

# FEDERAL MARITIME COMMISSION

EDAF ANTILLAS, INC.

*Complainant,*

v.

CROWLEY CARIBBEAN  
LOGISTICS, LLC; IFS  
INTERNATIONAL FORWARDING,  
S.L.; and IFS NEUTRAL  
MARITIME SERVICES

*Respondents.*

Docket No. 14-04

Served: September 14, 2016

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**BY THE COMMISSION:** Mario CORDERO, *Chairman*; Rebecca F. DYE, Michael A. KHOURI, William P. DOYLE, Daniel B. MAFFEI, *Commissioners*. Commissioner DOYLE filed a concurring opinion in which Chairman CORDERO and Commissioner MAFFEI join.

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## **Order Granting Petition for Attorney Fees**

In this complaint, Edaf Antillas, Inc. (Edaf) alleged that Crowley Caribbean Logistics, LLC (CCL), IFS International Forwarding SL (IFS), and IFS Neutral Maritime Service Inc. (Neutral) violated sections 10(d)(1) and 10(b)(8)) of the Shipping Act (46 U.S.C. §§ 41102(c); 41104(8)). While this case was pending, the

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Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281, § 402, 128 Stat. 3022 (Dec. 18, 2014) (Coble Act) was enacted. The Administrative Law Judge (ALJ) subsequently dismissed the complaint, and on October 15, 2015, the ALJ issued an order granting Respondents petitions for attorney fees. On October 19, 2015, the Commission determined to review the ALJ's order. On March 1, 2016, the Commission issued a new Final Rule implementing the Coble Act by amending its regulations governing the award of attorney fees in Shipping Act complaint proceedings and by providing guidance on the application of the new statutory provision. 81 Fed. Reg. 10,508.

On March 17, 2016, in light of this new Final Rule, the Commission ordered the parties to file supplemental briefs addressing attorney fee awards under 46 U.S.C. § 41305(e). Respondents complied and filed supplemental briefs. Edaf did not. As set forth below, after review of the ALJ's order granting the petitions for attorney fees, the Commission affirms in part and reverses in part the ALJ's decision and awards CCL \$23,963.20 and Neutral \$18,573.75 in attorney fees.

### **I. BACKGROUND**

#### **A. Procedural History**

On April 28, 2014, Edaf filed a complaint against CCL, IFS, and Neutral. Edaf alleged that all three parties violated sections 10(d)(1) and 10(b)(8) of the Shipping Act. Edaf also alleged that CCL violated section 10(b)(3) of the Shipping Act (46 U.S.C. § 41104(3)). Edaf sought \$158,000 for actual injury and "any additional amounts the Commission determines" for the respondents' violations of section 10(b)(3). Compl. On September 10, 2014, CCL, IFS and Neutral filed motions to dismiss the Complaint. CCL also filed a supplemental motion to dismiss. On November 6, 2014, the ALJ granted in part the motions to dismiss and dismissed all claims against IFS for failure to state a claim and dismissed the section 10(b)(3) and section 10(b)(8) claims against Neutral and CCL. The

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only surviving claims were Edaf's claim alleging CCL and Neutral violated section 10(d)(1) and Edaf's claim for reparations. *Edaf v. Crowley Caribbean Logistics*, 33 S.R.R. 710, 726 (ALJ 2014).

On December 18, 2014, while this case was pending, Congress enacted the Coble Act, which, among other things, deleted the phrase "plus reasonable attorney fees" from 46 U.S.C. § 41305(b) and added a new section, § 41305(e), reading: "Attorney Fees. – In any action brought under section 41301, the prevailing party may be awarded reasonable attorney fees."

On January 12, 2015, a briefing schedule was adopted requiring Edaf to file its proposed findings of fact, brief, and appendix on or before February 23, 2015. On January 14, 2015, the briefing schedule was emailed to Edaf's representative, who replied that it was received. Initial Decision at 3. No findings of fact, brief, or appendix were subsequently filed by Edaf.

On February 24, 2015, based on Edaf's failure to comply with the briefing schedule, IFS and Neutral filed a motion to dismiss, which included a request for attorney fees based on the Coble Act. IFS and Neutral contended that because the claims against IFS were dismissed on November 6, 2014, IFS was a prevailing party entitled to attorney fees under the Coble Act. Neutral contended that if the Complaint was dismissed for failure to prosecute, it would be entitled to attorney fees on both its previously dismissed claims and on the remaining claims. On February 25, 2015, CCL also filed a motion to dismiss due to Edaf's failure to comply with the briefing schedule and discovery responsibilities. CCL also claimed that it should be awarded attorney fees pursuant to the Coble Act.

Edaf was subsequently ordered to show cause by March 12, 2015, why its complaint should not be dismissed for failure to prosecute or failure to comply with its discovery responsibilities. Subsequently, IFS and Neutral filed a supplement to their motion to dismiss seeking dismissal for failure to comply with discovery responsibilities. Edaf neither filed the papers required by the briefing

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schedule nor responded to the order to show cause. The ALJ also ordered briefs from all parties by March 19, 2015, on whether the Coble Act should be applied to the proceeding. IFS/Neutral and CCL filed supplemental briefs. Edaf did not reply.

