

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No.:14-16

BALTIC AUTO SHIPPING, INC.,

Complainant,

– vs. –

**MICHAEL HITRINOV a/k/a
MICHAEL KHITRINOV,
EMPIRE UNITED LINES CO., INC.,
LYONS & FLOOD, LLP,
and JON WERNER, ESQ.**

Respondents.

SECOND AMENDED VERIFIED COMPLAINT

Complainant Baltic Auto Shipping, Inc. ("Complainant") by its undersigned attorney, Marcus A. Nussbaum, Esq., files this second amended complaint against the respondents herein, alleging violations of the Shipping act of 1984, 46 U.S.C. §40101, et. Seq. (the "Shipping Act") as follows:

I. Complainant

1. Complainant Baltic Auto Shipping, Inc. is a corporation organized and existing under the laws of Illinois with a principal place of business at 5811 W. 66th Street, Bedford Park, IL60638.

II. Respondents

2. Respondent Michael Hitrinov ("Hitrinov") is an adult individual and is a citizen of the State of New York who maintains a principal place of business at 2303 Coney Island Avenue,

Brooklyn, NY 11223.

3. Respondent Empire United Lines Co., Inc. (“EUL”) is a closely held corporation organized and existing under the laws of the State of New York with a principal place of business at 2303 Coney Island Avenue, Brooklyn, NY 11223. EUL also maintains a place of business at 52 Butler Street, in Elizabeth, New Jersey.

4. Respondent LYONS & FLOOD, LLP (“L&F”) is a limited liability partnership organized under the laws of the State of New York, with its primary place of business at One Exchange Plaza, 55 Broadway, Suite 1501, New York, NY 10006.

5. L&F is a law firm that practices maritime law in New York, New Jersey, Connecticut, and Massachusetts.

6. Respondent JON WERNER, ESQ., is an attorney authorized to practice law in the states of New York and New Jersey.

7. Mr. Werner is a partner of the law firm known as L&F.

8. At all times mentioned herein, L&F and Mr. Werner provided and continue to provide legal representation for respondents EUL and Hitrinov.

9. Respondent EUL is in the business of providing services as an ocean transportation intermediary, and operates as a non-vessel operating common carrier (“NVOCC”).

10. Respondent Hitrinov is the sole principal and officer of EUL.

11. The operation and supervision of EUL’s day-to-day activities are conducted by respondent Hitrinov.

12. At all times hereinafter mentioned, EUL is and was licensed by the Federal Maritime Commission as an ocean freight forwarder and/or a non-vessel operating common carrier (“NVOCC”) under license number 012052.

III. Jurisdiction

13. The Federal Maritime Commission (“FMC”) has subject matter jurisdiction over the claims in this action as this matter relates to contracts for carriage of goods by sea from ports of the United States in foreign trade and thus comes under the Carriage of Goods by Sea Act (“COGSA”), 46 U.S.C.S. § 30701, and the Shipping act of 1984, 46 U.S.C. §40101, et. Seq.

14. Complainant is seeking reparations for injuries caused to it by EUL and Hitrinov as a result of their violation of 46 U.S.C. §§ 41102, 41104, 40501 and the FMC’s regulations at 46 C.F.R. Part 515, by: (1) failing to observe regulations connected with receiving, handling, storing, and delivering of the Complainants property; (2) by resorting to unfair and unjust discriminatory methods because the Complainants have patronized another carrier; (3) by engaging in unfair and unjust discriminatory practice in the matter of rates and charges by charging rates not in accordance with EUL’s tariff on file with the Commission; (4) by engaging in unfair and unjust discriminatory practice in the matter of the loading and landing of freight and adjustment and settlement of claims; (5) by unreasonably refusing to deal or negotiate; and (6) by retaliating against the Complainant because it has filed a complaint with the Commission.

15. EUL is a non-vessel operating common carrier within the meaning of the Shipping Act.

IV. Statement of Facts and Matters Complained of

16. As set forth in detail below, the respondents have provided service in the liner trade that is not in accordance with rates, charges, classifications, rules, and practices contained in a tariff published with the Commission. The Respondent also engaged in an unfair and unjust discriminatory practice in the matter of rates or charges by charging the Complainant rates higher than that charged other shippers. Finally the Respondents failed to keep open to public inspection

in its tariff system tariffs showing all its rates charges classifications rules and practices between all points or ports on its own route and on any through transportation route that has been established.

