

**BEFORE THE
FEDERAL MARITIME COMMISSION**

DOCKET NO. 15-04

CROCUS INVESTMENTS, LLC AND CROCUS, FZE

(Complainants)

v.

**MARINE TRANSPORT LOGISTICS, INC. AND
ALEKSANDR SOLOVYEV a/k/a ROYAL FINANCE GROUP INC.**

(Respondents)

RESPONDENTS' PRE-HEARING BRIEF

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BACKGROUND

A. The Parties

This case is, ultimately, a commercial dispute with no Shipping Act implications. It is a case involving Complainants' buyer's remorse in buying three used boats which could not be re-sold and Complainants' poor investment into a failing business enterprise overseas in Jebel Ali. To put the facts into proper perspective, on or about April 2013, Alexander Safonov ("Safonov"), the owner of Complainants Crocus FZE and Crocus Investments, LLC, invested \$500,000 and co-founded a third company named Middle East Asia Alfa, FZC ("Middle East"), with Oleg Bortsov, in Jebel Ali. (*See* Dep. Tr. of Safonov, at 16:10-13; 25:1-22). As relevant to the facts in this case, Middle East employed an associate named Andrey Tretyakov ("Tretyakov"). (*See* Dep. Tr. of Safonov, at 18:21-23). Middle East was a company formed to purchase used motorboats in the U.S., and ship them overseas for repair and sale in Jebel Ali. (*See* Dep. Tr. of Safonov, at 17: 7-8).¹

In April 2013, Complainants began doing business with Respondent Aleksandr Solovyev ("Solovyev").² Solovyev's company, Car Express, was a licensed wholesaler auto/boat dealer. Car Express also acted, when applicable, as an agent for MTL and would recommend to its customers who were looking for export services to use MTL. As relevant to this case, Car Express assisted Complainants in purchasing three used motorboats from U.S. auction sites and

¹ Respondents had no involvement in the formation or operation of Middle East.

² Solovyev is the sole owner, officer, and director of three companies: (1) Car Express & Import, Inc. ("Car Express"), a company with a wholesaler auto/boat leader license; (2) Royal Finance Group, Inc. ("RFG"), a company advancing payments on behalf of its customers for the purchase of used vehicles/boats at auction and for payment of transportation charges; and (3) World Express & Connection, Inc. ("World Express"), a warehouse company providing loading and storage services for vehicles, boats, and other cargo, including for ocean movement from U.S. to non-U.S. ports.

arranging for the inland delivery of the motorboats to the Port of New Jersey for intended export. As an agent for MTL, Car Express would also obtain loading and ocean freight estimates from MTL and Car Express introduced Middle East (Tretyakov) to MTL in order for Tretyakov to contact MTL directly for booking shipments. [In the case in chief, once the boats were ready for shipment, Tretyakov, of Middle East, communicated directly with Marine Transport Logistics, Inc. (“MTL”) to book the shipments. (*See* Dep. Tr. of Alla Solovyeva, at 46:16 – 47:6; Dep. Tr. of Aleksandr Solovyev (“Solovyev”), at 48:20 – 49:4).]

Solovyev’s company, Royal Finance Group, Inc.’s (“RFG”) involvement in the case in chief was to advance payments, on behalf of Complainants, to parties in the U.S. In this regard, because Complainants were located overseas in Jebel Ali, RFG made the initial payment(s) to the U.S. auction sites to avoid late-payment penalties. (*See* Dep. Tr. of Solovyev, at 45:17 – 46:14). RFG also advanced payments to the inland trucker(s) for delivery to the warehouse, paid for warehouse charges, and paid the ocean freight to MTL (when requested to do so by the shipper) and, in turn, RFG invoiced Complainants with a single “lump sum” due, plus a small commission to RFG, for Complainants to make a single “lump sum” wire transfer payment to RFG.

The last of Solovyev’s companies, World Express, is a warehouse providing loading and storage services. World Express is located in the same lot as MTL; a lot which is shared by several other companies. World Express provides loading and storage services for MTL, but it is an arms-length commercial relationship, and World Express also provides loading and storage services for other customers. (*See* Dep. Tr. of Alla Solovyeva, at 15:9-16). To elaborate, because MTL does not have its own loading facilities, when a shipper books a shipment with MTL, MTL will direct the shipper to deliver, at the shipper’s own expense, the shipper’s cargo to

the World Express warehouse for loading and World Express will, in turn, invoice MTL for World Express' services, which MTL will invoice to its customer in accordance with MTL's tariff dealing with warehousing of U.S. export shipments. (*See* Appendix CX 178, Dep. Tr. of Alla Solovyeva, at 33:22 – 35:4, 36:15 – 37:25). [In the case in chief, two of the boats were booked for U.S. export shipment with MTL and were loaded onboard the vessel before the expiration of the 30 calendar days "free storage" set out in MTL's tariff and accordingly, no warehouse storage charges were issued (*See* Appendix CX 178).]

B. Complainants' purchase of the 2008 Chaparral Boat and 2011 Monterey Boat in May 2013 and shipping from U.S. to Jebel Ali through MTL.