On April 15, 2015, the ALJ issued an Initial Decision to Dismiss Proceeding for Failure to Prosecute (Initial Decision), dismissing, with prejudice, Edaf's complaint. The ALJ also found that Neutral, IFS, and CCL were entitled to reasonable attorney fees for work done after the enactment of the Coble Act. The ALJ delayed, however, making a determination on the amount of attorney fees until the Commission had an opportunity to address the impact of the Coble Act. The ALJ stated the following:

The Commission has not yet promulgated regulations governing awards under section 41305(e). Regarding the temporal application of section 43105(e) [sic], the Commission may determine that section 41305(e) should be applied retroactively, as Respondents in this proceeding argue it should. In the alternative, cognizant of the fact that before the Coble Act, complainants filed their complaints without an expectation that they could be required to pay attorney fees of a prevailing respondent, the Commission could determine that section 41305(e) should only be applied in proceedings commenced after enactment of the Coble Act. The Commission also may provide regulatory guidance on how it intends to exercise the greater discretion it now has in awarding attorney fees. *Compare* 46 U.S.C. § 41305(b) (the Commission "shall direct the payment of reparations ... plus reasonable attorney fees") *with* 46 U.S.C. § 41305(e) ("the prevailing party may be awarded reasonable attorney fees"). Therefore, I find that it is not appropriate to determine the amount of an attorney fee award at this time, but that

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determination should be deferred until the Commission has had an opportunity to address this decision and provide guidance on the application of section 41305(e).

Initial Decision at 22.

The Initial Decision became administratively final on May 18, 2015. Subsequently, on June 9, 2015, IFS and Neutral filed a petition for attorney fees.<sup>1</sup> On June 16, 2015, CCL filed a petition for attorney fees. On July 2, 2015, the Commission issued a Notice of Proposed Rulemaking in which it proposed to amend its rules regarding attorney fees in light of the Coble Act. 80 Fed. Reg. 38,153 (July 2, 2015).

B. ALJ's Order Granting the Respondents' Petitions for Attorney Fees

Despite stating an intent to defer ruling on attorney fees until the Commission provided guidance, the ALJ granted Respondents' petitions for attorney fees on October 15, 2015. In the Order, the ALJ stated that "[t]he applicant for an award of attorney fees bears the burden of establishing entitlement to an award, documenting the appropriate hours, and justifying the reasonableness of the rates," citing *Blum v. Stenson*, 465 U.S. 886 (1984). *Edaf v. Crowley Caribbean Logistics*, 33 S.R.R. 1311, 1315 (ALJ 2015). The ALJ also stated that the Commission "has used the Laffey Matrix to determine the reasonableness of attorney rates when awarding fees pursuant to repealed section 41305(b)." *Id.* The ALJ proceeded to discuss the petition of IFS/Neutral, including the declaration of Todd P. Kenyon, counsel for IFS/Neutral, the Laffey Matrix and invoices IFS/Neutral submitted as supporting exhibits. *Id.* at 1317. The ALJ concluded that IFS/Neutral had sufficiently documented the

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<sup>1</sup> IFS and Neutral were represented by the same counsel.

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appropriate hours and entitlement to the fees requested and awarded \$18,573.75 to Neutral.<sup>2</sup> *Id.*

The ALJ also discussed the petition of CCL, including the declaration of Eric Jeffrey, counsel for CCL, the Laffey Matrix, and invoices CCL submitted in support. *Id.* at 1317-18. The ALJ concluded, however, that CCL had sufficiently documented the appropriate hours and entitlement to the fees requested for Eric Jeffrey and awarded \$17,901.00 to CCL accordingly. *Id.* at 1318. The ALJ determined that for attorneys Lindsey Nelson and Angela Buckner, though the invoices sufficiently established the hours worked, the Laffey Matrix did not support the hourly rate claimed for each counsel. *Id.* The ALJ determined that the appropriate rate for Lindsey was \$402 per hour, instead of the \$420 per hour submitted. *Id.* The ALJ also determined that the appropriate rate for Buckner was \$328 per hour, instead of the \$385 per hour submitted. *Id.* The ALJ awarded \$1,085.40 for Nelson's attorney fees and \$4,952.80 for Buckner's attorney fees. *Id.* In total the ALJ awarded \$23,939.20 to CCL. *Id.*

C. Supplemental Briefs of Respondents addressing Attorney Fees

On October 19, 2015, the Commission determined to review the ALJ order granting attorney fees, and on March 1, 2016, the Commission issued a Final Rule regarding attorney fees. Additionally, on March 17, 2016, the Commission ordered the parties to file supplemental briefs in light of the Final Rule. CCL submitted a brief stating that it believed the ALJ's "award is fully consistent with the Commission's new regulations concerning attorney's fees." CCL Supp. Br. at 1. CCL concurred with the ALJ's finding that fees should only be allowed for work performed on or after the statutory

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<sup>2</sup> Because all claims against IFS were dismissed before December 18, 2014, and the petition sought services on or after that date, the ALJ determined that the services for which fees were sought were performed for Neutral. *Edaf v. Crowley Caribbean Logistics*, 33 S.R.R. 1311, 1314 n.2 (ALJ 2015).

