

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 15-04**

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**CROCUS INVESTMENTS, LLC AND CROCUS, FZE,**

– vs. –

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

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**COMPLAINANTS' PETITION TO REOPEN THE PROCEEDING FOR THE PURPOSE  
OF TAKING FURTHER EVIDENCE, TO REMAND THE PROCEEDING TO THE  
ADMINISTRATIVE LAW JUDGE AND TO STAY THE DUE DATE FOR FILING  
EXCEPTIONS**

On June 17, 2016, the Administrative Law Judge ALJ issued an initial decision in this case.<sup>1</sup> Pursuant to 46 C.F.R. §502.230, Complainants CROCUS INVESTMENTS, LLC and CROCUS, FZE ("Complainants"), by and through their attorney Marcus A. Nussbaum, Esq., hereby petition the Federal Maritime Commission (the "Commission") to reopen this proceeding in order to admit new evidence concerning respondents' violation of the Shipping Act of 1984 with respect to a 2008 Chaparral boat VIN# ending in D808; a 2011 Monterey 204 boat VIN ending in 1011; and a 2010 Formula 34PC boat, for which respondents undertook responsibility for the international transportation by water; and to remand the proceeding to the ALJ for further determination on the issue of respondents' violation of §41102 of the Act.<sup>2</sup> That evidence including additional findings of fact and argument thereon is contained in the attached document entitled

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<sup>1</sup> That decision is not yet administratively final. Exceptions are due on October 27, 2016 pursuant to the Commission's September 8, 2016 Order. If the Commission denies the petition to reopen the proceeding, Complainants intend to file exceptions to the Initial Decision and request twenty days from the date of the Commission's denial thereto.

<sup>2</sup> The Commission could also consider the evidence on a *de novo* basis as part of its review of filed exceptions. 46 C.F.R. §502.27; 46 C.F.R. §502.230.

## ADDITIONAL PROPOSED FINDINGS OF FACT BRIEF AND APPENDIX.

The evidence consists of newly obtained evidence provided to Complainants herein *after* Complainants filed their proposed findings of fact in this matter. Said evidence was provided to Complainants in April of 2016 by a non-party to this matter who is engaged in litigation against the respondents herein in the U.S. District Court for the Eastern District of New York, captioned as *MAVL Capital Inc. et al. v. Marine Transport Logistics Inc. et al.* (U.S.D.C. – E.D.N.Y. Docket No.: 1:13-cv-07110-SLT-RLM).<sup>3</sup> These new facts could not have been known to complainants before that date. Additionally, Complainants petition the Commission for a stay of the due date for filing exceptions in this proceeding. If the Commission denies the petition to reopen the proceeding, Complainants intend to file exceptions to the Initial Decision and request twenty days from the date of the Commission’s denial thereto.

### **PROCEDURAL HISTORY**

On May 27, 2015, the Complainants filed their Complaint with the Commission alleging violations of the Shipping Act against respondents herein with respect to three (3) boats owned by Complainants, to wit: (1) a 2011 Monterey 204 boat (the “Monterey”); (2) a 2008 Chapparral 190 SSI boat (the “Chapparral”); and (3) a 2010 Formula 34 PC boat (the “Formula 34”). Respondents filed their Answer on July 10, 2015, and the Presiding Officer issued a Scheduling Order on September 9, 2015, setting forth deadlines for discovery and submission of written materials and commencement of presentation of evidence. As required by the ALJ, Complainants filed their Proposed Findings of Fact and Appendix on January 15, 2016. Respondents filed their Proposed Findings of Fact and Appendix on February 11, 2016.

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<sup>3</sup> The two automobiles at issue in the Federal Court litigation, to wit: a 2006 Mercedes SL65, and a 2011 Porsche Panamera, are also the subject of an additional proceeding currently before the Commission captioned as *MAVL Capital, Inc., IAM & AL Group Inc., and Maxim Ostrovskiy v. Marine Transport Logistics, Inc. and Dimitry Alper* (FMC Docket No.: 16-16)

On April 12, 2016, the Presiding Officer issued an Order to Supplement the Record with respect to the Chaparral and Monterey *solely*. On June 17, 2016, the ALJ issued an Initial Decision, finding, among other things, that: (1) Complainants and respondents never entered into an agreement to transport the Formula by water from the United States to a foreign port and therefore the Shipping Act did not apply; (2) that with respect to the transport of the Chaparral and Monterey from Dubai back to the United States, that the respondents' *only* connection to the shipment was the fact that respondent MTL was listed as a consignee on the ocean liner bill of lading; (3) with respect to any claimed violations of the Shipping Act against respondents arising out of excessive storage fees, that "even if MTL were operating as an NVOCC, the boats were not received for US export shipment and the tariff does not apply"; and (4) Complainants *have not proved* that respondent Aleksandr Solovyev ("Solovyev") operated as an Ocean Transportation Intermediary without a valid license. These findings are based on an incomplete record. The record should be reopened to prevent an unfair and unjust result.