On or about April 2013, on Complainants' instructions, Car Express purchased a 2008 Chaparral Boat and 2011 Monterey Boat from Co-Part, a U.S. auction site. The purchase price of the 2008 Chaparral Boat was \$10,505 and the purchase price of the 2011 Monterey Boat was \$9,855. Car Express also arranged for the inland delivery of the two boats to World Express in New Jersey and obtained ocean freight quotes for the shipping of the two boats to Dubai. RFG, in turn, paid the initial purchase payment to Co-Part, and sent Complainants two "lump sum" invoices (i.e., one for each boat) in the amounts of \$15,455 and \$14,855. (*See* Appendix CX 007 and CX 011). The two boats were delivered, by inland trucking, to World Express, in New Jersey. Tretyakov, the associate at Middle East, booked the shipment of the two boats with MTL and gave MTL shipping instructions, including listing Tretyakov as the shipper and Middle East as the consignee on the MTL NVOCC bills of lading. (*See* Appendix CX 007 and RX 05). On May 5, 2013, the 2011 Monterey Boat was loaded onboard the MAERSK WYOMING and on May 22, 2013, the 2008 Chaparral Boat was loaded onboard the SEA LAND MERCURY (each in a container containing one other boat). (*See* Appendix RX 01-02). MTL issued its bill of

lading No. EO-20756 for the 2008 Chaparral Boat (*See* Appendix RX 04) and its bill of lading No. HBOL13535 for the 2011 Monterey Boat (*See* Appendix CX 006). The 2008 Chaparral Boat and 2011 Monterey Boat arrived in Dubai and were received by Safonov, without any issues. (*See* Dep. Tr. of Safonov, at 50:21-23).

C. Complainants' purchase of the 2010 Formula Boat in August 2013.

On or about August 2013, on Complainants' instructions, Car Express purchased a 2010 Formula Boat from Co-Part. The purchase price of the 2010 Formula Boat was \$56,280. As with the other boats, Car Express arranged for the inland delivery of the 2010 Formula Boat to World Express in New Jersey and obtained ocean freight quotes for the shipping to Dubai. RFG, in turn, paid the initial purchase payment to Co-Part, and sent Complainants a "lump sum" invoice in the amounts of \$59,780 covering the purchase price and delivery. (*See* Appendix CX 009). However, because of the large size of the 2010 Formula Boat, a trailer needed to be procured (for the 2010 Formula Boat to be loaded upon) for shipment on-deck aboard a ship. Solovyev located a trailer in November 2013, but it was rejected by Complainants. (*See* Dep. Tr. of Safonov, at 64:16-19 ("Initially, [Solovyev] offered some trailer that he found in November, but I didn't like that trailer.")) A second trailer that Complainants felt was "suitable" was eventually located by Solovyev in December 2013 and paid for by Complainants. (*See* Dep. Tr. of Safonov, at 64:20-24). However, due to the failure of Middle East's business in selling used boats in Dubai (discussed below), Complainants paid only the invoice for the purchase and delivery (to New Jersey) of the 2010 Formula Boat in the amount of \$59,780, and decided not to book the shipment of the 2010 Formula Boat with MTL for shipping to Dubai (to Middle East). (*See* Appendix CX 031).

D. The failure of Middle East's commercial operations.

It was around this time (i.e., December 2013) that Complainants, allegedly, began having difficulties with Middle East. Middle East had been an apparent commercial disaster, generating no profits in 2013 or 2014 and losing money. (*See* Dep. Tr. of Safonov, at 43:1-5). The company had managed to sell just seven boats, but the sales did not cover the company's expenses. (*See* Dep. Tr. of Safonov, at 43:6-11). A boat exhibition in Dubai was planned in March 2014, and Middle East presented its inventory for sale but the 2008 Chaparral Boat and 2011 Monterey Boat could not be sold. (*See* Dep. Tr. of Safonov, at 52:4-9). Complainants, further, began suspecting their employee at Middle East, Tretyakov, of stealing from Middle East. [Complainants allege that a lawsuit was later filed by Complainants against Tretyakov in Dubai. (*See* Dep. Tr. of Safonov, at 74:24 – 75:2)].

E. The May 2014 shipment of the 2008 Chaparral Boat and 2011 Monterey Boat from Jebel Ali to the U.S.

Presumably because of the commercial failure of Middle East's business and because a buyer could not be located in Dubai, on May 30, 2014, the 2008 Chaparral Boat and 2011 Monterey Boat were unexpectedly shipped by Middle East from Jebel Ali to New Jersey, under APL bill of lading No. APL B/L No. APLU020188407. (*See* Appendix RX 05). Solovyev and MTL were not involved in booking this shipment. Middle East, unilaterally and without MTL's consent, listed MTL as a consignee to the APL bill of lading. Upon arrival of the container in New Jersey on or about July 2014, MTL was notified by APL and MTL duly paid the port fee, customs clearance charges, and documentation charges. MTL, in turn, notified Solovyev, who had been MTL's agent on the initial May 2013 ocean shipment of the 2008 Chaparral Boat and

2011 Monterey Boat to Jebel Ali, and World Express reimbursed MTL for the port fee, customs clearances charges, and documentation charges, and retrieved the 2008 Chaparral Boat and 2011 Monterey Boat for storage at World Express to await instructions from Middle East.