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amendments instituted by the Coble Act. *Id.* CCL also concurred with the finding of the ALJ that CCL was a prevailing party. *Id.*

IFS/Neutral submitted a brief supporting the ALJ's decision to award Neutral attorney fees. IFS Supp. Brief at 1. IFS/Neutral concurred that the ALJ correctly awarded fees for work performed on or after the statutory amendments instituted by the Coble Act. *Id.* IFS/Neutral acknowledged that the Commission's comments in the Final Rule "indicate that in the majority of cases, awarding attorney fees to prevailing respondents for work performed on pending cases prior to December 18, 2014 would have an impermissible retroactive effect." *Id.* at 3. Because, however, the Commission indicated this would "not necessarily [be] binding in individual proceedings," IFS/Neutral contended that the facts of this case, in which Edaf's repeated disregard of the ALJ's orders caused IFS/Neutral to expend substantial resources, support an award of fees for work performed prior to the Coble Act's effective date. *Id.*

## **II. DISCUSSION**

This matter raises four issues: (1) Respondents' eligibility for attorney fees; (2) if so, Respondents' entitlement to attorney fees; (3) if so, Respondents' ability to recover attorney fees incurred before the effective date of the Coble Act; and (4) if fees are to be awarded, the appropriate amount of fees. The Commission finds that: (a) Respondents are eligible for attorney fees because they are prevailing parties; (b) Respondents are entitled to attorney fees in light of Edaf's conduct in this case; (c) Respondents may only recover attorney fees incurred after the effective date of the Coble Act; and (d) with one exception, the ALJ correctly calculated the amount of fees.

### **A. Standard of Review and Burden of Proof**

Commission Rule 254 states that the appeal of an award of attorney fees is governed by the procedures in 46 C.F.R § 502.227. *See* 46 C.F.R. § 502.254 (f) (2015). Pursuant to 46 C.F.R §

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502.227(a)(6), the Commission has the same powers that it would have in making the initial decision. Therefore, the standard of review by which the Commission now reviews the ALJ's Order Granting Petitions for Attorney Fees is *de novo*. Moreover, as the ALJ correctly noted, citing *Blum*, 465 U.S. at 895 n.11, and *Hensley v. Eckerher*, 461 U.S. 424, 437 (1983), "[t]he applicant for an award of attorney fees bears the burden of establishing entitlement to an award, documenting the appropriate hours, and justifying the reasonableness of the rates." See *Edaf*, 33 S.R.R. 1311 at 1315.

B. Eligibility for Attorney Fees

Based on § 41305(e), Rule 254 of the Commission's regulations states that "[i]n any complaint proceeding brought under 46 U.S.C. § 41301 (sections 11(a)-(b) of the Shipping Act of 1984), the Commission may, upon petition, award the prevailing party reasonable attorney fees." 46 C.F.R. § 502.254(a) (2016). In the Final Rule, the Commission cited *Smyth v. Rivero*, 282 F.3d 268, 274 (4th Cir. 2002) (citations omitted) to explain that: "The term 'prevailing party' . . . is a 'legal term of art,' and is interpreted . . . consistently – that is, without distinctions based on the particular statutory context in which it appears." 81 Fed. Reg. at 10,511. Furthermore, the Commission cited *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989) for the premise that: "The touchstone of the prevailing party inquiry" is "the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." 81 Fed. Reg. at 10,512. Rule 72 states that a dismissal for failure to prosecute and or obey an order will be considered an adjudication on the merits. 46 C.F.R. § 502.72(b). As such, the ALJ's dismissal of all the Complainant's claims, with prejudice, in this matter may be seen as a "material alteration of the legal relationship of the parties" and a success on the merits for Respondents. 81 Fed. Reg. at 10,512. IFS/Neutral and CCL, therefore, prevailed on all of Complainant's claims against them. Accordingly Respondents are eligible for an award of fees as prevailing parties.

C. Entitlement to Attorney Fees

Because Respondents are eligible for attorney fees as prevailing parties, the next question is whether they *should* recover their fees. As the revised statutory provision states that fees “may” be awarded, it is necessary to discuss when an award of fees is appropriate. 46 U.S.C. § 41305(e). The discussion in the new Final Rule addressed the issue and stated that the “primary consideration in determining entitlement to attorney fees is whether such an award is consistent with the purposes of the Shipping Act, and any factors the Commission relies upon in individual cases should be consistent with these purposes.” 81 Fed. Reg. at 10,509. Furthermore, based on an analysis of the several purposes of the Shipping Act, the Commission commented that it was appropriate that “prevailing complainants and prevailing respondents should be treated in an even-handed manner in determining whether to award attorney fees.” *Id.* at 10513.