17. From approximately November of 2007 through January of 2012, Complainants, via EUL, shipped containers with automobiles acquired by Complainants on behalf of foreign customers to ports abroad including, without limitation, the Port of the port of Kleipeda, Lithuania. Said containers contained in excess of 4000 used automobiles valued in excess of \$5,000,000.

18. Due to concerns about the rates it was being charged for transportation services provided by EUL, Complainant conducted an audit of the shipping related documents provided to Complainant by EUL for the period from 2007 through January of 2012. That audit revealed that EUL charged Complainant for shipments in excess of the amounts set forth in EUL's tariff. The amount Complainant was overcharged and the amount it overpaid for shipments was in excess of \$200,000.00 for that time period.

19. Upon information and belief, EUL did not have tariffs on file for various shipments handled by it on behalf of Complainant.

20. During the time period from November of 2007 through January of 2012, EUL billed Complainant in excess of \$200,000.00 for shipments for which it had no tariff on file.

21. Upon information and belief Complainant believes that EUL has overcharged it by billing amounts in excess of its lawful tariff from 2007 through January of 2012.

22. Complainant only learned that EUL was billing it for amounts in excess of its published tariff when it conducted an audit of the shipping related documents provided to Complainant by EUL for the period from 2007 through January of 2012. Complainant engaged in this analysis due to concern as to the rates it was being charged by EUL.

23. Prior to January of 2012 Complainant neither knew nor could have known that EUL was charging it for amounts in excess of EUL's published tariff.

24. EUL engaged in an unfair and unjustly discriminatory practice by charging Complainant rates greater than those it charged other shippers.

25. During the time period alleged herein, EUL accepted money from the Complainant for the shipment of various shipping containers, then subsequently refused to release these containers.

26. At all times alleged herein, EUL and Hitrinov failed to provide Complainant with proper and lawful documents of ownership (bills of lading), nor did they ever provide shipping invoices nor the terms and conditions of transport even though Complainant paid respondents. Respondents failed to deal in good faith, and provide proof of ownership with a correct original bill of lading and contract of transport in a timely manner to the Complainant.

27. On November 28, 2014, complainant filed the instant action before the Federal Maritime Commission ("FMC") in Washington, D.C., alleging that respondents EUL and Michael Hitrinov, had violated the Shipping Act of 1984.

28. Subsequent thereto, on December 8, 2014, complainant's counsel was contacted via email by Mr. Gerard Doyle, Esq., who is counsel for EUL and Hitrinov in the instant proceeding. In his email, Mr. Doyle claimed that a \$200,000.00 loan made to complainant by EUL in 2010 was unpaid. The documents annexed to that email contained a document entitled "Loan Agreement" allegedly describing defendants' agreement to accept a loan from plaintiff for one month at an interest rate of 1% per month.

29. Notably, the respondents' allegations regarding an unpaid loan had no relationship whatsoever with the proceeding ongoing before the FMC, and counsel was advised of that fact, by email on December 14, 2014.

30. The December 14, 2014 email also advised Mr. Doyle and Mr. Werner that the loan had been repaid in full, with interest.

31. On December 12, 2014, complainant's counsel was contacted by Mr. Jon Werner, Esq. who represented respondents in the 2011 District of New Jersey Action involving the parties herein that settled on or about November 29, 2011.

32. Strangely enough, Mr. Werner began making various inquires to complainant's counsel regarding the proceedings ongoing before the FMC.

33. On December 14, 2014, complainant's counsel responded to Mr. Werner's inquiry and respectfully explained to him that he had not formally appeared before the Federal Maritime Commission ("FMC") with respect to this matter, and that the undersigned was not at liberty to discuss the details of this proceeding with him.

34. On December 28, 2014, complainant's counsel advised Mr. Doyle to refrain from further including Mr. Werner in the parties' communications regarding the FMC matter, due to the fact that Mr. Werner had nothing to do with the FMC matter and had not formally made an appearance before the FMC on behalf of EUL and Hitrinov.

