

Before the  
FEDERAL MARITIME COMMISSION

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IN THE MATTER OF ORGANIZATION AND FUNCTIONS; RULES OF PRACTICE AND  
PROCEDURE; ATTORNEYS FEES

NOTICE OF PROPOSED RULEMAKING

FMC Docket No. 15-06

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**COMMENTS OF COZEN O'CONNOR**

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The law firm of Cozen O'Connor (hereinafter referred to as "Cozen") hereby submits its comments on the above-captioned Notice of Proposed Rulemaking ("NPRM").

Interests Of Cozen

Cozen is a law firm that practices extensively before the Federal Maritime Commission ("FMC" or "Commission"), representing both complainants (see, e.g., Docket Nos. 07-01, 09-01, 09-08, 11-15 and 11-18) and respondents (see, e.g., Docket Nos. 08-01, 10-06 and 10-10). Accordingly, it has extensive experience with litigation before the Commission, including claims for attorneys' fees.

The NPRM

In the NPRM, the Commission proposes to revise its regulations to reflect the changes made to the Shipping Act of 1984 by the Howard Coble Coast Guard and Maritime Transportation Act of 2014 ("Coble Act") with respect to the awarding of attorneys' fees in proceedings before the Commission. Whereas the Shipping Act of 1984 had provided that the award of attorneys' fees to a complainant that had secured an award of reparations was

mandatory, the Coble Act changed the statute so that the award of attorneys' fees to a prevailing party is now within the Commission's discretion. Thus, we agree the Commission is correct in interpreting the revised statute to mean that it is no longer mandatory that any party be awarded attorneys' fees, and that such fees are now available to any prevailing party, not just to a complainant that obtains an award of reparations.

### Comments

Cozen's comments are limited to certain aspects of the guidance the Commission intends to provide with respect to the manner in which it will exercise its discretion in awarding attorneys' fees.

1. Definition of "Prevailing Party" -- Cozen agrees with the Commission's observation that there is substantial federal case law interpreting the term "prevailing party." The Commission should be guided by existing precedent in interpreting this term, rather than attempting to formulate its own definition, either through regulation or adjudicated decisions.

2. The Standard For Awarding Attorneys' Fees -- In the NPRM, the Commission considers two standards that could be used for determining whether to award attorneys' fees -- one standard which treats successful plaintiffs more favorably than successful defendants (applicable under the Civil Rights Act) and another standard under which successful plaintiffs and defendants are treated equally (applicable under the Copyright Act). Cozen believes the Commission should adopt the Copyright Act standard and apply the criteria used by courts under this statute to complainants and respondents equally. There are two reasons for this.

As an initial matter, the Coble Act eliminated a mandatory award of fees to complainants only and replaced it with a discretionary award to any prevailing party. In other words, the statute was made less favorable to complainants than it had been. If Congress had intended that

complainants receive more favorable treatment with respect to attorneys' fees than respondents, it could have left the statute intact or made this policy clear in the Coble Act. However, it did not do so. Instead, it adopted a statutory standard that is facially neutral. For the Commission to apply its discretion in a manner that favors one category of prevailing party over another would be inconsistent with the intent of Congress as expressed in the Coble Act.

Moreover, the pro-plaintiff standard of determining entitlement to attorneys' fees used under the Civil Rights Act is not appropriate for use under the Shipping Act. As an initial matter, unlike complainants under the Shipping Act, plaintiffs under certain provisions of the Civil Rights Act (e.g., 42 U.S.C. §2000a-3) can only obtain injunctive relief. Given the inability to recover damages under such provisions of the Civil Rights Act, Congress provided plaintiffs with the ability to recover attorneys' fees if successful, thereby enabling them to act as "private attorneys general" in obtaining injunctive relief, and "vindicating a policy that Congress considered of the highest priority." *Newman et al. v. Piggie Park Enterprises, Inc., et al.*, 390 U.S. 400, 402 (1968). Since complainants under the Shipping Act may recover reparations to compensate them for actual injury, there is no similar consideration under the Shipping Act.

In addition, the fundamental policy underlying the Civil Rights Act is the elimination of discrimination and the protection of fundamental personal rights. The policies underlying the Shipping Act simply do not rise to the same level of importance. Therefore, the policy justifications for favoring plaintiffs' claims for attorneys' fees under the Civil Rights Act are not applicable to complainants' claims for attorneys' fees under the Shipping Act.

### 3. Particular Instance Involving Application of the Standard

In applying an even-handed standard to its evaluation of a petition for attorneys' fees, the Commission should consider the degree to which the prevailing party has prevailed (did it

prevail on all or only some of its claims?), the relief sought vs. the relief obtained (did the prevailing party obtain all of the relief sought or only a portion thereof?), and the relationship of the attorneys' fees sought to the two foregoing factors.

In particular, now that an award of attorneys' fees is no longer mandatory, the Commission should use its discretion in awarding such fees to avoid situations in which the fees awarded far exceed the relief obtained (see, e.g., *Bernard & Weldcraft Welding Equipment v. Supertrans Intermodal, Inc.*, 29 S.R.R. 1348, 1359 (ALJ 2003), administratively final February 12, 2003 (\$12,587.50 in attorneys' fees awarded in case involving reparations of \$310.98)). Such results should be avoided especially when the relief awarded the complainant is far less than what was originally sought. See, e.g., April 8, 2013 Determination and Award of Attorneys' Fees in FMC Informal Docket 1894(I)(attorneys' fees of \$24,848.75 awarded even though complainant recovered only \$1,390 of more than \$9,400 in reparations originally sought).

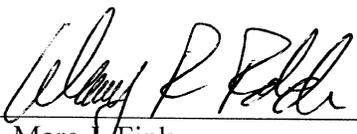
#### Conclusion

The Commission should rely on existing precedent when determining what constitutes a "prevailing party." When considering petitions for attorneys' fees, the Commission should apply the criteria used by courts under the Copyright Act, and should apply them equally to prevailing complainants and respondents. This should be done in a manner that avoids awards of attorneys' fees that far exceed the reparations awarded, particularly when complainant obtains relief that is

significantly less than originally sought.

Respectfully submitted,

COZEN O' CONNOR

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August 6, 2015