FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

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DOCKET NO. 13-02

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LISA ANNE CORNELL and
G. WARE CORNELL, Jr.

v.

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

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**Claimant's Exceptions to and Appeal of Initial Summary Decision**

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## INTRODUCTION

The Complainants appreciate the obvious effort and meticulous consideration of the record of the Administrative Law Judge in his review of an oft emotional dispute between two consumers and responding parties who represent collectively nearly than 50% of the world-wide cruise berths including many of those sailing from or to United States ports.

On the central question, the unreasonable refusal to deal, the ALJ got it right. The conduct of Princess Cruise Lines' general counsel was both outrageous and vexatious. There never was any legitimate transportation-related reason for the refusals to deal Princess' general counsel imposed.

However , the ALJ erred in his analysis of the scope of reparations under the Shipping Act, the right to recover interest, the reparations owed for booking a more expensive and less desirable cruise, factual issues related to concerted action under the Shipping Act, the charging of a fee in excess of the tariff, and the refusal to deal with Ware Cornell.

In each of these areas as set forth herein, disputed issues of fact require plenary consideration of the facts and law. Thus either dismissal under Rule 12 or summary judgment under Rule 56 was not authorized.

## FACTS

As recounted by the ALJ in the summary decision, the controversy between the Cornells and Respondents begins in February 2007 when Lisa Cornell purchased two works of art while aboard Carnival Imagination. After her return home, she canceled the purchases in accordance with the money back guarantee policy of the art vendor Global Fine Arts ("GFA"), a subsidiary of Carnival Corporation. Carnival Corporation is one of the respondents before the Commission.

When GFA declined to refund a portion of the price GFA calls the buyer's premium, Lisa Cornell filed the first of two lawsuits in Florida state courts.

That action, styled Lisa Anne Cornell v. Global Fine Arts, Inc., No. 07-07894 (Fla. 17th Jud. Cir.) is referred to by the ALJ as "Lawsuit One". In that claim, as the ALJ correctly recites, Lisa Cornell was not only trying to get back the $585 buyer's premium retained by GFA, but to correct two deceptive and unfair trade practices of GFA.

Two claims were asserted under the Florida Deceptive and Unfair Trade Practices Act (FDUTP A).

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

One of Respondents contentions was that it was justified in banning the Cornells because GFA had made an offer of judgment of $2,500. Florida civil procedure rules provide 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. (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, 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 FDUTP A. (Resp. Mot. Dismiss or S/J (filed 2/28/13), Exhibit 2 at 28-29.)

GFA filed a motion seeking legal fees of more than $60,000 it claimed it had 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.) However, Lisa Cornell timely moved to modify the judgment on the ground that the bait and switch claim which had been alleged in the complaint, was not addressed in GFA's motion for summary judgment. The court agreed with Lisa Cornell and modified the judgment leaving unresolved the bait and switch allegations (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. Before that motion was heard, additional discovery was conducted. The trial court further ordered mediation and this occurred in August, 2010.

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,"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 who were not

parties in Lawsuit One. Pursuant to the Release, the GFA parties 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.

Lisa Cornell attempted to book a cruise with Princess on August 9, 2010, but was denied access to the Princess Internet website.' She thought at first that the

computer system was down. In a telephone call to Princess, she learned that the system was operational. Thereafter, Lisa Cornell made a minimum of seventy-one unsuccessful attempts to book a cruise over the next several months and hundreds of times thereafter. (Declaration of Lisa Cornell (filed 5/13/13) ¶¶ 2-16, 32)

Ware Cornell spoke with Jeffrey Maltzman several times between the execution of the Mediated Settlement Agreement and mid-October, 2010. The information Maltzman had been providing was shown to be false when he admitted that a ban was and had been in place.

Lisa Cornell also attempted to book for her husband Ware Cornell but was denied access under his Captain's Circle account even on the day that Princess' counsel Jeffrey Maltzman advised that Ware Cornell was not banned. (Declaration of Lisa Cornell (filed 5/13/13) ¶31)

In mid-January 2012, Lisa Cornell attempted to book Cunard and P&O through their websites in the United Kingdom and Australia. She was blocked each time she attempted access. (Declaration of Lisa Cornell (filed 5/13/13) ¶37, Exhibit 8)

After determining she was being denied access and was banned from traveling, 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.) Lawsuit Two was served on November 15, 2010, five and one-half weeks after the court dismissed Lawsuit One. (Id.)