35. In that email of December 28, 2014, complainant's counsel also requested that Mr. Doyle refrain from copying Mr. Hitrinov on his communications to complainant's counsel, and also attached a second letter for Mr. Werner, that Mr. Doyle was free to forward to Mr. Werner if he chose to do so. In that letter, out of professional courtesy, complainant's counsel again requested

of Mr. Werner that going forward, he send all additional questions regarding this matter to the attorneys currently representing Empire and Mr. Hitrinov before the FMC.

36. On December 29, 2014, in retaliation for complainant having filed a complaint with the FMC, EUL and Hitrinov, by their counsel Mr. Werner, filed an emergency motion for an anti-suit injunction in the matter of *Baltic Auto Shipping, Inc. v. Hitrinov et al.* (U.S.D.C. – D.N.J. Docket No. 2:11-cv-06908-FSH-PS), seeking to restrain complainant from proceeding forward with their claims before the FMC. That motion was denied by the Court on January 16, 2015 in an Order by Hon. Faith S. Hochberg.

37. Prior to the denial of the motion for the anti-suit injunction, on January 5, 2015, Mr. Werner, in retaliation for complainant having started the FMC action, threatened the complainant and their counsel personally with sanctions under Federal Rule of Civil Procedure Rule 11 unless complainant and their counsel agreed to withdraw the claims before the FMC, specifically stating that: “We demand that you dismiss with prejudice your claims against Empire United Lines Co., Inc. and Michael Hitrinov before the Federal Maritime Commission within 21 days of the date of this letter..”.

38. On January 12, 2015, in blatant disregard of complainant’s request to exclude Mr. Werner from communications regarding proceedings between counsel in the FMC matter, Mr. Doyle once again emailed complainant’s counsel and copied Mr. Werner by email with a request for confirmation that the \$200,000.00 loan had been repaid.

39. In light of complainant’s counsel previously having advised Mr. Doyle: (1) to refrain from further including Mr. Werner in the parties’ communications regarding the FMC matter; and (2) that the loan had already been repaid, the complainant’s counsel ignored that request.

40. In addition, Mr. Doyle again ignored the undersigned's request to cease copying Mr. Hitrinov on his communications directly to the undersigned.

41. On January 20, 2015, in retaliation for complainant having filed a complaint with the FMC, EUL and Hitrinov, by their counsel Mr. Werner, filed a new action in the U.S. District Court for the District of New Jersey, captioned as *Empire United Lines Co., Inc. et al. v. Baltic Auto Shipping, Inc.* (U.S.D.C. – D.N.J. Docket No. 2:15-cv-00355-CCC-MF), along with a new motion for an anti-suit injunction. That motion was denied by Hon. Claire C. Cecchi on January 23, 2015.

42. The complaint in this new District of New Jersey matter alleges that complainant breached a settlement agreement containing a mutual release, and therefore waived its rights to bring an action against respondents before the FMC.

43. On January 22, 2015, EUL and Hitrinov once again filed a motion for a stay of the proceedings before the FMC, and that motion was denied by the Administrative Law Judge presiding over the FMC matter.

44. Once again, in retaliation for the complainant starting a proceeding before the FMC, on February 4, 2015, EUL and Hitrinov, by their counsel Mr. Werner, filed the second matter in the U.S. District Court for the Eastern District of New York (Captioned as *Empire United Lines Co., Inc. v. Presniakovas et al.* U.S.D.C. – E. D.N.Y., 1:15-cv-00557-DLI-RER), alleging that the complainant had failed to repay a loan in the amount of \$200,000.00.

45. In that Eastern District of New York matter, subsequent to complainant herein having filed its answer and counterclaim, in retaliation for complainant having started the FMC action, on or about March 19, 2015, Mr. Werner filed a frivolous motion to strike complainant's counterclaim and affirmative defenses.

46. That motion was filed by respondents and their counsel for the sole purpose of harassing, injuring, and annoying the complainant, and to cause complainant to incur legal fees.

47. In that motion, Mr. Werner incorrectly relied upon the adoption of a heightened pleading standard for affirmative defenses rather than the applicable standard of law in the Eastern District of New York.