F. The Dispute over Outstanding Storage

On or about August 3, 2014, Complainants allegedly sent an (undated) letter to Solovyev, stating that Complainants wanted to “make transportation” of the 2010 Formula Boat. (*See* Appendix CX 117). On August 13, 2014, Solovyev sent to Complainants RFG Invoices No. 70C010 in the amount of \$39,409.39 for the 369 days of storage for the 2010 Formula Boat and RFG Invoice No. 6642134 for \$5,500.00 for the port fee, custom clearance, delivery and unloading, and 32 days of storage, for the 2008 Chaparral Boat and 2011 Monterey Boat. The RFG Invoices had their genesis in invoices which had been sent, inadvertently, by World Express to MTL. (*See* Appendix CX 261-264). Complainants refused to pay the outstanding storage and customs charges.

DISCUSSION

I. COMPLAINANTS' CLAIMS DO NOT SUCCESSFULLY ALLEGE VIOLATIONS OF THE SHIPPING ACT

The Federal Maritime Commission's jurisdiction is limited to claims involving alleged violations of the Shipping Act. *See, e.g., Anchor Shipping Co. v. Alianca Navegacao Logistica Ltda.*, 30 S.R.R. 991 (FMC 2006). The Commission's jurisdiction turns on, essentially, whether a claim constitutes a breach of contract claim or whether it involves elements peculiar to the Shipping Act. *Id.* at 998. Thus, as a general matter, "allegations essentially comprising contract law claims should be dismissed unless the party alleging the violations successfully rebuts the presumption that the claim is not more than simply a breach of contract claim." *Id.* quoting *Cargo One, Inc. v. COSCO Container Lines*, 28 S.R.R. 1635, 1645 (2000). In the case at chief, Complainants' allegations of Shipping Act violations are thin, at best, and do not rebut the presumption of dismissal of "simple" breach of contract or tort claims. In particular, Complainants' Shipping Act claims against MTL arise from a shipment (from Dubai to the U.S. carried by APL) on which MTL was not a common carrier, and from a 2010 Formula Boat which was never tendered for export shipment to MTL.

II. RESPONDENT SOLOVYEV WAS AN AGENT FOR MTL, AND NOT AN UNLICENSED OCEAN FREIGHT FORWARDER

A. Car Express was an agent for MTL, a NVOCC, and is not required to be licensed by the Federal Maritime Commission.

Complainants begin with the claim that Solovyev was acting as an "unlicensed freight forwarder" in violation of 46 U.S.C. § 40901(a). However, Solovyev, through Car Express, in his role obtaining freight rate quotes from MTL and in assisting with the shipping arrangements, acted at all relevant times, as an agent of MTL. This is acknowledged by Complainants in their Proposed Findings of Fact. (*See* Complainants' Proposed Finding of Fact no. 13 ("MTL

permitted [Solovyev] to act on its behalf and hold himself out as its agent.”)) Solovyev is also clear, in his correspondence, in identifying Car Express as an agent of MTL. (See Appendix CX 103). In this regard, Complainants also acknowledge not only that Solovyev was an agent of MTL’s, but that MTL would be the NVOCC providing the ocean transportation. (See Complainants’ Pre-Hearing Brief at p. 3 (“ . . . Complainants understood that Marine Transport Logistics, Inc. was the NVOCC that was responsible for shipping their boats . . .”)) Although the Shipping Act imposes licensing responsibilities on NVOCCs and Ocean Freight Forwarders, there is no licensing requirement for *agents* providing NVOCC services for licensed NVOCC principals. *Landstar Express Am., Inc. v. FMC*, 569 F.3d 493, 500 (D.C. Cir. 2009). In any event, Complainants also have not shown with reasonable certainty that the violation of law is the proximate cause of the loss or injury. *Rose Int’l, Inc. v. Overseas Moving Network Int’l. Ltd.*, 29 S.R.R. 119, 187 (FMC 2001). There has not been any argument advanced by Complainants to suggest that the licensure, or the alleged lack thereof, of Solovyev as an ocean freight forwarder, caused or even contributed to Complainants’ damages.

B. At most, Solovyev acted as a freight broker, not a freight forwarder.

Notwithstanding Solovyev’s acknowledged role as an agent for MTL, the facts would suggest that, at most, Solovyev acted as a freight broker, not a freight forwarder. An “ocean freight broker is an entity which is engaged by a carrier to secure cargo for such carrier and/or to sell or offer for sale ocean transportation services and which holds itself out to the public as one who negotiates between shipper or consignee and carrier for the purchase, sale, conditions and terms of transportation.” 46 C.F.R. 515.2(n). This is an exact match for Complainants’ allegation that “Solovyev provided services in arranging the shipment of certain goods

internationally” in light of the fact that Complainants knew that MTL, as the NVOCC, was the actual carrier, and Complainants claim that Solovyev “set up all the shipping arrangements” and “in, essence, Solovyev was the middleman between Complainants and Marine Transport Logistics, Inc.” ((See Complainants’ Pre-Hearing Brief at p. 6-7).

