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**Via Email: [secretary@fmc.gov](mailto:secretary@fmc.gov)**

Attn: Karen V. Gregory, Secretary  
Federal Maritime Commission  
800 North Capitol Street NW  
Washington, DC 20573

**RE: Docket No. 15-06, Comments on Proposed Attorney Fee Regulation**

Dear Secretary Gregory:

We represent Maher Terminals, LLC (“Maher”), and on its behalf submit these comments in response to the request for comments and guidance set forth in the Federal Maritime Commission’s (“Commission”) July 2, 2015 notice of proposed rulemaking (“Notice”) concerning proposed amendments to the Commission’s rules of practice and procedure (“Rules”) pertaining to awards of attorney’s fees in proceedings under the Shipping Act of 1984 (“Shipping Act”), 80 Fed. Reg. 38153, July 2, 2015.

Maher is a marine terminal operator (“MTO”) located in the Port of New York and New Jersey. Maher’s MTO operations are subject to regulation under the Shipping Act and before the Commission, and Maher is currently party to proceedings pending before the Commission. Maher has experience with the Commission’s Rules and an interest in the proposed amendments to the Commission’s Rules concerning attorney’s fees, both generally as an MTO and specifically as a party before the Commission.

Section 402 of Title IV of the Howard Coble Coast Guard and Maritime Transportation Act of 2014, Public Law 113–281 (“Coble Act”), enacted on December 18, 2014, amended the statutory provision governing the award of attorney’s fees in Shipping Act complaint proceedings. As summarized in the Notice, pursuant to Section 402 of the Coble Act, attorney’s fees may now be awarded to the prevailing party in any complaint proceeding. *See* 46 U.S.C. 41305(e) (“Section 41305(e)"). The Notice proposes amendments to the Commission’s attorney-fee rule, Rule 254, and requests comments in response to three principal questions concerning the proposed rules and Section 41305(e):<sup>1</sup>

1. Who is eligible to recover attorney fees?
2. How will the Commission exercise its discretion to determine whether to award attorney fees to an eligible party?

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<sup>1</sup> Section 403 of the Coble Act also made amendments to certain statutory provisions governing the general organization of the Commission. Maher’s comments herein are solely with respect to the Commission’s proposed rules and requests for comment pertaining to Section 402.

3. How will the Commission apply the new attorney-fee provision to proceedings that were pending before the Commission when the Coble Act was enacted on December 18, 2014?

Each of the questions include subparts and further relevant information, which for clarity of presentation and completeness have been partially excerpted (in italics, and numbered, below), followed by Maher's comments in response:

1. *"Who is eligible to recover attorney fees?"*

- 1.1. *"What types of actions are covered by the attorney-fee provision?" "Based on the wording of the Coble Act's attorney-fee provision and the wording of section 41301, it appears that attorney fees may now be awarded in any complaint proceeding. The Commission requests comment on this interpretation."*

The Coble Act attorney fee provision, 46 U.S.C. § 41305(e), would apply only to complaint proceedings authorized under 46 U.S.C. § 41301. Therefore, Section 41305(e) would apply to a private party complaint proceeding alleging violations of the Shipping Act (whether seeking reparations and/or a cease and desist order), but not other complaint proceedings, actions or investigations authorized under the Shipping Act or described in the Rules, such as complaints or proceedings under 46 U.S.C. § 41302 and Rule 502.66.

- 1.2. *"Who is considered a 'party'?" "[T]he Commission's Rules define the term 'party' in Commission proceedings to include any natural person, corporation, association, firm, partnership, trustee, receiver, agency, public or private organization, or government agency (including a unit representing the agency). 46 CFR 502.41. The Commission requests comment on any reasons why the existing definition would not be appropriate to use in applying the new attorney-fee provision."*

The existing definition of "party" in 46 CFR § 502.41 is only appropriate to use in applying the new attorney-fee provision to the extent that the list of parties under Rule 41 are limited to those types of entities in their capacities as parties to complaint proceedings authorized under 46 U.S.C. § 41301, e.g., parties to actions under Section 502.62 (e.g., complainants and respondents) would be included, but parties to actions under Section 502.66 would not. In addition, while an intervenor may in certain circumstances be a "party" for the purpose of "prevailing party" under federal caselaw, attorney fee recovery standards applicable to specific types of parties may differ depending on the circumstances. Therefore, the "party" definition under Rule 41 should not be applied in any manner suggesting a procedural or substantive expansion of entitlement to attorney fees beyond the parties authorized under amended Rule 254, under complaint proceedings authorized under 46 U.S.C. § 41301.

