

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No.: 15-11

IGOR OVCHINNIKOV, IRINA RZAEVA, and DENIS NEKIPELOV,

Complainants,

– vs. –

**MICHAEL HITRINOV a/k/a
MICHAEL KHITRINOV,
EMPIRE UNITED LINES CO., INC., and CARCONT, LTD.**

Respondents.

**COMPLAINANTS’ BRIEF IN OPPOSITION TO THE MOTION BY
RESPONDENTS FOR A STAY**

Pursuant to Rules 69 and 71 of the Federal Maritime Commission’s (the “Commission”) Rules of Practice and Procedure (46 C.F.R. 502 *et seq.*), Complainants, through their Counsel, Marcus A. Nussbaum, Esq. and Seth M. Katz, Esq., respectfully submit this brief in opposition to the motion by respondents Michael Hitrinov a/k/a Michael Khitrinov and Empire United Lines Co., Inc. (collectively “Respondents”) for a stay of this proceeding.

As set forth below, the instant motion by Respondents abjectly fails to set forth *any* grounds warranting a stay in this matter, is legally and factually without merit, constitutes a frivolous motion and should be denied. While Respondents’ motion mainly consists of wild and specious allegations of conspiracy theories and personal *ad hominem* attacks against the undersigned, the foregoing fails to serve as grounds for warranting a stay of this matter, as does the litigation referenced by Respondents which is ongoing in the U.S. District Court for the District of New

Jersey.¹ Once stripped bare of Respondents' patently false allegations of misfeasance and malfeasance, improper business practices, and the like, it can be seen that Respondents' motion boils down to a simple request for special treatment by the Commission.

To the extent that Respondents attempt to proffer legal arguments in support of a stay, it is further submitted that those arguments demonstrate a failure by Respondents' counsel to understand some of the basic tenets and principles of maritime law, the Shipping Act of 1984, 46 U.S.C. §40101, *et. seq.* (the "Shipping Act"), and the fundamental purpose of this Commission, which is, to wit: "To foster a fair, efficient and reliable international ocean transportation system ***and to protect the public from unfair and deceptive practices.***"²

As to Respondents' failed attempt to demonstrate an alleged "conflict of interest" arising out of the undersigned's representation of the Complainants herein, purportedly posed by the undersigned having previously represented Mr. Sergey Kapustin in a separate and unrelated matter, once again, such "argument" (if it can fairly be characterized as such) is *completely lacking* in both standing and legal coherence. As Mr. Kapustin is *not* a party to the case at bar, and as the potential testimony and information adduced from Mr. Kapustin during discovery herein would be adverse to Mr. Hitrinov and Empire United Lines Co. Inc. (and *not* to Mr. Kapustin), it is difficult to comprehend how or in what way *any* conflict of interest is implied.

Regardless of the foregoing, it cannot be said that the Respondents *themselves* are unaware that the arguments made by them in support of a stay are unavailing, as Respondents have already

¹ Moreover, Respondents have taken it upon themselves to annex to their motion papers a retainer agreement provided by the undersigned to a former client, Mr. Sergey Kapustin. While the circumstances are yet unclear as to how Respondents obtained this private document, to the extent that Respondents and their Counsel may have violated the Rules of Professional Conduct, rest assured the matter will be fully pursued. Such disclosure violates Rule 4.4(a) of ABA's Model Rules of Professional Conduct. See Comment [1] ("Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and ***unwarranted intrusions into privileged relationships***, such as the client-lawyer relationship.").

² See, the FMC's Mission Statement at http://www.fmc.gov/about/about_fmc.aspx (emphasis added).

been instructed on this issue by the Commission, which denied their motion for a stay in a past proceeding, captioned as *Baltic Auto Shipping Inc. v. Empire United Lines Co. Inc.* (FMC Docket No.: 14-16). As explained below, for the very same reasons as set forth in the Commission's Order of February 2, 2015 in FMC Docket No.: 14-16 denying Respondents' request for a stay, and further due to Respondents' professed failure to set forth factual and legal grounds warranting a stay, Respondents' instant motion should be denied in its entirety.