On the other hand, these allegations of merely being a “middleman” do not fit nearly as well with the criteria for being an ocean freight forwarder providing freight forwarding services. An ocean freight forwarder “dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers, and processes the documentation or performs related activities incident to those shipments. 46 C.F.R. 515.2(o)(1).³ Examples of freight forwarding service set out by the Commission, which were not performed by Solovyev in connection with the export shipments, include booking cargo space, preparing or processing export declarations and documents and bills of lading, arranging for warehouse storage, preparing certification documents, arranging for insurance, clearing shipments with customs, sending notifications to banks, or giving export advice to exporters. 46 C.F.R. 515.2(i)(2-10),(13). At most, the facts show that Solovyev “ordered the cargo to port” and coordinated their arrival to the port, in that Car Express purchased the 2008 Chaparral Boat and 2011 Monterey Boat and arranged for their delivery; and that RFG handled freight or other monies. 46 C.F.R. 515.2(1),(11-12). Simply doing three of the “freight forwarding services” does not make Solovyev a freight forwarder, in particular since he was not an agent dispatching

³Because only the 2008 Chaparral Boat and 2011 Monterey Boat were shipped from the U.S. (in May 2013), Respondents address the claim that Solovyev was a “freight forwarder” primarily on the May 2013 “shipment from the United States” of the two boats. See 46 C.F.R. 515.2(o)(1). It is clear how that Solovyev cannot be a freight forwarder on the May 2014 Dubai to U.S. shipment of the 2008 Chaparral Boat and 2011 Monterey Boat, or for the 2010 Formula Boat which was never booked for shipment by Complainants.

shipments on behalf of Complainants, but only a “middleman” on behalf of a known principal, MTL.

C. Solovyev’s actions did not cause Complainants’ damages.

Notwithstanding that Solovyev was not required to be licensed in order to be MTL’s agent or as an ocean freight broker, the facts do not show that Solovyev’s licensure or actions caused the damages complained of. This is a recurring theme running throughout Complainants’ claims, as Complainants allege a violation of the Shipping Act without proving, with reasonable certainty, that the alleged violation caused Complainants’ damages. In this regard, Complainants’ claims are largely premised on the non-shipment of the 2010 Formula Boat and Complainants’ factually inaccurate allegation that Solovyev, “delayed the shipment of the [2010 Formula Boat] for six months” (*See* Complainants’ Pre-Hearing Brief at p. 7). This fact is contradicted by Complainants’ own testimony and otherwise unsupported by documents in the record, and without this “fact,” many, if not all, of Complainants’ allegations fall apart.

Complainants’ own testimony is clear that from August 2013 through December 2013, the reason that Complainants did not book the 2010 Formula Boat for shipment to Jebel Ali was because the parties needed to first locate and purchase a trailer for use in shipment. (*See* Dep. Tr. of Safonov, at 63:22 – 64:6). In this regard, a trailer was located by Solovyev in November 2013, but it was *rejected* by Complainants. (*See* Dep. Tr. of Safonov, at 64:16-19 (“Initially, [Solovyev] offered some trailer that he found in November, but I didn’t like that trailer.”)) A second trailer that Complainants felt was “suitable” was eventually located by Solovyev in December 2013 and paid for by Complainants. (*See* Dep. Tr. of Safonov, at 64:20-24). This

search for a trailer, in which Complainants were a full participant, accounts for non-booking of the 2010 Formula Boat from August 2013 to December 2013.

Even after December 2013, Complainants still did not book the shipment of, or pay for shipping of, the 2010 Formula Boat. Complainants' testimonial explanation for this decision is that, Complainant "noticed" that Tretyakov had "started to become a crook" and Complainant "decided [he didn't] want to deal with the crooks." (*See* Dep. Tr. of Safonov, at 64:25 – 65:8). In other words, it was because of a dispute between Complainant and one of Complainants' employees at Middle East, Tretyakov, which Complainant, on his own, elected not to book the 2010 Formula Boat for shipment to Jebel Ali and did not give any instructions for shipping the 2010 Formula Boat.

Complainants then testified that from December 2013 to February 2014, he (Safonov) and Solovyev "agreed and said that we will deal with it after new year." *See* Dep. Tr. of Safonov, at 65:13-17. Again, it is clear from Complainants' own testimony that shows Solovyev did not "fail" to ship the 2010 Formula at this time. The 2010 Formula Boat was not shipped from August 2013 to February 2014 because Complainants decided not to ship it.

Complainants further allege that Solovyev "[charged] additional money for the trailer which Complainants had already purchased." This claim has not been substantiated by Complainants, and no proof of wire transfers or payments have been submitted. However, it is believed that the charges that Complainants are referring to are for a separate trailer used in the shipment of a separate boat by MTL.⁴

⁴ Moreover, even if this claim of double-charging can be proven by Complainants, it does not follow that an inadvertent double-charging is a breach of fiduciary duty or a violation of the Shipping Act under § 41102(c), nor does it follow that this alleged double-charging is the proximate cause of Complainants' damages. At most, if proven by a preponderance of the evidence, Complainants would have a non-Shipping Act claim for the erroneous double-charging of either \$5,000 or \$4,950.