Lawsuit Two which was filed in the County Court of Broward County set fort 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 where it came before the same judge who had approved the settlement in Lawsuit One who had 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. No ruling on that motion was ever made in the Circuit Court. However, 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 Plaintiffs Motion to Enforce Settlement)).

The court scheduled an evidentiary hearing on Lisa Cornell's motion to enforce the settlement agreement in Lawsuit One which was held on February 2, 2012. At the hearing GFA and Lisa Cornell presented 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 plaintiffs 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 Plaintiffs Motion to Enforce Mediated Settlement Agreement) (emphasis in original)).)

Thereafter this action was brought.

## ACTUAL INJURY IS NOT THE SAME AS ACTUAL DAMAGE

As the Supreme Court observed almost four decades ago, "We need not define 'actual injury,' as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss." Gertz v. Welch, 418 U.S. 323, 349-350 (1974) (emphasis added)

The Gertz opinion represented the last expression of the Court prior enactment of the Shipping Act of 1984. In the reparations section of the act we find this mandate:

46 U.S.C. § 41305(b) provides:

> (b) Basic amount. If the complaint was filed within the period specified in section 41301(a) of this title [46 USC § 41301(a)], the Federal Maritime Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part [46 USC §§ 40101 et seq.], plus reasonable attorney fees.

Nowhere in §43105 does the Congress define the term "actual injury". However that term had been authoritatively explained by the Supreme Court ten years earlier. As a general proposition Congress is presumed to know the law when it enacts legislation, to wit "...where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322 (1992)

The term "actual injury" is different from the term "actual damages" which is used in other statutes passed by the Congress. The differentiation in terminology is significant. There is no reason to conclude that the terms are synonymous or interchangeable.

"Even as a legal term, however, the meaning of 'actual damages' is far from clear." FAA v. Cooper, 132 S. Ct. 1441, 1449 ( 2012) Justice Alito went on to survey the law on the meaning of "actual damages" under various causes of action. In some cases that term justified compensatory damages, in others it did not. [1]

[1] In dissent to Cooper Justice Sotomayor wrote, "The definition is plain enough: 'Actual damages' compensate for actual injury, and thus the term is synonymous with compensatory damages. See Black's 467 (defining "compensatory damages" as damages that "will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury") FAA v. Cooper, id, 132 S. Ct. 1441, 1457 (U.S. 2012) (*Court's emphasis*)

Section 10(b)(10) of the Shipping Act of 1984,46 U.S.C. § 41104(10) prohibits refusals to deal. The Congress clearly sought to prohibit common carriers from engaging in the very conduct so eloquently recounted by the ALJ in his initial decision.

That said however, if there is one striking feature about the ALJ's initial decision is that it finds it acceptable, under a particular view of the Shipping Act, to violate a central tenet of the act without any accountability. This determination thus vitiates Congressional intent when it included consumers within the zone of protection of the Shipping Act.

Although it is in the context of a statute, the Federal Fair Housing Act, which limits recovery to "actual damages" [2] United States v. Space Hunters, Inc., 2004 U.S. Dist. LEXIS 23699 (S.D. NY 2004) is instructive because it allows compensatory damages to an aggrieved consumer with whom a landlord refused to deal in direct violation of the Act. It is thus a recognition of the principle that

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[2]In a civil action under subsection (a), if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d), may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

42 USC §3613(c)(1)*emphasis added*

refusals to deal with individual consumers produce injuries that may be addressed by compensatory damages.

> Civil rights plaintiffs are entitled to recover compensatory damages for emotional distress when they establish a causal connection between the distress and a defendant's discriminatory conduct. See Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898, 907 (2d Cir. 1993). Here, there is no question that Toto's emotional harm was directly tied to Defendants' refusal to deal with him over the phone because Toto requires a relay service operator's assistance. It is true that the Government did not establish that Plaintiff experienced severe distress, but the damages awarded were well within reason given Defendants' conduct. Defendants' rebuke of Toto "involved the inevitable disappointment and frustration involved in being unable to obtain housing." United States v. Balistrieri, 981 F.2d 916, 932 (7th Cir. 1992). Therefore, the amount of damages was not so excessive or speculative as to require a new trial.