RELEVANT PROCEDURAL HISTORY AND FACTS

The full procedural history and chain of events leading up to Respondents' instant motion are already known to the Commission, as they are set forth in detail in the various filings already on the docket such as the Complaint in this matter and Complainants' Motion for Default Judgment, to which the Commission is respectfully referred. In accordance with the directives of the Commission as set forth in the Order of April 22, 2016 enlarging Complainants' time to respond to the instant motion for a stay, Complainants refrain from attaching those documents in order to minimize the burden on the Commission arising out of the filing and handling of voluminous papers.

Additionally, since Respondents' latest omnibus diatribe to the Commission constitutes a blunderbuss presentation of a myriad of issues ranging from simple untruths to patent absurdities, Complainants are compelled to respond as briefly as possible herein to same, least Complainants' silence be remotely construed as assent to Respondents' opprobrium as to the relevant facts in this matter.³ Complainants reject and object to Respondents' twisted interpretation of facts regarding the background of this case, mainly consisting of offensive, distasteful, and unlawyerly missives, inclusive of personal attacks and aspersions against the undersigned. Suffice it to say that there is

³ Additionally, Respondents attempt to mix apples and oranges – defenses related to joinder, this forum's subject matter jurisdiction, standing, and other issues properly reserved for a motion to dismiss. To the extent not necessary for opposition of the instant motion to stay, these issues will be fully addressed by Complainants at the appropriate time, such as during Respondents' anticipated motion to dismiss.

no need to burden the Commission with a ‘point by point’ refutation of each and every one of counsel’s scurrilous and specious accusations, which do not serve as factual grounds for warranting a stay herein.

Respondents’ wild accusations of “conspiracy” between the undersigned and counsel in the New Jersey action, further alluding to potential conflicts of interest and waiver of privilege, verges on paranoia. Those accusations are extraneous to the legal issues related to the motion to stay currently before this Commission. Rather than recognizing their failure to satisfy legal standards warranting the Commission’s exercise of such “an extraordinary, disfavored remedy” as a stay of this action, Respondents have resorted to personal attacks on Complainants’ counsel and attempts to re-litigate issues that were litigated before the New Jersey court, which only have marginal relevance to Respondents’ violation of the Shipping Act. For the reasons set forth below, Respondents’ motion should be denied.

ARGUMENT

I. THE FIRST FILED RULE, THE DOCTRINE OF JUDICIAL ECONOMY, AND ANY ARGUMENTS REGARDING THE POTENTIAL FOR DOUBLE LIABILITY DO NOT WARRANT A STAY OF THIS MATTER

A. Standard of Review on a Motion to Stay a Proceeding

To the extent that Respondents’ motion papers rely upon a recent decision by Judge Wirth at the Commission regarding the “test for evaluating a motion to stay” it is respectfully submitted that based upon the factors set forth by Judge Wirth in that standard or review, Respondents’ motion must be denied. Specifically, Judge Wirth makes reference to factors such as “which court first assumed jurisdiction”; “whether state or federal law provides the rule of decision on the merits”; and the “adequacy of the...court to protect the parties’ rights”. As explained below, the Federal Court did not and cannot assume jurisdiction over this matter, as the Commission has exclusive jurisdiction to hear Shipping Act claims. Part and parcel with the foregoing, is that the

Federal Court cannot make a decision on the merits nor can it protect the parties' rights with respect to claims arising out of Shipping Act violations. That can only be done in this forum.

Additionally, on the issue of whether or not a stay of a lawsuit pending the outcome of another lawsuit is warranted, it is well settled that a stay of a proceeding is "an extraordinary, disfavored remedy which requires [from the Court] the exercise of judgment and involves weigh[ing] competing interests and maintain[ing] an even balance." *Bechtel Corp. v. Local 215, Laborers' Int'l Union*, 544 F.2d 1207, 1215 (3d Cir. 1976). In seeking a stay, the moving party "bears the burden of proof . . . and must make out a clear case of hardship or inequity in being required to go forward[.]" *Landis v. North Am. Co.*, 299 U.S. 248, 255, (1936). There must be a "clear countervailing interest to abridge a party's right to litigate." *CTF Hotel Holdings, Inc. v. Marriott Int'l, Inc.*, 381 F.3d 131, 139 (D.N.J. 2004).

