claim). Second, she 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 is a deceptive and unfair "bait and switch" practice (the bait and switch claim). (Cornell Opp. (filed 3/25/13), Exhibit 1 ¶ 24. *See also* Cornell Exhibit 27 (filed 5/23/13) (*Cornell v. GFA* Complaint ¶¶ 10-15).)[5]

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[5] Ware Cornell calls this a "Consolidated Pleading" in which the defendant's answer to each allegation and affirmative defenses are inserted into a copy of the complaint. (Dec. of Ware Cornell (filed 5/27/13) ¶ 21.)

The ensuing litigation was contentious. GFA sought to disqualify Ware Cornell as Lisa Cornell's attorney and moved to dismiss the FDUPTA claims for lack of standing. The court denied both motions. (Cornell Opp. (filed 3/25/13), Exhibit 2 ¶ 3. *See also* Cornell Exhibit 27 (filed 5/23/13) (*Cornell v. GFA* Complaint Affirmative Defenses).)

Early in Lawsuit One, GFA made an offer of judgment of $2500 under a Florida procedure that provides if the offer of judgment 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. Lisa Cornell declined the offer of judgment and the parties engaged in extensive discovery. (*See* Resp. Mot. Dismiss or S/J (filed 2/28/13) at 3; Cornell Opp. (filed 3/25/13), Exhibit 1 ¶ 51; Supp. Dec. Ehrenreich (filed 5/13/13) ¶ 32.)

GFA then filed a motion for summary judgment on the buyer's premium claim but not the bait and switch claim. On June 5, 2009, the court heard argument on the motion. Lisa Cornell argued that the GFA statements of a "money back guarantee" in the onboard advertising for the sale were contrary to the contract Lisa Cornell signed after the sale. "If they are saying things that are absolutely contrary to their contract, they're saying it repeatedly and openly, and even put it in writing ahead of time. How is that not deceptive?" (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 2 at 28.) The court disagreed with this contention and granted summary judgment for GFA,[6] holding that because (1) the contract between GFA and its purchasers (the invoice) states that the buyer's premium is not refunded if the buyer backs out of the contract, and (2) Lisa Cornell signed the contract, GFA's refusal to refund the buyer's premium could not violate FDUTPA. (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 2 at 28-29.)

GFA filed a motion to recoup legal fees of more than $60,000 incurred after Lisa Cornell declined the offer of judgment. (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 4; Cornell Opp. (filed 3/25/13), Exhibit 1 ¶ 30.) Lisa Cornell then moved to modify the judgment so the court could address the bait and switch claim that had been alleged in the complaint, but not addressed by GFA's motion for summary judgment. The court modified the judgment and ordered briefing on the bait and switch claim. (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 4.)

On October 28, 2009, GFA moved for summary judgment on the bait and switch claim. The parties engaged in mediation before a hearing on that motion and GFA's motion for attorney's fees. On August 11, 2010, the parties signed a Mutual Release of All Claims and Settlement Agreement settling all of their dispute. (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 4-5 and Exhibit 3.) The Mutual Release, characterized by Lisa Cornell as "essentially a walk-away" (Cornell Opp. (filed 3/25/13), Exhibit 2 ¶ 13), covered not just GFA but defined "GFA parties" to include Respondents in this proceeding that were not parties in Lawsuit One. Pursuant to the Release, the GFA parties

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[6] Respondents state that the court entered its final judgment on August 18, 2009. (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 4.) I do not find a copy of the final judgment in the record. Part of the transcript of the June 5, 2009, hearing is in the record. (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 2.)

and the Cornells "waive[d], release[d] and forever discharge[d] all past, present and future claims . . . which either . . . may now or in the future have against each other . . . ." (Resp. Mot. Dismiss or S/J (filed 2/28/13) Exhibit 3.) The Release explicitly referenced Lawsuit One. Lisa Cornell released all her claims against GFA, including her bait and switch claim and her claim for attorney's fees that could be awarded to a prevailing plaintiff in a Florida FDUTPA case. The "GFA parties" released their claims against Lisa Cornell, including claims for attorney's fees and costs GFA claimed Lisa Cornell owed because she did not accept the offer of judgment. (*Id.*)

It was important to Lisa Cornell that she not be barred from sailing on cruise vessels operated by cruise lines related to GFA, including Respondents in this Commission proceeding. In the Mutual Release, GFA agreed:

> [T]hat from this date forward 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. It 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.

(Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 3 at 2.) The Respondents are within the definition of GFA parties, the Mutual Release does not state that Respondents agree to permit the Cornells to sail on their cruise ships. As part of the negotiations to include this provision in the Mutual Release, Lisa Cornell agreed to donate $1000 to a charity. The provision that she would make this payment is not included in the Release, but the parties agree that it was a condition and that she made the donation to Broward Adopt-A-Stray. (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 5; Cornell Opp. (filed 3/25/13), Exhibit 2 ¶ 13.) On October 8, 2010, the court dismissed Lawsuit One with prejudice, reserving jurisdiction to enforce the terms of the settlement agreement. (Cornell Opp. (filed 3/25/13), Exhibit 7-A.)

In her declaration filed May 13, 2013, Lisa Cornell states that she attempted to book a cruise with Princess on August 9, 2010, but was denied access to the Princess Internet website.[7] She thought at first that the computer system was down. In a telephone call to Princess, she learned that the system was operational. She made a number of unsuccessful attempts to book a cruise over the next several months. (Declaration of Lisa Cornell (filed 5/13/13) ¶¶ 2-16.)

After this denial of access, Lisa Cornell filed Florida Lawsuit Two, this time in Broward County Court, not the 17th Judicial Circuit where she had filed Lawsuit One. She named GFA, the defendant in Lawsuit One, and Princess Cruise Lines, the respondent in this proceeding but not a defendant in Lawsuit One, as defendants. *Lisa Anne Cornell v. Global Fine Arts, Inc. and Princess Cruise Lines, Ltd.*, No. 10-17682 COCE 54 (Fla. Broward Cty. Ct.) (Lawsuit Two). (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 8.) The date of filing of Lawsuit Two is not clear, but the

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[7] This first and all subsequent denials of access to the website alleged in the Amended Complaint occurred within the Act's three-year statute of limitations. 46 U.S.C. § 41301(a).

Summons and Complaint were served on November 15, 2010, five and one-half weeks after the court dismissed Lawsuit One. (*Id.*)

Lawsuit Two included two counts. Count One sought specific performance of the Mutual Release between Lisa Cornell and GFA that resolved Lawsuit One. Lisa Cornell contended that if Princess made its decision not to permit her to sail on its cruises before August 11, 2010, the date on which Lisa Cornell and GFA signed the Release, GFA breached its covenant of negotiating in good faith by failing to advise Lisa Cornell that Princess had already barred Lisa Cornell from its ships when they were negotiating the Release. In the alternative, if Princess made its decision not to permit her to sail on its cruises after the parties signed the Release, "PRINCESS, as an agent of GFA, breached the agreement by its conduct." (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 8 ¶¶ 15-18.)

Count Two of Lawsuit Two sought an injunction against Princess that would require Princess to permit Lisa Cornell to sail on its cruises. 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. (*Id.* ¶¶ 20-22.)

On December 2, 2010, GFA and Princess filed a motion to transfer Lawsuit Two from Broward County Court to the Circuit Court and judge who had approved the settlement in Lawsuit One and expressly reserved jurisdiction to enforce the agreement. GFA and Princess argued in the alternative that Lawsuit Two should be dismissed. (Cornell Opp. (filed 3/25/13), Exhibit 7.) Lisa Cornell responded on January 31, 2011, by filing a Motion to Enforce Mediated Settlement Agreement in Lawsuit One. (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 6.)

Lawsuit Two was transferred to the 17th Judicial Circuit without a decision on the motion to dismiss. On September 13, 2011, in an order under the Lawsuit One caption, the 17th Judicial Circuit held that the Lawsuit Two "complaint is not the proper vehicle to achieve enforcement of the settlement agreement" and *sua sponte* dismissed the complaint. (Cornell Opp. (filed 3/25/13), Exhibit 8 (*Cornell v. GFA*, No. 07-07894 (Fla. 17th Jud. Cir. Sept. 13, 2011) (Order on Plaintiff's Motion to Enforce Settlement)).) The record does not reflect whether the court also entered a written order of dismissal under the Lawsuit Two caption. The court scheduled an evidentiary hearing in Lawsuit One on Lisa Cornell's motion to enforce the settlement agreement. (*Id.*)

On February 2, 2012, the 17th Judicial Circuit judge held the hearing and heard testimony and argument. (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 7 (partial transcript).) On February 7, 2012, the court issued an order finding that Lisa Cornell "failed to prove a violation of the settlement agreement. WHEREFORE, this court **denies** plaintiff's motion to enforce mediated settlement agreement." (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 9 (*Cornell v. GFA*, No. 07-07894 (Fla. 17th Jud. Cir. Feb. 7, 2012) (Order on Plaintiff's Motion to Enforce Mediated Settlement Agreement) (emphasis in original)).) The record in this proceeding does not state whether Lisa Cornell appealed this order.

C. Federal Maritime Commission Complaint and Amended Complaint.

On January 30, 2013, the Cornells filed their Complaint with the Secretary. On April 29, 2013, after Respondents filed their motion to dismiss or for summary decision, the Cornells filed a Motion for Leave to Amend Verified Complaint and lodged an Amended Verified Complaint with the motion. The motion was unopposed and was granted. *Cornell v. Princess Cruise Lines, Ltd.*, FMC No. 13-02 (ALJ Apr. 30, 2013) (Order Granting Motion for Leave to Amend Complaint). The Amended Complaint reiterates the section 10(b)(10) claim from the original Complaint and adds claims of violation of sections 10(b)(4) and 10(c).

The Amended Complaint alleges that respondents Princess and Carnival plc operate as common carriers from ports in the United States and that Carnival Corporation is the parent corporation of Princess, Carnival plc, and other cruise lines that operate as common carriers from ports in the United States. The Amended Complaint recites allegations about Lisa Cornell's February 2007 cruise on the *Imagination*, purchase of art work from GFA, and the Florida lawsuits.

The Amended Complaint alleges that after the parties signed the Mutual Release in Lawsuit One, Lisa Cornell was unable to book a cruise on Princess. "Further investigation revealed that Mona Ehrenreich [general counsel for Princess] had issued orders to ban both LISA CORNELL and WARE CORNELL from cruising on ships operated by PRINCESS and CARNIVAL plc which includes Cunard and P & O." (Amended Complaint ¶ 14.) The Amended Complaint alleges that this "refusal to deal with the complainants by a common carrier for hire expressly violates 46 United States Code § 41104(10), which provides '[a] common carrier, either alone or in conjunction with any other person, directly or indirectly, may not – . . . (10) unreasonably refuse to deal or negotiate . . . .'" (Amended Complaint ¶ 23.)

> PRINCESS has recently refunded the deposit it received for a future cruise,[8] however it did so only after it was served with a copy of the original Verified Complaint. However, PRINCESS did not pay interest on the deposit nor did it pay the economic value of the shipboard credit of $150.00. Additionally LISA CORNELL and WARE CORNELL have incurred damages between August, 2010 and January 2013 in excess of $33,000.00[9] in attempting to have PRINCESS and Ehrenreich reverse the policy of refusing to deal with them as passengers.

(Amended Complaint ¶ 29.)

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[8] The original Complaint alleged that Princess failed to refund a deposit Lisa Cornell made during her last cruise with Princess in March 2010. (Complaint ¶ 29.) On February 13, 2013, after the Cornells filed the Complaint, Princess refunded the $100 deposit.

[9] The original Complaint said $23,000.00. (Complaint (original) ¶ 29.)

The Amended Complaint adds claims that Respondents violated two additional sections of the Shipping Act. The first additional claim alleges that Princess violated section 10(b)(4) of the Act: "A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (4) for service 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. The Amended Complaint alleges:

> 30. In connection with the settlement of the underlying GFA litigation with GFA [*sic*], Princess's [*sic*] lawyers demanded that the Complainant LISA CORNELL make a payment directly to PRINCESS. When refused they then demanded payment to a certain cancer charity in the name of Mona Ehrenreich, the general counsel of PRINCESS, who was supposedly uninvolved with the settlement negotiations.
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> 31. The $1,000 payment to Broward Adopt-A-Stray was deemed an acceptable alternative to insure an uninterrupted right to deal with PRINCESS and other Carnival Corporation cruise lines.
>
> 32. However it now appears through discovery that in fact PRINCESS was demanding and receiving a discriminatory tariff in violation of 46 U.S.C. § 41104. Consequently LISA CORNELL has been damaged by the payment of a surcharge for travel.

(Amended Complaint.)

The second additional claim alleges that Princess and Carnival plc violated section 10(c) of the Act, which provides: "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. The Amended Complaint alleges:

> 33. Affidavits filed with the Commission show conclusively that CARNIVAL plc and PRINCESS took concerted action to refuse to deal with Complainants. Specifically Simon Waters, General Counsel of CARNIVAL plc swore in pertinent part:
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> 3. Princess Cruise Lines Ltd. of Santa Clarita, California acts as the sales agent in the United States responsible for handling reservations by U.S. residents on Cunard brand vessels and on P & O brand vessels operating in the Australian region only.
>
> 4. While I am informed and believe that Princess will not process a cruise reservation for Lisa Cornell through their offices, Carnival plc had no

involvement whatsoever in Princess' decision to not accept booking from Lisa Cornell.

34. Mr. Waters declaration under penalty of perjury establishes concerted action in that upon becoming aware of a refusal to deal by an agent, CARNIVAL plc took no action to require its agent PRINCESS to act in conformity with the requirements of the law and most particularly the [S]hipping Act of 1984. CARNIVAL plc thus ratified the unlawful actions of PRINCESS and its General Counsel Mona Ehrenreich.

(Amended Complaint.)

As relief:

[The Cornells] request that the Commission issue appropriate relief, including, but not limited to, entry of a final order determining and assessing reparations to the Complainants which is inclusive of attorneys fees as damages under the exception to the American Rule which is known as the "wrongful act doctrine" in Florida and the "tort of another doctrine" in California in attempting to secure the rights guaranteed to them under the Shipping Act of 1984, as set forth herein in the amount of $33,000.00 and an award of fees and costs of action to Complainants and an assessment of penalties against the Respondents.

(Amended Complaint at 7.)

III. CONTROLLING AUTHORITY.

A. Statutory Background.

The Cornells filed their Amended Complaint pursuant to section 11 of the Act.

[Section 11] A person may file with the . . . Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.

46 U.S.C. § 41301(a).

The Amended Complaint alleges that Respondents are common carriers within the meaning of the Act. (Amended Complaint ¶¶ 4-6.)

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(6) (emphasis added). The Act prohibits common carriers from taking certain actions. The Amended Complaint alleges that Respondents violated three sections of the Act. (Amended Complaint ¶¶ 1, 23.)

> [Section 10(b)(10)] A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not – . . . (10) unreasonably refuse to deal or negotiate.

46 U.S.C. § 41104.

> [Section 10(b)(4)] A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (4) for service 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.

> [Section 10(c)] 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.

The Amended Complaint alleges that the Cornells were injured by Respondents' alleged violations and seeks a reparation award for their injuries. (Amended Complaint ¶ 18; Amended Complaint at 7.) The Act defines actual injury.

> (a) *Definition.* – In this section, the term "actual injury" includes the loss of interest at commercial rates compounded from the date of injury.
>
> (b) *Basic amount.* – If the complaint was filed within the period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.

46 U.S.C. § 41305.

B. Evidence and Burden of Persuasion.

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). All documents provided by the parties in support of their arguments on the motion to dismiss or summary decision are admitted as evidence. This initial decision is based on the Amended Complaint, the parties' memoranda, the exhibits filed with the memoranda, and the supplemental evidence and memoranda filed by the parties.

This initial summary decision addresses only material issues of fact and law. The parties disagree about what happened on many events that occurred during the more than six years since Lisa Cornell purchased the lithographs on the *Imagination*. It is not necessary to resolve these disagreements on matters not material to the outcome of this proceeding. 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); *In re Amrep Corp.*, 102 F.T.C. 1362, 1670 (1983).

A complainant alleging a violation of the Shipping Act "has the initial burden of proof to establish the[] violation[]. The applicable standard of proof is one of substantial evidence, an amount of information that would persuade a reasonable person that the necessary premise is more likely to be true than to be not true." *AHL Shipping Company v. Kinder Morgan Liquids Terminals, LLC*, FMC No. 04-05, 2005 WL 1596715, at *3 (ALJ June 13, 2005). *See* 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. § 502.155. "[A]s of 1946 the ordinary meaning of burden of proof [in section 556(d)] 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' Compensation 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. "[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 Steamship Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994).

IV. RESPONDENTS' MOTION TO DISMISS IS GRANTED IN PART AND DENIED IN PART.

As grounds for dismissal of the Amended Complaint,[10] Respondents argue:

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[10] Respondents filed their motion to dismiss before the Cornells filed their motion for leave to file the Amended Complaint. The arguments addressing the Complaint are equally applicable to the section 10(b)(10) allegations in the Amended Complaint. On May 13, 2013, Respondents filed Respondents' Supplement to Motion to Dismiss to Address New Issues Raised in the Amended

> The Motion to Dismiss is based on the fact that (1) the FMC lacks Subject Matter Jurisdiction for this dispute; (2) there is no statutory basis for the claims raised by the Complainants; (3) The [Amended] Complaint is barred by the doctrines of *collateral estoppel* and *res judicata*; and (4) Princess has the legal right to refuse to sell a cruise to the Complainants given their history of vexatious litigation, threats, and refusal to honor contracts they have signed.

(Resp. Mot. Dismiss or S/J (filed 2/28/13) at 1.)

A. The Commission Rules of Practice and Procedure Permit Consideration of a Motion to Dismiss.

The Commission's Rules of Practice and Procedure (Rules), 46 C.F.R. Part 502, do not explicitly provide for a motion to dismiss for lack of subject matter jurisdiction or a motion to dismiss for failure to state a claim.

> Rule 12 of the Commission's Rules of Practice and Procedure (the 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. As the Commission's Rules do not address motions to dismiss for lack of subject matter jurisdiction or failure to state a claim, Federal Rules 12(b)(1) and 12(b)(6) apply in this case. *See, e.g., The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, 2007 WL 2468431 (F.M.C.).
>
>> Rule 12(b)(1) permits a party to raise by motion lack of subject matter jurisdiction, and Rule 12(b)(6) permits a party to raise by motion failure to state a claim. With regard to motions to dismiss a complaint for lack of subject matter jurisdiction under Rule 12(b)(1), such motions may assert either a factual attack or a facial attack to jurisdiction. . . . A factual attack challenges "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." . . . In a facial attack, on the other hand, the court examines whether the complaint has sufficiently alleged subject matter jurisdiction. As it does when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court construes the complaint in the light most favorable to the plaintiff and accepts all well-pled facts alleged . . . in the complaint as true.

Complaint (the section 10(b)(4) and 10(c) claims) and the Cornells have responded.

Sinaltrainal v. Coca-Cola Company, 578 F.3d 1252, 1260 (11th Cir. 2009).

> 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, 677] (2009). The complaint must be sufficient to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *see also* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure Civ. § 1215 (3d ed. 2010) ("[T]he test of a complaint's sufficiency simply is whether the document's allegations are detailed and informative enough to enable the defendant to respond.").

Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., FMC No. 09-01, Order at 19-20 (FMC Aug. 1, 2011) (Order Denying Appeal, etc.).

B. The Commission Has Subject Matter Jurisdiction over the Amended Complaint.

1. The Amended Complaint alleges violations of the Shipping Act.

As noted above, "[a] person may file with the . . . Commission a sworn complaint alleging a violation of [the Shipping Act.]" 46 U.S.C. § 41301(a). The Cornells are persons within the meaning of the Act. 1 U.S.C. § 1. The Amended Complaint alleges that Respondents are common carriers within the meaning of the Act and that they violated sections 10(b)(10), 10(b)(4), and 10(c) of the Act.

