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 REPLY TO THE RESPONDENTS' RESPONSE TO THE COMMISSION'S NOTICE OF DEFAULT AND ORDER TO SHOW CAUSE

Complainants, through their Counsel, Marcus A. Nussbaum, Esq., respectfully submit this brief in Reply to the response (the "Response") by Respondents, Michael Hitrinov a/k/a Michael Khitrinov and Empire United Lines Co., Inc. ("Empire") to the Federal Maritime Commission's (the "Commission"), Notice of Default and Order to Show Cause dated March 30, 2016 (the "Notice of Default").

NATURE OF BRIEF

This brief is respectfully submitted by Complainants in support of the Commission's Notice of Default and findings of fact contained therein, and as a Reply to the Response thereto. As set forth below, Respondents have had notice of these proceedings, yet failed to timely appear, answer, or file a motion to dismiss in this matter; all resulting in the Commission's issuance of its instant Notice of Default.

JURISDICTION AND VENUE

It is respectfully submitted that the Commission has both personal and subject matter jurisdiction over the Respondents herein, and that service of process was properly made.

A. Complainants' Supplemental Service of Process

Separate and apart from the attempted service detailed in the Commission's findings of fact are Complainants' efforts to achieve service upon Respondents, Hitrinov and Empire.

On January 8, 2016, the United States Postal Service confirmed in writing dated December 23, 2015 that the current address for Empire is 2303 Coney Island Avenue, Brooklyn, NY 11223. See Appendix "1".

By email of December 4, 2015, the Commission advised Complainants that it sent the Notice of Filing and Complaint by U.S. mail to the above address.

After the Commission notified Complainants that the UPS mailings to the Respondents were refused, Complainants were advised by the Commission on December 4, 2015 to engage process servers in order to serve their complaint upon Respondents, Hitrinov and Empire. Accordingly, Complainants engaged special process servers to serve the Complaint on Hitrinov and Empire.

Annexed hereto as Appendix "2" is an "Affidavit of Non-Service" from Complainants' process server which explains that on December 21, 2015, prior to Empire having been successfully served on December 29, 2015, a process server attempted to serve the Notice of Filing and Verified Complaint in this matter upon Empire at their place of business bearing the address set forth above.

On February 14, 2016, Complainants filed a Motion For A Default Judgment against Respondents Hitrinov and Empire. Complainants served the motion on February 12, 2016 via first class mail upon Respondents Hitrinov and Empire at the above address. The first class mailings to Hitrinov and Empire of the Complainants' Motion For A Default Judgment Against Respondents were not returned.

B. The Complaint States a Claim within the Commission's Jurisdiction

Respondents argue that this dispute is outside the jurisdiction of the Commission because Complainants "cannot allege that they had any type of shipper-carrier relationship with Empire." In the first instance, the issue of the Commission's jurisdiction over this matter was already ruled upon twice.

First, in the Presiding Officer's Order Denying Respondents' Motion for Stay, dated April 27, 2016; and second, by the Presiding Officer during the telephonic conference and ensuing ruling on May 3, 2016.

STATEMENT OF FACTS

Complainants respectfully rely upon the findings of fact made by the Commission in its Notice of Default and Order to Show Cause of March 30, 2016.

Said findings of fact included, *inter alia*, the Respondents' receipt and subsequent deliberate refusal of papers from the Commission, as well as Respondents having had notice of this proceeding. For purposes of brevity, said findings of fact are wholly incorporated herein, and fully made a part hereof.

ARGUMENT

I. THE RESPONDENTS HAVE FAILED TO DEMONSTRATE REQUISITE "GOOD CAUSE" FOR SETTING ASIDE THE DEFAULT

A. Standard of Review

It is well settled that "In determining whether good cause exists to set aside an entry of default, [C]ourts should consider: (1) 'the willfulness of the default'; (2) 'the existence of a meritorious defense'; and (3) 'the level of prejudice that the non-defaulting party may suffer should relief be granted.'" See, Addison v. Reitman Blacktop, Inc., 272 F.R.D. 72, 77 (E.D.N.Y. 2010); (citing, Pecarsky v. Galaxiworld.com Ltd., 249 F.3d 167, 171 [2d Cir. 2001]).

B. Respondents' Default Was Willful

Willful failure has been defined as "any intentional or conscious failure as distinguished from involuntary non-compliance." See, Roberts v. Norden Div., United Aircraft Corp., 76 F.R.D. 75, 80 (E.D.N.Y.1977). It is well settled that a finding of bad faith is not a necessary predicate to concluding that a defendant acted 'willfully' for the purposes of Rule 60(b)(1). See, Gucci Am., Inc., Guess, Inc. v. Gold Ctr. Jewelry, 158 F.3d 631, 635 (2d Cir.1998). Rather, "it is sufficient that the defendant defaulted deliberately." Id.

It is respectfully submitted that the Commission's findings of fact overwhelmingly demonstrate that the Respondents willfully refused UPS mailings from the Commission ("It appears likely that when

UPS attempted to deliver the packages mailed by the Secretary, Hitrinov and Empire, respondents in another Commission proceeding, refused delivery because the packages came from the Commission." See, Notice of Default.)