Finally, Complainants allege that in February 2014, he (Safonov) sent Solovyev an email instructing Solovyev to ship the 2010 Formula Boat to Miami. (*See* Dep. Tr. of Safonov, at 65:9-13) Solovyev has no recollection of this email, and this email has never been produced by Complainants.⁵ This allegation is, in any event, on shaky footing as Complainants' testimony is only that "maybe [he] tried – attempted to contact [Solovyev] over the phone or Skype. I just don't remember exactly." (*See* Dep. Tr. of Safonov, at 67:10-15). Complainants then testify that in June 2014, he spoke on the phone with Solovyev, and they said that they "will meet" when the 2008 Chaparral Boat and 2011 Monterey Boat arrive in the U.S. (*See* Dep. Tr. of Safonov, at 68:5-7). This clear timeline accounts for the non-shipment of the 2010 Formula Boat from its purchase date (August 2013) through to June 2014. It is clear that any allegation of "unresponsiveness" cannot be supported by a preponderance of the evidence, especially when the communications that Solovyev is alleged to be unresponsive to have not been produced. Moreover, the facts are clear that Complainants did not want to ship the 2010 Formula Boat to Dubai at any point during August 2013 to June 2013; so it is not known what Solovyev is alleged to be "unresponsive" to.

Complainants next allege that Solovyev violated 46 U.S.C. § 41102(c) by "issuing an invoice on behalf of Marine Transport Logistics, Inc. which did not comport to Marine Transport Logistics, Inc.'s posted tariffs and was not justified due to Solovyev's own delays in shipping the boat." (*See* Complainants' Pre-Hearing Brief at p. 7). Complainants' claim that the delay in

⁵ Moreover, it cannot be lost that the in the May 27, 2015 Complaint filed with the Commission in this case, Complainants subscribed and signed to under oath, by Safonov, that in February 2014, "Complainants contacted MTL, and requested that MTL reroute the shipment of *all three boats* to Florida, USA." (Complaint at ¶ 20 (emphasis added)). Of course, the allegation in the Complaint cannot be true, as sworn to, because in February 2014, two of the three boats had already been shipped to Jebel Ali (in May 2013). But, this untrue allegation raises a real question, in Respondents' mind, on whether any email was, in fact, sent by Complainants in February 2014 and what the contents of the email actually stated; particularly because such email has not been produced

shipping was “due to Solovyev” is factually incorrect, as discussed already, and does not need to be re-argued. The invoices for storage, moreover, were not issued by Solovyev on behalf of MTL, but on behalf of World Express. (See Appendix CX 261-264). World Express is an independent warehouse, and is separate and distinct from MTL’s NVOCC activity, the latter which is covered by the Shipping Act. In particular, the World Express storage invoices at issue for storage of the 2010 Formula Boat are not related to MTL’s NVOCC activities; the 2010 Formula Boat was never booked for shipment with MTL and MTL never issued a bill of lading for the 2010 Formula Boat. It was delivered to World Express and left there while Complainants were deciding what to do with it before, eventually after 369 days, Complainants decided to ship the 2010 Formula Boat to Florida. Accordingly, the continuous storage at World Express is not subject to MTL’s stated tariff for “boats received for US export shipment.” (See Appendix CX 178). Similarly, the storage invoices for the 2008 Chaparral Boat and 2011 Monterey Boat at World Express were also separate from MTL’s NVOCC activities. In this regard, although MTL, as the consignee on the APL bill of lading, paid for the customs clearance of the two boats, it was not done in connection with MTL’s NVOCC activities or a US export shipment. Accordingly, the storage of the 2008 Chaparral Boat and 2011 Monterey Boat at World Express are also not subject to MTL’s tariff.

The facts show that Solovyev, through Car Express, was an agent for MTL, and was not required to be licensed. If anything, the facts stated above and in the record reflect that Solovyev acted as an ocean freight broker on the May 2013 shipment of the 2008 Chaparral Boat and 2011 Monterey Boat to Dubai, and acted only as a warehouse, through World Express, on the continuous storage of the 2010 Formula Boat and on the July 2014-August 2014 storage of the 2008 Chaparral Boat and 2011 Monterey Boat in New Jersey.

II. COMPLAINANTS' HAVE FAILED TO PROVE A SHIPPING ACT VIOLATION BY MARINE TRANSPORT LOGISTICS, INC.

A. Principles of agency law does not have any relevancy to the regulatory nature of the Shipping Act.

Complainants argue that MTL “assisted Solovyev” and is, therefore, subject to liability as a common carrier under the Shipping Act liability. At the outset. Complainants begin by quoting a rule from the Restatement (Third) of Agency, § 5.04, in part, as follows: “A third party who deals with a principal through an agent, knowing or having reason to know that the agent acts adversely to the principal, does not deal in good faith for this purpose.” (See Complainants’ Brief at pp. 7-8). However, the Shipping Act is of a regulatory nature and it is not at all clear how agency law, as alleged by Complainants, is implicated. Moreover, Restatement (Third) of Agency, § 5.04. addresses the legal issues of (1) whether notice is imputed to the principle; and (2) whether the principal can be liable to a third-party if the agent is acting adversely to the principal’s interest, does not have any applicability here. See Comments to § 5.04 (“The doctrine stated in this section is an exception to the general rule, stated in § 5.03, that notice is imputed to a principal of a fact that an agent knows or has reason to know if knowledge of the fact is material to the agent's duties to the principal and to the principal's legal relations with third parties.”) It is acknowledged by all parties that Solovyev, was acting as MTL’s agent. MTL was the “principal” with Solovyev acting as MTL’s “agent”, and Complainants are the “third party”. Applying § 5.04 to the facts of this case would lead to the conclusion that if Solovyev is acting adverse to MTL’s interests, as is seemingly alleged by Complainants, and Complainants were aware of it, then *Complainants* were not dealing in good faith and MTL cannot be charged with knowledge or liability for Solovyev’s actions. This application of agency law does not support Complainants’ claim for liability against MTL.