The Commission has jurisdiction over allegations that "involve elements peculiar to the Shipping Act." *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000). Allegations "involving unfair or unjustly discriminatory practices, undue or unreasonable preferences, undue or unreasonable prejudice or disadvantage, and just and reasonable regulations and practices, are inherently related to Shipping Act prohibitions and are therefore appropriately brought before the Commission." *Id.* Allegations of violations of the three sections of the Act that the Cornells contend were violated by Respondents fit within this definition and are appropriately brought before the Commission. *See* 46 U.S.C. § 41104 ("unreasonably refuse to deal or negotiate"); 46 U.S.C. § 41104 ("engage in any unfair or unjustly discriminatory practice in the matter of – (A) rates or charges"); 46 U.S.C. § 41105 ("boycott or take any other concerted action resulting in an unreasonable refusal to deal"). Therefore, construing the Amended Complaint in the light most favorable to the Cornells and accepting all well-pleaded facts alleged in the complaint as true, the Amended Complaint sufficiently alleges subject matter jurisdiction and withstands a facial attack on subject matter jurisdiction.

2. Princess, Carnival plc, and Carnival Corporation are common carriers within the meaning of the Shipping Act.

In a factual attack on subject matter jurisdiction, Respondents argue that they are not common carriers within the meaning of the Act. Respondents contend:

> It is debatable whether a modern cruise line would be deemed a common carrier in the same context as ancient shipowners. Most cases discussing the duties of a common carrier to transport guests or freight arise in the 1800's when most rail and ferry routes were government licensed to a single company and therefore if that company refused passage, then the aggrieved individual may have no alternate method of reaching their destination. The voyages and trips discussed in those cases involved transportation from one place to another rather than a modern cruise which is essentially an ocean vacation that most often simply returns the guest to the same place where their trip began. Modern cruise ships are principally a form of entertainment and vacation rather than point to point transportation.

(Resp. Mot. Dismiss or S/J (filed 2/28/13) at 16.) Respondents primarily rely on 19th century cases involving common carriage on vessels and 20th century antitrust cases. It is significant that Respondents do not cite any case holding that a cruise line is not a common carrier.

In their opposition, the Cornells argue that cruise ships are common carriers. (Cornell Opp. (filed 3/25/13) at 10-13.) The Cornells rely on an opinion of the District of Columbia Circuit explicitly answering the question of whether a modern cruise line is a common carrier within the meaning of the Shipping Act. *American Ass'n of Cruise Passengers, Inc. v. Carnival Cruise Lines, Inc.*, 911 F.2d 786 (D.C. Cir. 1990) (*Carnival* (D.C. Cir.)). The Cornells also cite to a law review article discussing the duty of common carriers to provide service to all. Singer, Joseph, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. R. 1283, 1312-1313 (1996).

In *Carnival* (D.C. Cir.), a travel agency brought an antitrust action in federal district court against Carnival Cruise Lines, Inc.,[11] several other vacation cruise lines, and two trade associations (collectively the cruise lines), alleging that the cruise lines engaged in a concerted refusal to deal with the travel agency in violation of federal and state antitrust laws. The cruise lines moved to dismiss, arguing that they are "common carriers" within the meaning of section 3(6) of the Shipping Act of 1984, 46 U.S.C. App. § 1702(6) [now 46 U.S.C. § 40102(6)], "and that an agreement to which cruise lines are parties is therefore subject to the exclusive jurisdiction of the Federal Maritime Commission." *Carnival* (D.C. Cir.), 911 F.2d at 787-788. The district court denied the motion, then certified the cruise lines' application for interlocutory appeal of this issue.

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[11] The undersigned does not know the connection, if any, between Carnival Cruise Lines, Inc., the defendant/appellant in *Carnival* (D.C. Cir.), and Carnival plc and Carnival Corporation, Respondents in this proceeding.

In the court of appeals, the cruise lines argued

> that the plain language and the legislative history of the Shipping Act, and the FMC's consistent interpretation of the Act (and of its predecessor, the Shipping Act of 1916), all lead to the conclusion that a cruise line is a common carrier. They also assert that when the Congress passed the 1916 and the 1984 Acts, it adopted the common law, under which a cruise line was held to be a common carrier. Lastly, the carriers contend that the approach taken by the district court, in which a cruise line is a common carrier if it is "primarily involved in point-to-point," as opposed to round-trip, transportation, creates just the kind of jurisdictional dichotomy that the Congress sought to avoid when it passed the Shipping Act.

Carnival (D.C. Cir.), 911 F.2d at 789.

> The [FMC], as amicus curiae, supports the carriers' claim that cruise lines are common carriers, and contends that its decision to that effect in [*Petchem, Inc. v. Canaveral Port Auth.*, 23 S.R.R. 974 (FMC 1986)] is entitled to deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 . . . (1984).

Id.

The court of appeals noted the definition of common carrier set forth in the Act.

> Section 3(6) [now 46 U.S.C. § 40102(6)] defines "common carrier" to mean: a 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 – (A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and (B) 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. . . .

Id. The court concluded that "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." *Id.* at 792. The court's holding is consistent with the Commission's decision in *Petchem, Inc. v. Canaveral Port Auth.*, 23 S.R.R. 974, 984 (FMC 1986) ("To conclude that round-trip vacation cruises are not ocean common carriage would contradict the language of [section 10(b)(10) of the Shipping Act of 1984]."), *aff'd sub nom. Petchem, Inc. v. Federal Maritime Commission*, 853 F.2d 958 (D.C. Cir. 1988) (merits affirmed without reaching jurisdictional question).

In their reply to the Cornells' opposition, Respondents return to their argument that cruise lines are not common carriers.

> Respondents' Motion pointed out that most of the case law discussing the duties of a common carrier to transport guests or freight arises in the context of ancient shipowners and not modern cruise lines. Thus, according to these cases, it is debatable whether a modern cruise line would be deemed a common carrier, at least for the purposes of a round trip vacation cruise that does not actually deliver passengers to any different place from where they began, in the same context as ancient shipowner cases which mostly dealt with ferry or liner service transporting passengers from one place to another.

(Respondents' Reply in Support of [Their] Motion to Dismiss or Alternatively Motion for Summary Judgment (Resp. Reply (filed 4/16/13)) at 3 n.4.) Respondents also contend that "the only source Complainants cite" for supporting the Cornells' argument that Respondents have a duty as common carriers to carry all who want to travel is the Joseph Singer law review article. (*Id.* at 5 n.6.)

Respondents do not address the District of Columbia Circuit's holding in *Carnival* (D.C. Cir.), a source cited by the Cornells in their opposition (Cornell Opp. (filed 3/25/13) at 11), that cruise lines are common carriers under the Shipping Act. Respondents do not explain why, in the face of an opinion of the District of Columbia Circuit holding that cruise lines are common carriers within the meaning of the Act, and the Commission's decision in *Petchem*, "it is debatable whether a modern cruise line would be deemed a common carrier." In *Carnival* (D.C. Cir.): "[T]he [cruise lines] contend[ed] that the approach taken by the district court, in which a cruise line is a common carrier if it is 'primarily involved in point-to-point,' as opposed to round-trip, transportation, creates just the kind of jurisdictional dichotomy that the Congress sought to avoid when it passed the Shipping Act." *Carnival* (D.C. Cir.), 911 F.2d at 789. In this proceeding, Princes, Carnival plc, and Carnival Corporation contend that the approach taken by the district court in *Carnival* (D.C. Cir.) was correct.

Other courts in cases under the Shipping Act and other laws have held cruise ships are common carriers, including at least two in which Respondents' counsel in this proceeding represented the cruise line. In a case in which Respondents' counsel represented the cruise line, a passenger filed suit against a cruise line alleging sexual assault by crew member. When ruling on a motion to dismiss, the district court stated:

> [T]rains and cruise ships are considered common carriers of passengers, so common carrier standards are applicable to both modes of transportation. See 46 U.S.C. App. § 1702(6) [the Shipping Act definition now codified as 46 U.S.C. § 40102(6)] (defining common carrier as "a 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").

Doe v. Celebrity Cruises, 145 F. Supp. 2d 1337, 1344 n.5 (S.D. Fla. 2001). After the jury entered a verdict for the plaintiff, the judge granted Celebrity Cruises's motion for judgment as a matter of law on other grounds. The district court found, however, that "[t]he evidence is sufficient to show

Celebrity is a common carrier." *Doe v. Celebrity Cruises*, 287 F. Supp. 2d 1321, 1328 (S.D. Fla. 2003).

The Eleventh Circuit affirmed in part, reversed in part, and remanded. In its cross-appeal, Celebrity Cruises "raise[d] the important issue of whether a cruise line, as a common carrier, is strictly liable for crew member assaults on its passengers during transit." *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 904 (11th Cir. 2004). The court noted: "[T]he parties do not dispute that a cruise ship is considered a common carrier under federal maritime law." *Id.* at 905 n.12.

Other cases finding that cruise lines are common carriers include:

- *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1334 (11th Cir. 1984) (in suit seeking damages allegedly caused by the failure of the sanitary system, Carnival Cruise Lines cruise ship *Tropicale*, as a common carrier, owes a special duty to its passengers).

- *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 834 (9th Cir. 2002) (cruise line is a common carrier in suit by passenger to determine whether a passenger is contractually bound by the fine print of a passenger ticket).

- *Reming v. Holland America Line Inc.*, No. C11-1609RSL, 2013 WL 594281, at *3 (W.D. Wash. Feb. 14, 2013) (cruise line is "a passenger vessel that may not contractually limit its liability for its own negligence").

- *In re Royal Caribbean Cruises Ltd.*, No. 1-23070-CIV, 2013 WL 425837, at *4-5 (S.D. Fla. Feb. 4, 2013) (cruise vessel *Monarch of the Seas* is a vessel transporting passengers between a United States port and a foreign port and subject to restrictions on provisions limiting liability for personal injury and death in 46 U.S.C. § 30509).

- *Wright v. United States*, No. 09-20543-CIV, 2011 WL 381809, at *2 (S.D. Fla. Jan. 27, 2011) (fraudulent use of credit card on board cruise ship supports criminal conviction for theft by fraud of goods valued in excess of $1,000 from a vessel operated by a common carrier moving in interstate and foreign commerce, in violation of 18 U.S.C. § 659).

- *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 466-471 (Fla. 2007) (as a carrier, cruise line is not vicariously liable for medical negligence in treatment of passenger by doctor hired by cruise line) (I note that Respondents' counsel represented petitioner Carnival Corporation in this case).

Respondents quite clearly meet the Shipping Act's definition of "common carrier"; that is, 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 from the port or point of receipt to the port or point of destination; and they use, for all or part of that transportation, a vessel operating on the high seas between a port in the United

States and a port in a foreign country. 46 U.S.C. § 40102(6). In *Carnival* (D.C. Cir.) the District of Columbia Circuit agreed with the Commission's position and held that cruise lines are common carriers within the meaning of the Act. Respondents do not cite any case in which a court has held that a cruise line is not a common carrier. Therefore, I find that Respondents are common carriers within the meaning of the Act.[12]

3. The Amended Complaint states a claim of violation of section 10(b)(10).

a. The Amended Complaint alleges that Respondents are common carriers that violated section 10(b)(10).

To prove a violation of section 10(b)(10), first, a complainant must establish that the respondent is a common carrier within the meaning of the Act. Second, a complainant must establish that the common carrier unreasonably refused to deal or negotiate with the complainant. "This requires a two-part inquiry: whether [the common carrier] refused to deal or negotiate, and, if so, whether its refusal was unreasonable." *Canaveral Port Auth. – Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, 29 S.R.R. 1436, 1448 (FMC 2003).

> A refusal to deal or negotiate is not on its own a violation of the Shipping Act. We must also determine whether the refusal was unreasonable. *Cf.*, *Petchem, Inc. v. Federal Maritime Comm'n*, 853 F.2d [958, 963] (D.C. Cir. 1988) ("The Shipping Act clearly contemplates the existence of permissible preferences or prejudices.").

Id. "Refusals to deal or negotiate are factually driven and determined on a case-by-case basis." *Id.* at 1449.

> The Act does not guarantee the right to enter into a contract, much less a contract with any specific terms; such a right has not existed either before or since the passage of [the Ocean Shipping Reform Act of 1998]. All that is required is that common carriers . . . refrain from "shutting out" any person for reasons having no relation to legitimate transportation-related factors.

New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans, FMC No. 00-11, 2001 WL 865692, at *8 (ALJ June 27, 2001) (Initial Decision), *aff'd*, 2002 WL 33836158 (FMC June 28, 2002).

In other Commission proceedings involving the question of whether a respondent's actions are reasonable or unreasonable, the Commission has used a burden-shifting scheme. For instance,

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[12] The Cornells state that as a holding company, Carnival Corporation arguably may not be a cruise line. (Cornell Opp. at 10 n.1.) Given the outcome below, I pretermit this question and assume for this decision that Carnival Corporation is a common carrier.

Petchem v. Canaveral Port Auth. concerned the appropriate standard for judging exclusive terminal arrangements under the Shipping Act, 1916.

> [Exclusive] arrangements are generally undesirable and, in the absence of justification by their proponents, may be unlawful under the Shipping Acts. However, in certain circumstances, such arrangements may be necessary to provide adequate and consistent service to a port's carriers or shippers, to insure attractive prices for such services and generally to advance the port's economic well-being. The burden of adducing evidence of such circumstances falls upon the port and the other parties to the exclusive arrangement, both because they are the arrangement's proponents and because evidence of that nature usually lies within their control. Nevertheless, the ultimate burden of proof in any Shipping Act challenge to an exclusive terminal arrangement or franchise rests with the party wishing to overturn the franchise.

Petchem, Inc. v. Canaveral Port Auth., 23 S.R.R. 974, 990 (FMC 1986), *aff'd sub nom. Petchem, Inc. v. Federal Maritime Comm'n*, 853 F.2d 958 (D.C. Cir. 1988).

In *Ceres v. Maryland Port Administration*, the complainant alleged that a port engaged in an unreasonable practice in violation of section 10(d)(1) of the Shipping Act of 1984.

> In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.

Ceres Marine Term., Inc. v. Maryland Port Admin., 27 S.R.R. 1251, 1270-1271 (FMC 1997) (footnote and citation omitted), *aff'd in part, rev'd in part on other grounds sub nom. Maryland Port Admin. v. Federal Maritime Comm'n*, 164 F.3d 624, 1998 WL 716035 (4th Cir. Oct. 13, 1998) (Table).

A similar scheme is appropriate when considering a claim that a respondent violated section 10(b)(10). First, a complainant must establish that the respondent is a common carrier within the meaning of the Act. Second, a complainant must establish that the respondent refused to deal or negotiate with the complainant. The respondent must then introduce evidence that the refusal to deal or negotiate was reasonable "because evidence of that nature usually lies within [the respondent's] control." *Petchem, Inc. v. Canaveral Port Auth.*, 23 S.R.R. at 990. The burden of persuasion remains with the complainant to demonstrate that the refusal to deal or negotiate was unreasonable.

5 U.S.C. § 556(d); *Petchem, Inc. v. Canaveral Port Auth.*, 23 S.R.R. at 990 (the ultimate burden of proof in any Shipping Act challenge lies with the complainant).

The Amended Complaint alleges that Respondents are common carriers within the meaning of the Act (Amended Complaint ¶¶ 4-6) and that Respondents unreasonably refused to deal or negotiate with the Cornells in violation of section 10(b)(10) of the Act. (Amended Complaint ¶¶ 13-14; 22-23.) The Amended Complaint has facial plausibility and gives Respondents fair notice of what the claim is and the grounds upon which it rests. Therefore, the Amended Complaint states a claim of violation of section 10(b)(10) within the Commission's subject matter jurisdiction.

b. The "statutory basis" for Complainants' section 10(b)(10) claim applies.

Respondents first contend that the fact that GFA offered to settle Lisa Cornell's claim for nearly five times the $585 that she was seeking proves that GFA did offer to deal or negotiate; therefore, there could not have been a violation of section 10(b)(10). (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 9.) "The fact that Lisa Cornell does not like the outcome of those negotiations, does not mean there has been a violation of 46 U.S.C. § 41104(10)." (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 9.) Respondents attached several exhibits to the motion to support their contentions.

"In its review of a 12(b)(6) motion to dismiss, the Court may consider "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." The Amended Complaint is the only pleading filed in this proceeding. Respondents' motion is not a pleading. *See* Fed. R. Civ. P. 7 (defining pleadings).

The contention by Princess that it did deal or negotiate is a defense to the claim that it violated section 10(b)(10); that is, it fulfilled any obligation to deal or negotiate with the Cornells. I must "construe[] the complaint in the light most favorable to the [Cornells] and accept[] all well-pled facts alleged . . . in the complaint as true." *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, FMC No. 09-01, Order at 19-20 (FMC Aug. 1, 2011) (Order Denying Appeal, etc.), *quoting Sinaltrainal v. Coca-Cola Company*, 578 F.3d at 1260. The well-pleaded facts in the Amended Complaint allege a violation of section 10(b)(10). Therefore, the motion to dismiss based on the contention that Princess fulfilled any obligation it may have had to deal or negotiate with Lisa Cornell is denied.

As noted, Respondents attached several exhibits to the motion to support their contentions.

> If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Fed. R. Civ. P. 12(d). The parties conducted extensive discovery during the Florida litigation and have been given an opportunity to present all the material that is pertinent to this issue. Princess's contention that it fulfilled any obligation to deal or negotiate with the Cornells is addressed below on summary decision.

Respondents contend that even if section 10(b)(10) applies to cruise lines, all the cruise line has to do is negotiate, implying that the Commission should not look into the substance of the negotiations.

> In fact, even if the statute applied to cruise lines passengers, it would only require the parties to negotiate (which they have done). It does not require a cruise line to carry every individual who demands to buy a cruise. (If Plaintiff's interpretation were correct, for example, a cruise line would be required to sell a cruise to a known terrorist).

(Resp. Mot. Dismiss or S/J (filed 2/28/13) at 10.)

Section 10(b)(10) requires more of a common carrier than simply listening to a potential passenger's request for transportation, then just saying no. "The common carrier must refrain from 'shutting out' any person for reasons having no relation to legitimate transportation-related factors." *New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans*, FMC No. 00-11, 2001 WL 865692, at *8. The issue in this proceeding or any other proceeding alleging a violation of section 10(b)(10) is whether Respondents *unreasonably* just said no.

Section 10(b)(10) does not mean that a cruise line must carry all persons who want to sail. Respondents' claim that if section 10(b)(10) applied to cruise lines, a cruise line would be required to sell a cruise to a known terrorist is without merit. For instance, the Intelligence Reform and Terrorism Prevention Act of 2004 requires the Secretary of Homeland Security to develop a "no transport" list for cruise lines.

> WATCH LISTS. –
>
> (1) IN GENERAL. – As soon as practicable but not later than 180 days after the date of the enactment of this Act, the Secretary of Homeland Security shall –
>
> (A) implement a procedure under which the Department of Homeland Security compares information about passengers and crew who are to be carried aboard a cruise ship with a comprehensive, consolidated database containing information about known or suspected terrorists and their associates;
>
> (B) use the information obtained by comparing the passenger and crew information with the information in the database to prevent known or suspected terrorists and their associates from boarding such ships or to subject them to specific

> additional security scrutiny, through the use of "no transport" and "automatic selectee" lists or other means.

Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, § 4071(a), 118 Stat. 3638, 3729 (2004).

> The Act requires the Secretary of Homeland Security to "compare[] information about passengers and crew who are to be carried aboard a cruise ship with a comprehensive, consolidated database containing information about known or suspected terrorists and their associates" and also to use "information obtained by comparing the passenger and crew information with the information in the database to prevent known or suspected terrorists and their associates from boarding such ships or to subject them to specific additional security scrutiny, through the use of 'no transport' and 'automatic selectee' lists or other means."