In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994), a Supreme Court case that addressed entitlement, wherein prevailing plaintiffs and prevailing defendants were treated similarly, the Court put forth several factors to utilize in considering entitlement: “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” (quoting *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 156 (3d Cir. 1986) (internal quotations omitted)). Although *Fogerty* addressed attorney fee awards under a different statute, we believe that they provide a useful guide for the Commission. In this matter, the Complainant failed to substantiate the legal and factual components of its case, knowingly disregarded the ALJ’s orders on numerous occasions, abandoned its claim, forced multiple Respondents to expend significant resources of both time and money in their defense and, perhaps most egregiously, failed to terminate the claim when it could have limited the expense of the Respondents. Moreover, Complainant had ample opportunity to withdraw its

claim.<sup>3</sup> Complainant could have voluntarily withdrawn its Complaint at any time until May 27, 2014 when CCL submitted its Answer; moved at any point to dismiss the Complaint by stipulation of the parties; or entered into a settlement agreement and moved to have the claim dismissed by an order of the ALJ. 46 C.F.R. § 502.72(a). Up until, February 24, 2015, the day after Complainant failed to reply to the ALJ's ordered briefing schedule of January 14, 2015, Complainant was not subject to having its Complaint involuntarily dismissed. *See* 46 C.F.R. § 502.72(b). We believe that deterring complainants from failing to prosecute their claims by awarding respondents attorney fees furthers the purposes of the Shipping Act. Proceedings that continue on because of non-responding parties like this one, waste the time and resources of both respondents and the Commission and potentially delay the resolution of other complaint proceedings. Therefore, we are granting in part IFS/Neutral and CCL's petitions for attorney fees in this case.

D. Attorney Fees for Work Performed After the Enactment of the Coble Act

In *Landgraf*, the Supreme Court stated that “[i]f there is no congressional directive on the temporal reach of statute, we determine whether the application of the statute to the conduct at issue would result in a retroactive effect. If so, then in keeping with our ‘traditional presumption’ against retroactivity, we presume that the statute does not apply to that conduct.” 511 U.S. at 280 (internal citations omitted). Furthermore, in *Martin v. Hadix*, 527 U.S. 343 (1999) the Court stated: “When determining whether a new statute operates retroactively, it is not enough to attach a label (e.g., ‘procedural,’ ‘collateral’) to the statute; we must ask whether the statute operates retroactively.” *Id.* at 359. As the Commission stated in its new Final Rule “there is no indication from either the language

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<sup>3</sup> *See Martin v. Hadix*, 527 U.S. 343, 360-361 (1999) (rejecting “the assumption that the attorney's initial decision to file a case on behalf of a client is an irrevocable one.”).

of the Coble Act or its legislative history to suggest Congressional intent to apply the statute retroactively.” 81 Fed. Reg. at 10,516.

In the Final Rule, the Commission stated:

Following the passage of the Coble Act . . . . complainants were on notice that any prevailing party, including a prevailing respondent, was eligible for attorney fees. After that date, any expectation of continued immunity from liability for such fees would be unreasonable. . . . [A]warding attorney fees for services performed by respondent’s counsel on or after December 18, 2014, would not, as a general matter, attach new legal consequences to conduct completed before enactment and would not present a retroactivity problem.

On or after December 18, 2014, complainants were on notice that they should consider the status of petitions and matters then proceeding before the Commission and then make reasoned decisions on how to proceed.

81 Fed. Reg. 10,517 (citations omitted).

Where a statute would not have a retroactive effect on a case, the general rule is that “a court should ‘apply the law in effect at the time it renders its decision.’” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273, 277 (1994) (quoting *Bradley*, 416 U.S. at 711 (citations omitted)). As the Coble Act was in effect at the time the ALJ rendered the Order Granting Petitions for Attorney Fees, and all parties were on notice as of December 18, 2014, of the implications of the Act, it was appropriate for the ALJ to apply the Act to the petitions for attorney fees for work performed on or after the effective date of the Act.

E. Attorney Fees for Work Performed Before the Enactment of the Coble Act

IFS/Neutral contends that fees should be awarded for services performed before the enactment of the Coble Act on December 18, 2014. IFS/Neutral states that even though the Commission indicated that in the majority of cases, awarding fees for work performed prior to December 18, 2014, would be an impermissible retroactive award of fees, because the Commission also stated that this would “not necessarily [be] binding in individual proceedings,” Edaf’s repeated disregard of the ALJ’s orders support an award of fees for work performed prior to the Coble Act’s effective date. IFS Supp. Br. at 3.