- 1.3. *"When will a 'party' be considered to have 'prevailed' in a covered action?" "[T]he Commission proposes to rely on relevant federal case-law to the extent practicable in determining whether a party has 'prevailed' in a particular complaint proceeding and is thus*

*eligible to recover attorney fees under the new fee shifting provision. The Commission requests comment on this approach and any alternative approaches.”*

First, the Commission should apply and conform its own body of authority under the Shipping Act on attorney-fee eligibility, where applicable, before looking to other federal law for guidance. With respect to complainants in Section 41301 proceedings, the previously-applicable attorney-fee provision and the Commission’s interpretive authority applying Rule 254 to determine whether such complainants were entitled to attorney-fee awards, is useful guidance to inform whether a complainant has “prevailed” under the new fee shifting provision.

Thus, under the previously-applicable attorney-fee provision, a complainant in a reparation action was entitled to an award of attorney’s fees when (1) proving a violation of the Shipping Act; (2) actual injury is caused by such violation; and (3) payment of reparations to compensate for such injury. *See A/S Ivarans Rederi v. Companhia de Navegacao Lloyd Brasileiro*, 25 S.R.R. 1061, 1063 (FMC 1990). As pointed out in the Notice, the prior attorney-fee rule differed from the proposed new rule in that previously, “[c]omplainants who prevailed on the merits of the complaint, but who did not obtain a reparations award, were not eligible to recover attorney fees. *See id.* at 1064; 51 FR 37917.” Under the new rule, obtaining a reparations award is no longer a prerequisite to an award of attorney’s fees. Under the Commission’s existing authority, conformed to the new rule, prevailing on the merits of the complaint should be the sole consideration for the threshold determination of whether a complainant “prevailed” in a covered action for consideration of eligibility for an attorney-fee award.<sup>2</sup>

Second, the determination of whether a respondent or other eligible party has prevailed under “relevant federal caselaw” would depend in significant part on which federal caselaw is deemed “relevant.” As set forth below, the relevant federal caselaw for the purpose of determining whether the equivalent of a defendant “prevailed” for the purpose of the attorney-fee rules should be drawn from the federal caselaw addressing entitlement to attorney’s fees under federal remedial statutes (see responses to No. 2 below). Under other remedial statutes with similar “prevailing party” provisions, a defendant successfully defending against an otherwise colorable complaint (absent a finding that the plaintiff’s complaint was frivolous, unreasonable, or without foundation) would not constitute “prevailing” for the purposes of the attorney-fee provision.

2. *“How will the Commission exercise its discretion?”*

2.1. *“The text of the new attorney-fee provision is silent as to how the Commission should exercise its discretion in awarding fees to an eligible party.”*

2.1.1. *“The Commission has identified two prevalent standards used by the federal courts in determining fee entitlement under this type of provision.” “The Commission requests*

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<sup>2</sup> In light of the expansion of the attorney fee provision to any Section 41301 complaint proceeding, and the change from mandatory to discretionary eligibility for prevailing parties, additional factors concerning actual injury and/or reparation awards or cease and desist orders are not appropriate or necessary.

*comment on these two standards and whether either standard would be appropriate to use in applying the new attorney-fees provision in complaint proceedings.”*