Justin Florence, comment, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 Yale L.J. 2148, 2154 n.17 (2006), available at http://www.yalelawjournal.org/pdf/115-8/Florence.pdf. Whether a person is identified on a DHS "no transport" or "automatic selectee" list is a "legitimate transportation-related factor[]" that a cruise line may consider when the person wants to sail on a cruise ship. It is reasonable within the meaning of section 10(b)(10) for a common carrier to refuse to deal or negotiate with a person on a DHS watchlist.

Respondents rely on a case involving an attempt to sail on a cruise ship with a colony of bees for the proposition that "[m]odern courts have likewise recognized the rights of cruise lines to refuse passage to certain guests based on their past behavior or reputation." (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 18.) In that case, a passenger purchased tickets for a cruise on a Carnival ship. "Carnival's ticket contract states at paragraph 4(e): 'No Guest is permitted to bring on board the Vessel live animals (other than qualified service animals, with not less than 14 days advance notice given to Carnival).'" *Afkhami v. Carnival Corp.*, 305 F. Supp. 2d 1308, 1312 (S.D. Fla. 2004). Other provisions of the contract gave Carnival the right to disembark a passenger who violated the terms of the contract. After the passenger boarded, Carnival officials learned that:

> [The passenger and his party] boarded the *Victory* with a small wooden container of fifty to sixty live bees. Plaintiffs did not seek permission from Carnival prior to carrying the bees aboard the *Victory* nor [did] they advise Carnival that the bees were in their possession when they passed through security, or upon boarding.

Id. at 1313. The passengers, who are Iranian, alleged in their lawsuit that they were subject to disparate treatment in violation of 28 U.S.C. § 1981, 28 U.S.C. § 1983, and Title II of the Civil Rights Act, 42 U.S.C. § 2000a. The passengers did not allege a violation of section 10(b)(10) of the Shipping Act, a matter within the exclusive jurisdiction of the Commission. The court granted

summary judgment for Carnival on the 28 U.S.C. § 1981 and Title II claims and dismissed the 28 U.S.C. § 1983 with leave to refile. *Afkhami v. Carnival Corp.*, 305 F. Supp. 2d at 1329.

The court's decision in *Afkhami* is not inconsistent with jurisdiction over the Cornells' Amended Complaint. Were the *Afkhami* case before the Commission on a claim of violation of section 10(b)(10), the issue would be whether Carnival's decision not to permit the passengers to sail was unreasonable. A violation of the terms of the ticket contract is a legitimate transportation-related factor and a cruise line's decision to disembark a passenger for that violation is not unreasonable. That is not what occurred with the Cornells, however.

Respondents argue that the definition of what is meant by "unreasonably refuse to deal or negotiate" is found in an interpretation of section 10(b)(10) promulgated by the Commission. The interpretation states:

> (a) 8(c) of the Shipping Act . . . authorizes ocean common carriers and agreements between or among ocean common carriers to enter into a service contract with a shippers' association, subject to the requirements of the Act. Section 10(b)(10) of the Act . . . prohibits carriers from unreasonably refusing to deal or negotiate. Section 7(a)(2) of the Act . . . exempts from the antitrust laws any activity within the scope of that Act, undertaken with a reasonable basis to conclude that it is pursuant to a filed and effective agreement.
>
> (b) The . . . Commission interprets these provisions to establish that a common carrier or conference may not require a shippers' association to obtain or apply for a Business Review Letter from the Department of Justice prior to or as part of a service contract negotiation process.

46 C.F.R. § 545.1.

Respondents contend that based on this interpretation:

> [T]he FMC itself has determined that § 46 U.S.C. 41104(10) precludes common carriers from refusing to deal or negotiate with **[shippers'] associations** during **service contract negotiations**. There is nothing in the statute or other authorities to support Complainants' theory that this rule has anything to do with an individual cruise line's decision not to sell a vacation cruise to one specific passenger with a history of vexatious litigation, a history of ignoring contracts they have signed, and a history of threatening to litigate a $585 dispute to the end of time. The statute does not apply to disputes between cruise line passengers and the carrier.

(Resp. Mot. Dismiss or S/J (filed 2/28/13) at 10 (emphasis in original).)

The Act defines the term "shippers' association" as "a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group to obtain carload, truckload, or other volume rates or service contracts." 46 U.S.C. § 40102(23). "Shippers' association" is one of several entities that the Act defines as a shipper. 46 U.S.C. § 40102(22). Section 10(b)(10) prohibits a common carrier from unreasonably refusing to deal or negotiate with a shippers' association. The Commission published section 545.1 to address a problem that had developed for shippers' associations negotiating service contracts with carriers and conferences.

The Department of Justice utilizes a procedure by which a person concerned that planned conduct may violate antitrust laws may seek an opinion from Justice in advance of acting about whether the act will violate the law. "Persons concerned about the legality under the antitrust laws of proposed business conduct may ask the Department of Justice for a statement of its current enforcement intentions with respect to that conduct pursuant to the Department's Business Review Procedure. *See* 28 C.F.R. Section 50.6." *See* http://www.justice.gov/atr/public/busreview/201659a.htm, last visited June 26, 2013.

After passage of the Shipping Act of 1984, the Commission "specifically rejected the suggestion that shippers' associations be required to produce for the benefit of carriers and conferences with which they are negotiating any Department of Justice Business Review Letters they had received." FMC Interpretations of Statements of Policy, Proposed Interpretive Rule, 53 Fed. Reg. 27178 (July 19, 1988). Despite this rejection, shippers' associations

> requested[ed] Business Review Letters from the Department of Justice, allegedly because conferences refuse to negotiate with them unless they have such a letter. Thus, it appears that conferences may be adhering to the mistaken belief that they may inadvertently violate the antitrust laws by negotiating a service contract with an association itself violating the antitrust laws. Regardless of a conference's motive, a refusal to negotiate with a shippers' association pending receipt of documentation which has been established to be clearly unnecessary or immaterial constitutes a section [10(b)(10)] prohibited act.

Id. After a period for comment, the Commission promulgated the rule on which Respondents rely: "The . . . Commission interprets these provisions to establish that a common carrier or conference may not require a shippers' association to obtain or apply for a Business Review Letter from the Department of Justice prior to or as part of a service contract negotiation process." 53 Fed. Reg. 43698 (Oct. 28, 1988), now codified at 46 C.F.R. § 545.1(b).

The Commission promulgated Interpretive Rule 541.1(b) to articulate clearly its position regarding Business Review Letters and to eliminate a specific problem that developed in negotiations between common carriers and shippers' associations. Respondents' argument that Interpretive Rule 541.1(b) means section 10(b)(10) applies *only* to shippers' associations negotiating service contracts, not all common carriers negotiating with all persons, is without merit.

Section 10(b)(10), the statutory basis for the Cornells' Amended Complaint, applies in this proceeding.

c. Princess's contention that Princess has the legal right to refuse to sell a cruise to the Complainants given their history of vexatious litigation, threats, and refusal to honor contracts they have signed does not support dismissal of the section 10(b)(10) claim.

The allegations in the Cornells' Amended Complaint, which must be taken as true on a motion to dismiss, alleges that in the Florida cases, "LISA CORNELL has done no more than seek the protection of the courts to resolve disputes." (Amended Complaint ¶ 28.) Princess contends that it

> clearly has the right to refuse to sell passage to a guest who had demonstrated a repeated pattern of ignoring written contracts, who is a proven and documented vexatious litigant[13] and who has threatened one of the cruise line's affiliates. The Verified Complaint filed with the FMC, unfortunately, is yet another example supporting Princess' reasonable reason for believing Lisa Cornell should not vacation on its ships.

(Resp. Mot. Dismiss or S/J (filed 2/28/13) at 20.) Respondents attached eleven exhibits to the motion to support their contentions.

This contention by Princess is a defense to the claim that it violated section 10(b)(10); that is, its refusal to deal or negotiate with Lisa Cornell was reasonable. I must "construe[] the complaint in the light most favorable to the [Cornells] and accept[] all well-pled facts alleged . . . in the complaint as true." *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, FMC No. 09-01, Order at 19-20 (FMC Aug. 1, 2011) (Order Denying Appeal, etc.), *quoting Sinaltrainal v. Coca-Cola Company*, 578 F.3d at 1260. Therefore, the motion to dismiss based on the contention that Lisa Cornell is a "proven and documented vexatious litigant" is denied.

As noted, Respondents attached eleven exhibits to the motion to support their contentions. The parties have been given an opportunity to present all the material that is pertinent to this issue. Princess's contention that it reasonably refused to deal or negotiate with Lisa Cornell because she is a proven and documented vexatious litigant is addressed below on summary decision.

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[13] Florida has a statutory definition of vexatious litigant. Fla. Stat. § 68.093(2)(d)1. Respondents do not argue that the Cornells meet this definition, (Resp. Reply (filed 4/16/13) at 1-2), and the Florida court did not find that Lisa Cornell is a vexatious litigant with the meaning of the Florida statute.

d. Princess Cruise Lines's argument that the doctrines of collateral estoppel and res judicata bar the section 10(b)(10) claim are considered on summary decision.

In an argument applicable only to it, (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 11 n.11), Princess contends that the issues raised in this proceeding are the same issues raised in the Florida lawsuits. Therefore, Princess contends, the doctrines of collateral estoppel and res judicata bar the Amended Complaint. Princess relies on several exhibits to support its argument.

Respondents present matters outside the pleadings to support their argument about collateral estoppel and res judicata. Therefore, the motion must be treated as one for summary decision. Fed. R. Civ. P. 12(d). This argument is addressed below using summary decision standards.

2. The Amended Complaint states a claim of violation of section 10(b)(4).

Section 10(b)(4) provides: "A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (4) for service 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. The Amended Complaint alleges that during the discussions resulting in the settlement of Lawsuit One, Lisa Cornell agreed to donate $1,000 to Broward Adopt-A-Stray "to insure an uninterrupted right to deal with PRINCESS and other Carnival Corporation cruise lines." (Amended Complaint ¶ 31.) Lisa Cornell contends that this payment to Broward Adopt-A-Stray in this circumstance means that "in fact PRINCESS was demanding and receiving a discriminatory tariff in violation of 46 U.S.C. § 41104. Consequently LISA CORNELL has been damaged by the payment of a surcharge for travel." (Amended Complaint ¶ 31.)

Accepting as true all relevant factual allegations in the Amended Complaint, drawing inferences from these allegations in the light most favorable to Lisa Cornell, and considering only the facts alleged in the Amended Complaint, documents attached as exhibits or incorporated by reference in the Amended Complaint, and matters of which judicial notice may be taken, I find that the Amended Complaint alleges that Princess, a common carrier, engaged in an unfair or unjustly discriminatory practice in the matter of rates or charges. Therefore, the Amended Complaint states a claim that Princess violated section 10(b)(4) of the Act. The motion to dismiss the section 10(b)(4) claim is denied.

The parties have been given an opportunity to present all the material that is pertinent to the motion, including information obtained during the extensive discovery in the Florida lawsuits. Lisa Cornell's contention that the $1000 payment to Broward Adopt-A-Stray is an unfair or unjustly discriminatory practice in the matter of rates or charges is addressed below on summary decision.

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

The Amended Complaint alleges that Carnival plc uses Princess as its agent for booking. It further alleges that once Carnival plc learned that Princess issued the "Do Not Book" order for Lisa Cornell, its failure to instruct its agent Princess to permit Lisa Cornell to book cruises on Carnival plc establishes concerted action between Carnival plc and Princess in violation of section 10(c)(1).

Section 10(c)(1) requires a group of two or more common carriers boycotting or taking other concerted action resulting in an unreasonable refusal to deal. Accepting as true all relevant factual allegations in the Amended Complaint, drawing inferences from these allegations in the light most favorable to Lisa Cornell, and considering only the facts alleged in the Amended Complaint, documents attached as exhibits or incorporated by reference in the Amended Complaint, and matters of which judicial notice may be taken, the Amended Complaint alleges that Carnival plc used Princess as its agent for booking cruises. The Amended Complaint does not allege that Princess was operating as a common carrier when it was performing Carnival plc's bookings. I find 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). Therefore, the claims that Princess and Carnival plc violated section 10(c) are dismissed.

C. Conclusion on Respondents' Motion to Dismiss.

The Cornells are persons within the meaning of the Shipping Act who may file a complaint alleging violations of the Act. The Cornells' Amended Complaint alleges that Respondents are common carriers within the meaning of the Act. The Amended Complaint alleges that Respondents violated section 10(b)(10) of the Act by unreasonably refusing to deal or negotiate with the Cornells; that is, that Respondents unreasonably barred the Cornells from taking cruises on their vessels operating as common carriers within the meaning of the Act. The Amended Complaint alleges that the Cornells suffered actual injury that was proximately caused by Respondents' violation of the Act. Accepting as true all factual allegations in the Amended Complaint and drawing inferences from these allegations in the light most favorable to the Cornells, the Cornells state a claim of violation of section 10(b)(10) that is within the Commission's jurisdiction. Therefore, Respondents' motion to dismiss the section 10(b)(10) claims is denied.

The Amended Complaint alleges that Princess, a common carrier, engaged in an unfair or unjustly discriminatory practice in the matter of rates or charges when GFA required Lisa Cornell to pay $1000 to Broward Adopt-A-Stray as part of the settlement of Lawsuit One and that Lisa Cornell suffered an actual injury as a result. Therefore, the Amended Complaint states a claim that Princess violated section 10(b)(4) of the Act.

The Amended Complaint alleges that Carnival plc and Princess "took concerted action to refuse to deal with Complainants" in violation of section 10(c)(1). Princess was operating as Carnival plc's booking agent, not as a common carrier taking "concerted action" with a second

common carrier Carnival plc, when it refused to deal with the Lisa Cornell. The claim that Princess and Carnival plc violated section 10(c)(1) of the Act is dismissed.

V. RESPONDENTS' ALTERNATIVE MOTION FOR SUMMARY DECISION.

A. Respondents' Motion.

Respondents also move for summary decision.

> The alternative Motion for Summary . . . Judgment is based on the fact that (1) the claims raised in this FMC [Amended] Complaint have already been released by the Complainants by the terms of a signed Settlement Agreement in a previous litigation; (2) neither [Carnival plc] or Carnival [Corporation] have ever taken any action to restrict the ability of either Mr. or Mrs. Cornell to vacation on their cruise ships; (3) neither PLC, Carnival or Princess has ever restricted the ability of G. Ware Cornell, Jr. to vacation on their cruise ships; and (4) the $100 deposit has been refunded.

(Resp. Mot. Dismiss or S/J (filed 2/28/13) at 1.)

As stated above, because Respondents' motion to dismiss on res judicata and collateral estoppel grounds and Respondents' claim that Respondents have a legal right to refuse to sell a cruise to Lisa or Ware Cornell are based on evidence outside the Amended Complaint, they are addressed using summary decision standards.

B. Standards for Summary Decision.

The Commission has emphasized:

> At the summary judgment stage, the role of the judge ". . . is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, [477 U.S. 242, 249 (1986)]. The party seeking summary judgment . . . has the burden of demonstrating that there is no genuine issue of material fact. *Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970); [10A]Wright, Miller & Kane, [*Federal Practice and Procedure* § 2727, p. 455 (3d ed. 1998)].

EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. – Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. § 515.27, 31 S.R.R. 540, 545 (FMC 2008).

The party moving for summary judgment bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *Green v. Dalton*, 164 F.3d 671, 675

(D.C. Cir. 1999) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)). The mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-248 (1986). However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (citation omitted). The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita,* 475 U.S. at 587.

A party opposing a motion for summary judgment cannot rest on the allegations of the complaint but must come forward and designate specific facts, by affidavit or otherwise, showing that a genuine issue of material fact exists that can only be resolved by the trier of fact. *Celotex*, 477 U.S. at 324; *Nissan Fire & Marine Ins. Co. v. Fritz Companies*, 210 F.3d 1099, 1103 (9th Cir. 2000); *Reese v. Jefferson School Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir. 2000). The mere existence of some alleged factual dispute will not defeat a properly supported motion for summary judgment because Rule 56(c) requires "that there be no genuine issue of *material* fact." *Anderson*, 477 U.S. at 247-248 (emphasis added). Material facts are those which could actually affect the outcome of the lawsuit. *Webb v. Lawrence County*, 144 F.3d 1131, 1135 (8th Cir. 1998).

To defeat a motion the nonmoving party must do more than "simply show there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586-587. Once the moving party points out an absence of proof on an essential element of the nonmoving party's case, the burden shifts to the nonmoving party to provide evidence to the contrary. *Celotex*, 477 U.S. 317, 322-323 (1986). The moving party is not required to negate those portions of the non-moving party's claim on which the non-moving party bears the burden of proof. *Celotex*, 477 U.S. at 323.

In evaluating the evidence at the summary judgment stage, the court considers only those facts which are supported by admissible evidence. "[A] successful summary judgment defense requires more than argument or reallegation; [the opposing party] must demonstrate that at trial it may be able to put on admissible evidence proving its allegations." *JRT, Inc. v. TCBY Sys., Inc.*, 52 F.3d 734, 737 (8th Cir. 1995). *See also Walker v. Wayne County, Iowa*, 850 F.2d 433, 434 (8th Cir. 1988) (holding that courts considering a summary judgment motion "may consider only the portion of the submitted materials that is admissible or usable at trial"), *cert. denied*, 488 U.S. 1008 (1989). The court is not required "to scour the record in search of a genuine issue of triable fact. We rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996), *quoting Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995). The court "may limit its review to the documents submitted for purposes of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001).

At summary judgment it is insufficient for the nonmoving party merely to reassert ultimate facts without providing any support for the contentions. The inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion, *Gibson v. County of*

Washoe, Nev., 290 F.3d 1175, 1180 (9th Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003), but conclusory allegations as to ultimate facts are not adequate to defeat summary judgment. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993). "'Ultimate facts' are defined ... as 'those which the law makes the occasion for imposing its sanctions.'" *Laughlin v. U.S.*, 344 F.2d 187, 191 (D.C. Cir. 1965), citing *Evergreens v. Nunan*, 141 F.2d 927, 928 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944). "[T]he mere fact that the [nonmoving party] vigorously dispute[s] the *legal conclusions* to be drawn from the facts presented by the [moving party is] no bar to the grant of summary judgment." *Sagers v. Yellow Freight System, Inc.*, 529 F.2d 721, 728 n.13 (5th Cir. 1976) (emphasis added). "It is axiomatic that where questions of law alone are involved in a case, summary judgment is appropriate." *Int'l Ass'n of Machinists & Aerospace Workers, Dist. 776 v. Texas Steel Co.*, 538 F.2d 1116, 1119 (5th Cir. 1976), *cert. denied*, 429 U.S. 1095 (1977).

C. Material Facts as to Which There Is No Genuine Dispute.

The following material facts as to which there is no genuine dispute (Undisputed Facts or UF)[14] are derived from the parties' affidavits, declarations, and exhibits filed in this proceeding. All exhibits submitted by the parties are admitted into evidence.

I have limited these to objective facts and excluded contentions articulating what a party thinks the undisputed facts mean. For example, in her supplemental affidavit dated May 9, 2013, Ehrenreich states:

> Despite only $585 being in dispute, Mrs. Cornell filed suit in Florida State Court under [FDUTPA] claiming that she had been defrauded by GFA's retention of the buyer's premium. This claim and lawsuit were a direct breach of Mrs. Cornell's two signed contracts with Princess affiliate GFA wherein she had agreed that the buyer's premium was not refundable.

(Ehrenreich 5/9/13 Supp. Dec. ¶ 18.) There is no dispute to the fact that Lisa Cornell commenced an action against GFA in a Florida circuit court alleging that GFA's refusal to refund the buyer's premium of $585 is a deceptive and unfair practice (the buyer's premium claim). UF 21, 23.There is also no dispute to the fact that the contract indicates that the buyer's premium will not be returned. It is not a fact, but Ehrenreich's contention, that filing Lawsuit One was "a direct breach of Mrs. Cornell's two signed contracts with Princess affiliate GFA wherein she had agreed that the buyer's premium was not refundable."

1. Complainants Lisa Anne Cornell and G. Ware Cornell are husband and wife. (Amended Complaint ¶ 8.)

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[14] UF followed by a number refers to a material fact as to which there is no genuine dispute.