B. MTL was not a common carrier for the 2010 Formula Boat or the May 2014 shipment of the 2008 Chaparral Boat and 2011 Monterey Boat.

Complainants next argue that MTL violated the Shipping Act because as a NVOCC under 46 U.S.C. § 40102(6)(A), MTL “assumes responsibility for transportation of a shipment.” (*See* Complainants’ Pre-Hearing Brief at p. 8). 46 U.S.C. § 40102(6)(A) provides, in relevant part, that a common carrier “assumes responsibility for the transportation from the port or point of receipt to the port or point of destination.” 46 U.S.C. § 40102(6)(A)(ii). Aside from merely quoting the statutory definition of a “common carrier”, however, Complainants do not specify which shipments MTL allegedly failed to “assume responsibility for the transportation” of under 46 U.S.C. § 40102(6)(A)(ii).

But, it is undisputed that MTL only issued two bills of lading for the two shipments which were actually booked with MTL by Complainants (and paid for by Complainants): (1) the May 5, 2013 shipment of the 2011 Monterey Boat under MTL B/L No. HBOL13535 [booked by MTL as a shipper with Maersk for ocean transportation under Maersk B/L No. 560010878] and the (2) May 22, 2013 shipment of the 2008 Chaparral Boat under MTL B/L No. EO-20756 [booked by MTL as a shipper with Maersk for ocean transportation under Maersk B/L No. 56008346], both from New Jersey to Jebel Ali, and both performed without incident. (*See* Complainants Proposed Findings of Fact No. 16.) These two shipments are the only shipments on which MTL acted as a NVOCC and issued bills of lading. However, there are no facts to show that MTL failed to “assume responsibility” for these two shipments nor are there any damages claimed arising from these two shipments.

On May 30, 2014, Middle East unexpectedly shipped the 2008 Chaparral Boat and 2011 Monterey Boat from Jebel Ali to New Jersey, under an APL B/L No. APLU020188407, dated

May 30, 2014. (*See* Appendix RX 05). Unknown to MTL at the time, but MTL was listed by Middle East as the consignee on the APL B/L. However, despite being listed as a consignee, it is clear that MTL was not acting as a common carrier for this move. MTL, as the consignee, did not “assume responsibility for the transportation from the port or point of receipt to the port or point of destination.” Thus, there cannot be a violation by MTL of 46 U.S.C. § 40102(6)(A) with regard to this May 30, 2014 shipment either.

Finally, there cannot be a violation by MTL of 46 U.S.C. § 40102(6)(A) with regard to the 2010 Formula Boat either. The facts are clear that no shipment or booking of the 2010 Formula Boat was ever made by Complainants (or by Middle East) with MTL. Initially, Complainants may have *contemplated* booking the shipment of the 2010 Formula Boat to Jebel Ali with MTL. But, for reasons already discussed, Complainants decided not to book this shipment, through no wrongdoing of MTL’s. Accordingly, there cannot be a violation by MTL of 46 U.S.C. § 40102(6)(A) because MTL never assumed a booking was never made, and thus, MTL never “[assumed] responsibility for the transportation from the port or point of receipt to the port or point of destination” or used “for or part of that transportation, a vessel operating on the high seas”. 46 U.S.C. § 40102(6)(A)(ii),(iii). It is axiomatic of law under the Shipping Act that in order for a NVOCC to “fail” to fulfill its common carrier obligations, the NVOCC must, in fact, be acting as a common carrier. The three decisions cited by Complainants are in compliance with this axiom. (*See* Complainants’ Pre-Hearing Brief at p. 8). Thus, in the factual circumstances presented in the three decisions cited by Complainants: common carrier obligations existed for a NVOCC who issued a fraudulent onboard bill of lading, but then terminated the shipment at the last minute and refused to ship the cargo. *William R. Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11, 22 (ALJ 1991). Common carrier obligations existed for a

NVOCC who refused to issue a bill of lading for a shipment, despite the cargo being shipped, and further refused to release the cargo at destination. *William J. Brewer v. Saeid B. Maralan and World Line Shipping, Inc.*, 29 S.R.R. 6, 9 (FMC 2001). And, lastly, common carrier obligations existed when a NVOCC, despite having received payment for a shipment from its shipper, refused to pay the NVOCC's destination delivery/handling agent its fees and causing delay in concluding the shipment. *Houben v. World Moving Serv., Inc.*, 31 S.R.R. 1400, 1405 (FMC 2010). However, none of the above factual circumstances apply to the case in chief and the 2010 Formula Boat. Even if MTL is a licensed NVOCC, it cannot be charged with violating the Shipping Act, as a NVOCC, on cargo delivered to a separate warehouse (World Express) and held there without the cargo owner ever giving shipping instructions, making a booking or paying ocean freight, and without MTL issuing a bill of lading or providing transportation.

