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June 23, 2016

The Hon. Karen V. Gregory
Secretary of Federal Maritime Commission
800 North Capitol St.
Room 1046
Washington, D.C. 20573

Re: Docket No. 15-11 – Ovchinnikov v. Hitrinov

Dear Ms. Gregory:

Enclosed for filing in the above-captioned matter are an original true copy and five (5) additional copies of:

1. Respondents' Motion to Strike Complainants' Reply to a Reply

Please contact me if you have any questions.

Sincerely,

Eric C. Jeffrey

Enclosures

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 15-11

IGOR OVCHINNIKOV, ET Al

v.

MICHAEL HITRINOV ET AL

Consolidated With

DOCKET NO. 1953(I)

KAIRAT NURGAZINOV, ET Al

v.

MICHAEL HITRINOV ET AL

RESPONDENTS' MOTION TO STRIKE COMPLAINANTS' REPLY TO A REPLY

In yet another midnight missive, Counsel for Complainants has filed an unauthorized and mis-styled reply to a reply, without prior leave of the Presiding Officer, without any effort to comply with the obligation to confer, and addressed almost exclusively to issues that could and should have been addressed in its Motion to Compel. Respondents hereby move to strike this improper pleading, reply to Complainants' required but unstated motion for leave to file their reply, and proffer a response to Complainants' misguided reply, to be considered if and only if the Presiding Officer agrees to consider Complainants' instant Reply to Complainants' Motion to

Strike, Preclude, and/or Compel Compliance with the Presiding Officer's Orders filed on June 22, 2016 ("Reply to a Reply").

As a preface to this pleading, Respondents reiterate that, as established in their Motion for Judgment on the Pleadings, and again in Respondent's Motion to Strike Complainants' purported "shipping documents," filed contemporaneously herewith, Complainants have submitted fraudulent shipping documents to the Presiding Officer. We believe that this fundamental matter is critical to the proceedings, so that nothing else should go forward until it is resolved (save Respondents' Motion for Judgment on the Pleadings, which can be decided without reliance on Complainants' falsified shipping documents).

Putting aside obvious nomenclatural issues presented by Complainants' Reply,[1] as well as their attempt to reply to multiple responses,[2] the Reply should be struck because it is offered without leave of the Presiding Officer and contains material that is "redundant, immaterial, impertinent, or scandalous." F.R.C.P. 12(f). Further, Complainants have failed to show any "extraordinary circumstances" that would justify their hybrid reply even had they properly requested leave. Finally, to the extent that Complainants' improper Reply to a Reply is considered, FMC practice requires that Respondents, as non-movants, be given the "last word."

1. <u>Complainants' Unauthorized Reply Should be Struck</u>

Although the FMC Rules do not specifically address motions to strike, such motions have been accepted by the Commission. See, e.g., *The Auction Block Co. v. City of Homer*, 33

[1] The title of the pleading states that it is a reply to Complainants' own Motion to Compel. Nowhere do the FMC Rules (or the Federal Rules of Civil Procedure) authorize a party to reply to its own pleading.

[2] The "reply" addresses both Respondents' Response to Complainants' Motion to Compel and Respondents' Response to Complainants' Multiple Email Motions.

SRR 107 (ID 2013), affirmed 33 S.R.R 589 (FMC 2014) (granting a motion to strike and for sanctions); *Save on Shipping v. PRMSA*, 27 SRR 151 (FMC 1995) (granting motion to strike); *Green Master International Freight Services, Ltd.*, 29 SRR 1303 (FMC 2003) (same).

Complainants' reply to two responses is made without leave of the Presiding Officer. Although Rule 71(c) allows a reply to a response in "extraordinary circumstances," it is clear that the showing of such circumstances must be made in a separate motion, not as part and parcel of the reply itself. Otherwise, the litigants themselves could effectively decide what constitutes exceptional circumstances and bootstrap themselves into the right to file an otherwise forbidden reply. It would also make meaningless the Rule requiring that any request to the Presiding Officer be made by motion. Rule 69(a). For that reason it should be struck.

Respondents also note that Complainants' "reply" is replete with statements about Counsel for Complainants that are "immaterial, impertinent, or scandalous" (or all three). These should be struck in accordance with F.R.C.P. 12(f). See *Save on Shipping, supra* (striking material that was "immaterial and needlessly provocative").[3]

2. <u>Complainants Have Failed to Show "Extraordinary Circumstances"</u>

Apart from Complainants' failure to file their request for relief by motion, the purported showing of "extraordinary circumstances" they embed in their reply is nothing of the kind. Complainants simply recite a string of purported facts and declare themselves satisfied. There is simply no showing at all as to why these purported facts amount to "extraordinary circumstances." Complainants only attempt at an argument is their assertion that Respondents'

[3] The undersigned especially objects to Complainants' reprehensible comments regarding Ms. Vohra, who may be young and inexperienced in FMC matters, but who in the undersigned's estimation is far more competent than either of Complainants' Counsel, and who actually bothers to read the rules. Ms. Vohra signed the Response because the undersigned was out of town.

Response to Complainants' Email Motions was an unauthorized reply to a reply. Ignoring the obvious irony of filing an unauthorized reply to a purportedly unauthorized reply, Complainants are simply wrong.