48. On March 18, 2015, Mr. Werner, in retaliation for defendants having started the FMC action, again threatened complainant and its counsel with sanctions Federal Rule of Civil Procedure Rule 11 unless the complainant agreed to withdraw the claims before the FMC, specifically stating that: “We demand that you dismiss with prejudice your claims against Empire United Lines Co., Inc. and Michael Hitrinov before the Federal Maritime Commission within 21 days of the date of this letter, and withdraw the Answer filed with this Court on February 25, 2015. If you refuse to dismiss your claims against Empire United Lines Co., Inc. and Michael Hitrinov and withdraw the Answer, then we will be forced to file the attached Motion for Sanctions with the Court.”

49. On March 25, 2015 an initial conference was held before Magistrate Judge Reyes in the Eastern District of New York matter, during which the Court noted that it was interesting how the respondents could have failed to realize that a loan in the amount of \$200,000.00 had not been repaid since 2010. Interestingly enough, during the conference, Mr. Werner also made reference to the FMC matter, when the Eastern District of New York matter has no connection to the FMC matter.

50. Subsequent thereto, on April 16, 2015, Mr. Werner admitted that his client had indeed received a wire transfer in the amount of \$202,000.00 on December 9, 2010 with the

notation: “return of the loan”. Notably, respondents were advised of that fact on December 14, 2014.

51. On April 8, 2015, respondents, by their counsel Mr. Werner, in retaliation for defendants having started the FMC action, filed the motion against complainant and its counsel in the new District of New Jersey matter, in which respondents seek an order granting them sanctions under Federal Rule of Civil Procedure Rule 11.

52. That motion was filed by respondents and their counsel for the sole purpose of harassing, injuring, and annoying the complainant, and to cause complainant to incur legal fees.

53. In that motion, Mr. Werner’s legal arguments fail to meet the standard for warranting relief pursuant to FRCP Rule 11, as they are premised entirely on a factual dispute.

54. In that motion, Mr. Werner improperly attempts to use the motion as a discovery device and to test the legal sufficiency or efficacy of allegations in the pleadings.

55. In that motion, Mr. Werner incorrectly argued to the Court that the continuing violation doctrine is not applicable to causes of action for reparations under the Shipping Act, and that the doctrine is limited solely to the Commission’s own enforcement proceedings.

56. Mr. Werner’s legal arguments stand in stark and marked contrast to the FMC’s binding precedent in the matter of *Seatrain Gitmo, Inc. v. Puerto Rico Maritime Shipping Auth.*, 18 S.R.R. 1079 (ALJ 1979).

57. In that motion, Mr. Werner incorrectly argued to the Court that complainant’s claim for “storage/demurrage charges and lost contracts...have nothing to do with any of the claims asserted in the FMC matter..”

58. Mr. Werner’s arguments stand in stark and marked contrast to the allegations by complainant herein, in which complainant alleges that it is “seeking reparations for injuries caused

to it by EUL and Hitrinov as a result of their violation of 46 U.S.C. §§ 41102, 41104, 40501 and the FMC's regulations at 46 C.F.R. Part 515, by: (1) failing to observe regulations connected with receiving, handling, storing, and delivering of the Complainants property....” and that “During the time period alleged herein, EUL accepted money from the Complainant for the shipment of various shipping containers, then subsequently refused to release these containers.”

59. In that motion, Mr. Werner incorrectly argued to the Court that ““if there had been any breach of the settlement agreement by EUL, Baltic's recourse would have been to re-open the case in this Court to make an application for enforcement of the settlement agreement...”

60. Mr. Werner's legal arguments stand in stark and marked contrast to the well-established rule that the FMC has exclusive jurisdiction to adjudicate violations of the Shipping Act of 1984.

61. Subsequent thereto, on or about April 13, 2015, Magistrate Judge Falk, who is overseeing the case in the new District of New Jersey matter, held a telephonic conference, where he asked respondents' counsel why the motion for sanctions was filed prior to discovery having been conducted, and further noted that respondents' counsel did not follow proper procedure in doing so.

62. By virtue of the foregoing, Mr. Werner and his law firm have retaliated against the complainant for filing a complaint with the FMC.

63. Mr. Werner was advised orally and in writing numerous times that his acts were retaliatory, yet he persisted in his unlawful activity.