- *“The first is the standard used by federal courts applying the fee-shifting provision in the Copyright Act, 17 U.S.C. 505. The Supreme Court has cited with approval a nonexclusive list of factors for courts to consider when determining entitlement, including ‘frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.’ Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 n.19 (1994) (quoting Lieb v. Topstone Industries, Inc., 788 F.2d 151, 156 (3rd Cir. 1986)) (internal quotation marks omitted). In addition, the courts use the same standard for prevailing plaintiffs and prevailing defendants when making such determinations. See Fogerty, 510 U.S. at 534–35.”*
- *“The second standard identified by the Commission is used in determining entitlement to attorney fees under the Civil Rights Act, e.g., 42 U.S.C 2000a-3(b), 42 U.S.C. 2000e-5(k). Under this standard, prevailing plaintiffs are treated more favorably than prevailing respondents when determining entitlement to attorney fees. While prevailing plaintiffs ‘ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust,’ Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968), prevailing defendants are awarded attorney fees only ‘upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation.’ Christiansburg Garment Co. v. Equal Employment Opportunity Comm’n, 434 U.S. 412, 421 (1978).”*

First, the two standards identified in the Notice address two very different outcomes from applying similar language in very different classes of statutes. The Supreme Court explained in *Martin v. Franklin County Capital Corp.*, 546 U.S. 132 (2005), that to distinguish the applicable standard under a given statute the court looks to “the large objectives of the relevant Act, which embrace certain equitable considerations” of Congressional purposes in the statutes at issue. *Id.* at 139-140, citing *Flight Attendants v. Zipes*, 491 U.S. 754, 759 (1989) (internal quotations and citations omitted). Therefore, the relevant analysis to determine the most appropriate standard to use in applying the new attorney-fees provision in Shipping Act complaint proceedings is to look to the comparative Congressional “large objectives” and “equitable considerations” pertaining to private party proceedings under the Shipping Act.

Second, the standard most applicable to the new “prevailing party” attorney-fee provision under Section 41305(e) of the Shipping Act is the standard as interpreted in other federal remedial statutes with “prevailing party” language, such as *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) and *Christiansburg Garment Co. v. Equal Employment Opportunity Comm’n*, 434 U.S. 412, 421 (1978). The Supreme Court in *Martin* highlighted two particularly distinguishing statutory factors warranting the “ordinary recovery” standard for plaintiffs: (1) complainants vindicating public rights and acting as “private attorneys general” in private party rights of action and (2) statutes where a defendant that is

required to pay attorney's fees violates federal law. 546 U.S. at 137, citing *Zipes*, 491 U.S. at 762 (“Our cases have emphasized the crucial connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes”); *see also Martin*, 546 U.S. at 137 (distinguishing *Martin* from *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) and others, on the basis that in *Martin* “plaintiffs do not serve as private attorneys general when they secure a remand to state court, nor is it reasonable to view the defendants as violators of federal law.”).

The “large objectives” of the Shipping Act more closely embrace the “equitable considerations” of the nature addressed in *Piggie Park*, *Christiansburg*, *Albemarle*, and *Zipes*—not the unique goals and objectives of the Copyright Act at issue in *Fogerty*. The Shipping Act regulates the common carriage of goods by water in interstate and foreign commerce, granting immunity from otherwise applicable antitrust statutes, with a primary purpose to foster and maintain a non-discriminatory transportation system. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 622-23 (1966). Private-party complaints under Section 41301 can be brought by any person—including persons without any actual injury or damages—seeking enforcement of the anti-discrimination and antitrust public protections of the Shipping Act. Like other remedial statutes, complainants in Section 41301 proceedings function as “private attorneys general,” bringing complaints vindicating their own rights as well as those of the public interest against alleged violators of federal law. *See, e.g., Inlet Fish Producers, Inc., Complainant v. Sea-Land Service, Inc., Respondents*, 2001 WL 1632551, at \*10 (“such adjudication is a form of private enforcement of the rights established by Congress in the statute.”). When a private-party complainant establishes a violation of the Shipping Act, the respondent is necessarily a violator of the Shipping Act, and accordingly, any attorney fees awarded to a prevailing complainant are awarded against the violator of the Shipping Act.

Thus, consistent with the Court's guidance in *Martin*, the objectives and equitable principles at issue in the Shipping Act are significantly more aligned with *Piggie Park* and *Christiansburg*, and not aligned with *Martin* or in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994).<sup>3</sup>

2.1.2. “In particular, the Commission requests comment on the factors considered under each standard in determining entitlement and whether the same standard should apply to prevailing complainants and prevailing respondents.”