2. Ware Cornell is an attorney. (Cornell Opp. (filed 3/25/13), Exhibit 1 ¶ 2.)[15]

3. Respondent Carnival plc operates cruise vessels.

4. Carnival plc's cruise vessels operate between ports in the United States and ports in foreign countries.

5. Respondent Carnival Corporation operates cruise vessels. *See* n.12, *supra*.

6. Carnival Corporation's cruise vessels operate between ports in the United States and ports in foreign countries.

7. Respondent Princess Cruise Lines, Ltd. (Corp) (Princess Cruise Lines or Princess) operates cruise vessels and also operates as Carnival plc's booking agent in the United States.

8. Princess Cruise Lines's cruise vessels operate between ports in the United States and ports in foreign countries.

9. In February 2007, Lisa Cornell took a cruise on the Carnival cruise ship *Imagination*. (Amended Complaint ¶ III.7.)

10. While at sea, Lisa Cornell attended an onboard auction conducted by Global Fine Arts, Inc. (GFA). (Amended Complaint ¶ III.7.)

11. GFA is a parent, subsidiary, or affiliated of subsidiary of respondents Princess Cruise Lines, Carnival plc, and Carnival Corporation. (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 3.)

12. GFA does not operate cruise vessels. (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 3.)

13. Lisa Cornell bid on and purchased two lithographs from GFA for $1950.00 each. (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 2; Cornell Opp. (filed 3/25/13), Exhibit 2 ¶ 2; Supp. Dec. Ehrenreich (filed 5/13/13) Exhibit 1 (Invoice IM10990) and Exhibit 2 (Invoice IM10991).)[16]

14. Lisa Cornell paid an additional 15% of the purchase priced as a buyer's premium – $292.50 for each lithograph, a total of $585. (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 2; Cornell

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[15] The Cornells' list of exhibits identifies Ware Cornell's declaration as Exhibit 2 and Lisa Cornell's declaration as Exhibit 1. They are reversed in the appendix.

[16] The last digit is cut off on Invoice IM19900. I assume Lisa Cornell paid the same price, buyer's premium, and shipping for each lithograph.

Opp. (filed 3/25/13), Exhibit 2 ¶ 2; Supp. Dec. Ehrenreich (filed 5/13/13) Exhibit 1 (Invoice IM10990) and Exhibit 2 (Invoice IM10991).)

15. Lisa Cornell paid $95.00 shipping and handling for each lithograph. (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 2; Cornell Opp. (filed 3/25/13), Exhibit 2 ¶ 2; Supp. Dec. Ehrenreich (filed 5/13/13) Exhibit 1 (Invoice IM10990) and Exhibit 2 (Invoice IM10991).)

16. Lisa Cornell signed Carnival Cruises Fine Arts Invoices IM10990 and IM10991 which state in part: (a) "If an order is cancelled prior to shipping, the full purchase price, less the buyer's premium up to a maximum of $2000 USD per piece, will be refunded."; and (b) "Images used for the purpose of sale or display on a vessel may not be the actual piece Purchaser receives unless so stated on this invoice." (Supp. Dec. Ehrenreich (filed 5/13/13) Exhibit 1 (Invoice IM10990) and Exhibit 2 (Invoice IM10991).)

17. When Lisa Cornell arrived home after the cruise, she changed her mind about her purchases. (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 2; Cornell Opp. (filed 3/25/13), Exhibit 1 ¶ 16.)

18. Before the two lithographs were framed and delivered, Ware Cornell notified GFA that Lisa Cornell wanted to cancel her purchase of the lithographs. (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 2; Cornell Opp. (filed 3/25/13), Exhibit 1 ¶ 17; Supp. Dec. Ehrenreich (filed 5/13/13) ¶ 17.)

19. GFA refunded the purchase price of $1950.00 and the shipping and handling charge of $95.00 for each lithograph, but did not refund the buyer's premium totaling $585. (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 2; Cornell Opp. (filed 3/25/13), Exhibit 1 ¶ 18; Supp. Dec. Ehrenreich (filed 5/13/13) ¶ 17.)

20. Ware Cornell contacted GFA in an unsuccessful attempt to convince GFA to refund the buyer's premium. (Cornell Opp. (filed 3/25/13), Exhibit 1 ¶¶ 16-19.)

21. In 2007, Lisa Cornell, represented by Ware Cornell, commenced an action against GFA in a Florida circuit court: *Lisa Anne Cornell v. Global Fine Arts, Inc.*, No. 07-07894 (Fla. 17th Jud. Cir.) (*Cornell v. GFA* or Lawsuit One). (Supp. Dec. Ehrenreich (filed 5/13/13) ¶ 18; Cornell Exhibit 27 (filed 5/27/13) (*Cornell v. GFA* Complaint).)

22. Respondents' counsel in this proceeding represented GFA in *Cornell v. GFA*. (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 3.)

23. Lisa Cornell asserted two claims under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA):

    1. GFA's refusal to refund the buyer's premium of $585 is a deceptive and unfair practice (the buyer's premium claim);

2. 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 the ship is a "bait and switch" practice and is deceptive and unfair practice (the bait and switch claim).

(Cornell Opp. (filed 3/25/13), Exhibit 1 ¶ 24; Cornell Exhibit 27 (filed 5/27/13) (*Cornell v. GFA* Complaint ¶¶ 14-15; ¶¶ 19-20).)

24. GFA made an offer of judgment of $2500 under a Florida procedure that provides if the offer of judgment 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. Lisa Cornell did not accept the offer of judgment and the parties engaged in extensive discovery. (*See* Resp. Mot. Dismiss or S/J (filed 2/28/13) at 3; Cornell Opp. (filed 3/25/13), Exhibit 1 ¶ 51; Supp. Dec. Ehrenreich (filed 5/13/13) ¶ 26.)

25. GFA filed a motion for summary judgment on the buyer's premium claim, but not the bait and switch claim. After hearing argument on the motion on June 5, 2009, the court granted summary judgment for GFA on the buyer's premium claim.[17] The court held that because the contract/invoice states that buyer's premium is not refunded if the buyer backs out of the contract and Lisa Cornell signed the contract, GFA's refusal to refund the buyer's premium could not violate FDUTPA. (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 2 at 28; Supp. Dec. Ehrenreich (filed 5/13/13) ¶ 30.)

26. GFA filed a motion to recoup legal fees of more than $60,000 based on Lisa Cornell's refusal to accept the offer of judgment. (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 4; Cornell Opp. (filed 3/25/13), Exhibit 1 ¶ 30.)

27. Lisa Cornell moved to modify the judgment because the court had not addressed the bait and switch claim set forth in the complaint. The court modified the judgment and ordered briefing on the bait and switch claim. (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 4; Cornell Exhibit 27 (filed 5/27/13) (*Cornell v. GFA* Complaint ¶¶ 14-15).)

28. On October 28, 2009, GFA moved for summary judgment on the bait and switch claim. (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 4; Cornell Opp. (filed 3/25/13), Exhibit 1 ¶ 16.)

29. Before the court decided GFA's motion for summary judgment on the bait and switch claim and GFA's motion to recoup the legal fees, the parties engaged in mediation, and on August 11, 2010, signed a Mutual Release of All Claims and Settlement Agreement settling

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[17] Respondents state that the court entered its final judgment on August 18, 2009. (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 4.) I do not find a copy of the final judgment in the record. Part of the transcript of the June 5, 2009, hearing is in the record. (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 2.) The date of entry of the final judgment is not material to this proceeding.

all of their dispute. (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 4-5; Cornell Opp. (filed 3/25/13), Exhibit 2 ¶ 13.)

30. Pursuant to the Mutual Release, Lisa Cornell waived all her claims against GFA (including the bait and switch claim) and GFA waived its claims for legal fees arguably due because Lisa Cornell did not accept the offer of judgment. (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 3.)

31. Lisa Cornell wanted to include a provision in the Mutual Release that would prevent GFA from encouraging cruise lines not to permit her to sail on their cruise ships. (Cornell Opp. (filed 3/25/13), Exhibit 2 ¶ 13.)

32. Pursuant to the Mutual Release, signed by Lisa Cornell and by Karen Reich for GFA, GFA agreed that it would 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. It 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 Cornells "agree[d] that if they sail onboard any cruise where GFA is operating an onboard art auction, they shall not disparage GFA, shall not attend such auction, shall not purchase or attempt to purchase anything from GFA, and shall not discuss said auction with any other individuals onboard." (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 3 at 2.)

33. As part of the negotiations to include the GFA promise, Lisa Cornell agreed to make a $1,000 charitable donation to Broward Adopt-A-Stray. (Amended Complaint ¶¶ 30-31.)

34. Lisa Cornell made the donation to Broward Adopt-A-Stray. (Dec. of Lisa Cornell (filed 5/27/13) ¶ 13.)

35. The court did not make a finding on GFA's motion for summary judgment on the bait and switch claim.

36. The court did not make a finding on GFA's claim for legal fees based on the rejection of the offer of proof.

37. Mona Ehrenreich is general counsel for Princess Cruise Lines. (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 4 ¶ 1.)

38. In the course of her duties as general counsel, Mona Ehrenreich monitored *Cornell v. GFA*, No. 07-07894 (Fla. 17th Jud. Cir.). (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 4 ¶ 3.)

39. Based on her knowledge of *Cornell v. GFA*, Ehrenreich concluded Lisa Cornell "was a vexatious litigant, an individual with a proven record of ignoring contractual terms she

had signed, and someone who through her counsel had threatened to 'litigate this matter to the end of time.' Despite the fact that this lawsuit was over $585, Lisa Cornell's conduct of the case, including her refusal to accept GFA's $2,500 offer of judgment in my opinion was extortionate, unethical and unreasonable." (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 4 ¶ 3.)

40. On June 2, 2010, Ehrenreich sent an email to Linda Weller, her executive assistant, asking "[a]re the Cornells from the GFA lawsuit on [Do Not Book]?" (Cornell Opp. (filed 3/25/13), Exhibit 4.)

41. Weller responded: "No, they are not. Shall I put them on?" (Cornell Opp. (filed 3/25/13), Exhibit 4.)

42. Ehrenreich responded: "Yes please. And search to see if they have a current booking in which case we will need to cancel them." (Cornell Opp. (filed 3/25/13), Exhibit 4.)

43. On June 2, 2010, Princess Cruise Lines flagged Lisa Cornell's name in its computer reservations system as "blacklist." (Cornell Opp. (filed 3/25/13), Exhibit 6.)

44. On July 27, 2010, Linda Weller signed a "Do Not Book" Passenger Submission Form for Lisa Cornell stating that the nature of the problem is "[f]iled a frivolous lawsuit against GFA while sailing on a Carnival ship." (Cornell Opp. (filed 3/25/13), Exhibit 6.)

45. On August 5, 2010, Ehrenreich approved the "Do Not Book" Passenger Submission Form that had been prepared by Linda Weller. (Cornell Opp. (filed 3/25/13), Exhibit 6.)

46. Ehrenreich "made the determination, on behalf of Princess, that Lisa Cornell was an individual whose conduct and tactics made her someone Princess did not want sailing on its ships." (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 4 ¶ 4.)

47. Ehrenreich "made and implemented the decision to refuse to sell cruises to Lisa Cornell." (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 4 ¶ 5.)

48. Ehrenreich has "very rarely felt someone's litigation tactics were so abusive, extortionate and inappropriate that [she] concluded their conduct and character warranted banning them from sailing on [Princess] ships. For example, in the last five years, Lisa Cornell is the only litigant [she has] barred from buying a Princess cruise solely because of what their litigation tactics revealed about their conduct and character." (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 4 ¶ 6.)

49. After signing the Mutual Release, Lisa Cornell made several attempts to book a cruise with Princess Cruise Lines, but found that she could not access the Princess computers. (Dec. of Lisa Cornell (filed 5/27/13) ¶¶ 2-6; ¶¶ 30-39.)

50. Lisa Cornell wanted to take cruises between ports in the United States and foreign ports. (Dec. of Lisa Cornell (filed 5/27/13) ¶¶ 41-50.)

51. On October 14, 2010, Respondents' counsel informed Lisa Cornell that she was banned and that the ban was permanent. (Dec. of Lisa Cornell (filed 5/27/13) ¶ 15.)

52. On October 8, 2010, the court dismissed Lawsuit One with prejudice, reserving jurisdiction to enforce the terms of the settlement agreement. (Cornell Opp. (filed 3/25/13), Exhibit 7-A.)

53. After the court approved the Release and dismissed Lawsuit One, Lisa Cornell filed a second lawsuit naming GFA, the defendant in Lawsuit One, and Princess Cruise Lines, a respondent in this proceeding but not a defendant in Lawsuit One, as defendants. *Lisa Anne Cornell v. Global Fine Arts, Inc. and Princess Cruise Lines, Ltd.*, No. 10-17682 COCE 54 (Fla. Broward Cty. Ct.) (Lawsuit Two). (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 8.)

54. Lawsuit Two included two counts.

    1. Count One sought specific performance of the settlement agreement between Lisa Cornell and GFA that resolved Lawsuit One. Lisa Cornell contended that if Princess Cruise Lines locked her out of the Princess web site (thereby barring her from sailing on Princess ships) before August 11, 2010, the date on which Lisa Cornell and GFA signed the Mutual Release, GFA breached its covenant of negotiating in good faith by failing to advise Lisa Cornell that Princess Cruise Lines had already barred Lisa Cornell from its ships when they were negotiating the Release. In the alternative, if Princess Cruise Lines locked Lisa Cornell out of its web site after the parties signed the Mutual Release, "PRINCESS, as an agent of GFA, breached the agreement by its conduct." (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 8 ¶¶ 15-18.)

    2. Count Two sought an injunction against Princess Cruise Lines that would require it to permit her to sail on its cruises. Lisa Cornell contended that Princess Cruise Lines has a common carrier duty to give passage to all persons except those who present a threat. (*Id.* ¶¶ 20-22.)

55. On December 2, 2010, GFA and Princess Cruise Lines filed a motion to transfer Lawsuit Two from Broward County Court to the judge in the 17th Judicial Circuit who had approved the Mutual Release in Lawsuit One and who had expressly reserved jurisdiction to enforce the Mutual Release. GFA and Princess argued in the alternative that Lawsuit Two should be dismissed. (Cornell Opp. (filed 3/25/13), Exhibit 7.)

56. On January 31, 2011, Lisa Cornell filed a Motion to Enforce Mediated Settlement Agreement in Lawsuit One. (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 6.)

57. Lawsuit Two was transferred to the 17th Judicial Circuit without a decision on the motion to dismiss. On September 13, 2011, in an order captioned as the 17th Judicial Circuit case, the 17th Judicial Circuit judge held that the Lawsuit Two "complaint is not the proper vehicle to achieve enforcement of the settlement agreement" and *sua sponte* dismissed the complaint. The court stated that it would proceed on Lisa Cornell's motion to enforce the settlement agreement. "However, the court requires an evidentiary hearing on the motion. Further, the only parties before the court on the motion to enforce the settlement agreement are the two original parties." (Cornell Opp. (filed 3/25/13), Exhibit 8 (*Cornell v. GFA*, No. 07-07894 (Fla. 17th Jud. Cir. Sept. 13, 2011) (Order on Plaintiff's Motion to Enforce Settlement)).)

58. On February 2, 2012, the court conducted a hearing on Lisa Cornell's motion to enforce. (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 7 (partial transcript).)

59. On February 7, 2012, the court issued an order in Lawsuit One finding "that the plaintiff failed to prove a violation of the settlement agreement. WHEREFORE, this court **denies** plaintiff's motion to enforce mediated settlement agreement." (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 9 (*Cornell v. GFA*, No. 07-07894 (Fla. 17th Jud. Cir. Feb. 7, 2012) (Order on Plaintiff's Motion to Enforce Mediated Settlement Agreement) (emphasis in original)).)

60. Complainants commenced this proceeding on January 30, 2013.

61. Ware Cornell never sought to take a cruise on a cruise ship operated by any Respondent. (Cornell Opp. (filed 3/25/13), Exhibit 1 ¶ 49 ("I would not try to make a reservation on Princess, P & O, P & O (Australia) or Cunard for fear we or one of us would be turned back as well."); Dec. of Ware Cornell (filed 5/13/13) .)

62. Lisa Cornell never sought to take a cruise on a cruise ship operated by Carnival plc or Carnival Corporation. (Dec. of Lisa Cornell (filed 5/13/13).

63. On March 27, 2010, Lisa Cornell made a $100 deposit for a future cruise with a "Sail By Date" of March 26, 2014. If Lisa Cornell did not book a cruise within four years, the deposit would be returned without interest. The letter states that "upon making your full deposit towards your booking, the appropriate shipboard credit will be applied." The shipboard credit is valued between $25 and $150, depending on the cruise length and whether it is for "Inside Categories" or "Outside." (Dec. of Lisa Cornell (filed 5/13/13), Exhibit 18.)[18]

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[18] The letter is addressed to "Mrs. L. Cornwell," but given the circumstances and the fact that it is in Lisa Cornell's possession, I find that the letter records a deposit for Lisa Cornell.

64. Princess Cruise Lines returned the deposit without interest on February 13, 2013, after the Cornells commenced this proceeding. (Amended Complaint ¶ 29.)

65. Lisa Cornell and Ware Cornell currently have reservations on the Holland America cruise ship *Maasdam* for a 13-day voyage beginning October 5, 2013, in Montreal, Quebec, and ending October 18, 2013, in Ft. Lauderdale, Florida. The total cost for the cruise is $6,920.14. (Dec. of Lisa Cornell (filed 5/13/13) ¶ 60 and Exhibit 19.)

66. Lisa Cornell and Ware Cornell would prefer to sail on the Princess cruise ship *Emerald Princess* on a fourteen-day cruise beginning October 26, 2013, in Montreal and ending in Ft. Lauderdale. The advertised price for the cruise is $5,398.00. (Dec. of Lisa Cornell (filed 5/13/13) ¶ 61 and Exhibit 19.)

67. The *Maasdam* cruise and the *Emerald Princess* cruise have different itineraries. (Dec. of Lisa Cornell (filed 5/13/13) Exhibit 19.)

C. Respondents' Motion for Summary Decision Is Granted in Part and Denied in Part.

1. The *Cornell v. GFA*, No. 07-07894 (Fla. 17th Jud. Cir.) Mutual Release did not release the Cornells' claims against Respondents under the Shipping Act.

Respondents contend that the Mutual Release signed in Lawsuit One bars the claims in this proceeding.

> When this matter settled at mediation, the Complainants signed a contractual release of all past, present and future claims against any and all of the Respondents named in this Third Lawsuit. Specifically, the Settlement Agreement included an unambiguous provision stating Lisa Cornell and Ware Cornell:
>
> > waive, release and forever discharge all past, present **and future** claims, rights, causes of action . . . which either GFA PARTIES or CORNELL PARTIES may now or **in the future** have, against each other including, **but not limited to**, claims in any way related to Lisa Cornell's cruise aboard the cruise ship *Imagination* on or about February 2007 and any art auction or art purchase thereon.

(Mot. to Dis. or S/J at 22 (citations omitted) (emphasis in original).)

Lisa Cornell and GFA signed the Mutual Release on August 11, 2010. Ware Cornell also signed the Release. Lisa Cornell contacted Princess and attempted to book cruises after the parties signed the release. UF 49. Respondents contend that by signing the release, the parties intended for

the Cornells to release her claims regarding any *future* violations of the Shipping Act by any of the GFA parties, which the Release defines to include Respondents in this proceeding. (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 3.) The material facts as to which there is no genuine dispute and the controlling legal principles do not support this contention.

This is a federal tribunal enforcing a federal statute. Accordingly, federal law is applied to the release. *See Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1316 and n.27 (5th Cir. 1983) (applying federal law to release in antitrust case). The effect of a release is determined in accordance with the intentions of the parties. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 342-348 (1971).