Complainants are consumers. Respondents represent a substantial portion of an industry devoted to the carriage of individuals. Because the Congress included consumers when it prohibited refusals to deal, it is illogical to hold that Congress did not want consumers to be able to enforce those rights.

The term "actual injury" should be held by the Commission to include the intangible value of the deprivation of statutory rights in consumer actions.

In this case the Complainants have been compelled to:

1. litigate in multiple forums,

2. pay a fee in excess of the tariff to insure the right to travel on a common carrier as demanded by Princess Cruise Lines,

3. be humiliated by being publicly defamed and compared to terrorists blackmailers, and extortionists, and

4. litigate whether a regulated common ocean carrier falls within the Commission's jurisdiction.

What consumer would undergo such effort and humiliation to secure the right to book travel granted to them under the Shipping Act and the common law? What cruise line would hesitate to refuse to deal in the future because there can be no penalty for its conduct?[3]

Along with the denial of those right to book travel, the withholding of a deposit and the denial of interest on that deposit, "actual injury" has been sustained. The question of fact remaining for the ALJ to determine is the amount of damages which have been sustained by Petitioners.

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[3] The Commission should fine Princess, Cunard, and P&O for their willful violations of the Shipping Act in their refusals to deal over an extended period of time and for their concerted action to violate the Act. Additionally Princess should be fined for its willful violation of the Shipping Act by imposition of a fee in excess of a tariff, and the overall conduct of this litigation.

## POST-COMPLAINT COMPLIANCE

> "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."
>
> Initial Summary Decision, p.66

The repayment of the deposit some thirty-two months after secretly determining that Princess would not accept any bookings for travel by Lisa Cornell does not moot anything.

The fact that Princess did this secretly, without any advice to Lisa Cornell of the ban, and then negotiated a settlement and extracted $1,000 in the form of a charitable contribution to insure the right to travel on Princess reflects a deviousness that cannot be mooted.[4] In fact the return of the deposit did not occur previously despite Mona Ehrenreich's affidavit in February, 2012

Naturally enough, federal courts have hesitated to give free passes to defendants who return the property of others only after suit is filed.

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[4] As we have said the practice of secretly banning a traveler while holding her money amounts to "Double Secret Probation" which as one district court held recently, described as "something that would matter greatly to those it affects, but whose effect they cannot appreciate because they don't know that it is affecting them." Wigton v. Berry, 2013 U.S. Dist. LEXIS 80155, 74 (W.D. Pa. June 7, 2013)

In a case arising under the Federal Water Pollution Control Act, 33 U.S.C. §1365., the Third Circuit was confronted with an argument that the post-complaint compliance of the defendant had render the action moot.

> A citizen suit would lose much of its effectiveness if a defendant could avoid paying any penalties by post-complaint compliance. See Pan American Tanning, 993 F.2d 1017; Tyson Foods, 897 F. 2d at 1136-37. 8 If penalty claims could be mooted, polluters would be encouraged to "delay litigation as long as possible, knowing that they will thereby escape liability even for post-complaint violations, so long as violations have ceased at the time the suit comes to trial." Tyson Foods, 897 F.2d at 1137. Moreover, whether or not damage claims are mooted would depend on the vagaries of when the district court happens to set the case for trial. See id. We cannot embrace a rule that would weaken the deterrent effect of the Act by diminishing incentives for citizens to sue 9 and encourage dilatory tactics by defendants. See Pan American Tanning, 993 F.2d 1017,1993 WL 154239, at *4; Tyson Foods, 897 F.2d at 1137.
>
> Natural Resources Defense Council v. Texaco Ref. & Mktg., 2 F. 3d 493, 503-504 (3d Cir. Del. 1993

While the Shipping Act and the Federal Water Pollution Control Act serve different federal interests both are clearly remedial legislation.

## INTEREST

Because of the ALJs holding that reparations are limited to out of pocket losses including interest, the question of interest is important. If Princess should have paid interest, reparations would be awarded by the ALJ under his analysis.

As we observed in our memorandum and the ALJ noted "Interest is always allowed." It is.