Respondents here show nothing more than a request for special treatment, and have demonstrated neither hardship nor inequity, and thus, this Commission should exercise its discretion and deny Respondents' motion.

B. The Commission's Order of February 2, 2015 in FMC Docket No.: 14-16 Denying Respondents' Request for a Stay Therein Warrants Denial of Respondents' Instant Motion

It is submitted that the Commission may possibly share the same sense of déjà vu as the undersigned has with respect to the instant debate over whether or not a stay of this matter is appropriate. The first page of Respondents' motion papers explains that Respondents seek a stay herein "pending resolution of *first-filed* federal court claims regarding the same transactions..." and in support thereof also explains that "Litigating claims in two jurisdictions regarding the same cars is contrary to *judicial or administrative economy*..." (emphasis added).

The Commission is respectfully referred to page "3" of the Commission's Order of February 2, 2015 in FMC Docket No.: 14-16 Denying Respondents' Request for a Stay (the "Order"), wherein the Commission makes reference to Respondents' erroneous assertion that the

Commission should have stayed that proceeding because “the 2015 district court case is a continuation of the 2011 district court case and the 2011 district court case was the *first filed* case between the parties on this matter, *so judicial economy requires staying the Commission case...*” (emphasis added). As can be seen herein, Respondents now repeat the same argument that was previously unavailing to the Commission.

Up front, and on the issue of the “first-filed” rule, it is important to note that in order for this rule to be applicable, both forums subject to this rule must have the ability to obtain *concurrent* jurisdiction over the issues at hand, which, in this case, they do not and cannot. The “first-filed rule” provides that: “in all cases of federal *concurrent* jurisdiction, the court which first has possession of the subject must decide it.” *See, EEOC v. Univ. of Penn.*, 850 F.2d 969, 971 (3d Cir.1988) (quoting *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 929 (3d Cir.1941)) (further citation omitted). As explained below, the district court does not and cannot obtain jurisdiction over Shipping Act claims.

C. The Federal Maritime Commission Has Exclusive Jurisdiction Over This Matter

In response to that same failed arguments made by respondents in 2015, the Commission explained in the Order that: “The appropriate test for the Commission's jurisdiction is whether a complainant's allegations ‘involve elements peculiar to the Shipping Act.’” *See*, Order at 3 (citing to *Cargo One, Inc. v. COSCO Container Lines Company, Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000)). The Commission then found that it had subject matter jurisdiction over that proceeding because the Complaint therein (as does the Complaint in the instant matter) alleges that Respondent “Empire, a non-vessel-operating common carrier licensed by the Commission, violated the Shipping Act on transportation of cargo by water between ports in the United States and ports in a foreign country.” *Id.* The Commission further explained that “jurisdiction over a complaint alleging violations of the Shipping Act exists even though a proceeding in another forum

may have resolved some issues between the parties...⁴ and that the fact that the service contract at issue in *Cargo One* required arbitration in another forum, “does not outweigh the Commission's duty to protect the public...” Id.

It is respectfully submitted that the rule gleaned from the Order is directly applicable to the instant matter, as the allegations of Complainants herein involve elements peculiar to the Shipping Act, and Complainants do indeed allege that Respondents violated the Shipping Act on transportation of cargo by water between ports in the United States and ports in a foreign country. Most significantly, the Order concluded, just as the Commission should now conclude, that: “The Commission should not delay its proceeding pending a decision in the [district court litigation]. Whatever the outcome of the New Jersey cases, “[t]he Commission has *exclusive jurisdiction* to administer and enforce the 1984 Act. Violations of the 1984 Act can be rectified only by the sanctions and remedies provided for in that Act.” Id. at 5 (citing to Unpaid Freight Charges, 26 S.R.R. 735, 739 (FMC 1993)) (emphasis added).