Specifically, IFS/Neutral addressed the three-part test in *Bradley*, which identifies whether an injustice would result from applying new law by addressing “(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights.” *Id.* at 4, *citing Bradley* at 717. IFS/Neutral argued that the parties are “on equal footing.” *Id.* Furthermore, citing *Landgraf*, 511 U.S. at 277, they contended that there has been no removal of Edaf’s rights, because attorney fees “are collateral to the main cause of action and uniquely separable from the cause of action to be proved at trial.” *Id.* With regard to the impact of the Coble Act upon Edaf’s rights, IFS/Neutral contended that no extra or unanticipated obligation was imposed by the Act. *Id.* at 6.

In *Martin*, the Court distinguished *Bradley*, discussed *supra*, (as did the Court in *Landgraf* on the same grounds) by explaining that, in *Martin*, to reduce attorney fees for work performed prior to the effective date of the statute limiting such fees would “upset the reasonable expectations of the parties,” while the facts in *Bradley* were such that attorney fees were already available before the passage of the applicable statute by other avenues, and, therefore, there “was no manifest injustice in allowing the fee statute to apply in that case.” *Martin*, 527 U.S. at 360. With regard to the application of the Coble Act, and the facts of this case, the principles of *Martin* would apply, not *Bradley*. When the Complaint was filed in this

matter, the Commission was without authority to make an award of attorney fees to a prevailing respondent. There were also no other avenues by which attorney fees could have been available to a prevailing complainant, and the Commission did not have the requisite authority until December 18, 2014. If the Coble Act amendments were therefore applied retroactively for services performed before December 18, 2014, “the reasonable expectations” of the parties would be upset. *Id.* In *Martin*, the Supreme Court also stated:

The inquiry into whether a statute operates retroactively demands a common sense, functional judgment about “whether the new provision attaches new legal consequences to events completed before its enactment.” This judgment should be informed and guided by “familiar considerations of fair notice, reasonable reliance, and settled expectations.” *Martin*, 527 U.S. at 357-58.

In the matter at hand, there was no reasonable expectation of attorney fees to be awarded a prevailing respondent prior to the enactment of the Coble Act, and “a common sense, functional judgment” would necessitate a finding that the Coble Act was being applied retroactively if fees were awarded for work performed before the effective date. Therefore, in keeping with the “traditional presumption” against retroactivity, as stated in *Landgraf*, the Commission does not have the authority in this matter to apply the Coble Act retroactively, and fees may not be awarded for services performed before the enactment of the Coble Act on December 18, 2014. Given the cases decided subsequent to *Bradley*, we do not agree with IFS/Neutral that *Bradley* provides the requisite authority to justify a retroactive award of attorney fees in this matter. IFS/Neutral also cited *Landgraf*, 511 U.S. at 277-78, for the proposition that retroactively allowing attorney fees, which “are collateral to the main cause of action,” is not impermissible. *Id.* Although the collateral nature of attorney fees is relevant to determining whether fees may be awarded for work performed after the enactment of the Coble Act in cases in which the complaint was filed prior to enactment, *see supra*, we do not agree that the collateral

nature of fees justifies awarding fees for work performed prior to the effective date of the Act. *See* 81 Fed. Reg. at 10,517. Therefore, we do not concur with IFS/Neutral's argument that they are entitled to fees related to work performed prior to enactment. Given that the claims against IFS were dismissed prior to December 18, 2014, we agree with the ALJ that the services performed after that date by IFS/Neutral's counsel were performed on behalf of Neutral alone.

F. Hours Expended and Fees Awarded

The Updated Laffey Matrix<sup>4</sup> has been relied upon by the Commission and courts to determine reasonable attorney fees, *Petra Pet, Inc. v. Panda Logistics LTD., Panda Co. Ltd.*, 33 S.R.R. 336 (FMC 2014), and has been upheld as a valid method to determine reasonable attorney fees in the District of Columbia. *See McDowell v. District of Columbia*, Civ. A. No. 00-594 (RCL), 2001 U.S. Dist. LEXIS 8114 (D.D.C. 2001).<sup>5</sup> As counsel for all Respondents are located in Washington, D.C., the Updated Laffey Matrix therefore provides a reasonable basis to establish a determination of attorney fees, and the Commission may rely on it to determine an appropriate fee. In support of the request, IFS/Neutral provided a Declaration of Todd P. Kenyon; the Updated Laffey Matrix (Exhibit 1), as well as billing statements (Exhibit 2, 3, and 4). IFS/Neutral's Exhibits 2, 3, and 4, and Mr. Kenyon's declaration show the following attorney work times and associated fees: Mr. Todd P. Kenyon spent a total of 37.3 hours of attorney work time, from December 18, 2014, through June 9, 2015 charging an average rate of \$250.00 per hour, with fees

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<sup>4</sup> *See Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985) (establishing a matrix to be used to determine an attorney's hourly rate based on his or her number of years of experience).