This black-letter principle was recognized by Justice Cardozo when he served as Chief Judge of the Court of Appeals of the State of New York. In Prager v. New Jersey Fidelity & Plate Glass Ins. Co., 245 N.Y. 1, 156 N.E. 76, 52 A.L.R. 193 (1927) Cardozo posited that the underlying policy behind the rule is that if a claimant is to be made whole, interest should be awarded since he has been without the use of the funds while such use was enjoyed by the withholding party.

The ALJ misapprehended the law when it ruled that their was no expectation of interest. That would have been true had the respondent PCL not determined on June 2, 2010 that it would thereafter refuse to deal with Lisa Cornell.

Thus from that point, it had a duty to return the money it held as it had no intention of honoring the promises Princess had made to Lisa Cornell. From that point in time it was wrongfully detaining Lisa Cornell's money.

Other courts are in accord.

> As a general rule, interest on money is allowed (1) when provided for by contract, (2) when authorized by statute, or (3) when treated as an element of compensatory damages for wrongful detention of money by a party liable to pay. New York Life Ins. Co. v. Cooper, 76 F.Supp. 976, 979 (S.D. NY 1944).
>
> United States v. McDonald Grain & Seed Co., 135 F. Supp. 854, 856-857 (D. ND 1955).

Likewise Enright v. Heckscher, 240 F. 863, 880 (2d Cir 1917) holds in an action for the return of funds advanced for a stock subscription that "[w]here there is no express promise to pay interest it is recoverable upon the theory that it is damages for the retention of money due and unpaid".

Princess Cruise Lines is based in California. Its Civil Code specifically authorizes pre-suit and pre-judgment interest on claims for sums certain:

> (a) Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt.
>
> California Civil Code Section 3287

This statute "has been consistently applied to require the award of prejudgment interest where the judgment is for money owed or to be refunded pursuant to a statutory obligation. Tripp v. Swoap, 17 Cal. 3d 671, 681, 131 Cal. Rptr. 789, 552 P.2d 749 (1976).See also, Irwin v. Mascott, 112 F. Supp. 2d 937, 956 (N.D. Cal. 2000)

## $1000 PAID TO SECURE NONDISCRIMINATORY TREATMENT

The ALJ correctly concludes that Princess' requirement that Lisa Cornell pay $1000 to an animal rescue charity falls within Section 10(b)(4) of the Shipping Act's proscription against unfair or unjustly discriminatory practices.

"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." Initial Summary Decision, p. 29.

However, the ALJ erred in concluding that "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." Initial Summary Decision, p. 50. The evidence was there and the source material was even quoted through the Initial Decision by the ALJ.

Verified allegations in pleadings stand in opposition to summary judgment motions without more. [5]In so holding that Lisa Cornell had not identified evidence that the $1000 payment had any relationship to carriage aboard a Princess vessel, the ALJ overlooked the sworn allegations within the Verified Amended Complaint.

30. In connection with the settlement of the underlying GFA litigation with GFA, Princess's 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

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 USC §41104 (4). Consequently LISA CORNELL has been damaged by the payment of a surcharge for travel.

Verified Amended Complaint ¶¶ 30-32.

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[5] Rule 56 contemplates that the summary judgment motion shall be accompanied and opposed by "supporting and opposing affidavits . . . made on personal knowledge, [which] shall set forth such facts as would be admissible in evidence . . . ." Fed. R. Civ. P. 56(e). Verification is defined as "confirmation of correctness, truth, or authenticity, by affidavit, oath, or deposition." Black's Law Dictionary 1400 (5th ed. 1979). Neal verified the complaint under the statutory substitute for the taking of an oath, declaring "under penalty of perjury . . . that the foregoing is true and correct," and dating his signature. See 28 U.S.C. § 1746(1) (1991). Thus, the complaint was verified and constituted an affidavit.

Every circuit that has faced this issue has treated verified complaints as acceptable opposition to a motion under Rule 56 for summary judgment. Neal v. Kelly, 963 F.2d 453, 457 (D.C. Cir. 1992)

Astonishingly, Princess's counsel Jeffrey Maltzman admits in the record that the $1000 payment was made at the insistence of Princess and not GFA. Significantly the ALJ so found and quotes from the Respondents Supplement to Motion to Dismiss filed on May 13, 2013-"The charitable donation was paid as an inducement for Princess to forgo its potential claim for attorneys' fees against Mrs. Cornell..."