An argument made by Respondents in favor of a stay is their claim that both the FMC and the district court can “adequately protect litigants’ rights” and that the “...correct procedure is for Complainants to intervene in the first-filed federal case or file their own federal complaint and seek consolidation.” The simplistic answer to the Respondents’ contention is that the sole cause of action at issue in the instant case (i.e. Respondents’ violations of the Shipping Act) is absent from the action now pending before the district court. As set forth above, the Federal Maritime Commission has exclusive jurisdiction involving actions for reparations arising out of violations of the Shipping Act. Therefore, the reparations sought by Complainants herein (including an award of attorneys’ fees as authorized under the Shipping Act) are unavailable in the district court. Those

⁴ Id. at 4 (citing to *Cargo One*, supra). *A fortiori*, jurisdiction exists here due to the fact that the proceeding in New Jersey referenced by Respondents *does not* include the Complainants as parties and *has not* resolved any issues amongst the parties herein.

claims by Complainants are within the sole purview of this Commission. Thus, the underlying premise for the Respondents' motion to stay—that both the district court and this Commission would be able to render duplicative judgments—is factually and legally incorrect. *See, generally, Nat'l Food & Beverage Co. v. United States*, 96 Fed. Cl. 258, 268 (2010) (stay pending resolution of government's condemnation action in different court, involving portion of same land, was not warranted).

The Commission is respectfully referred to the Complaint filed in this matter, which alleges that Respondents violated, *inter alia*, sections §§ 40701(a), 41102(c), 41104(2), 41104(3), 41104(4), 41104(8), 41104(9), 41104(10), 41106(2), 41106(3) of the Shipping Act. In light of the foregoing, and in light of the Commission's *exclusive jurisdiction* to administer and enforce the Shipping Act, Respondents' motion for a stay should be denied.

D. Respondents Are Not Subject To The Potential For Double Liability Because The FMC Action And The District Court Action Are Seeking Relief For Different Claims

Respondents' argument in favor of a stay because of the potential for double liability is also unavailing. On this issue, Respondents argue that “the present arrangement of dual claims against Empire poses the possibility that Empire could be held liable to two different sets of complainants with regard to the very same transactions regarding the very same cars” and that “the Constitution does not countenance such double liability regarding the same assets in different jurisdictions.” This argument fails to consider that under well settled precedent, there is no double liability arising out of recovery for separate and distinct causes of action.⁵

⁵ Moreover, Respondents' citation to *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71 (1961) for the proposition that Respondents could be exposed to “double liability”, completely misses the mark. *Western Union* resolved the dispute amongst different States claiming the same property, and held that the Due Process Clause of the Fourteenth Amendment prevents more than one State from escheating a given item of property. *Id.*, at 79. That holding has nothing to do with limiting recovery, on the one hand, for Respondents' liability to Complainants arising out of violations of the Shipping Act, and on the other hand, for Respondents' liability in the New Jersey matter for breach of contract and fraud to Respondents' business partner Kapustin and Global Auto Group.

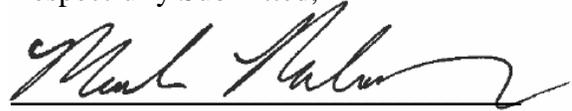
At issue herein are different plaintiffs bringing separate and distinct causes of action (arguably) arising out of the same events against the same defendants. As the First Circuit observed, “where two suits arising from the same incident involve different causes of action, *defendants are not faced with the potential for double liability because separate suits have different consequences and different measures of damages*. See, *Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1, 3 (1st Cir. 1998).

CONCLUSION

In light of the foregoing, it is submitted that the instant motion by Respondents abjectly fails to set forth any grounds warranting a stay in this matter, is legally and factually without merit, constitutes a frivolous motion and should be denied.

Dated: April 26, 2016
Brooklyn, New York

Respectfully Submitted,



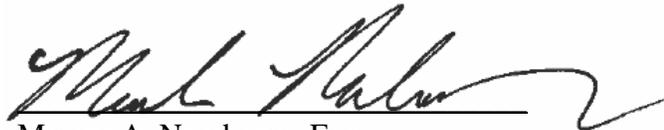
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the **COMPLAINANTS' BRIEF IN OPPOSITION TO THE MOTION BY RESPONDENTS FOR A STAY** upon Respondents' Counsel at the following address:

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Dated: April 26, 2016 in Brooklyn, New York.