It is further respectfully submitted that the Commission's findings of fact in this case additionally exemplifies precisely the type of willful and bad faith behavior that has previously warranted the entry of a default judgment. See, e.g., Commercial Bank of Kuwait v. Rafidain Bank, 15 F.3d 238, 243 (2d Cir.1994); (defendant failed, for untenable reasons to answer the complaint after purposely evading service for months); S.E.C. v. Breed, No. 01–CV–7798, 2004 WL 1824358 (S.D.N.Y. 2004); (defendant's default was willful because the evidence suggested defendant evaded service where plaintiffs attempted personal service multiple times, including when there were cars in the driveway, and the [C]ourt did not find the defendant's explanation for why she was never home compelling. See, Id.).

C. Respondents Cannot Demonstrate A Meritorious Defense

As set forth below, Respondents have not and cannot demonstrate a meritorious defense which would warrant setting aside the entry of default.

i. Standard of Review

It is well settled that in order to proffer a meritorious defense, a "defendant seeking to vacate an entry of default must present some evidence beyond conclusory denials to support his defense." See, Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 98 (2d Cir. 1993) ("[a] defendant seeking to vacate an entry of default must present some evidence beyond conclusory denials to support his defense".) See, Id. Further, such evidence "is measured not by whether there is a likelihood that it will carry the day, but whether the evidence submitted, if proven at trial, would constitute a complete defense." Id. It is respectfully submitted that apart from the conclusory denials eschewed by the Court in Enron, *supra*, Respondents have *abjectly failed* to present any evidence in support of any such meritorious defense.

D. Excusing Respondents' Default Would Result In Prejudice Suffered By Complainants

It is respectfully submitted that if excused, Respondents' default would undeniably prejudice the Complainants herein. Predominantly, vacating the default will cause Complainants to suffer prejudice

as a result of having to litigate against Respondents' frivolous defenses. See, e.g., Robinson v. Ergo Sols., LLC, 4 F. Supp. 3d 181, 187 (D.D.C. 2014 (plaintiff would be prejudiced if the Court were to allow setting aside the default entered against defendant as costs to litigate this matter have already exceeded the total value of plaintiff's damage award—due, in large part, to defendant's seriatim filing of frivolous motions). It is respectfully submitted that the case at bar constitutes precisely the scenario addressed in Robinson, *supra*, where litigation costs herein could easily exceed Complainants' damages and where Respondents have already interposed frivolous motions in this matter.

To the extent that the Commission follows the Federal Rules of Civil Procedure regarding timeliness, Respondents herein would necessarily have had to file an Appearance, Answer, or Motion to Dismiss in December, 2015. The ensuing five (5) month delay has caused Complainants to expend considerable attorneys' fees litigating their default judgment motion, as well as the frivolous motions filed by Respondents in an obvious effort to vexatiously harass Complainants, multiply litigation costs, and unnecessarily delay these proceedings.

It is well settled that ensuing delay caused by Respondents' default which causes a Complainant to needlessly expend attorneys fees has been held sufficient to constitute prejudice within the meaning of the law applying to defaults and motions seeking the vacating of defaults. See, e.g., Stuart v. Kempthorne, 99-CV-8163, 2007 WL 2071605, (E.D.N.Y.2007); (delays combined with increased litigation costs can constitute prejudice); see also, In re Futterman, 99-CV-8793, 2001 WL 282716 (S.D.N.Y. 2001); State Farm Mut. Auto. Ins. Co. v. Cohan, No. 09-CV-2990 (JS), 2010 WL 890975, at (E.D.N.Y. 2010), aff'd, 409 F. App'x 453 (2d Cir. 2011).

It is respectfully submitted that the foregoing abundantly demonstrates the prejudice already suffered by Complainants, as well as the pronounced likelihood of continuing prejudice which would undeniably result from the vacating of the entry of the default.

CONCLUSION

It is respectfully submitted that based upon the foregoing, Respondents have failed to establish or set forth any prima facie establishment of reasonable excuse or good cause shown as to why this

Commission should not now issue an Initial Decision on Default. Neither have Respondents demonstrated a meritorious defense which might otherwise warrant the vacating of said default. Nor have Respondents offered any evidence that said default was anything but willful as concluded by the Commission as finder-of-fact in their Notice of Default.

In stark contrast thereto, Complainants have abundantly met all of the requisite elements in order for the Commission to issue an initial decision on default, to wit: willful failure, absence of a meritorious defense, and prejudice to Complainants.

Consequently, it is respectfully urged and otherwise prayed for that the Commission now issue an Initial Decision on default against the Respondents in the amount of $80,981.00 plus interest, attorneys fees, and such other relief as the Commission may deem just and proper under the circumstances.

Dated: Brooklyn, New York
May 18, 2016

Respectfully Submitted,

Marcus A. Nussbaum, Esq.
P.O. Box 245599
Brooklyn, NY 11224
Tel: 888-426-4370
Fax: 347-572-0439
Attorney for Complainants
marcus.nussbaum@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the **COMPLAINANTS' BRIEF IN REPLY TO THE RESPONDENTS' RESPONSE TO THE COMMISSION'S NOTICE OF DEFAULT AND ORDER TO SHOW CAUSE** upon Respondents' Counsel at the following address:

Nixon Peabody LLP
Attn: Eric C. Jeffrey, Esq.
799 9th Street NW, Suite 500
Washington, DC 20001-4501

by first class mail, postage prepaid, and by email (ejeffrey@nixonpeabody.com).

Marcus A. Nussbaum, Esq.
P.O. Box 245599
Brooklyn, NY 11224
Tel: 888-426-4370
Fax: 347-572-0439
Attorney for Complainant
marcus.nussbaum@gmail.com

Dated: May 18, 2016 in Brooklyn, New York.