The Release does not state that Lisa Cornell is giving up her right to sail on Respondents' cruise ships and, in fact, explicitly contemplates that the Cornells would be sailing on cruise ships on which GFA would be conducting auctions. The Mutual Release has two references to future cruises. First, GFA promised that it would 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." UF 32. (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 3 at 2.) Second, the Cornells "agree[d] that if they sail onboard any cruise where GFA is operating an onboard art auction, they shall not disparage GFA, shall not attend such auction, shall not purchase or attempt to purchase anything from GFA, and shall not discuss said auction with any other individuals onboard." UF 32. (*Id.*) The Release was signed by Lisa Cornell and by Karen Reich for GFA. No Respondent in this proceeding signed the Release.

Given this language, even if GFA and the "GFA parties" intended for the Mutual Release to apply to claims of future violations of the Shipping Act by Respondents, the Cornells quite clearly did not, and GFA and the GFA parties knew that they did not. Therefore, based on the material facts as to which there is no genuine dispute, I conclude that intentions of the parties when they signed the Mutual Release did not include waiving, releasing, or discharging the Cornells' claims against Respondents for violations of the Shipping Act occurring after the parties signed the Mutual Release. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, *supra.*

Furthermore, there are public policy reasons for not permitting a person to release claims of future violations of the Shipping Act. The Commission has held that persons cannot waive violations of the Shipping Act.

> Therefore, we hold that, as a matter of law, the common law doctrines of waiver and estoppel may not be invoked to prohibit a party to an agreement subject to the Commission's jurisdiction from later challenging the agreement in a complaint filed with the Commission alleging that one of the parties to the agreement violated a duty imposed on it by the Shipping Act.

Ceres Marine Term., Inc. v. Maryland Port Admin., 29 S.R.R. 356, 372 (FMC 2001), *dismissed on other grounds*, 30 S.R.R. 358 (FMC 2004). This holding is consistent with other federal laws designed to protect the public.

> More than a half-century ago, the Supreme Court stated that "in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action," an agreement which confers even "a partial immunity from civil liability for future violations" of the antitrust laws is inconsistent with the public interest. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329, 75 S. Ct. 865, 99 L. Ed. 1122 (1955); *see also Minnesota Mining and Mfg. Co. v. Graham–Field, Inc.*, No. 96 cv 3839, 1997 WL 166497, at *3 (S.D.N.Y. Apr. 9, 1997) ("GFI could not have waived [its antitrust] claim in the releases because a prospective waiver of an antitrust claim violates public policy.").

In re American Exp. Merchants' Litigation, 667 F.3d 204, 215 (2d Cir. 2012).

The Commission did hold under the Shipping Act, 1916, that a potential passenger can explicitly release the right to book passage on a common carrier as part of the settlement of a state lawsuit. *Dr. Ethel M. Hepner v. The Peninsular and Oriental Steam Navigation Company*, 22 S.R.R, 1543 (FMC Dec. 20, 1984).

> In December, 1976, Dr. Hepner was a passenger aboard the P & O liner M/V SUN PRINCESS. As a result of an incident occurring on that voyage, Dr. Hepner brought suit in the Superior Court of the State of California, County of Los Angeles, alleging that she had suffered injuries due to the negligent and willful misconduct of an employee of P & O. In settlement of that suit, P & O and Dr. Hepner entered into an agreement . . . . P & O agreed to pay Dr. Hepner $40,000 in settlement of the claim and Dr. Hepner agreed that "at no time in the future" would she board or attempt to board any vessel owned by P & O nor would she attempt to book passage on any vessel owned by P & O. She further agreed that if she attempted to board any P & O vessel in contravention of the settlement agreement, P & O would have the right to eject her forcibly from the ship without incurring liability for any injuries which she might sustain.

Id. at 1544. The Commission rejected Hepner's arguments contending that the agreement violated the Shipping Act, 1916, and affirmed the administrative law judge's dismissal of the complaint. *Id.* at 1546.

Hepner explicitly gave up her right to sail on P & O cruise ships in return for a payment of $40,000. The Mutual Release in this proceeding does not state that the Cornells agreed "at no time in the future would they board or attempt to board any vessel" operated by a "GFA party" or attempt to book passage on a cruise ship operated by a "GFA party."

There is no genuine dispute about any material fact that must be resolved by the trier of fact. Based on the material facts as to which there is no genuine dispute, I find that when the Cornells signed the Mutual Release, they did not release their right to commence and maintain a proceeding

against Respondents alleging a violation of section 10(b)(10) of the Shipping Act or any other provision of the Act occurring after the parties signed the Release.

2. Princess Cruise Lines, Carnival plc, and Carnival Corporation did not refuse to deal or negotiate with Ware Cornell in violation of section 10(b)(10).

The Amended Complaint alleges that general counsel for Princess Cruise Lines "issued orders to ban both LISA CORNELL and WARE CORNELL from cruising on the ships operated by PRINCESS and CARNIVAL plc which includes Cunard and P & O." (Amended Complaint ¶ 14.) The Amended Complaint does not allege that a Respondent unreasonably refused to deal or negotiate with Ware Cornell on any occasion. Respondents submitted with their motion a declaration by the general counsel of Princess stating that Ware Cornell had not been barred from sailing with Princess. (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 4 ¶ 7.)

On April 17, 2013, I issued an Order requiring Ware Cornell to file an affidavit or declaration with supporting documentation, if any, setting forth:

> The date(s) and time(s) that he alleges a Respondent unreasonably refused to deal or negotiate with him on or after January 30, 2010. The declaration or affidavit must identify the Respondent that he contends unreasonably refused to deal or negotiate with him and include the name of the vessel on which he wanted to take a cruise, the dates on which the cruise was scheduled to take place, the vessel's itinerary, including all scheduled ports of call, and the person or persons to whom he made the request, and attach any documentary evidence supporting his allegations. If the alleged refusal was by a lockout from a web site, the date and time of each attempt to access the web site must be stated.

Cornell v. Princess Cruise Lines, Ltd., FMC No. 13-02 (ALJ Apr. 17, 2013) (Order to Supplement the Record). Ware Cornell filed his declaration in response on May 13, 2013, claiming:

- "Lisa Cornell attempted to book passage for us both on numerous occasions." (Dec. of Ware Cornell (filed 5/13/13) ¶ 2.)

- "In September, 2010 I spoke directly to the [Carnival] PCL Captain's Circle desk over the phone to book under my existing Captain's Circle number. This call was needed because Lisa was unable to book passage under her name or her Captain's Circle Number. My number was associated with that of my ex-wife Karen H. Curtis and was located by the Captain Circle desk with the address of my former home in Miramar, Florida which I shared with my ex-wife." (Dec. of Ware Cornell (filed 5/13/13) ¶ 3.)

- Ware Cornell had conversations with counsel for GFA about whether he was banned in which counsel first told him that he had been banned and later told him that he had not been

banned and states that he received a new Captain's Circle profile. (Dec. of Ware Cornell (filed 5/13/13) ¶¶ 7-12.)

- "Although Mr. Maltzman says that I was never banned by Princess, he had [previously] told me I was quite emphatically." (Dec. of Ware Cornell (filed 5/13/13) ¶ 8.)

- "At some point in time Princess assigned me number exactly the same as my wife's number except for a different letter at the end of the number. My number is 701426578A. Lisa Cornell's Circle Number is 701426578B." (Ware Cornell 5/13/2013 Declaration ¶ 10.)

- "These numbers are important because Lisa and I have never cruised together on Princess. I should have been and in fact was in the system along with my ex-wife. There is no logical reason that a new number would be created for me, other than to get me into the system to ban me. If Princess was able to ban my wife, it was able to ban me me [*sic*] under the same Captains Circle number." (Dec. of Ware Cornell (filed 5/13/13) ¶ 11.)

Ware Cornell concludes his declaration by stating: "In short, I was told I was banned. Evidence exists that I was banned. Princess's new assertions that I was never banned are very much in dispute." (Dec. of Ware Cornell (filed 5/13/13) ¶ 13). Princess contends that Ware Cornell was not banned. (Supp. Dec. Ehrenreich (filed 5/13/13) ¶ 36.) Accordingly, the parties dispute whether Princess issued a "Do Not Book" order for Ware Cornell. This fact is not material to the outcome, however.

As a complainant in this proceeding and the party opposing summary decision, Ware Cornell has the burden of designating specific facts showing that a genuine issue of material fact exists that can only be resolved by the trier of fact. The facts identified must be material facts which could actually affect the outcome. *Celotex*, 477 U.S. at 324; *Nissan Fire & Marine Ins. Co., v. Fritz Companies*, 210 F.3d 1099, 1103 (9th Cir. 2000); *Reese v. Jefferson School Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir. 2000); *Anderson*, 477 U.S. at 247-248; *Webb v. Lawrence County*, 144 F.3d 1131, 1135 (8th Cir. 1998). At no point in his declaration does Ware Cornell state that he ever sought to deal or negotiate with Princess Cruise Lines, Carnival plc, or Carnival Corporation and he did not

> identify the Respondent that he contends unreasonably refused to deal or negotiate with him and include the name of the vessel on which he wanted to take a cruise, the dates on which the cruise was scheduled to take place, the vessel's itinerary, including all scheduled ports of call, and the person or persons to whom he made the request, and attach any documentary evidence supporting his allegations.

Cornell v. Princess Cruise Lines, Ltd., FMC No. 13-02 (ALJ Apr. 17, 2013) (Order to Supplement the Record). If Ware Cornell did not seek to deal or negotiate with a Respondent, no Respondent refused to deal or negotiate with him, much less unreasonably refused to deal or negotiate with him.

Although there is a dispute of fact as to whether Princess ever banned Ware Cornell, this is not material to the question of whether any Respondent unreasonably refused to deal or negotiate with Ware Cornell about a cruise on one of Respondents' vessels. Ware Cornell has not identified any occasion on which any Respondent refused to deal or negotiate with him. No discovery from Respondents is needed on this issue. There is no genuine dispute about any material fact that must be resolved by the trier of fact, and Respondents are entitled to judgment as a matter of law. Therefore, summary decision is entered for Respondents on Ware Cornell's claim that Respondents violated section 10(b)(10) by unreasonably refusing to deal or negotiate with him and Ware Cornell's section 10(b)(10) claim is dismissed with prejudice.

3. Carnival plc and Carnival Corporation did not refuse to deal or negotiate with Lisa Cornell in violation of section 10(b)(10).

On April 17, 2013, I issued an Order requiring Lisa Cornell to file an affidavit or declaration with supporting documentation, if any, setting forth:

> The date(s) and time(s) that she alleges any Respondent unreasonably refused to deal or negotiate with her on or after January 30, 2010. The declaration or affidavit must identify the Respondent that she contends unreasonably refused to deal or negotiate with her and include the name of the vessel on which she wanted to take a cruise, the dates on which the cruise was scheduled to take place, the vessel's itinerary, including all scheduled ports of call, and the person or persons to whom she made the request, and attach any documentary evidence supporting her allegations. If the alleged refusal was by a lockout from a web site, the date and time of each attempt to access the web site must be stated.

Cornell v. Princess Cruise Lines, Ltd., FMC No. 13-02 (ALJ Apr. 17, 2013) (Order to Supplement the Record).

Lisa Cornell filed her declaration in response on May 13, 2013. (Lisa Cornell 5/13/2013 Declaration.) At no point in her declaration does Lisa Cornell state that she ever sought to deal or negotiate for a voyage on a cruise ship operated by Carnival plc or Carnival Corporation. If Lisa Cornell did not seek to deal or negotiate with Carnival plc or Carnival Corporation, Carnival plc and Carnival Corporation did not refuse to deal or negotiate with her, much less unreasonably refuse to deal or negotiate with her.

Lisa Cornell has not identified an occasion on which Carnival plc or Carnival Corporation refused to deal or negotiate with her about a cruise on a cruise ship operated by Carnival plc or Carnival Corporation. No discovery from Respondents is needed on this issue. There is no genuine dispute about any material fact that must be resolved by the trier of fact, and Respondents are entitled to judgment as a matter of law. Therefore, summary decision is entered for Carnival plc or Carnival Corporation on Lisa Cornell's claim that Carnival plc and Carnival Corporation violated section

10(b)(10) by unreasonably refusing to deal or negotiate with her and Lisa Cornell's section 10(b)(10) claim against Carnival plc and Carnival Corporation is dismissed with prejudice.[19]

4. The doctrines of collateral estoppel and res judicata do not bar Lisa Cornell's section 10(b)(10) claim.

In an argument applicable only to it (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 11 n.11), Princess contends that the issues raised in the Florida lawsuits are the same issues as are raised in this proceeding and the outcome of the Florida lawsuits precludes the Cornells' claims asserted in the Amended Complaint.

> The entire basis of the Complainants' Second Lawsuit was a complaint that GFA and Princess had breached the Original Lawsuit's settlement agreement by Princess refusing to sell a vacation cruise to Lisa Cornell. In the Motion to Enforce the Settlement Agreement which Cornell filed in the Second Lawsuit, Lisa Cornell conceded she was "seeking no damages in this proceeding," but instead was requesting an order from the court requiring Princess:
>
> > as a common carrier doing business in Florida to accept [Lisa Cornell] for passage on that same basis that it offers transport to all other persons.
>
> (See Motion to Enforce the Settlement Agreement attached as Exhibit 6). Therefore, the claim raised in the Second Lawsuit (and rejected by the court) is the same allegation Complainants raise in this Third Lawsuit with the FMC.
>
> More specifically, during the Second Lawsuit, the court held a lengthy evidentiary hearing on February 2, 2012. Ware Cornell presented the testimony of a computer expert, Lisa Cornell, and Lisa Cornell's mother. Lisa Cornell testified that at the Eleventh Hour during the mediation she requested the provision in the Settlement Agreement that she not be placed on a Do Not Book List . . . .
>
> * * *
>
> Throughout the hearing Ware Cornell claimed that Lisa Cornell was not only barred from Princess ships, but from other cruise lines as well . . . .

(Resp. Mot. Dismiss or S/J (filed 2/28/13) at 12-13.) Respondents repeat the claim that the hearing held on February 2, 2012, was in the Lawsuit Two at page 14 of their brief ("The entire basis for the

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[19] Lisa Cornell states that because of the Princess "Do Not Book" order, she is unable to book with Cunard and P & O. (Dec. of Lisa Cornell (filed 5/13/13) ¶¶ 36-40.) Cunard and P & O are not parties in this proceeding. Therefore, no relief can be granted against them.

Second Lawsuit and its evidentiary hearing conducted in the Florida Circuit Court was to force Princess to allow her to vacation on their ships") and at page 23 ("However, as the Florida Circuit Court ruled in dismissing Complainants' Second Lawsuit, GFA upheld its end of the bargain."). In their Reply, Princess states that "the state court in the Second Lawsuit held a ***lengthy three-hour*** special[ly] set evidentiary hearing on February 2, 2012." (Resp. Reply (filed 4/16/13) at 8 (emphasis in original).)

The claims of Princess that Lisa Cornell filed the motion to enforce the Mutual Release in Lawsuit Two, that the February 2, 2012, hearing was in Lawsuit Two, and that the court rejected the claims raised in Lawsuit Two on their merits are factually incorrect. The motion to enforce is captioned and was filed in Lawsuit One, *Cornell v. GFA*, No. 07-07894 (Fla. 17th Jud. Cir.). UF 56. The court dismissed Lawsuit Two *sua sponte* on September 13, 2011, five months before the February 2, 2012, hearing because it found that Lisa Cornell's complaint in Lawsuit Two "is not the proper vehicle to achieve enforcement of the settlement agreement." UF 57. In that same order, the court stated: "[T]he only parties before the court on the motion to enforce the settlement agreement [in Lawsuit One] are the *two original parties*." UF 57 (emphasis added). The two original parties to Lawsuit One were Lisa Cornell and GFA. Princess was not a party – original or otherwise – in Lawsuit One or the February 2, 2012, hearing, the Mutual Release is silent about Princess's obligation to grant passage to the Cornells, and the court's order does not reject a claim that Princess refused to permit Lisa Cornell to book passage on Princess vessels.

The dismissal of Lawsuit Two because the complaint is not the proper vehicle for enforcing the agreement is equivalent to saying the court did not have jurisdiction over the complaint.

> "The basic rule that dismissal for lack of subject matter jurisdiction does not preclude a second action on the same claim is well settled." 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4436 (1981) (citing *Hughes v. U.S.*, 4 Wall. (71 U.S.) 232, 237, 18 L. Ed. 303 (1866), and other cases).

Holloway v. Brush, 220 F.3d 767, 778 (6th Cir. 2000). The court did not address the claims against Princess issue raised by Count Two of Lawsuit Two – an injunction against Princess that would require it to permit Lisa Cornell to sail on its cruises because Princess has a common carrier duty to give passage to all persons except those who present a threat (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 8 ¶¶ 20-22) – when it dismissed Lawsuit Two.

The February 2, 2012, hearing was in Lawsuit One. The issue in the February 2, 2012, hearing was whether GFA, the only defendant in the hearing, violated the Mutual Release in Lawsuit One by encouraging cruise lines not to permit Lisa Cornell to cruise on their ships. The court found "that plaintiff failed to prove a violation of the settlement agreement" by GFA and denied the motion. UF 59. The court did not make a finding about whether Princess refused to grant either Lisa Cornell or Ware Cornell passage on a cruise ship and certainly did not reject this claim.

The issue before the Commission in this proceeding is whether the Respondents are common carriers that unreasonably refused to deal or negotiate with Lisa Cornell and Ware Cornell in violation of section 10(b)(10). This obligation of Respondents to deal and negotiate with all members of the public (not just the Cornells) is imposed by section 10(b)(10) of the Act. It is not a product of the Mutual Release, and exists whether or not Lisa Cornell demanded and received the commitment from GFA not to encourage cruise lines to refuse to grant the Cornells passage on a cruise ship, whether or not GFA complied with the Mutual Release, whether or not Princess made its Do Not Book decision before or after Lisa Cornell and GFA signed the Mutual Release, and whether or not GFA violated the Mutual Release. "The Commission has exclusive jurisdiction to administer and enforce the 1984 Act. Violations of the 1984 Act can be rectified only by the sanctions and remedies provided for in that Act." *Unpaid Freight Charges*, FMC No. 92-46, 58 Fed. Reg. 7190 (Feb. 5, 1993), 26 S.R.R. 735 (FMC 1993) (Final Interpretive Rule). Therefore, the Florida courts did not have jurisdiction to determine whether Princess, Carnival plc, or Carnival Corporation violated section 10(b)(10) by unreasonably refusing to permit the Cornells to cruise on their ships. There is no genuine dispute about any material fact that must be resolved by the trier of fact. The Florida approval of the Mutual Release between the Cornells and GFA and finding that GFA did not violate the Mutual Release in Lawsuit One do not bar the Cornells' claims in this proceeding on res judicata or collateral estoppel grounds.

5. Princess Cruise Lines's motion for summary decision against Lisa Cornell on the section 10(b)(10) claim is denied.

In the motion to dismiss, Princess contends that it fulfilled any obligation it may have had to deal or negotiate with Lisa Cornell. Because it relied on matters outside the pleadings, this claim is addressed on summary decision.

Princess contends that:

> The Cornell's reliance on [section 10(b)(10)] of the Shipping Act is erroneous and without merit as a matter of law. First, the fact that GFA made an offer of judgment and attempted to settle the matter six years ago at the very beginning of the Florida litigation (for approximately five times what the [Cornells] were seeking in damages) undercuts any plausible theory that the Respondents refused to deal or negotiate with them. Further, throughout the Second Lawsuit, Ware Cornell engaged in discussions with Defense counsel over whether Princess would agree to sell a vacation cruise to his wife. Princess ultimately declined to change their position (in large part because the Complainants' Second Lawsuit provided additional proof that their assessment of Lisa Cornell and her threats and tactics was accurate). Simply put, even if the cited statute applied in this circumstance (which it does not), **the parties have negotiated with the Complainants – several times**. The fact that she does not like the outcome of those negotiations, does not mean there has been a violation of 46 U.S.C. § 41104(10).

(Resp. Mot. Dismiss or S/J (filed 2/28/13) at 9 (emphasis in original).) This argument misapprehends what is at issue in this proceeding.