Princess never was part of Lawsuit One and thus had no potential claims to assert against Lisa Cornell. Since Princess admits to be behind the payment and since it had no claim for attorneys fees, the payment is an admitted §10(b)(4)

At the very least, the evidence is materially in dispute. The material issue of fact left unresolved relates specifically to the payment's purpose. Lisa Cornell says it was for the purpose of securing travel and Princess claims it was meant as an inducement to forgo Princess' claims for attorneys fees. This cannot be resolved on summary judgment and accordingly it was error for the ALJ to grant summary judgment on this claim.

Having found that Lisa Cornell has stated a cause of action the ALJ should not decided the issue at this stage of the proceedings. The Commission has the power to forbid unlawful practices under §10(b)(4) of the shipping Act. It should sustain the exception and remand the issue to the ALJ for trial.

## THE REFUSAL TO DEAL WITH WARE CORNELL

> "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 1 O(b)( 1 0) claim against Princess, Carnival plc, and Carnival Corporation." Initial Summary Decision, p. 2.

The ALJ's findings are clearly erroneous. In fact on page 44 of the summary decision he makes specific reference in the record to Ware Cornell's attempts as follows:

> 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.)

If it is indeed the conclusion of the ALJ that an authorized agent, such as a spouse or travel agent, cannot attempt to make a booking for a prospective

passenger, that conclusion is devoid of any supporting law. "In the law of agency, actual authority takes two forms: (1) express authority, and (2) authority that is implied or incidental to a grant of express authority. W. Edward Sell, Sell on Agency 25-31 (1985)." Thomas v. INS, 35 F.3d 1332, 1338 (9th Cir. 1994).

Ware Cornell's declaration of May 13, 2013 describes an grant of authority to an agent[6], and Lisa Cornell's unsuccessful attempts to book for Ware Cornell constitutes an actual injury.

Consequently the ALJ's finding that Ware Cornell did not attempt to book is clearly erroneous.

## CUNARD, P&O AND CARNIVAL PLC ARE PARTIES

The ALJ misapprehends the record when he concludes that " Cunard and P&O are not parties in this proceeding. Therefore, no relief can be granted against them."

To the contrary the Verified Amended Complaint (like the original verified complaint before it) in pertinent part avers:

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[6] "In response to the directive number 1, my wife Lisa Cornell attempted to book passage for us both on numerous occasions. She was authorized to make bookings for me and as a former travel industry professional with Air Canada is far more knowledgeable than I am on booking vacation travel. Because we were banned on her favorite cruise line, we made alternative travel plans." (Dec. of Ware Cornell (filed 5/13/13) ¶2.)

> 5. CARNIVAL plc ("CARNIVAL plc") is a corporation established under the laws of the United Kingdom which does business under the names of Cunard Line, P&O Cruises, and P&O Cruises Australia as a common carrier for hire of passengers from ports in the United States.
>
> Verified Amended Complaint ¶5.

That statement is confirmed by Simon Waters, the General Counsel of Carnival plc, who himself swears that "Carnival plc is located in the United Kingdom and operates Cunard Line and P&O brand of cruises." Respondents reply memorandum April 12, 2013, Exhibit 4.

Further, as previously set forth, Lisa Cornell attempted to book travel on both Cunard and P&O through their websites in the United Kingdom and Australia in mid-January, 2012 but was denied access to the sites. (Declaration of Lisa Cornell (filed 5/13/13) ¶37, Exhibit 8)[7]

Consequently, it was error for the ALJ to dismiss the claims that relate to Cunard and P&O.

## §10(C)(1) CLAIM

Because of the misapprehension regarding the Carnival plc's status as operators of Cunard and P&O "brand" of cruise lines the ALJ did not consider the

[7] Her inability to book on the foreign website stands in contrast to the affidavit of Ethel Blum who opines that Lisa Cornell could book travel on Cunard and P&O by hiring an off-shore travel agent.

extent of the development of the record as it relates to the §10(c) allegations. That section prohibits a "conference or group of common carriers " from conducting a "boycott or tak[ing] any other concerted action resulting in an unreasonable refusal to deal."

Having already found that Princess' refusal to deal was "unreasonable" the ALJ veers off track in concluding that "The Amended Complaint does not allege that Princess was operating as a common carrier when it was performing Carnival plc's bookings." Initial Summary Decision, p. 30.