C. Complainants have not shown that storage of the boats at World Express is an unjust and unreasonable practice by MTL.

Complainants last allege that MTL "failed to establish, observe, and enforce just and reasonable regulations and practices." (*See* Complainants Pre-Hearing Brief at p. 8). However, Complainants allegations, in this regard, involve the May 2014 Dubai to U.S. shipment of the 2008 Chaparral Boat and 2011 Monterey Boat, which was shipped under an APL Bill of Lading on which MTL was listed only as a consignee. When the 2008 Chaparral Boat and 2011 Monterey Boat arrived at MTL, without any other information or notice provided to MTL, MTL cleared the two boats with Customs and notified Solovyev, who had been MTL's agent on the May 2013 U.S. to Dubai shipment [performed by MTL] of the same two boats. Solovyev, in turn, put the two boats into his storage warehouse at World Express to await instructions on this issue from Middle East (the shipper on the bill of lading). Complainants have not shown how

such practice is unjust and unreasonable, especially given the absence of instructions coming from Middle East [the shipper] and the breakdown in the commercial relationship between Complainants and Middle East being the impetus for the boats being placed into storage.

The issue of storage invoices has been addressed previously. But, at the risk of repetition, it is clear that the storage of the three boats was not done by MTL “for US export shipment” and any invoices issued by MTL were a reflection of storage invoices first issued by World Express. In this regard, because World Express, RFG, and MTL are independent companies operating at arms-length, the storage invoices in this were first, inadvertently, issued by World Express to MTL. (*See Appendix CX 261-264*). MTL, in turn, recognizing that the boats at issue had been brought to the port by RFG; RFG being the company who advanced payments to MTL on the May 2013 shipment of the 2008 Chaparral Boat and 2011 Monterey Boat, invoiced RFG. And RFG, who had been advancing payments on behalf of Complainants, issued the final invoices to Complainants in August 2014, once Complainants had finally decided, after nearly a year, on how to dispose of the boats. What is clear is that the storage of the three boats has nothing to do with MTL, as a NVOCC, and is not “contrary” as alleged to the storage rates in MTL’s tariff for *U.S. export shipments* delivered to MTL for export.

III. COMPLAINANTS’ CLAIMS FOR DAMAGES ARE SPECULATIVE AND INSUFFICIENTLY UNSUPPORTED

Notwithstanding Complainants’ inability to meet their burden of proof in showing a Shipping Act violation by Respondents, Complainants also fail to prove entitlement to the quantum of damages claimed. The burden of proving entitlement to reparations rests squarely with the Complainant. *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. 8, 13 (2003) citing 46 C.F.R. § 502.155 (“the burden of proof shall be

on the proponent of the rule or order.”) There is no presumption of damages; damages must be the proximate result of the violations of the statute in question. *Id.* “The Commission has always held that the mere proof of a violation of law without proof of pecuniary loss and without a showing of proximate causation [does] not warrant an award of reparation.” *Guam v. Sea-Land Service, Inc.*, 29 S.R.R. 1509, 1562-1563 (ALJ 2003).

The statements of the Commission in [*California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213 (Oct. 19, 1990)] and the other cited cases are in the mainstream of the law of damages as followed by the courts, for example, regarding the principles that the fact of injury must be shown with reasonable certainty, that the amount can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences, the principles that the damages must be foreseeable or proximate or, in contract law, within the contemplation of the parties at the time they entered into the contract, the fact that speculative damages are not allowed, and that regarding claims for lost profits, there must be reasonable certainty so that the court can be satisfied that the wrongful act caused the loss of profits.

Tractors and Farm Equipment Ltd., v. Cosmos Shipping Co., Inc., 26 S.R.R. 788, 788-799 (ALJ 1992).

Complainants’ assert various damages claims totaling \$667,528.51, comprised of: (A) \$419,739.00 in “loss in use” and “loss in rents”; (B) \$132,530 in “market value”; and (C) \$115,259.51 in unpaid storage. Complainants’ claim for \$115,259.51 in indemnity is based on a pending action filed against Complainants by World Express and is premature, pending a determination of liability in that action. As next discussed, the remaining claims are totally speculative and are not supported by submitted evidence or reasonable inferences. (*See* Complainants’ Pre-Hearing Brief at pp. 8-9). Accordingly, it is respectfully submitted that even

if the Commission finds a violation of the Shipping Act, Complainants' failure to show entitlement to reparations in the amount alleged precludes any award to Complainants.

A. Complainants' calculation for loss of use/rent is not supported by any evidence in the record.

Complainants claim, in support of its calculation for loss of use and lost profits, that in 2013, Crocus was "planning on renting out the three boats at issue in this lawsuit." (*See* Complainants' Pre-Hearing Brief at p. 9). This "plan" of running a boat-rental business, if it ever in fact existed, never proceeded beyond an idyllic pipedream. Crocus had no offices (other than Complainants' personal residence), no employees beyond Mr. Safonov and his wife, and no publicly-accessible online presence. (*See* Depo. Tr. of Safonov, at 8:25 – 9:17, 11:23 – 12:3). Crocus did not have any boats available to rent. (*See* Depo. Tr. of Safonov, at 12:22 – 13:10). Crocus has never generated any boat rental income. (*See* Depo. Tr. of Safonov, at 13:11-16). Complainants have no commercial experience in boat rentals; and Crocus' only business is that of a secretive "online business" offering "consulting services." (*See* Depo. Tr. of Safonov, at 10:1-2 (Q: What do you mean by "online business"? A: That is a commercial secret.))