For at least three reasons, GFA's offer of judgment in Lawsuit One was not a "deal or negotiation" by Princess within the meaning of section 10(b)(10) of the Act. First, GFA is not a common carrier within the meaning of the Act. UF 12. Therefore, GFA is not subject to section 10(b)(10) and it can neither deal or negotiate nor refuse to deal or negotiate with Lisa Cornell within the meaning of section 10(b)(10). Second, the negotiations with GFA and the offer to settle for nearly five times the $585 she was seeking was a negotiation on Lisa Cornell's Florida case alleging GFA violated FDUTPA by wrongfully retaining the buyer's premium, not a negotiation on the purchase of transportation on a common carrier subject to the Commission's jurisdiction. GFA is not a common carrier; therefore, Lisa Cornell did not attempt to deal or negotiate with GFA for transportation within the Commission's jurisdiction. Third, the dealing and negotiating was with GFA, not Princess.

The discussions between Ware Cornell and Princess Cruise Lines' attorney about whether Princess would agree to sell a vacation cruise to his wife do not bar this proceeding before the Commission. In the affidavit of the general counsel of Princess Cruise Lines, Princess concedes that it refuses to deal with Lisa Cornell; that is, that it refuses to permit her to take cruises on its ships. (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 4 ¶ 3-5.) This is not a fact in dispute. What is at issue in this proceeding is whether this refusal by Princess is *unreasonable*. *Canaveral Port Auth. – Possible Violations*, 29 S.R.R. at 1448. In other words, was Princess "'shutting out' [Lisa Cornell] for reasons having no relation to legitimate transportation-related factors." *New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans*, FMC No. 00-11, 2001 WL 865692, at *8. *See Ceres Marine Term., Inc. v. Maryland Port Admin.*, 27 S.R.R. at 1270-1271 ("the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors").

Princess Cruise Lines' motion for summary decision on Lisa Cornell's claim that Princess violated section 10(b)(10) is denied.

6. Summary decision is entered for Princess on the claim of violation of section 10(b)(4).

The Amended Complaint alleges that during the discussions resulting in the settlement of Lawsuit One, Lisa Cornell agreed to donate $1,000 to Broward Adopt-A-Stray "to insure an uninterrupted right to deal with PRINCESS and other Carnival Corporation cruise lines." UF 33. (Amended Complaint ¶ 31.) The Cornells contend that this provision violates section 10(b)(4): "A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (4) for service 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.

The material facts as to which there is no genuine dispute demonstrate that the Mutual Release resulted from negotiations between Lisa Cornell and GFA leading to the settlement of

Lawsuit One. At that point in Lawsuit One, GFA still faced a claim that despite the provisions in Invoices IM10990 and IM10991 stating "[i]mages used for the purpose of sale or display on a vessel may not be the actual piece Purchaser receives unless so stated on this invoice," UF 16, GFA violated FDUTPA on the bait and switch claim. Lisa Cornell faced a claim in excess of $60,000 in attorney's fees for not accepting GFA's offer of judgment at the beginning of Lawsuit One. Lisa Cornell and GFA each decided it was in their best interests to waive their claims and end the litigation. GFA and the GFA parties agreed to forgo any claims for attorney's fees and all other claims, Lisa Cornell agreed to waive her bait and switch claim and all other claims, and Lisa Cornell paid $1,000 to Broward Adopt-A-Stray in return for GFA's promise not "to encourage or entice any cruise line to refuse to grant either Lisa Cornell or Ware Cornell passage on any cruise ship." UF 33. The Florida court with jurisdiction found that GFA did not breach this promise.

In their supplement to the motion to dismiss addressing the new claims raised in the Amended Complaint, Respondents state: "The charitable donation was paid as an inducement for Princess to forgo its potential claim for attorneys' fees against Mrs. Cornell – not as a fee for shipping cargo or freight." (Respondents' Supplement to Motion to Dismiss to Address New Issues Raised in the Amended Complaint at 3.) The Cornells quote this language and argue that this means "it was Princess and not Global Fine Arts who was behind the demand for the payment" and the $1,000 payment in return for the GFA's promise to refrain from encouraging cruise lines not to permit Lisa Cornell to sail "is . . . a payment demanded over and above the tariff to secure a right which should never have been in question in the first place." (Memorandum in Opposition to Respondents' Supplement to Motion to Dismiss to Address New Issues Raised in the Amended Complaint (filed 5/20/13) (Cornell Opp. New Issues (filed 5/20/13) at 8.)

Lisa Cornell has not identified any evidence that would support a finding that the $1,000 payment had any relationship to the common carriage of a passenger aboard a Princess vessel or any other transportation rate or charge. For reasons similar to the reasons that GFA's negotiations about the Mutual Release cannot be considered to fulfill Princess Cruise Lines's obligation to deal or negotiate with the Cornells, *see* Part V.C.5 above, Lisa Cornell's payment of $1,000 to Broward Adopt-A-Stray cannot be considered an unfair or unjustly discriminatory practice in the matter of rates or charges in violation of section 10(b)(4). Even if it is assumed that Princess "wanted" a payment by Lisa Cornell as part of her settlement of Lawsuit One with GFA, the fact that the same attorney represents GFA and Respondents does not mean the payment is a rate or charge for transportation by Princess. There is no genuine dispute about any material fact that must be resolved by the trier of fact. Summary decision is entered for Princess on this claim and the section 10(b)(4) claim is dismissed with prejudice.

D. Conclusion on Respondents' Motion for Summary Decision.

Although the parties dispute whether Princess issued a "Do Not Book" order for Ware Cornell, this is not material to this proceeding. When asked to do so, Ware Cornell did not identify any occasion when he sought to deal or negotiate with any Respondent about transportation on one of its cruise ships and a Respondent refused to deal or negotiate with him. There is no dispute about

any material fact that must be resolved by the trier of fact and Princess Cruise Lines, Carnival plc, and Carnival Corporation are entitled to summary decision on Ware Cornell's section 10(b)(10) claims against them as a matter of law. Accordingly, Ware Cornell's Amended Complaint alleging violation of section 10(b)(10) is dismissed with prejudice.

When asked to do so, Lisa Cornell did not identify any occasion when she sought to deal or negotiate with either Carnival plc or Carnival Corporation about transportation on one of its cruise ships and Carnival plc or Carnival Corporation refused to deal or negotiate with her. Although the parties dispute whether because of the Princess "Do Not Book" order, Carnival plc and Carnival Corporation would have refused to permit Lisa Cornell to book a trip with them, this fact is not material to this proceeding. Lisa Cornell never tried to book a trip on a Carnival plc or Carnival Corporation cruise ship, so neither Carnival plc nor Carnival Corporation refused to deal or negotiate with her. There is no dispute about any material fact that must be resolved by the trier of fact and Carnival plc and Carnival Corporation are entitled to summary decision on Lisa Cornell's section 10(b)(10) claims against them as a matter of law. Therefore, Lisa Cornell's Amended Complaint against Carnival plc and Carnival Corporation alleging violation of section 10(b)(10) is dismissed with prejudice.

There is no dispute about any material fact that must be resolved by the trier of fact and the undisputed facts demonstrate that the $1,000.00 donation Lisa Cornell made to Broward Adopt-A-Stray related to the settlement of claims between GFA and the GFA parties litigated in the Florida lawsuits, not transportation by Princess Cruise Lines. Princess is entitled to summary decision on Lisa Cornell's Amended Complaint alleging that Princess violated section 10(b)(4) when GFA solicited and received a $1,000.00 donation by Lisa Cornell to Broward Adopt-A-Stray, and Lisa Cornell's section 10(b)(4) claim is dismissed with prejudice.

VI. SUMMARY DECISION IS ENTERED *SUA SPONTE* FOR LISA CORNELL ON HER CLAIM THAT PRINCESS CRUISE LINES, LTD. (CORP) VIOLATED SECTION 10(b)(10).

A. A Judge Has Discretion to Enter Summary Decision *Sua Sponte*.

Although Respondents moved for summary decision, Lisa Cornell has not. Nevertheless, a judge has the authority to enter a summary decision for a party who has not made that motion.

> Entering a judgment when there has been a motion but no cross-motion is somewhat different from the situation in which neither party has moved under Rule 56 and the court wishes to act *sua sponte*. When there has been a motion but no cross-motion, the judge already is engaged in determining whether a genuine issue of material fact exists and the parties have been given an opportunity to present evidence designed either to support or refute the request for the entry of judgment.

The grant of judgment for the nonmoving party clearly is proper if both sides agree that there are no material fact issues and join in the request that the case be decided, for the moving or the nonmoving side, on the basis of a motion for judgment made by only one of them. But what if no mutual agreement is reached? A few courts, expressing a reluctance to enter a judgment in the absence of a motion requesting the court to do so, have refrained from disposing of the original motion in order to allow a cross-motion to be made. The weight of authority, however, is that summary judgment may be rendered in favor of the opposing party even though the opponent has made no formal cross-motion under Rule 56. Judge Charles E. Clark, one of the original draftsmen of the federal rules, commented on the trend in the cases as follows:

> [T]he Advisory Committee hesitated to authorize such a judgment [when no cross-motion was made] without formal request therefore and has left what I fear is an ambiguity and a slight leaning toward formality .... [T]he trend of rulings in the district courts is to hold the formal motion here unnecessary. This is an instance where, seemingly, the judges on the firing line have reached a better result than that suggested by inhibitions of the drafting committee.

As indicated by Judge Clark, the practice of allowing summary judgment to be entered for the nonmoving party in the absence of a formal cross-motion is appropriate. It is in keeping with the objective of Rule 56 to expedite the disposition of cases and, somewhat more remotely, with the mandate of Rule 54(c) requiring the court to grant the relief to which a party is entitled "even if the party has not demanded such relief in the pleadings."

10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2720 (3d ed.) (footnotes omitted).

As discussed above, to prove a violation of section 10(b)(10), first, a complainant must establish that the respondent is a common carrier and second, that the respondent unreasonably refused to deal or negotiate with the complainant, which requires a two-part inquiry: whether the respondent refused to deal or negotiate, and, if so, whether its refusal was unreasonable. *Canaveral Port Auth. – Possible Violations*, 29 S.R.R. at 1448. There is no dispute that Princess operates cruise ships and that those cruise ships sail between ports in the United States and ports in foreign countries. Therefore, the record establishes that Princess is a common carrier within the meaning of the Act. The affidavits of the general counsel for Princess establish that Princess issued a "Do Not Book" order for Lisa Cornell and refused and continues to refuse to permit Lisa Cornell to sail on its vessels. UF 36-47; UF 50. The record also establishes that Lisa Cornell attempted to book cruises on Princess vessels for cruises between a Unites States port and a foreign port but was unable

to do so because she had been banned from Princess ships. UF 48-49.[20] Accordingly, the only remaining inquiry to determine whether Princess violated section 10(b)(10) is whether the "Do Not Book" order issued by Princess is justified by differences in transportation factors. *Ceres Marine Term., Inc. v. Maryland Port Admin.*, 27 S.R.R. at 1270-1271; *New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans*, FMC No. 00-11, 2001 WL 865692, at *8.

I am already "engaged in determining whether a genuine [dispute] of material fact exists" on Lisa Cornell's claim that Princess violated section 10(b)(10) and "the parties have been given an opportunity to present evidence designed either to support or refute the request for the entry of judgment." Princess is in control of the information concerning its reasons for barring Lisa Cornell from its cruise ships. Related corporation GFA, represented by the same counsel who now represents Princess, had an opportunity to depose Lisa Cornell and take extensive discovery from her about her claims against GFA and Princess in the Florida litigation and should have no need to take additional discovery about its reasons for barring her. Princess has been invited to submit its reasons for refusing to permit Lisa Cornell to sail on its cruise ships and has accepted that invitation. Given this fully developed record, I find that it is appropriate in this case to address summary decision for Lisa Cornell on her 10(b)(10) claims against Princess on the record as it now stands without the need for additional discovery.

B. Princess Cruise Lines's Stated Reasons for Barring Lisa Cornell from its Cruise Ships.

In its opening brief, Princess claims it "has the legal right to refuse to sell a cruise to the Complainants given their history of vexatious litigation, threats, and refusal to honor contracts they have signed." (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 1.) In their reply, Respondents state:

> The Declaration of Mona Ehrenreich . . . in support of Princess' Motion to Dismiss, makes clear that Princess refuses to sell another vacation cruise to Lisa Cornell because Lisa Cornell has a proven record of disregarding written contracts relating to her cruises and because her conduct led Princess to conclude she is someone who was extortionate, unethical, unreasonable, and whose character and conduct warranted banning them [*sic*] from sailing on Princess' ships. These are precisely the valid reasons which prior courts have cited as justifying a decision to refuse someone passage.

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[20] The D.C. Circuit held that "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*." *Carnival* (D.C. Cir.), 911 F.2d at 792 (emphasis added). To violate section 10(b)(10), the cruise line must have unreasonably refused to deal or negotiate about a cruise that included a U.S. port and a foreign port.

(Resp. Reply (filed 4/16/13) at 3-4.) "Complainants cite no legal authority ruling it is unreasonable for a shipowner to refuse to sell a cruise vacation to a person who has repeatedly ignored and breached written contracts relating to her cruises." (*Id.* at 5.)

In the Order issued April 17, 2013, Princess was given the opportunity to present additional evidence supporting this claim by filing the following information:

1. A declaration or affidavit by an appropriate person or persons identifying the contracts relating to her cruises that Respondents allege Lisa Cornell has a proven record of disregarding, ignoring, and/or breaching, and the facts that support a finding that she disregarded, ignored, and/or breached the contracts. Copies of the contracts must be attached to the declaration or affidavit.

2. A declaration or affidavit by an appropriate person or persons setting forth all other evidence on which Princess base their contention that Lisa Cornell "is someone who was extortionate, unethical, unreasonable, and whose character and conduct warranted banning [her] from sailing on Princess' ships," and attach any documentary evidence supporting the contention.

Cornell v. Princess Cruise Lines, Ltd., FMC No. 13-02 (ALJ Apr. 17, 2013) (Order to Supplement the Record). Respondents filed their additional affidavits and documentary evidence on May 13, 2013. In their supplemental memorandum, Respondents state:

> As is outlined in great detail in the Supplemental Declaration of Mona Ehrenreich filed herewith, Ms. Ehrenreich made her decision only after she (1) observed Lisa Cornell's extortionate, unethical and unreasonable conduct in litigation against the affiliated art company; (2) learned of threats made by Cornell in that litigation; (3) observed that Lisa Cornell refused to recognize or honor contractual terms she had signed; (4) observed Lisa Cornell's conduct during a six year litigation war; and (5) concluded Lisa Cornell was someone whose character and conduct justified not having her onboard Princess' ships. The very lengthy Supplemental Declaration demonstrates that this situation involved far more than merely someone whose litigation actions showed she who was extortionate, unethical, and unreasonable. She was also someone who threatened the company, who routinely ignored the terms of written contracts she signed, who set out to intentionally interfere with the company's business operations with oppressive and unreasonable litigation, and who has demonstrated that her promise "to litigate this matter to the end of time" is more than mere words.

(Resp. Supp. (filed 5/15/13) at 3.) Respondents attached a thirteen-page declaration of Mona Ehrenreich, the general counsel for Princes, as evidence. (Supp. Dec. Ehrenreich (filed 5/13/13) .) Ehrenreich, "the only corporate officer at Princess authorized to place someone on [Do Not Book] status" (Supp. Dec. Ehrenreich (filed 5/13/13) ¶ 3), states:

> While each situation is judged on its individual merits, the principal reasons for someone to be on Princess' Do Not Book status are (1) individuals who pose a safety or security threat to the company, our vessels, passengers or crew; (2) individuals who have committed some crime while onboard a previous cruise; (3) individuals that were expelled mid-voyage from a previous cruise because they caused damage to the vessel, were disruptive to other passengers, or violated orders or rules of the vessel or vessel's Master; (4) individuals who have defaulted on financial obligations to the company; (5) individuals who have breached written contracts without legal justification; or (6) individuals whose character and conduct demonstrate that they should not be permitted to sail on our vessels.

(Supp. Dec. Ehrenreich (filed 5/13/13) ¶ 5.) Ehrenreich does not claim that any of the first four reasons apply to Lisa Cornell. Ehrenreich's declaration focuses on claims of breached contracts (*id.* ¶¶ 14-24) and claims of extortionate, unethical, and unreasonable conduct. (*Id.* ¶¶ 25-35.)

Regarding claims that Lisa Cornell breached contracts, Ehrenreich summarizes Lisa Cornell's purchase of the lithographs and the invoices, then concludes:

> Despite only $585 being in dispute, Mrs. Cornell filed suit in Florida State Court under [FDUTPA] claiming that she had been defrauded by GFA's retention of the buyer's premium. This claim and lawsuit were a direct breach of Mrs. Cornell's two signed contracts with Princess affiliate GFA wherein she had agreed that the buyer's premium was not refundable.

(*Id.* ¶ 18.) Regarding the bait and switch claim in Lawsuit One, Ehrenreich states:

> . . . Mrs. Cornell also breached the two contracts by suing claiming that the possibility she might receive a different lithograph number from the series constituted a "bait & switch" in violation of FDUTPA. Again, this claim was a direct breach of the two contracts she had signed wherein she acknowledged the items she received might not be the same physical sample shown on the ship and that she accepted that the "Images used for the purpose of sale or display on a vessel may not be the actual piece Purchaser receives unless so stated on this invoice." This was a second and separate breach of the same two contracts.

(*Id.* ¶ 19.) Ehrenreich also alleges that the Cornells breached the settlement agreement in Lawsuit One by filing their complaint with the Commission and by granting the press and public media an interview for publication discussing the allegations and facts relating to the prior lawsuit and the settlement. (*Id.* ¶¶ 20-23.)

> Thus, to summarize, Lisa Cornell initially breached both of the two written contracts she signed when she purchased the subject art in 2007 (both with respect to the handling of the buyer's premium and with respect to her so-called 'bait and switch'

claim). Additionally, Lisa Cornell and Ware Cornell breached the Settlement Agreement they both signed by filing the instant action notwithstanding their contractual promise to release all past and future claims against Respondents and by refusing to dismiss this case as required by the Settlement Agreement. Finally, Complainants breached the Settlement Agreement by granting interviews to the press and public media in an effort to publicize their Federal Maritime Commission lawsuit and their past disputes in order to further embarrass and damage Respondents.

(*Id.* ¶ 24.)

Regarding Lisa Cornell's alleged extortionate, unethical, and unreasonable conduct, Ehrenreich states:

25. Almost immediately I saw that Lisa Cornell's approach to [Lawsuit One] was not to obtain reimbursement of the $585 that she claimed was in dispute, but rather was a way for her husband to spend an enormous amount of time on the case in order to punish defendant for not giving her back the $585 and in the expectation that the Cornells would be able to recover significant attorneys fees against defendant under [FDUTPA] (which like many states allows for an award of attorneys fees to a prevailing party).

26. At the early stages of the case I instructed that a $2,500 statutory Offer of Judgment be made to Lisa Cornell. This was almost five times the amount she claimed she was owed and was intended to end the case before Lisa Cornell forced Princess' affiliate to spend an inordinate amount on attorneys fees litigating such a minor dispute. Mr. Cornell advised his wife had rejected the offer and that she intended to litigate this matter to the end of time since they would be awarded his attorneys fees when he prevailed.

27. While I am not sure I recall details in the precise order they occurred due to the complexity of the case, I observed over the course of approximately the next two years how Mrs. Cornell turned this simple $585 dispute into an enormously expensive litigation. For example, as each of Plaintiff's claims was disproven, she would introduce entirely new allegations and claims. When the court granted summary judgment on the FDUTPA claim relating to the retained buyer's premium, Plaintiff commenced a new series of litigation over the hypothetical and theoretical issue that Mrs. Cornell might have received a different numbered print from the same series rather than the sample she saw onboard (despite the fact she had signed contracts acknowledging and accepting this practice and despite the fact she had not in any way suffered any harm or damage from this possibility since she cancelled the purchase before the art was shipped).