Simply put, as the ALJ found, Princess is a common carrier. The statute itself does not require that Princess "be operating as a common carrier" when it combined with other common carriers (Carnival plc though its Cunard and P&O "brands") to deny the Cornells the right to book passage on any of their ships. The statute prohibits common carriers from concerted actions resulting in boycotts and refusals to deal.

The ALJ's expressed rationale for dismissing with prejudice the §10(c)(1) claim cannot be found within any of the arguments set forth in the Respondents' supplement to the Motion to Dismiss dated May 14, 2013. The Respondents never argued that the conduct of a common carrier in causing other common carriers to boycott prospective passengers does not constitute prohibited action under §10(c)(1).

Because of the ALJ's disposition of this claim by asserting that neither Cunard nor P&O were parties, he never reached the issues which were actually argued by the parties.

Specifically, Respondents argued that they were protected from such concerted action penalties because all of the Respondents were either parents or wholly owned subsidiaries.

In opposition, the Claimants offered evidence that the Respondents did not fall within the protection of a statutory "corporate conspiracy" doctrine because the Respondents were not all wholly owned subsidiaries or parents of each other. This evidence creates material issues of fact sufficient to preclude the grant of summary judgment.

Thus the §10(c)(1) claim should be returned to the ALJ for discovery and for trial.

## CRUISE PRICE DIFFERENTIAL

> Predicting the weather is not an exact science. The forecasts or omission of forecasts is a discretionary function excepted from the Federal Tort Claims Act by 28 USC § 2680(a),
>
> Williams v. United States, 504 F. Supp. 746, 750 (E.D. Mo. 1980)

Without any evidence from Lisa Cornell regarding why she might prefer a longer cruise several weeks later for less money, the ALJ proclaims that the beginning of October is prime time for seeing the leaves. However, there may be ( and in fact are) other reasons such as price and destinations which in an of themselves preclude summary judgment.

While the Respondents offer a supposed travel agent "expert" to say that in her opinion the Emerald Princess sailing is only $161 cheaper her experiences as the "First Lady of the Port of Miami" and an author does not demonstrate any methodology to her conclusions.

She does not claim to have discussed Lisa Cornell's reasons for her preferences, checked her previous travel history including ports visited, or considered anything other than published itineraries.Ms. Blum does not assert any rate-setting experience or historical knowledge about the leaves along the route on the specific days the ships are in port.

However, the materials relied upon by Ethel Blum and by the ALJ and submitted to the ALJ demonstrate that the Emerald Princess cruise is a day longer, visits more and different ports. and is cheaper by more than $1500 Lisa Cornell asserts or at least by the $161 Ethel Blum opines.

However, Blum's declaration shows on its face that she has applied no methodology that meets or even approaches Daubert standards. Ms. Blum simply concludes that when she considers a number of factors, she believes there "is no real difference".

By contrast, Lisa Cornell's declaration dated May 13, 2013 says this about her choice for cruises in October:

> "49. My husband and I wanted to travel on the Emerald Princess Oct 26, 2013 from Quebec city to Fort Lauderdale. Because I am still banned we will travel on the Maasdam, operated by Holland America.

Notably, Lisa Cornell does not explain her reasons for wanting to travel on the Emerald Princess' repositioning cruise. She does not need to. She has sworn this would have been her choice if available. Notably, both cruises are repositioning Canada-Florida cruises during the month of October, 2013.

The Emerald Princess and the Maasdam southbound repositioning cruises are only offered once per year per ship and only specific dates. There is no choice of dates only of ships, length of cruise and number of ports. Both ships return to Florida for the winter season.

These cruises were offered to the public. Every one of the passengers on the Emerald Princess could have chosen to take the Maasdam. Every passenger on the Maasdam, save the Cornells, could have chosen to take the Emerald Princess. It is

Princess Cruise Lines fault that the Cornell's were forced to pay more and neither the spin put on the cruises by a travel agent or the misapprehension of the record by the ALJ should excuse Princess from paying reparations.

The ALJ found that the Maasdam cruise cost $1522.14 more than the Emerald Princess cruise. Initial Summary Decision, p.72. The initial decision makes it clear that he did not award reparations because of his own conclusions about desirability. This is not proper application of the standard for the granting of summary judgment.

By determining this issue on summary judgment, the ALJ erred.