<sup>5</sup> "Plaintiffs may point to such evidence as an updated version of the Laffey matrix or the U.S. Attorney's Office matrix, or their own survey' to demonstrate the prevailing market rates in the community." *McDowell*, 2001 U.S. Dist. LEXIS 8114 at 8-9 (*citing Covington v. District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995)).

totaling \$9,325.00. See Declaration, Exhibits 2-4. Mr. Joshua S. Parks spent a total of 52.85 hours of attorney work time, from January 8, 2015, through June 9, 2015 charging an average rate of \$175.00 per hour, with fees totaling \$9,248.75. *Id.*

IFS/Neutral's counsel billed for attorney work time performed from December 18, 2014, through June 9, 2015, totaling \$18,573.75. The declaration submitted by Mr. Kenyon, as well as the billing statements, provide a sufficient basis for the Commission to determine the appropriate rates to be charged and to calculate the attorney fees award. *See Tienshan, Inc. v. Tianjin Hua Feng Transp. Agency Co., Ltd.*, 32 S.R.R. 52, 57-58 (ALJ 2011) (time records prepared contemporaneously and partners' affidavits have been accepted by the Commission to establish hours submitted); *see also Bernard & Weldcraft Welding Equip. v. Supertrans Int'l, Inc.*, 29 S.R.R. 1348, 1358 (ALJ 2003). After reviewing the attorney fees submitted, the length of experience of each attorney, and the Updated Laffey Matrix, the fees appear reasonable for Mr. Kenyon, and Mr. Parks. Accordingly, the Commission grants the petition with regard to the attorney fees sought in the amount of \$18,573.75 for Neutral.

In support of its request, CCL provided a Declaration of Eric Jeffrey (Exhibit A); the Updated Laffey Matrix (Exhibit B), as well as billing statements (Exhibit C). CCL's Exhibits and Mr. Jeffrey's declaration show the following attorney work times and associated fees: Mr. Jeffrey spent a total of 30.6 hours of attorney work time, from December 18, 2014, through June 15, 2015, charging an average rate of \$585.00 per hour, with fees totaling \$17,901.00. *See* Declaration, Exhibits B, C. Ms. Lindsey Nelson spent a total of 2.7 hours of attorney work time, from January 8, 2015, through January 30, 2015, charging an average rate of \$420.00 per hour, with fees totaling \$1,134.00. *Id.* Ms. Angela Buckner spent a total of 15.1 hours of attorney work time, from February 2, 2015, through June 15, 2015, charging an average rate of \$385.00 per hour, with fees totaling \$5,813.50. *Id.* In total, CCL's counsel billed for attorney work time performed from December 18, 2014, through June 15, 2015, in the amount of \$24,848.50.

The declaration submitted by Mr. Jeffrey, as well as the billing statements, provide a sufficient basis for the Commission to determine the appropriate rates to be charged and to calculate the attorney fees award. *See Tienshan*, 32 S.R.R. at 57-58; *see also Bernard*, 29 S.R.R. at 1358. After reviewing the attorney fees submitted, the length of experience of each attorney, and the Updated Laffey Matrix, the fees appear reasonable for Mr. Jeffrey.<sup>6</sup>

The fees requested for Ms. Nelson and Ms. Buckner, however, are not consistent with the Updated Laffey Matrix, which, as discussed above, the Commission has determined to be a reasonable basis to establish fees. The declaration submitted by Mr. Jeffrey shows that Ms. Nelson was an attorney for no more than 6 years at the time the work was performed. The Updated Laffey Matrix rate for an attorney four to seven years out of law school for the time period 6/01/14 through 5/31/15 is \$402 per hour. The declaration submitted by Mr. Jeffrey shows that Ms. Buckner was an attorney for less than 3 years at the time the work was performed. The Updated Laffey Matrix rate for an attorney one to three years out of law school for the time period 6/01/14 through 5/31/15 is \$328 per hour and for the time period 6/01/15 through 5/31/16 is \$331 per hour. In accordance with the Updated Laffey Matrix and Commission precedent in *Petra Pet*, Ms. Nelson's services should be compensated at \$402 per hour. Ms. Buckner's services should be compensated at \$328 per hour for the services performed until 6/01/15, and \$331 per hour for services performed thereafter. Accordingly, CCL should be awarded \$1,085.40 for Ms. Nelson's attorney fees and \$4,976.80 for Ms. Buckner's attorney fees.<sup>7</sup>

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<sup>6</sup>This does not include \$175.50 for work done on December 17, 2014, which was included in CCL's Supplemental Petition's Calculation of Fees, because it was incurred prior to December 18, 2014, the effective date of the Coble Act and the date from which CCL is requesting payment.

<sup>7</sup> This is a \$24 increase over the amount the ALJ awarded in the Order Granting Petitions for Attorney Fees. The ALJ did not account for the increased amount of \$331 per hour in the Updated Laffey Matrix for services performed during the time period 6/01/15 through 5/31/16 for an attorney one to three years out of law school.

In light of the hours worked, the Updated Laffey Matrix, and Commission precedent, the Commission grants the petition with regard to the attorney fees sought in the amount of \$23,963.20 for CCL.