Further to the comments in response to No. 2.1.1. above, prevailing complainants and parties in the nature of complainant/plaintiffs should “ordinarily recover an attorney's fee unless special circumstances

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<sup>3</sup> The standard applied in *Fogerty* was premised on the unique goals, objectives, and policies at issue in the Copyright statute; as expressly distinguished from the goals, objectives, and policies at issue in federal remedial statutes wherein private party complainants acted as private attorneys general and unsuccessful defendants violated federal law. Neither the standard, nor the “non-exclusive factors” referred to, (but not decided in) *Fogerty*, are appropriate authority or guidance to use in applying the new attorney-fees provision in Shipping Act complaint proceedings. Moreover, the Supreme Court noted in *Martin* that while its earlier decision in *Fogerty* observed that some courts employed “non-exclusive factors” as guides to evaluating Copyright Act attorney-fee determinations, the Court highlighted that it did not identify any applicable fee standard in *Fogerty*. Rather, in *Fogerty*, the Court decided only whether the same standard applied to prevailing plaintiffs and prevailing defendants under the Copyright Act. *Fogerty*, 510 U.S. at 534–535, n.19; *Martin*, 546 U.S. at 141, n.\*.

would render such an award unjust,” and prevailing respondents and parties in the nature of respondents should be awarded attorney fees only “upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation.” Although different standards are applied to prevailing plaintiffs and prevailing defendants, the standards fairly effectuate the objectives of the statutes at issue. See *Martin*, 546 U.S. at 140, quoting *Christiansburg*, 434 U.S. at 422 (awarding fees simply because the party did not prevail “could discourage all but the most airtight claims, for seldom can a [party] be sure of ultimate success”). To the extent that inferences are drawn from the text of the Coble Act amendment, the change from mandatory to discretionary awards in reparations proceedings, in concert with the expansion of attorney fee award availability to injunction proceedings, provides no basis to infer an intent “to discourage all but the most airtight claims” by complainants.

*2.2. The Commission also seeks feedback on the following questions:*

*2.2.1. “Should the Commission decline to adopt any framework as part of this rulemaking and, instead, address all entitlement issues through the formal adjudication process?”*

No, establishing a framework as part of a rulemaking process is a more appropriate means to address these questions than merely taking a piecemeal approach through the adjudication process. As the Supreme Court explained in evaluating the standards of attorney-fee discretion: “Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.” *Martin*, 546 U.S. at 139. The Commission, as both a regulatory agency and an adjudicatory agency, has the unique opportunity to address the scope and manner of discretion to be applied in matters pending before the Commission (including before Administrative Law Judges) in a forthright and consistent manner.

*2.2.2. “If the Commission decides to adopt one of the standards used by the courts, should any additional criteria be added?”*

- *“For example, if the Commission were to adopt the nonexclusive list of factors used in Copyright Act attorney-fee determinations, are there additional factors the Commission should consider in light of the purpose of the Shipping Act and the nature of complaint proceedings brought under the Act?”*

Further to the comments in response to No. 2.1.1. above, in light of the purpose of the Shipping Act and the nature of complaint proceedings brought under the Shipping Act, prevailing complainants and parties in the nature of complainant/plaintiffs should “ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust,” and prevailing respondents and parties in the nature of respondents should be awarded attorney’s fees only “upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation.”

- *“Should the standard for entitlement used by the Commission depend on the type of proceeding? For example, should the Commission use a standard more favorable to*

*complainants in small claims proceedings, which often, though not always, involve individuals who file complaints against businesses with greater resources?”*

In general, the interests of complainants are similar regardless of the procedural Rules under which complaints are brought or the different financial capacity of complainants. Indeed, while the costs of bringing a small claims complaint before a settlement officer may be lower in overall terms, the costs of bringing a complaint under the normal rules is high regardless of the resources of the respondent. Both present financial barriers for complainants. With respect to *pro se* complainants and other small claims in general, effective use and management of the small claims process could be an effective means to promote adjudication in the face of limited or imbalanced resources. Along these lines, however, the Commission could consider altering or limiting the ability of a respondent to elect to remove a small claims complaint to a full proceeding.