* * *

> 30. After approximately two years of litigation, the Florida State Court granted defendant's motion for summary judgment finding that there was no basis to claim retention of the buyer's premium was a deceptive trade practice under FDUTPA when the fact it was non-refundable was written into the purchase contract Mrs. Cornell had signed. The court therefore entered a final judgment in favor of defendant. Plaintiff moved to have the order modified and convinced the court that they should be allowed additional time to conduct further discovery on their bait and switch theory and again the case went back into protracted litigation.

(*Id.*) Ehrenreich also identifies as extortionate, unethical, and unreasonable Lisa Cornell's decision to file Lawsuit One in the Florida Circuit Court that has a jurisdictional mandate of hearing cases exceeding $15,000 instead of small claims court. (*Id.* ¶ 31.)

> Based on the above, as well as literally hundreds of other examples of her conduct that I cannot presently recall in detail due to the passage of six years, I concluded [that] Mrs. Cornell's litigation tactics were extortionate, unethical, and unreasonable and that she was a person whose character and conduct warranted placing her on Princess' Do Not Book status. Her conduct in this third lawsuit (the FMC matter) by Amending her Complaint to add clearly irrelevant and unjustified additional theories further convinces me that our decision was correct. Based upon what I observed, I believe that Mrs. Cornell is set upon a mission of disrupting our company's operations and I therefore believe it would unwise and unfair to force our shipboard staff and other guests to have to engage with her in a continuous and intimate matter required to serve all meals and to provide all lodging, cleaning and entertainment during a future protracted vacation cruise.

(*Id.* ¶ 34.)

> Finally, any cruise vacation involves the cruise line and the guest entering into a written passage contract that contains numerous legal terms and conditions. Our fares are set with the expectation that our guests will abide by those contractual terms. Mrs. Cornell's proven history of ignoring her contractual commitments and obligations to affiliated companies renders her someone Princess is unwilling to enter into a passage contract with because we have a reasonable basis to believe that Mrs. Cornell would ignore her passage contract terms just as she has ignored the terms of the two purchase contracts she signed with GFA and her signed Settlement Agreement (including confidentiality provision) with GFA. Simply put, Princess does not want to invite Mrs. Cornell to cruise onboard its ships as we believe any future cruise will simply invite even more opportunities for Mrs. Cornell to pursue her abusive and frivolous litigation war against Princess and its affiliates.

(*Id.* ¶ 35.)

C. Princess Cruise Lines violated section 10(b)(10) of the Shipping Act by unreasonably refusing to deal or negotiate with Lisa Cornell.

1. Princess has not articulated legitimate transportation-related factors to ban Lisa Cornell from its vessels.

The facts that Princess articulates to support its decision to bar Lisa Cornell from its cruise ships can be summarized into eleven claims.

1. Filing Lawsuit One breached the contract of sale.

2. Filing Lawsuit One in a Florida circuit court for a $585 claim alleging violations of FDUTPA instead of in a Florida county court with small claims jurisdiction is extortionate, unethical, and unreasonable.

3. Alleging that the buyer's premium provision in the contract of sale violates the contract "wherein she had agreed that the buyer's premium was not refundable."

4. Alleging the bait and switch claim when Lisa Cornell never received the lithograph breaches the contract of sale.

5. Filing this proceeding with the Commission violates the settlement agreement in which Lisa Cornell released all claims including future claims.

6. Speaking to the press and public media about the lawsuit violates the settlement agreement.

7. Rejecting the offer of judgment in Lawsuit One is extortionate, unethical, and unreasonable.

8. When the court in Lawsuit One rejected one of Lisa Cornell's arguments, she would introduce entirely new allegations and claims.

9. Lisa Cornell engaged in abusive discovery tactics in Lawsuit One.

10. Filing the Amended Complaint in this proceeding is extortionate, unethical, and unreasonable

11. Given her history, Princess has a "reasonable basis to believe that Mrs. Cornell would ignore her passage contract terms" if she were permitted to sale on a Princess cruise ship.

Of these eleven claims, only the last, Ehrenreich's speculation (not a fact) that Lisa Cornell would ignore her passage contract terms if permitted to sail, has any connection to transportation.

This speculation is not justified by the record. Lisa Cornell is a member of a group that Princess calls the Captains Circle. (Dec. of Lisa Cornell (filed 5/13/13) ¶¶ 16-19.) The Captain's Circle "is the top tier of [the Princess] loyalty program." (Supp. Dec. Ehrenreich (filed 5/13/13) ¶ 8.) Lisa Cornell has sailed extensively on Princess cruise ships, including two cruises taken on the *Grand Princess* while she and GFA were involved in the Florida litigation: A cruise of thirty-three days in 2009 and a cruise of fourteen days in 2010.

During those cruises, Princess "inexorably must have [had] its personnel interact extensively and over a protracted period while providing meals, entertainment and services to [Lisa Cornell]." (Resp. Supp. (filed 5/15/13) at 4.) There is no suggestion by Ehrenreich or Princess that Lisa Cornell did anything on any cruise, whether before or after she filed Lawsuit One, to demonstrate that she is an individual who (1) poses a safety or security threat to Princess, its vessels, passengers or crew; (2) committed some crime while onboard a previous cruise; (3) was expelled mid-voyage from a previous cruise because she caused damage to the vessel, was disruptive to other passengers, or violated orders or rules of the vessel or vessel's Master; or (4) defaulted on financial obligations to Princess. (Supp. Dec. Ehrenreich (filed 5/13/13) ¶ 5.) She has sailed for years on Princess cruise ships, including forty-seven days during the Florida litigation, with no suggestion that she caused any problems with either shipboard staff or other guests. Nothing suggests that it would be "unwise and unfair to force our shipboard staff and other guests to have to engage with [Lisa Cornell] in a continuous and intimate matter required to serve all meals and to provide all lodging, cleaning and entertainment during a future protracted vacation cruise." Lisa Cornell's quarrel was not with the crew on Princess ships, other guests on those ships, or, until Princess issued the "Do Not Book" order, Princess management. It was with GFA's policies regarding art auctions. Nothing suggests that Lisa Cornell's presence on board a Princess cruise ship would be disruptive to the ship's crew or other passengers.

2. Princess Cruise Lines's characterizations of Lisa Cornell's actions are not supported by the record.

In large part, Ehrenreich's declarations are phrased as conclusory statements, not statements of fact. For example, it is a statement of fact that Lisa Cornell commenced an action against GFA alleging that the buyer's premium provision violates FDUTPA. UF 21. Ehrenreich's contention that filing this action breached the contract of sale as set forth in Invoices IM10990 and IM10991 is a conclusion.

1. Filing Lawsuit One breached the contract of sale.

Ehrenreich states:

> Despite only $585 being in dispute, Mrs. Cornell filed suit in Florida State Court under [FDUTPA] claiming that she had been defrauded by GFA's retention of the buyer's premium. This claim and lawsuit were a direct breach of Mrs. Cornell's two

signed contracts with Princess affiliate GFA wherein she had agreed that the buyer's premium was not refundable.

(Supp. Dec. Ehrenreich (filed 5/13/13) ¶ 18.)

In Lawsuit One, Lisa Cornell contended that the buyer's premium provision itself violated Florida law. Princess does not cite any authority holding that filing a lawsuit alleging a provision in a contract is unlawful is a breach of the contract, and the Florida court that had jurisdiction over the case made no such finding.

2. Filing Lawsuit One in a Florida circuit court for a $585 claim alleging violations of FDUTPA instead of in a Florida county court with small claims jurisdiction is extortionate, unethical, and unreasonable.

GFA asserted that the Florida circuit court did not have jurisdiction over Lisa Cornell's FDUTPA claim and that Lawsuit One should be transferred to the county court for treatment pursuant to small claims rules. (Cornell Exhibit 27 (filed 5/27/13)(*Cornell v. GFA* Complaint (Consolidated Pleading) Second Affirmative Defense).) The circuit court determined that it did have jurisdiction. The Florida court, the court with jurisdiction over the case, did not make any finding that Lisa Cornell's conduct of the lawsuit was extortionate, unethical, or unreasonable.

3. Alleging that the buyer's premium provision in the contract of sale breaches the contract "wherein she had agreed that the buyer's premium was not refundable."

In Lawsuit One, Lisa Cornell argued that given GFA's representations about refunds before the auction that she claimed contradicted the contract, GFA violated FDUTPA. Although the Florida court granted summary judgment for GFA, it did not find that Lisa Cornell breached the contract by filing a complaint alleging the buyer's premium violated FDUTPA.

4. Alleging the bait and switch claim when Lisa Cornell never received the lithograph breaches the contract of sale.

Although GFA moved for summary judgment on the bait and switch claim, the parties settled before the court issued a ruling on the claim. The Florida court did not reach the question of whether GFA's practice violated FDUTPA and made no finding that it did.

5. Filing this proceeding with the Commission violates the settlement agreement in which Lisa Cornell released all claims including future claims.

As held above, the Mutual Release does not bar the Cornells from filing a complaint with the Commission alleging that a future refusal of Princess Cruise Lines to permit the Cornells from sailing on its cruise ships violates the Shipping Act.

6. Speaking to the press and public media about the lawsuit violates the settlement agreement.

If the Cornells have spoken to the press in violation of the Mutual Release, GFA's remedy lies with the Florida 17th Judicial Circuit that retained jurisdiction. (Cornell Opp. (filed 3/25/13), Exhibit 7-A.) The record does not reflect whether GFA has sought relief from the court and that there has been a determination by that court that the Cornells breached the Release by speaking to the press.

7. Rejecting the offer of judgment in Lawsuit One is extortionate, unethical, and unreasonable.

The offer of judgment addressed only Lisa Cornell's claim for damages, but did not address her underlying claim that GFA's practices violated FDUTPA. Through FDUTPA, the state of Florida provides a mechanism that permits a person to bring an action against a defendant alleging an unfair or deceptive practice and another mechanism that permits a defendant to make an offer of judgment with a remedy for the defendant if the offer is rejected. The Florida court did not bind that Lisa Cornell's rejection of the offer of judgment was extortionate, unethical, and unreasonable.

8. When the court in Lawsuit One rejected one of Lisa Cornell's arguments, she would introduce entirely new allegations and claims.

As an example of this, Ehrenreich states:

> When the court granted summary judgment on the FDUTPA claim relating to the retained buyer's premium, Plaintiff commenced a new series of litigation over the hypothetical and theoretical issue that Mrs. Cornell might have received a different numbered print from the same series rather than the sample she saw onboard (despite the fact she had signed contracts acknowledging and accepting this practice and despite the fact she had not in any way suffered any harm or damage from this possibility since she cancelled the purchase before the art was shipped).

(Supp. Dec. Ehrenreich (filed 5/13/13) ¶ 27.)

Lisa Cornell's complaint in Lawsuit One set forth both the buyer's premium claim and the bait and switch claim. UF-23. GFA's first motion for summary judgment addressed only the buyer's premium claim. After the court found against Lisa Cornell and dismissed the case entirely, Lisa Cornell reminded the court that GFA had not moved for summary judgment on the bait and switch claim. The court altered its order and scheduled litigation on the bait and switch claim. UF 27. A party does not "commence[] a new series of litigation" by seeking relief on a claim set forth in her original complaint, but not addressed by the court. The court made no finding that Lisa Cornell introduced entirely new allegations and claims into Lawsuit One.

9. Lisa Cornell engaged in abusive discovery tactics in Lawsuit One.

It is likely that Florida courts have the discretion to sanction parties for abusive discovery tactics. Nothing in the record indicates that GFA sought relief by claiming Lisa Cornell engaged in abusive discovery tactics or that the Florida court determined that Lisa Cornell engaged in abusive discovery tactics.

10. Filing the Amended Complaint in this proceeding is extortionate, unethical, and unreasonable.

Filing a Commission complaint against a common carrier alleging a violation of the Shipping Act is not extortionate, unethical, and unreasonable.

11. Given her history, Princess has a "reasonable basis to believe that Mrs. Cornell would ignore her passage contract terms" if she were permitted to sale on a Princess cruise ship.

As discussed above, Lisa Cornell has sailed on Princess cruise ships, including two cruises totaling forty-seven days while she and GFA were litigating in Lawsuit One. There is nothing in the record to support a finding that Lisa Cornell ever did anything to violate the passage contract terms when sailing on a Princess cruise ship.

Princess argues that:

> [I]t is reasonable to refuse to book Lisa Cornell on a Princess cruise because it "is consistent with [the] purported desire to limit its liability and [the] belief that [Complainant] was commercially unreasonable." *Marin Tug & Barge v. Westport Petroleum, Inc.*, 271 F.3d 825, 829 (9th Cir. 2001) (affirming the district court's holding that it was not retaliatory for an oil company to refuse to deal with a barge operator who chose to litigate against the company without first attempting to reach a reasonable resolution).

(Resp. Supp. (filed 5/15/13) at 4.) *Marin Tug* is inapposite. The court affirmed summary judgment for a defendant on a claim that refusing to deal with the barge operator "was not 'wrongful' in the sense required to make out the California tort of intentional interference with prospective economic advantage." *Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.*, 271 F.3d at 835. Princess, on the other hand, is prohibited by section 10(b)(10) of the Shipping Act from unreasonably refusing to deal or negotiate with persons who want to sail on its vessels, and may not shut out any person for reasons having no relation to legitimate transportation-related factors. *New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans*, FMC No. 00-11, 2001 WL 865692, at *8.

Princess has not articulated any legitimate transportation-related factors that would support its refusal to permit Lisa Cornell to sail on its cruise ships. Therefore, based on the material facts

as to which there is no genuine dispute, I find that Princess unreasonably refused to deal or negotiate with Lisa Cornell in violation of section 10(b)(10) of the Shipping Act. 46 U.S.C. § 41104(10).

B. Remedies.

1. Princess is ordered to cease and desist from violating the Act.

"[T]he general rule is that [cease and desist] orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities." *Portman Square Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 86 (ALJ 1998), admin. final Mar. 16, 1998, *citing Alex Parsinia d/b/a Pacific Int'l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997), admin. final, December 4, 1997. "A cease and desist order must be tailored to the needs and facts of the particular case." *Marcella Shipping Co. Ltd.*, 23 S.R.R. 857, 871-872 (ALJ 1986), admin. final, Mar. 26, 1986.

Princess has refused to deal or negotiate with Lisa Cornell for more than three years and the "Do Not Book" order apparently remains in effect. There is a reasonable likelihood that it will continue to remain in effect unless Princess is required to stop. Therefore, an order requiring Princess to cease and desist from violating the Act is entered.

2. Lisa Cornell is not entitled to a reparation award.

The Act provides: "If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation." 46 U.S.C. § 41301(a).

> (a) **Definition.** – In this section, the term "actual injury" includes the loss of interest at commercial rates compounded from the date of injury.
>
> (b) **Basic amount.** – If the complaint was filed within the period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.

46 U.S.C. § 41305. "The Commission shall, upon petition, award the complainant reasonable attorney's fees directly related to obtaining a reparations award in any complaint proceeding under section 11 of the Shipping Act . . . ." 46 C.F.R. § 502.254(a).

As the complainant, Lisa Cornell has the burden of proving entitlement to reparations. *See James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. 8, 13

(2003) ("As the Federal Maritime Board explained long ago: '(a) damages[21] 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.'").

> The statements of the Commission in [*California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213 (Oct. 19, 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 Equip. Ltd. v. Cosmos Shipping Co., Inc., 26 S.R.R. 788, 798-799 (ALJ 1992).

Attorney fees incurred while attempting to resolve a dispute without litigation are not recoverable as an award of attorney fees connected with a reparation award, but attorney fees relating to the preparation and filing of the complaint may be awarded. *Bernard & Weldcraft Welding Equip. v. Supertrans Int'l, Inc.*, 29 S.R.R. 1348, 1350 (ALJ 2003), admin. final Feb. 12, 2003.

a. Lisa Cornell filed the Complaint within three years of the accrual of her claim.

Princess issued the Lisa Cornell "Do Not Book" order on June 2, 2010, UF 40-43, and Lisa Cornell first had problems accessing the Princess web site in August 2010. UF 49-51. The Cornells filed their Complaint with the Commission on January 30, 2013. UF 60. Therefore, the Cornells commenced this proceeding within the statutory period.

b. The $100 deposit for a future cruise and the $150 shipboard credit are not actual injuries proximately caused by the violation of section 10(b)(10).

In her original FMC Complaint, Lisa Cornell sought refund of a $100 deposit she had made for a future cruise. (Complaint (original) ¶ 29.) After receiving the Complaint, Princess refunded the $100 deposit. In the Amended Complaint, Lisa Cornell acknowledges receipt of the refund.

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[21] Reparations under the Shipping Act and damages are synonymous. *See Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 775 (2002) (Breyer, J., dissenting).

> However, PRINCESS did not pay interest on the deposit nor did it pay the economic value of the shipboard credit of $150.00. Additionally LISA CORNELL and WARE CORNELL have incurred damages between August, 2010 and January 2013 in excess of $33,000.00 in attempting to have PRINCESS and Ehrenreich reverse the policy of refusing to deal with them as passengers.

(Amended Complaint ¶ 29.) As a claim for actual injury, Lisa Cornell states "although my $100 deposit was returned only within the last six weeks, I lost the value of the $150 shipboard credit that was given as a bonus." (Dec. of Lisa Cornell (filed 5/13/13) ¶ 58.)

There is no dispute that Lisa Cornell made a $100 deposit for a future cruise. The letter documenting the deposit is found at Exhibit 18 of the Cornells' supplemental exhibits filed May 13, 2013. UF 63. The letter, effective date March 27, 2010, confirms Princess received the $100 deposit toward a future cruise with Princess. The letter is addressed to "Mrs. L. Cornwell," but given the circumstances and the fact that it is in Lisa Cornell's possession, I find that the letter records a deposit for Lisa Cornell. The "Sail By Date" is March 26, 2014. The letter states that "upon making your full deposit towards your booking, the appropriate shipboard credit will be applied." The shipboard credit is valued between $25 and $150, depending on the cruise length and whether it is for "Inside Categories" or "Outside."

> Shipboard credit may only be used on a single voyage and expires at the end of that voyage. Any unused portion of shipboard credit is not redeemable for cash. Multiple shipboard credits cannot be redeemed by single occupancy passengers. More than two future cruise deposits may be applied per person to the same booking, however the shipboard credit is only available once per person. . . . If you do not use your future cruise deposit in the allocated four years, it will automatically be refunded back in the form it was purchased.

(Dec. of Lisa Cornell (filed 5/13/13) Exhibit 18.)

There is no dispute that Princess returned the deposit on February 13, 2013, after the Cornells commenced this proceeding. UF 64. Assuming that a reparation award of $100 would be appropriate if Princess had not returned the deposit, that claim is dismissed as moot.

Lisa Cornell argues that although the deposit was returned, she "was never paid interest on the deposit." (Dec. of Lisa Cornell (filed 5/13/13) ¶ 59.) In a section headed "*Interest is always awardable*" in her response to Respondents' supplemental brief, Lisa Cornell contends:

> As the record now establishes, no refund or credit was given until this action was filed. In the meantime, the Respondent Princess had use of that money.
>
> The argument that Princess may hold money belonging to another with no intention of providing the services it was intended to secure without paying for the

> use of that money is absurd. What this record shows is that with respect to this issue, like so many others, Princess will never concede anything.

(Cornell Opp. New Issues (filed 5/20/13) at 9.)

Lisa Cornell does not cite any authority that would entitle her to an award of interest on the $100. Princess Cruise Lines's letter acknowledging receipt of the deposit makes clear that the person making the deposit has no expectation of interest. The letter provides a four-year window to use the deposit. The letter does not provide that if the person waits two years before taking a cruise, the deposit is valued at $100 plus two years' accumulated interest. If the deposit is not used in four years, it is simply returned to the depositor. There is no suggestion that interest is included with the return. UF 63. Based on these facts that are not in dispute, I conclude that if it is assumed an unrefunded deposit could be an actual injury in these circumstances, Lisa Cornell would not be entitled to interest. Therefore, I find that Lisa Cornell is not entitled to interest on the $100 from March 27, 2010, to February 13, 2013, as a reparation award.