### **III. CONCLUSION**

The ALJ's dismissal of all the Complainant's claims, with prejudice, constitutes a "material alteration of the legal relationship of the parties" and success on the merits for Respondents. 81 Fed. Reg. 10,512. Respondents IFS/Neutral, and CCL, therefore, prevailed against all of Complainant's claims. In light of the Complainant's actions, which resulted in dismissal, the Commission finds that the award of fees is consistent with the purposes of the Shipping Act and the factors laid out in *Fogerty*. Accordingly, the Commission finds that Respondents are entitled to an award of attorney fees.

In light of the guidance provided in the Final Rule regarding awards under § 41305(e), the Commission affirms in part the granting of attorney fees for work performed subsequent to the implementation of the Coble Act in the amount of \$23,963.20 for CCL and \$18,573.75 for Neutral. The Commission does not have the authority to apply the Coble Act retroactively, and does not concur with IFS/Neutral's argument that they are entitled to fees for services performed before the enactment of the Coble Act on December 18, 2014.

THEREFORE, IT IS ORDERED, That by September 29, 2016, Edaf pay CCL attorney fees in the amount of \$23,963.20.

IT IS FURTHER ORDERED, That by September 29, 2016, Edaf pay Neutral attorney fees in the amount of \$18,573.75.

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Thus the ALJ limited payment to \$328 per hour for the 8 hours of services performed in that time period. It is this difference that results in the Commission's determination to affirm the ALJ in part, rather than affirm completely.

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

By the Commission.

Rachel E. Dickon  
Assistant Secretary

Commissioner William P. Doyle, concurring, with whom Chairman Cordero and Commissioner Maffei join:

While I agree with the majority's framework for determining whether attorney fees should be awarded in a case, I write separately to more thoroughly address why the Claimant in this case is being penalized and to stress that awarding attorney fees to prevailing Complainants or Respondents should only occur in limited, fact-specific instances to avoid any chilling effect on parties filing meritorious claims in the future.

The Complainant in this case was represented in the proceedings through an officer of the company who holds himself out as an "attorney" and "esquire" in his filings. The Complainant was non-responsive to several attempts by Respondents to move the case along. And more disturbing, the Complainant ignored the Administrative Law Judge's (ALJ's) order to file papers and to show cause.

I. Entitlement to Attorney Fees

It is instructive to review past legal precedents with respect to awarding attorney fees. For instance, the "American Rule" states that, "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). Under that Supreme Court precedent, each party to a case is responsible for its own attorney fees unless a recognized exception is met or a statute specifically authorizes shifting the responsibility for paying attorney fees onto the opposing party. The Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281, §402, 128 Stat. 3022 (Dec. 18, 2014) is one such statute and provides that the Federal Maritime Commission "may, upon petition, award the prevailing party reasonable attorney fees." 46 C.F.R. § 502.254(a) (2016).

I also find instructive Supreme Court precedent with respect to sanctions: “a court may assess attorney’s fees as a sanction for the ‘willful disobedience of a court order.’” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991).

In following that statute, the majority’s decision determines whether attorney fees should be awarded by first analyzing whether a party is eligible (as a “prevailing party”) to receive an award for attorney fees and, if eligible, then asks whether that prevailing party is entitled to attorney fees.

When the Federal Maritime Commission issued its Final Rule implementing the Howard Coble Act, the Commission stated that, “primary consideration in determining entitlement to attorney fees is whether such an award is consistent with the purposes of the Shipping Act, and any factors the Commission relies upon in individual cases should be consistent with these purposes.” 81 Fed. Reg. 10508, 10509 (Mar. 1, 2016).

## II. Application

On April 28, 2014, Edaf Antillas, Inc. filed a Complaint against Crowley Caribbean Logistics, LLC, IFS International Forwarding, S.L., and IFS Neutral Maritime Services alleging several violations of sections 10(d)(1), 10(b)(3), and 10(b)(8) of the Shipping Act of 1984. Compl. At 7-9. Although a formal Notice of Appearance was not filed, the Complaint was signed by “Carlos E. Matos Malec, Esq.” as President of Edaf Antillas, Inc. *Id.* at 11. In addition to *distinguishing himself as an attorney* in his signature on the Complaint, Mr. Malec’s sworn and notarized affidavit characterized himself as “Carlos E. Matos Malec, *an attorney...*” *Id.* at 12. (*Emphasis added*).

Following the filing of the Complaint, Edaf Antillas (appearing throughout the case proceedings through Carlos Matos Malec) cooperated with the Respondents to establish a schedule for the discovery process to be completed January 8, 2015, and for parties to submit their Proposed Findings of Fact, Appendices, and

Brief to the ALJ by February 23, 2015 (for the Complainant) and by March 23, 2015 (for the Respondents). Aug. 14, 2014, Disc. Schedule at 2; Jan. 14, 2015, Br. Schedule at 1.