Despite not having facilities, employees, market presence, inventory, or any relevant commercial experience whatsoever, Complainants argue that they would have somehow earned \$416,739.00 in *profit* and are entitled to reparations in that amount. This figure is pulled from thin air, and is not supported by any evidence in the record. Complainants have not submitted, for example, any proof of past income or accounting of expected expenses, e.g., wages, facility leases and upkeep, marketing, inventory maintenance, etc., for a boat rental business, to enable the Commission or Respondents to evaluate the damages claim. *See, e.g., Clayton v. Howard Johnson Franchise Sys. Inc.*, 954 F.2d 645, 652 (11th Cir. 1992)(applying Florida law, "in order

to recover for lost future profits, a party must prove income and expenses of the business for a reasonable time prior to the alleged breach. If the party presents evidence only of gross receipts or fails to prove expenses with some specificity” an award of damages cannot stand.) Only the bare statement in Complainants’ Pre-Hearing Brief that the \$416,739.00 figure is “based on market research that Safonov [i.e., Complainant] performed” supports its calculation. (See Complainants’ Pre-Hearing Brief at p. 9). But, Mr. Safonov’s qualifications for performing this market research and the details and methodology of this market research were not submitted to the Commission or to Respondents. Because Complainants’ speculative claim of lost profits is not supported to a reasonable certainty, and because speculative damages are not allowed, it is respectfully submitted that Complainants have not shown with reasonable certainty their lost profits of \$416,739 and are not entitled to an award in that amount . *Tractors and Farm Equipment Ltd., Supra.*

B. Complainants’ calculation for market value is not supported by any evidence in the record.

Complainants’ calculation of the “market value” of \$132,530, is likewise not supported by any evidence in the record. For the 2008 Chaparral Boat and 2011 Monterey Boat, Complainants claim a “current market value” of \$30,000 “as of *today* according to the National Automobile Dealers Association website [NADA]” (emphasis added) for the 2008 Chaparral Boat and \$36,000 for the 2011 Monterey Boat [for a total of \$66,000]. Again, other than this bare self-serving statement in Complainants’ Pre-Hearing Brief, Complainants do not submit any evidence to the Respondents or to the Commission detailing when or how this valuation was determined. Complainants’ gratuitous addition of an extra \$10,000 to their \$66,000 claim for market value as “credit for the loss in value” is likewise supported only by Complainants’

counsel's bare statement. (*See* Complainants' Pre-Hearing Brief at p. 9 ("Complainants approximate that in 2014, the boats were valued \$10,000.00 more than their current market values.")) This approximation and the purported valuation is not to a degree of reasonable certainty. Moreover, in 2013, Complainants purchased the 2008 Chaparral Boat for \$10,505 and the 2011 Monterey Boat for \$9,855, for a total of \$20,360 (\$10,505 + \$9,855). In other words, the purchase price of the two boats three years ago in 2013 was \$45,640 less than Complainants' alleged 2016 market value today of \$66,000. If Complainants are going to claim that the market value today is \$45,640 more than Complainants paid in 2013, it must be supported by more than bare allegations.

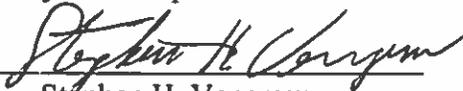
With regard to the "market value" of the 2010 Formula Boat, Complainants do not turn to their alleged NADA valuations of current market value, but are content to cite to the purchase price of \$59,780.00, plus an additional \$4,950.00 for the trailer. It should also not be lost that Complainants purchased the three boats at issue in 2013, along with other boats, expecting to turn a profit from their resale in Dubai. But, reality quickly set in and Complainants discovered that the expected market demand did not exist. In fact, Complainants' company for the resale of the boats (Middle East) was operating at a *loss*, having sold just seven boats, in total, with the income from those sales inadequate to cover the company's expenses. It should also not be lost on the Commission that "market value" assumes the existence, in the first instance, of a market, which is apparently no longer the case as Complainants discovered the three boats are, for Complainants' purposes, unsaleable. The burden here is on Complainants to prove market value, in a down market, with reasonable certainty, and it is respectfully submitted that Complainants have failed to do so.

CONCLUSION

The unfortunate facts are that in 2013, Complainants made a poor commercial investment into a used boat repair and sale business in Jebel Ali, and Complainants were left with three used boats that could not be sold, and allegedly, a business partner in Jebel Ali who was stealing from the company. Complainants' former business partner may be liable to Complainants. However, without showing a violation of the Shipping Act or even proximate causation, Respondents cannot turn to Respondents to recover. To prevail in a proceeding to enforce a Shipping Act claim, a Complainant has the burden of proving by a preponderance of the evidence that a Respondent violated the Shipping Act. 5 U.S.C. § 556(d). It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman S.S. Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994). For all of the foregoing reasons, it is respectfully submitted that Complainants have not met this burden.

Dated: February 11, 2016

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CERTIFICATE OF SERVICE

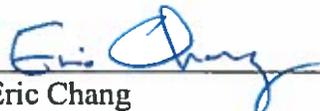
The undersigned declares under penalty of perjury that the following is true and correct:

1. I am over the age of eighteen years and I am not a party to this action.
2. On February 11, 2016, I served a complete copy of Respondent's Proposed Findings of Fact and Response to Complainants' Proposed Findings of Fact; Pre-Hearing Brief; and Respondents' Appendix, in Docket No. 15-04 by E-mail and UPS to:

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