On or about April 13, 2016, plaintiffs' counsel in the Federal Court matter described above, ongoing in the U.S. District Court for the Eastern District of New York, contacted Complainant's former counsel for the first time. Plaintiff's counsel explained that the respondents herein were being sued in Federal Court concerning a 2006 Mercedes SL65, Vehicle Identification Number ("VIN") ending in 3072 (the "Mercedes"); and (2) a 2011 Porsche Panamera, VIN ending in 7399 (the "Porsche"), which the respondents herein shipped to Complainants' facility in Dubai for storage and repair (and which are relevant to Complainants' claims herein and also referred to by the Presiding Officer in his initial decision).

## **BRIEF STATEMENT**

The pleadings filed in the Federal Court matter, together with discovery related materials provided by plaintiffs therein to the Complainants herein (said discovery materials not having been publically available), provide new evidence regarding inconsistent statements made by the respondents in this forum and in Federal Court regarding respondents' undertaking of responsibility for shipment of the Formula to ports abroad, as well as respondents' failure to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering the Formula, the Monterey, and the Chaparral.

Complainants retained new counsel after the issuance of the Initial Decision in this matter. Former counsel was not a maritime attorney. Former counsel relied on the veracity of representations made by the respondents during discovery and depositions. New facts identify clear inconsistencies that call into question the credibility and veracity of the evidence presented upon which the Initial Determination rests.

Further, and based upon a review of the record (and in particular the Oral Argument Transcript of May 13, 2016), the Presiding Officer acknowledged the absence of discovery regarding the respondents' adherence to corporate formalities (or lack thereof) on the issue of whether or not Complainants were entitled to pierce the corporate veil as to individual respondent, Solovyev.

Complainants respectfully submit that the new additional evidence is material to and undermines the logic of the Initial Decision. This new additional evidence and documents will permit consideration of facts pertaining to an alleged Shipping Act violation on the basis of a more complete record. The Commission's Rules of Practice and Procedure give the Commission the

authority to reopen this proceeding to take official notice of the documents filed in the Federal litigation.

## DISCUSSION

### **I. REOPENING THE PROCEEDING**

Complainants petition the Commission to reopen this proceeding in order to admit new evidence concerning respondents' violation of the Shipping Act of 1984 with respect to a 2008 Chaparral boat VIN# ending in D808 (the "Chaparral"); 2011 Monterey 204 boat VIN ending in 1011 (the "Monterey"); and 2010 Formula 34PC boat (the "Formula") for which respondents undertook responsibility for the international transportation by water. 46 C.F.R. §502.230 governs the reopening of a proceeding by the Commission. The Rule states, in relevant part, as follows:

(d) Reopening by the Commission. Where a decision has been issued by the presiding officer or where a decision by the presiding officer has been omitted, but before issuance of a Commission decision, the Commission may, after petition and reply in conformity with paragraphs (a) and (b) of this section, or upon its own motion, reopen a proceeding for the purpose of taking further evidence.<sup>4</sup> 46 C.F.R. §502.230(d); and

(e) Remand by the Commission. Nothing contained in this rule shall preclude the Commission from remanding a proceeding to the presiding officer for the taking of additional evidence or determining points of law. 46 C.F.R. §502.230(e)

The Commission is respectfully urged to take particular note of subsection (e) of the Rule, cited above, in that *nothing* in the Rule precludes the Commission from remanding a proceeding to the presiding officer for taking additional evidence. While it is anticipated that respondents may argue in opposition to this petition that some of the newly proffered evidence may have been

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<sup>4</sup> Complainants note that the rule in its current version at 46 C.F.R. §502.230 was issued in 1967 and constituted a change from the Commission's original rule governing reopening of proceedings. The original version codified at 46 C.F.R. §502.261, contained a requirement that if the purpose of the petition for reopening was to take further evidence, there be a showing that the evidence was not available at the time of the prior hearing. That requirement was deleted in the current rule. See General Order 16, Amtd. 2, 33 FR 9402, June 27, 1968 (issuance of §502.230); General Order 16, 30 FR 13604, 13616, October 26, 1965 (issuance of 46 C.F.R. §502.261). However, in this situation the evidence Complainants wish to have the Commission take notice of and include in the record was not available at the time Complainants filed their Proposed Findings of Fact in January of 2016.

previously available, it is respectfully submitted that the newly proffered evidence which was not presented previously would have clearly resulted in a different conclusion by the Presiding Officer with respect to the issues set forth herein in that respondents did violate the Shipping Act. It is additionally respectfully submitted that it would be unjust for the Initial Decision to stand “as is” as a result of prior counsel’s inexperience and respondents’ misrepresentations on the record.