## CUNARD AND P&O ADMIT THAT PRINCESS WOULD NOT BOOK TRAVEL ON THEIR VESSELS

The Declaration of Simon Waters acknowledges that Princess would not book Lisa Cornell for travel on Carnival plc "brands" Cunard and P&O. Although he does not say when he learned of it, he obviously learned of it as he pinned his declaration and he never asserts that he has instructed Princess to discontinue its unlawful practices as it relates to the Cunard and P&O vessels. At the very least Waters had ratified Princess' unlawful refusal to deal.

> Ratification also may be found to exist by implication from a principal's failure to dissent within a reasonable time after learning what had been done. "If a corporation acquires or is charged with knowledge of an unauthorized act undertaken by someone on its behalf, and does not repudiate that act within a

> reasonable time, but instead acquiesces in it, the corporation is bound by the act."
>
> IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp., 26 F. 3d 370, 375 (2d Cir. 1994)

The ALJ erred in not ordering Cunard and P&O through its operator Carnival plc to cease and desist the unlawful refusal to deal and in failing to award reparations and attorneys fees.

## BLOOMERS

This Commission decided Bloomers of California, Inc. v Ariel Maritime Group, Inc ,26 S.R.R. 183 (1992). Now the Commission needs to consider why no case has ever managed to fall within its holding in over twenty years. Because Bloomers remains good law, it must be applied to this cause and our exceptions granted.

To summarize, 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 ALJ's determination that Bloomers's applicability turned on the fact that the Complainant had been forced into litigation. This case presents exactly the same situation.

Here the promise negotiated with Princess' lawyers on behalf of Global Fine Arts was completely illusory, since Princess through its general counsel has now 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. Moreover this fact was hidden by Princess until the payment of the $1000 tribute was made forty-five days later. During that time Princess deliberately fabricated reasons that Lisa and Ware Cornell could not book on Princess despite the agreements negotiated to insure it.

Contrary to the ALJ's determination that Lawsuit Two was voluntarily begun as opposed to Bloomer's passive defense of a baseless claim, there is no real difference in the two situations. Bloomers made a choice to defend. It did not have to. It could have ignored the lawsuit and proceeded directly to the Commission. Bloomers defended an action which was instituted in violation of the Shipping Act. Lisa Cornell prosecuted an action designed to end an unlawful refusal to deal in violation of the Shipping Act.

Both Bloomers and Lisa Cornell were victimized by wrongful conduct and violations of the Shipping Act. Bloomers chose to defend. Lisa Cornell chose to try to enforce a Mediated Settlement Agreement. Both actions were equally reasonable. Both Lisa Cornell and Bloomers made reasonable decisions as to how to respond to unlawful tactics. Both sought compensation for the inevitable legal fees associated with violations of the Shipping Act.

In each case the fees were foreseeably incurred. Princess Cruise Lines could have anticipated that a violation of the Shipping Act would result in justifiable litigation in the same way Bloomers respondent could have anticipated that its litigation would cause Bloomers unnecessary fees.

Courts have uniformly condemned "gotcha" tactics and practices like those described in Bloomers and by the ALJ herein. Bloomers was awarded fees as damages as reparations for the time and effort involved in having to litigate. Claimants were forced to litigate with both GFA and Princess because of the deceit and the exaction of a $1000 payment to secure the right to travel on Princess. Litigation will necessarily result from this kind of behavior and the Bloomers principle compels the award of attorneys fees.

## CONCLUSION

This is a very important case. Unlike the issues which traditionally come before the Commission, this case is brought by consumers whom the Congress sought to protect.

Many of the determinations by the ALJ, if allowed to stand, will mean that this Commission will be powerless to protect the public in the same manner it protects its traditional regulatory constituency. The exceptions are made advisedly and with full appreciation of the labor expended by the Administrative Law Judge.

The Commission has the power and indeed the duty to protect the public to the same extent it protects others who come before it.

Lisa and Ware Cornell earnestly entreat you to sustain our exceptions and remand to the ALJ for further proceedings.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via Electronic and U.S. Mail to Steve Holman, Esq., Maltzman & Partners P.A., 55 Miracle Mile, Suite 320, Coral Gables, FL 33134, steveh@maltzmanpartners.com, this August 13, 2013.

BY: _____
G. WARE CORNELL JR.