Regarding the shipboard credit, although Lisa Cornell values it at $150, its actual value depends on the length of cruise and whether it is used for "Inside Categories" or "Outside." The provisions that the shipboard credit "used on a single voyage and expires at the end of that voyage" and that two cruise deposits may be applied per person to the same booking but only one shipboard credit indicate that the shipboard credit is used for purchases on board ship during a cruise and is not related to the transportation of the passenger. This places the shipboard credit in the class of "passenger line vessel operations, safety issues, amenities on board vessels, or fare levels" over which the Commission has no authority. FMC Notice to Cruise Passengers, http://www.fmc.gov/about/notice_to_cruise_passengers.aspx, last visited June 26, 2013. Therefore, its alleged loss cannot constitute a reparation award for a violation of section 10(b)(10).

c. The attorney's fees and costs incurred in the Florida lawsuits are not actual injuries proximately caused by the violation.

The Cornells allege:

> WARE CORNELL on behalf of LISA CORNELL incurred in excess of $30,000 in compensable attorneys fees attempting to enforce the mediated agreement as it relates to the right to travel and further incurred in excess of $3,000 in costs associated with this effort. Had PRINCESS simply honored the agreement its own lawyers had negotiated, the Complainants would not have incurred such losses.

(Amended Complaint ¶ 18.) The Cornells seek an award "in excess of $33,000.00 in attempting to have PRINCESS and Ehrenreich reverse the policy of refusing to deal with them as passengers." (Amended Complaint at 7.)

As an exhibit, the Cornells include a summary of legal fees prepared by Cornell & Associates, P.A. and captioned "Matter: Cornell v. PCL." (Ware Cornell 5/13/2013 Declaration ¶¶ 14-18; Exhibit 22.) This exhibit lists claimed attorney's fees of $35,447.50 and $3,157.02 in costs from September 10, 2010, through February 23, 2012. All of the claimed charges relate to activities related to the Florida lawsuits. *See, e.g.*, 9/28/2012 – legal research on enforcement [of Lawsuit One settlement] – $600.00; 1/22/2011 – legal research in opposition to motion to dismiss/transfer – $2,350.00; 3/10/2011 – attend hearing before Judge O'Connor – $1,600.00; 2/1/2012 – meet with expert and Marilyn McGillivray re: testimony, continues trial preparation – $3,550.00; 2/2/2012 – attend trial and preparation for trial – $4,750.00. Some are for activities that are not properly compensated as an attorney service. *See, e.g.*, 9/25/2012 – deliver check to Adopt-A-Stray [a task that could be accomplished with an envelope and first class stamp] – $650.00. Some are for activities that arguably are related to pre-FMC complaint negotiations with Respondents. (*See, e.g.*, 9/20/2010 – TC with Mr. Maltzman's office re: PCL lockout, numerous conversations with Lisa Cornell – $250.00.)

No Respondent in this proceeding was a defendant in Lawsuit One. Attorney fees incurred litigating the Florida lawsuits are not collectable as attorney fees in this Commission proceeding.

The Cornells contend that the Commission's decision in *Bloomers of California, Inc. v. Ariel Maritime Group, Inc.*, 26 S.R.R. 183 (FMC 1992), supports an award of attorney's fees as actual injury caused by Princess Cruise Lines's refusal to permit Lisa Cornell to sail on Princess cruises.

> In *Bloomers*, the respondent NVOCC had attempted to coerce shippers to pay excess freight and had brought suit in court against the shippers, forcing them to hire counsel to defend. After successfully defending in court, one shipper, Bloomers, filed a complaint against the carrier with the Commission, claiming that the unlawful Shipping Act practice had compelled the shipper to pay an attorney to defend in court.
>
> The Commission's determination of *Bloomers* turned on the fact that the Complainant had been forced into litigation with a third party. This case presents exactly the same situation. We are aware that other Complainants have sought to use the *Bloomers* precedent without success. Here the promise negotiated with Princess' lawyers on behalf of Global Fine Arts was completely illusory, since Princess through its general counsel has revealed that she had already banned the Complainants from travel. This fact was of course a fact known to Princess during the negotiation of the settlement agreement and, naturally enough, completely unknown to Complainants.
>
> Courts have uniformly condemned such "gotcha" practices and awarded fees as damages as reparations for the time effort involved in having to litigate with third parties.

(Cornell Opp. New Issues (filed 5/20/13) at 10-11.)

The situation in *Bloomers* and the Cornell's situation are not comparable. In *Bloomers*, the NVOCC (later the *Bloomers* respondent) sued the shipper (later the *Bloomers* complainant) in a court for a charge that the Commission later determined to be unlawful under the Act. In the subsequent Commission proceeding, the shipper argued that:

> [I]t was entitled to recover its legal fees, not as attorney's fees as such, but as damages flowing from the unlawful practice of Respondents, which was in part to demand the payment of unjustly discriminatory charges by means of a lawsuit to collect such charges. Section 10(b)(10)[22] . . . forbids a carrier, in the disjunctive, to "demand, charge, or collect" unlawful rates or charges. In general, actual injury will not have been incurred where a complainant has not paid the unlawful charges. The Commission finds that where, however, as here, the demand itself, in the form of a lawsuit, is part of the unlawful practice, the payment of legal fees incurred in defending that lawsuit constitutes actual injury for which reparations may be granted.

Bloomers v. Ariel Maritime Group, 26 S.R.R. at 183.

In *Bloomers*, before commencement of the Commission proceeding, the common carrier/FMC respondent sued the FMC complainant in court for what the Commission later determined to be an unlawful rate or charge. The FMC complainant won that lawsuit. The Commission determined that the lawsuit in court was part of the unlawful practice and the cost of defending that lawsuit was actual injury to the FMC complainant.

In the Cornell lawsuits in Florida court, in stark contrast with what occurred in *Bloomers*, it was not Princess, Carnival plc, or Carnival Corporation, but Lisa Cornell who chose to commence and maintain two lawsuits in state court. Focusing on the period from September 10, 2010, through February 23, 2012, for which she seeks legal fees, Lisa Cornell filed Lawsuit Two against GFA and Princess. The court dismissed Lawsuit Two when it found that the complaint "is not the proper vehicle to achieve enforcement of the settlement agreement." (Cornell Opp. (filed 3/25/13), Exhibit 8 (*Cornell v. GFA*, No. 07-07894 (Fla. 17th Jud. Cir. Sept. 13, 2011) (Order on Plaintiff's Motion to Enforce Settlement)).) Lisa Cornell then filed a motion to enforce the Mutual Release with GFA in Lawsuit One, an action in which Princess was not a party. The Florida court conducted an evidentiary hearing in which Lisa Cornell apparently focused more on Princess than GFA, and Lisa Cornell asked the court "to enforce the agreement and order Global Fine Arts to have Princess remove any restriction on Lisa Cornell's traveling." (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 7 at 84 *ll.* 20-22.) The court found that Lisa Cornell "failed to prove a violation of the settlement agreement." (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 9.) In other words, Lisa

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[22] In 1991, section 10(b)(10) stated: "No common carrier, either alone or in conjunction with any other person, directly or indirectly, may . . . (10) demand, charge, or collect any rate or charge that is unjustly discriminatory between shippers or ports." 46 U.S.C.A. app. § 1709(b) (1991).

Cornell lost. *Bloomers* does not support an argument that the attorney's fees Lisa Cornell expended (assuming she paid the fees) is an actual injury caused by the violation of section 10(b)(10) by Princess.

The Cornells contend that "[b]oth Florida and California courts have allowed recovery of fees as damages just as did the Commission in *Bloomers*. . . . [The doctrine] confers the right to fees for the post-settlement litigation relating to the travel ban." (Cornell Opp. New Issues (filed 5/20/13) at 11.) They contend that it was Princess, not GFA, that negotiated the terms of the settlement of Lawsuit One and that Princess has breached that settlement. (*Id.* at 11-14.) If this is true, than Lisa Cornell's remedy is in the Florida courts with jurisdiction over that settlement or an appeal of that court's decision in the appropriate Florida court of appeals, not with the Commission. I again note that the court found Lisa Cornell "failed to prove a violation of the settlement agreement." UF 58.

The Commission only has the authority to award attorney's fees that Congress has granted to it. In a case involving another federal agency, the court quoted with approval an order of a federal administrative law judge.

> The federal courts have awarded attorney's fees in certain classes of cases not covered by statute, and Turner argues by analogy that the [Federal Communications] Commission has authority to do the same thing. But the "foundation" for this practice in the courts is "the original authority of the chancellor to do equity in a particular situation," *Sprague v. Ticonic National Bank*, 307 U.S. 161, 166, 59 S. Ct. 777, 780, 83 L. Ed. 1184 (1939), and the Commission has no such equitable authority. Instead, the Commission must find its authority in its enabling statutes. *Regents v. Carroll*, 338 U.S. 586, 70 S. Ct. 370, 94 L. Ed. 363 (1949).

Turner v. F.C.C., 514 F.2d 1354, 1355-1356 (D.C. Cir. 1975), *quoting Radio Station WSNT, Inc.*, 27 F.C.C.2d 993 (1971). The court continued:

> We affirm the [Federal Communications] Commission's order. Congress, and not the Commission, can authorize an exception to the "American Rule" that litigants bear the expense of their litigation. The reasoning of the Supreme Court in *Alyeska Pipeline Co. v. Wilderness Society*, [421 U.S. 240 (1975)] is fully applicable to litigation before the Federal Communications Commission. Congress has no more extended a "roving commission" to the FCC than it has to the Judiciary "to allow counsel fees as costs or otherwise whenever the . . . (Commission) might deem them warranted."

Turner v. F.C.C., 514 F.2d at 1356.

Furthermore, the litigation in the Florida court could not have given Lisa Cornell the remedy she seeks from the Commission. Even if Lisa Cornell had prevailed on her motion and the Florida court found that GFA violated the settlement agreement in Lawsuit One, the court could not have

ordered Princess, Carnival plc, or Carnival Corporation to permit Lisa Cornell to sail on its vessels. First, even if she had proven that GFA violated the agreement by taking an "action to encourage or entice [a Respondent] to refuse to grant either Lisa Cornell or Ware Cornell passage on [a] cruise ship," this would not have any probative value as to whether a particular Respondent acted in accordance with that encouragement and unreasonably refused to deal or negotiate with Lisa or Ware Cornell. Second, Princess, Carnival plc, and Carnival Corporation were not parties in Lawsuit One. Therefore, the court could not have ordered a Respondent to permit Lisa Cornell or Ware Cornell to sail on their cruise ships. The settlement agreement in Lawsuit One did not provide that Princess, Carnival plc, or Carnival Corporation would permit Lisa Cornell to sail on their cruise ships. Pursuant to the Mutual Release, GFA agreed that it would 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." UF 30. In her motion to enforce the agreement filed in Lawsuit One, Lisa Cornell alleged that GFA, the only defendant in Lawsuit One, breached this provision. The Florida court found that Lisa Cornell "failed to prove a violation of the settlement agreement." UF 56. Third, the Commission has exclusive jurisdiction to enforce the Shipping Act. Based on these undisputed facts, as a matter of law Lisa Cornell cannot establish that Princess, Carnival plc, and Carnival Corporation are liable for the attorney's fees and costs incurred in Lawsuit One (or Lawsuit Two).

To summarize, Lisa Cornell contends that she suffered actual injury in the form of attorney's fees and costs allegedly proximately caused by Princess's "Do Not Book" order for the Cornells' litigation against GFA in the Florida courts during the period from August 10, 2010, through February 22, 2012. (*See* Ware Cornell 5/13/13 Dec. ¶ 14.) Lisa Cornell chose to litigate her claim in a Florida state court, not before the Commission that has exclusive jurisdiction over Shipping Act claims. Lisa Cornell chose to litigate against the auction company GFA, not the common carrier Princess. Lisa Cornell chose to litigate the issue of whether GFA breached the Lawsuit One settlement agreement by encouraging or enticing a cruise line to refuse to grant her passage on a cruise ship, not the issue of whether Princess, Carnival plc, or Carnival Corporation unreasonably refused to deal or negotiate with her in violation of section 10(b)(10). Even if the court, which had already said the only parties in the hearing would be the two original parties, had found that GFA breached the Mutual Release, it could not have ordered Princess to permit Lisa Cornell to book cruises because Princess was not a party to Lawsuit One. Even if Respondents violated the Shipping Act in every way imaginable, Respondents are not responsible for Lisa Cornell's attorney's fees and costs resulting from her choice to litigate in the wrong forum against the wrong party making the wrong claim.

d. The difference in cost between the *Maasdam* cruise and the *Emerald Princess* cruise is not recoverable in a reparation award.

Lisa Cornell states that she currently has reservations for herself and her husband on the Holland America cruise ship *Maasdam* for a thirteen-day cruise beginning October 5, 2013, in Montreal, Quebec and ending October 18, 2013, in Ft. Lauderdale, Florida. The total cost for the *Maasdam* cruise is $6,920.14. UF 65. She states that they would prefer to sail on the Princess cruise ship *Emerald Princess* on a fourteen-day cruise beginning October 26, 2013, in Montreal and ending

in Ft. Lauderdale. The advertised price for the *Emerald Princess* cruise is $5,398.00. UF 66. She contends that she is entitled to a reparation award for the $1,522.14[23] difference. She also claims damages of $103.95 for Internet access on the *Maasdam* that would be free on the *Emerald Princess* since she is an elite Captains Circle Member. UF 62.

Although cruise ships are common carriers within the meaning of the Act that provide transportation between ports in the United States and ports in foreign countries, it is quite clear from the record that is not all they provide. As Respondents state, "[m]odern cruise ships are principally a form of entertainment and vacation . . . ." (Resp. Mot. Dismiss or S/J (filed 2/28/13) at 16.) While cruise ships are common carriers subject to the Shipping Act, it must be recognized that a significant portion of a passenger's fare pays for amenities not related to transportation from Montreal to Ft. Lauderdale, such as the size and location on the vessel of the stateroom, meals, entertainment, and, as Respondents contend, the view. For example, the *Maasdam* cruise takes place during the peak season of viewing the autumn foliage while the *Emerald Princess* sails three weeks later. ([Respondents'] Reply to Complainants' Response to order to Supplement the Record (filed 5/24/13), Exhibit 2 ¶ 7 (Dec. of Ethel Blum).) It is likely that a cruise ship passenger would pay more and expect to pay more for a cruise during peak leaf season than for a cruise after the leaves have turned brown and fallen from the trees. A comparison of the relative values of these factors unrelated to transportation would be based on pure speculation. Therefore, that difference in cost between the two cruises is not recoverable in a reparation award.

3. Lisa Cornell is not entitled to an award of attorney's fees under the Act.

The Shipping Act gives the Commission limited power to enter an award of attorney's fees: If a complainant proves an actual injury, "the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees." 46 U.S.C. § 41305. Lisa Cornell has not proven actual injury and entitlement to a reparation award. Therefore, this provision does not permit an award of attorney's fees.

Although Princess did not return the deposit until after the Cornells commenced this proceeding, the return was voluntary. The Commission did not enter a decision finding actual injury or ordering Princess to refund the deposit. Even if it is assumed that a reparation award of $100 would be appropriate because Princess had the $100 deposit when Lisa Cornell tried to book a cruise, because the $100 deposit has been returned, no reparation award can be entered.

> Numerous federal statutes allow courts to award attorney's fees . . . to the "prevailing party." The question presented here is whether this term includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not.

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[23] Lisa Cornell incorrectly states that the difference is $1,822.14. (Dec. of Lisa Cornell (filed 5/13/13) ¶ 61.)

Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598, 600 (2001). Therefore, Princess voluntary return of the deposit after the Cornells commenced this proceeding will not support an award of attorney's fees for the Cornells.

Without a reparation award, Lisa Cornell is not entitled to an award of attorney's fees under the Shipping Act. 46 U.S.C. § 41305(b); 46 C.F.R. § 502.254(a).[24]

4. Lisa Cornell is not entitled to an award of costs.

The Commission is authorized only to award "reasonable attorney fees," 46 U.S.C. § 41305, a term that does not include "costs." *Global Transporte Oceanico S.A. v. Coler Ocean Independent Lines Co.*, 28 S.R.R. 1162, 1163 n.5 (ALJ 1999). Therefore, the request for costs is denied.

5. A civil penalty may not be awarded in this proceeding.

This is a private party proceeding pursuant to section 11(a) of the Act. 46 U.S.C. § 41301(a). The Cornells seek "an assessment of penalties against the Respondents." (Amended Complaint at 7.) This appears to seek a civil penalty pursuant to 46 U.S.C. § 41107(a).

The Commission has stated that:

> Section 13(a) [46 U.S.C. § 41107(a)] of the 1984 Act provides that whoever violates a provision of the Act ". . . is liable to the United States for a civil penalty." Section 13(c) further provides that the Commission may, after notice and an opportunity for a hearing, assess each civil penalty provided for [in] the Act, *id.* App. § 1712(c). In addition, Section 11(a) allows a private party to file a complaint alleging a violation of the Act and to seek reparations. *Id.* § 1710(a). This statutory scheme does not contemplate the imposition of civil penalties in a private party complaint proceeding.

California Shipping Line, Inc. v. Yangming Marine Transport Corp., 25 S.R.R. 1213, 1231 (1990). *See also East Coast Columbia Conference, et al., Petition for Investigation*, 22 S.R.R. 723, 726 (1984) (1916 Act) (third parties are not part of civil penalty proceedings); *Prudential Lines v. Farrell Lines*, 22 S.R.R. 826, 851 (ALJ Apr. 24, 1984) (1916 Act). ("[P]rivate complainants have no standing in the matter [of civil penalties]."). Therefore, a civil penalty may not be imposed in this proceeding.

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[24] I also note that even if Lisa Cornell did prove entitlement to a reparation award, attorney's fees incurred while attempting to resolve a dispute without litigation are not recoverable as an award of attorney's fees connected with a reparation award, although attorney's fees relating to the preparation and filing of the complaint may be awarded. *Bernard & Weldcraft Welding Equip. v. Supertrans Int'l, Inc., supra.*

ORDER

Upon consideration of the Respondents' Motion to Dismiss or Alternatively Motion for Summary Judgment, Complainants' opposition thereto, the supplemental filings of the parties, and the record herein, and for the reasons stated above, it is hereby

ORDERED that Respondents' Motion to Dismiss be **GRANTED IN PART** and **DENIED IN PART**. The claim that Respondents violated section 10(c)(1) of the Shipping Act is dismissed for failure to state a claim upon which relief can be granted. In all other respects, Respondents' motion to dismiss is **DENIED**. It is

FURTHER ORDERED that Respondents' motion for summary decision be **GRANTED IN PART** and **DENIED IN PART**. (1) The Amended Complaint of G. Ware Cornell, Jr., against all Respondents alleging violation of section 10(b)(10) is **DISMISSED WITH PREJUDICE**. (2) The Amended Complaint of Lisa Anne Cornell against respondents Carnival plc and Carnival Corporation alleging violation of section 10(b)(10) is **DISMISSED WITH PREJUDICE**. (3) The Amended Complaint of Lisa Anne Cornell against respondent Princess Cruise Lines, Ltd. (Corp) alleging violation of section 10(b)(4) is **DISMISSED WITH PREJUDICE**. (4) In all other respects, Respondents' motion for summary decision is **DENIED**. It is

FURTHER ORDERED, *sua sponte*, that summary decision be entered for complainant Lisa Anne Cornell on her claim that respondent Princess Cruise Lines, Ltd. (Corp) violated section 10(b)(10) of the Shipping Act of 1984, 46 U.S.C. § 41104(10). It is

FURTHER ORDERED that respondent Princess Cruise Lines, Ltd. (Corp) cease and desist its refusal to permit complainant Lisa Anne Cornell from sailing on cruise ships operated by Princess Cruise Lines that sail between a port in the United States and a port in a foreign country.

Clay G. Guthridge
Administrative Law Judge