The instant petition, pursuant to subsection (e) of the Rule allows the Commission discretion full discretion to remand the matter back to the Presiding Officer to take the additional evidence. A remand, which is generally exercised after an Initial Decision, which is the case here, allows the Commission to avoid a completely unjust result.

Additionally, Rule §502.12 reads, in relevant part, as follows:

Applicability of Federal Rules of Civil Procedure.

In proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice.

Against the backdrop of Rule 502.12, the Commission is respectfully urged to consider the applicability of Rule 60 of the Federal Rules of Civil Procedure, which reads, in relevant part, as follows:

- (b) Grounds for Relief from a Final Judgment, Order, or Proceeding.  
On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons....
- (1) ***mistake, inadvertence, surprise, or excusable neglect***;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), ***misrepresentation, or misconduct by an opposing party***;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer

equitable; or

(6) *any other reason that justifies relief*. (Fed. R. Civ. P. 60) (Emphasis added).

It is well settled that failure to disclose or produce material requested in discovery can constitute “misconduct” within the purview of 60(b)(3). *See, Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir.1988). Similarly, a 60(b)(3) motion may be granted where the court is “reasonably well satisfied that the testimony given by a material witness is *false*; that, without it, a jury might have reached a different conclusion; that the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after trial.” *See, Davis v. Jellico Community Hosp., Inc.*, 912 F.2d 129, 134 (6th Cir.1990) (quoting *Gordon v. United States*, 178 F.2d 896, 900 (6th Cir.1949), cert. denied, 339 U.S. 935, 70 S.Ct. 664, 94 L.Ed. 1353 (1950)).

With respect to the foregoing rule, it is respectfully submitted that the additional proposed facts and argument annexed hereto explain that respondent Solovyev and his wife, Alla Solovyeva (President of MTL) made misrepresentations of fact during their depositions regarding their ownership in MTL and non-party WEC. Their misrepresentation that Solovyev has *no ownership* in MTL and that Alla Solovyeva has *no role* in WEC (which she explained was merely a “designated warehouse”) not only misled prior counsel, but affected the outcome of these proceedings and resulted in the Presiding Officer failing to take into account that WEC is a licensed OTI, with its own tariffs and subject to the jurisdiction of the Commission (and likely a necessary party to this action).

Agencies have broad discretion in deciding whether to reopen a proceeding and their decisions are reviewed under an abuse of discretion standard. See, Interstate Commerce Commission v. Jersey City et al., 322 U.S. 503 (1944); Interstate Commerce Commission v. Bhd.

of Locomotive Engineers, 482 U.S. 270 (1987). The Commission preference for a complete record was discussed in the case of Hudson Shipping Hong Kong Ltd. d/b/a Hudson Express Lines - Possible violations of Section 10(a)(1) of the Shipping Act of 1984, 29 SRR 1376 (ALJ 2002), where the ALJ reopened the record and vacated discovery sanctions prior to issuance of an initial decision. The ALJ explained the rationale favoring reopening to permit the development of a complete record:

...it is Commission policy that the evidentiary record be fully developed fully [sic] before an initial decision is rendered. Maersk Line Agency for the Benefit of Mitsui and Co., 22 FMC 224 [19 SRR 1014] (1979)...[i]tis not just the policy, but the responsibility of the Commission and, by delegation of authority, the presiding judge, to inquire into and consider all relevant facts. Michigan Consolidated Gas Co. v. Federal Power Commission, 283 F2d 204, 226, *cert. denied*, 364 US 913 (1960). The Commission's role is not one of 'an umpire blindly calling balls and strikes for adversaries appearing before it.' Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F2d 608, 620 (2d Cir. 1965). The Commission would not be fulfilling its responsibility if it were to decide the issues upon a [sic] incomplete record. Indeed of, even greater importance than the concept of fairness between the parties as they maneuver to develop a record which fits neatly within their positions, is the need to ensure that justice is served and all relevant facts are investigated and considered by the Commission. Isbrandtsen Co. v. United States, 96 F.Supp. 883, 892 (SDNY 1951); Landis, *The Administrative Process* 39 1938. Id. at 1377.

The Commission may reopen a proceeding for the purpose of taking further evidence, particularly if the evidence is a material fact that "might affect the outcome of the suit under the governing law". Green Master Int'l Freight Services Ltd. - Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 29 SRR 1303, 1318 (FMC 2003) citing Gonzalez v. Torres, 915 F. Supp .511, 515 (DPR 1996).

The evidence Complainants seek to have admitted is relevant and material since it addresses Complainants' claims that the respondents violated the Shipping Act with respect to the three subject boats. The evidence Complainants urge the Commission to take notice of was not available at the time Complainants filed their Proposed Findings of Fact in January of 2016.