From May 2014 to October 2014, the Complainant and the Respondents proceeded with the case through the typical motions and discovery processes. Beginning in November 2014, however, the Complainant cited a “significant family matter” and began to miss deadlines and communicate poorly with the other parties. Third J. Status Rep. at 2. To accommodate that family matter, the Respondents agreed to Mr. Malec’s request for a one-week extension to respond to interrogatories and document requests. *Id.* Those were originally due November 6, 2014, and even after the extension Mr. Malec advised Respondents in a telephone conversation on November 20, 2014, that he needed additional time. *Id.* Ultimately, responses to interrogatories and discovery requests were delivered to Respondents on December 5, 2014. *Id.*

A January 30, 2015 Status Report from Respondent IFS Neutral further noted that a deposition of an Edaf Antillas accountant, Jugo Cosme, had not occurred as scheduled on January 14, 2015. Status Rep. IFS Neutral Mar. Serv. Inc. at 2. During Mr. Malec’s deposition on January 13, he advised Respondents that Mr. Cosme “was likely not available for his deposition on January 14.” *Id.* In follow-up emails, the Respondents advised that they were open to rescheduling and proposed alternate dates on January 15, 16, or 20. *Id.* On the morning of January 14, Mr. Malec advised by email that Mr. Cosme would not be available for the deposition. *Id.* The Respondents again replied by email with their proposed alternate dates, and when no response was received from Mr. Malec, they again emailed on January 16. *Id.* at 2-3. On January 19, Mr. Malec finally replied to express only that “he had no news on whether Mr. Cosme was available.” *Id.* at 3. The Respondent’s again followed-up by email on January 19 and continued to email on January 26 and 29 with proposed alternate dates. *Id.* On January 30, Mr. Malec again replied stating that Mr. Cosme remained unavailable. *Id.*

After the Complainant missed the February 23, 2014, deadline to file Proposed Findings of Fact, Appendices, and Brief, the Respondents quickly filed Motions to Dismiss for Failure to Prosecute. On March 2, 2015, the ALJ issued an Order for the Complainant to File Papers and to Show Cause, which gave the Complainant an extension until March 12, 2015, to respond.

When the Complainant failed to respond or communicate within the extended timeframe, the ALJ issued his Initial Decision Dismissing Proceeding for Failure to Prosecute on April 15, 2015. In that decision, the ALJ noted that the March 2<sup>nd</sup> Order “was sent to Edaf Antillas at its email address of record [carlos@forsapr.com] on that date.” Initial Decision at 4. The ALJ found that the Complainant had notice of that Order and the earlier February 23<sup>rd</sup> filing deadline because “between June 2, 2014 and January 15, 2015, using his company email address, Edaf Antillas’s representative [Mr. Malec] sent email to judges@fmc.gov at least nine times.” *Id.* Additionally, the ALJ noted that the Complainant had an obligation to keep the email address of record current and to notify the Federal Maritime Commission of any changes. *Id.* at 5. Based on those reasons, the ALJ found that the Complainant “received the order to show cause at its representative’s email address...failed to comply with the orders controlling this proceedings...” and therefore dismissed the case with prejudice for failure to prosecute. *Id.*

### III. Conclusion

A stated purpose of the Shipping Act of 1984 is to “provide an efficient and economic transportation system in the ocean commerce of the United States...” One means to achieve that purpose is through the Federal Maritime Commission’s many processes for resolving disputes between parties. An efficient and economic transportation system is one in which all parties adhere to agreed-upon responsibilities. When a party fails in those responsibilities and does not take adequate corrective actions, a case is often brought before the Commission. It is imperative to that

purpose, then, that parties are able to raise meritorious claims and seek resolution of disputes. If the Commission awards attorney fees too broadly, however, a chilling effect may become imbedded whereby parties are less likely to bring meritorious cases out of fear that an opposing party's legal fees could be imposed on them in the event their claim fails.

In keeping with the tradition of the "American Rule" and the need to avoid a chilling effect on meritorious cases, I will only support awarding attorney fees to the prevailing party in limited, fact-specific cases. The facts in this case demonstrate that the Complainant's representative, Mr. Malec, led the Respondents through nearly 12 months of legal proceedings before walking away from the case without any notice or communication.

As an attorney, Mr. Malec should have known that a this type of action is not acceptable in the U.S. legal system. Edaf Antillas' claims likely were meritorious, as demonstrated by the ALJ's decision not to dismiss all of the initial claims. Attorneys have a responsibility to act with reasonable diligence and promptness in representing a client, and in representing himself as both an officer of Edaf Antillas and as an attorney, that responsibility fell on Mr. Malec's shoulders. If the Complainant did not plan to fully prosecute its claims in a responsible and timely manner, then Complaint should have taken appropriate steps to properly dismiss the action.

Based on those facts, I concur with the majority's decision that the Respondents are entitled to attorney fees because of the bad faith conduct by Edaf Antillas and its representative, but I reiterate that I will only support awarding attorney fees in limited situations in the future.