64. Mr. Werner's retaliatory acts include a coordinated campaign of filing frivolous motions, including two separate motions for a stay of the instant proceeding (both of which were filed in the District of New Jersey matters, all of which were denied), a frivolous motion to strike

complainant's answer and counterclaim in the Eastern District of New York matter, two separate threats of sanctions against the undersigned personally and complainant, and the actual filing of the motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure in the new District of New Jersey matter.

65. All of the foregoing motions were filed for the sole purpose of retaliating against the Complainant, to discourage the Complainant from proceeding forward in the instant matter, and to unnecessarily cause complainant to incur legal fees.

V. Violations of the Shipping Act

A. EUL violated 46 U.S.C. §§ 41104(2)(a), 41104(4)(a) and 41104(8) by charging Complainant rates greater than those it charged other shippers.

B. EUL violated 46 U.S.C. §§ 41104(2)(a), 41104(4)(a) and 41104(8) by charging Complainant rates greater than those reflected in its published tariff.

C. EUL violated 46 U.S.C. § 40501(a) by failing to keep open to public inspection in its tariff system tariffs showing all its rates charges classifications rules and practices between all points or ports on its own route and on any through transportation route that has been established.

D. EUL violated 46 U.S.C. §41102(c) by failing to provide Complainant with: (1) proper and lawful documents of ownership (bills of lading); (2) shipping invoices; and (3) the terms and conditions of transport even though Complainant paid respondents. Respondents failed to deal in good faith and provide proof of ownership with a correct original bill of lading and contract of transport in a timely manner to the Complainant.

E. All respondents have violated 46 U.S.C. §41104(3) by retaliating against the Complainant because the Complainant has filed a complaint with the Commission.

VII. Injury to Complainant

A. As a result of respondents' aforementioned violations of the Shipping Act of 1984, the complainant has sustained and continue to sustain injuries and damages in excess of \$400,000.00. The full extent of damages can only be determined after obtaining discovery in regard to the entire time period for which EUL has been overcharging Complainant and the dollar amount of such overcharges, and after final calculation of the legal fees incurred by complainant due to respondents' filing of frivolous legal actions and motions.

VIII. Prayer for Relief

- A. Statement regarding ADR procedures: Alternative dispute resolution procedures were not used prior to filing the Complaint and Complainant has not consulted with the Commission Dispute Resolution Specialist about utilizing alternative dispute resolution.
- B. **WHEREFORE**, Complainant prays that respondents be required to answer the charges herein; that after due hearing, an order be made commanding said respondent to pay to Complainant by way of reparations for the unlawful conduct hereinabove described the sums described herein, with interest and attorney's fees or such other sum as the Commission may determine to be proper as an award of reparation; and that such other and further order or orders be made as the Commission determines to be proper in the premises.
- C. Complainant requests a hearing on this matter, and further requests that the hearing be held in Washington, D.C.



Marcus A. Nussbaum, Esq.
P.O. Box 245599
Brooklyn, NY 11224
Tel: 888-426-4370
Fax: 347-572-0439
Attorney for Complainant
marcus.nussbaum@gmail.com

Dated: April 27, 2015

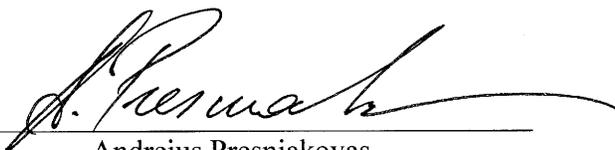
VERIFICATION

STATE OF ILLINOIS)
)ss:
COUNTY OF COOK)

Andrejus Presniakovas, being duly sworn, says:

I am the president of the corporate Complainant in the action herein: I have read the annexed SECOND AMENDED COMPLAINT and know the contents thereof, and the same are true to my knowledge, except those matters therein which are stated to be alleged upon information and belief, and as to those matters I believe them to be true. My belief as to those matters therein not stated upon knowledge, is based upon facts, records, and other pertinent information contained in my personal files.

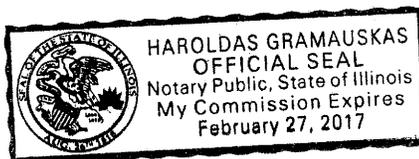
DATED: Bedford Park, Illinois
 April 27, 2015



Andrejus Presniakovas

Sworn to before me this

27 day of April, 2015





Notary Public