3. *“How will the commission apply the provision to pending proceedings?”*

3.1. *“The Commission will likely need to address whether and how section 41305(e) applies to complaint proceedings that were initiated prior to December 18, 2014, and are still pending before the Commission.”*

3.1.1. *“One option for addressing attorney-fee determinations in pending proceedings would be to analyze the specific facts of individual cases under the framework above and determine whether application of the new provision would have a retroactive effect. If it would not, the Commission would apply the new provision to determine entitlement to attorney fees. The Commission requests comment on this approach and any alternative approaches. Would a brightline rule be preferable? For example, the Commission could establish a rule stating that it will apply the previous entitlement standard in all complaint proceedings initiated before a certain date, such as the enactment date of the Coble Act.”*

A brightline rule addressing the application of Section 41305(e) promulgated via the rulemaking process would be highly preferable. As an initial matter, analyzing the specific facts of individual cases to determine whether application of the new provision would have a retroactive effect would unnecessarily extend the period of uncertainty in individual cases and it could result in inconsistent decisions and therefore engender continued uncertainty. Case-by-case evaluation would also be more administratively burdensome and, in all events, it would be unnecessary because these legal questions are amenable to a brightline rule.

Retroactive application of statutes and statutory amendments is strongly disfavored. *Landgraf v. USI Film Products*, 511 U.S. 244, 276 (1994). As the Supreme Court explained in *Landgraf*:

Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the “principle that the legal effect of

conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.”

*Landgraf*, 511 U.S. at 265. A brightline rule is consistent with the Court’s guidance, as “individuals should have an opportunity to know [how section 41305(e) will be applied in complaint proceedings that were initiated prior to December 18, 2014] and to conform their conduct accordingly...”

The two-step retroactivity analysis set forth in *Landgraf* (and applied in *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006)) is straightforward here. Regarding step one, Congressional intent for retroactive application must be clear in the statute; no retroactive application will be inferred “*absent clear congressional intent favoring such a result.*” *Id.* (emphasis added); *see also id.* at 263-64 (noting “the axiom that ‘[r]etroactivity is not favored in the law,’ and its interpretive corollary that ‘congressional enactments and administrative rules will not be construed to have retroactive effect *unless their language requires this result.*’”) (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988)) (emphasis added). There is no clear Congressional intent that the Coble Act should be retroactively applied. Section 402 provides only that “[i]n any action brought under section 41301, the prevailing party may be awarded reasonable attorney fees.” There is no express statement in the statutory text requiring retroactive application. Therefore, under step one of the *Landgraf* analysis, Section 41305(e) should not be applied retroactively.

With respect to step two, the retroactive effect of Section 41305(e) to parties in pending proceedings is, as a practical matter, categorical and can be appropriately addressed in a rulemaking without analysis of individual cases. The relevant question is “whether [a statutory amendment] would have retroactive effect, *i.e.*, whether it impair[s] rights a party possessed when he acted, increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed.” *Landgraf*, 511 U.S. at 265. If a statute would have retroactive effect under step two, the presumption against retroactive application dictates that the statute should not be retroactively applied to pending proceedings.

Here, *any* application of Section 41305(e) would have retroactive effect on parties to pending proceedings, and therefore Section 41305(e) should not be applied retroactively. For complainants that filed Section 41301 reparations proceedings, the change from the availability of a mandatory right to attorney fees to the availability of discretionary attorney fees would impair rights that a complainant possessed when filing its complaint (*i.e.* the loss of the statutory *right* to recover attorney’s fees) and increase a complainant’s liability for past conduct and/or impose a new duty (*i.e.* the expansion of attorney-fee liability to respondents). Similarly, for respondents in Section 41301 cease and desist proceedings, the expanded availability of attorney fees to *any* Section 41301 complaint proceeding would potentially increase a respondent’s liability for past conduct and/or impose a new duty (*i.e.* the expansion of attorney-fee liability to cease and desist complainants). And the possible expansion of attorney-fee recovery to interveners or other parties would likewise increase liability and/or impose new duties on any

non-prevailing party, complainant or respondent. In short, the Commission should apply the entitlement standard in complaint proceedings initiated prior to December 18, 2014 and remaining pending before the Commission.

Very truly yours,

*Lawrence I. Kiern/sc*

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