Reopening the record to allow for admission of new evidence will foster a more complete record.

**REMAND OF THE PROCEEDING TO THE ALJ**

Complainants also petition for a remand of the proceeding to the ALJ for further determination on the issue of respondents' violation of §41102 of the Act with respect to the subject boats.

It is well-settled that, in determining whether a particular movement of freight is interstate or intrastate or foreign commerce, **the intention existing at the time the movement starts governs and fixes the character of the shipment** ... . [T]emporary stoppage within the state, made necessary in furtherance of the interstate carriage, does not change its character. State of Texas v. Anderson, Clayton & Co., 92 F.2d 104, 107(5th Cir.) (shipper intended cotton for export when cotton sent from Rochester, Texas to Houston; thus not an intrastate shipment), cert. denied, 302 U.S. 747, 58 S. Ct. 265, 82 L. Ed. 578 (1937). 1-3 Goods in Transit § 3.05 (2015).

In this case, it is undisputed that the Formula was intended for export. The storage arranged, as an unlicensed ocean freight forwarder, Solovyev, or interstate transportation to Florida, did not alter its export character.

The new evidence also establishes that respondents violated §41102 of the Act by collecting monies for services related to export of the Formula, such as the procuring of a boat trailer and preparation of shipping documentation but failed to provide any services. See, Alexandre Kaminski v Keystone Limited, (6/23/93, FMC) Informal Docket No. 1739(I) (shipping company that collected money from customer but failed to provide any services in return violated former 46 USCS Appx § 1709(d)(1)); Corpco International, Inc. v Straightway, Inc., (6/8/98, FMC) Docket No. 97-05 (violation of former 46 USCS Appx § 1709(d)(1) may be found where non-vessel-operating common carrier (NVOCC) has agreed to ship cargo and has been paid to do

so, but cargo cannot be delivered because NVOCC's agents refuse to issue negotiable bill of lading required to secure delivery).

The new evidence further establishes that respondents violated §41104 of the Act by collecting twice for the boat trailer for the Formula and charging/invoicing monies for storage of all three boats in excess of that authorized under respondents tariffs. See, Tadeusz A. Pawlowicz v William Allen, (ABU W. Garcia) (6/15/93, FMC) Informal Docket No. 1725(I) (shipping company's handling of customer's shipment of antique maps constituted violation of former 46 USCS Appx § 1709(b)(6)(E) where invoice received by customer was more than twice amount stated on bill of lading (most of which was attributable to higher crating costs), and customer repeatedly tried to contact company and was either ignored or told to contact crating company directly).

Lastly, and as set forth at length in the proposed additional facts and argument annexed hereto, the respondents breached their fiduciary duties to complainants while acting in the capacity of ocean freight forwarder.

Based on new evidence, the Commissions regulations, case law, to avoid a miscarriage of justice based on an incomplete or inaccurate record, it is appropriate to remand the proceeding to the ALJ for consideration of the new evidence annexed hereto in support of Complainants' claims that the respondents violated the Shipping Act with respect to the subject boats.

#### **STAY OF THE DUE DATE FOR FILING EXCEPTIONS**

If the Commission denies the petition to reopen the proceeding, Complainants intend to file exceptions to the Initial Decision and request at least twenty days from the date of the Commission's denial thereto. In the interim, Complainants petition for a stay of the due date for filing exceptions, or, if the proceeding is remanded to the ALJ, until twenty days after the ALJ

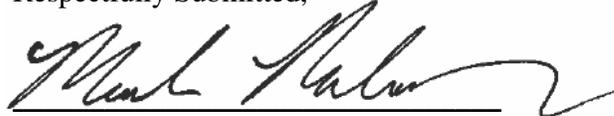
issues a decision. The Commission's decision on Complainants' petition may affect Complainants' exceptions to the ALJ's decision as to whether respondents violated the Shipping Act with respect to the subject boats. Therefore it is respectfully submitted that a stay of the deadline for the filing of exceptions would be appropriate.

**RELIEF REQUESTED**

Complainants petition the Commission to reopen this proceeding in order to admit new evidence, including that obtained from an ongoing litigation in the U.S. District Court for the Eastern District of New York. This evidence is relevant to a determination on Complainants' claims that the respondents violated the Shipping Act with respect to the subject boats. Complainants further petition the Commission to remand the proceeding to the ALJ for consideration of the new evidence and further determination on the issue of respondents' alleged violations of the Shipping Act and petitions for a stay of the due date for filing exceptions until twenty days after a ruling on Complainants' petition by the Commission, or in the event the proceeding is remanded for a stay of the due date until twenty days after a decision by the ALJ.

Dated: October 27, 2016  
Brooklyn, NY

Respectfully Submitted,



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