As Complainants have previously been advised on multiple occasions, and as discussed above, any request for action by the Presiding Officer is perforce a motion under the FMC's Rules. Rule 69(a). As demonstrated by Complainants' own Appendices and the Exhibits hereto, Complainants made multiple motions, which they acknowledge were made by email. As set forth in Respondent's Combined Response to those Motions, Complainants made the following requests for an action or order by the Presiding Officer:

- **June 15 at 2:50 that the Presiding Officer**: (a) reject Respondents' response, (b) preclude Respondents from opposing the motion to compel, and (c) grant the motion to compel "on default." See Exhibit 1 and Appendix B to Complainants' Reply to a Reply.

- **June 15 at 4:27 that the Presiding Officer:** (a) reject Respondents' response as "fatally defective" and (b) deny Respondents leave to serve a corrected response. See Appendix C to Complainants' Reply to a Reply.

- **June 15 at 9:00 that the Presiding Officer:** (a) "must" find the response "fatally procedural defective," (b) "*reject*" the response, and (c) "grant Complainants' instant motion on default, in its entirety." See Exhibit 2.

There can be no dispute that, under the express words of the Rules, these requests for relief are non-dispositive "motions" to which Respondents had, and exercised, a right to respond.

Furthermore, the actual substance of Complainants Reply to a Reply is addressed not to Respondents' Response to Multiple Email Motions, but rather to Complainants June 7 Motion to Compel and Respondents' response thereto. Complainants now seek to re-litigate matters already addressed in the authorized pleadings regarding their own Motion. There is simply nothing in the current "reply" that could not have been addressed in Complainants' Motion to

Compel (and indeed much of the current argument is simply repetition of matters already argued).

Finally, we note that Complainants' unstated but required non-dispositive motion to file the "reply" was proffered without any attempt to confer with Counsel for Respondents, and does not contain any statement that such conferral was attempted. For this reason as well, the motion should be denied.

3. Respondents Should be Permitted to Reply

The Commission has customarily recognized that fundamental fairness necessitates that the non-moving party to a non-dispositive motion be given the "last word" if the moving party is allowed to file a reply to a reply. See, e.g., *Universal Fixture Manufacturing Co. v. ANERA*, 26 SRR 386, 387 (ALJ 1992); *Matson Navigation Co.—Hawaiian Cargoes*, 25 SRR 245, 246 (FMC 1989). Moreover, because Complainants could, and in many cases did, address these arguments in their Motion to Compel, their last ditch effort constitutes improper sandbagging. See, e.g., *NRDC v. EPA*, 25 F.3d 1063, 1071 n.4 (D.C. Cir. 1994) ("We require petitioners and appellants to raise all of their arguments in the opening brief to prevent 'sandbagging' of appellees and to provide opposing counsel the chance to respond"). Accordingly, while Respondents urge the Presiding Officer not to consider Complainants' unauthorized and misbegotten reply, to the extent that he does so, he should also consider the following response.

In submitting their unauthorized Reply to a Reply, Complainants make many untrue statements of fact and law. Most are trivial, and need no correction. We therefore address only a few of Complainants' patently incorrect assertions.[4]

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[4] We also note that Complainants repeatedly refer to Respondents' purported "release" of the vehicles to third parties. As previously established, EUL did not release vehicles. That was done solely by CarCont, which is neither a party to this proceeding (because never served) nor a

Complainants badly mis-state the unfortunate email colloquy with Ms. Hutchins. They prevaricate in saying that Appendix B represents the undersigned's first response to Ms. Hutchins inquiry. As demonstrated in Exhibit 3, hereto, the undersigned first, and almost immediately,[5] responded as follows: "Respondents' Response was directed to Complainants' Motion to Compel, and for other relief. Sorry for the confusion." This email was delivered to Counsel for Complainants as well as Ms. Hutchins. While this clarification should have ended the matter,[6] Mr. Nussbaum (or Mr. Katz)[7] responded an hour later with the first of his (their) many motions, without even acknowledging Respondents' clarification,. See Exhibit 1 (another item conveniently omitted by Counsel for Complainants). Counsel for Respondents declined to engage in this argument, but merely provided relevant facts.

Complainants are equally "careless" with respect to the law. For example, at pp. 5-6 of Complainants' Reply to a Reply, they repeat the mistaken assertion (first made in their Complaint) that Respondents performed Ocean Freight Forwarder duties in connection with this shipment, even though Respondents' previously identified that obvious error. As the Complaint is premised on the antithetical assumption that EUL is an NVOCC, not an OFF, Complainants' argument is simply pointless.

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jurisdictional entity. Complainants' claim to be rightful "owners" of the vehicles is also unsubstantiated and indeed is contradicted by the Titles and by the Complainants' own shipping documents, which show that they still owed Global Auto Enterprise various amounts for the vehicles and/or transportation costs (this also puts paid Complainants' claim to have repaid in the price of the vehicles the transportation charges paid by Global Auto Enterprise).

[5] The undersigned was traveling that day, so access to emails and ability to open attachments was periodically limited.

[6] Respondents fail to comprehend Complainants' fixation on irrelevant minutia. As the Commission has ruled, substance governs over form, and denominational errors are of no consequence. See, e.g., *Ocean Common Carrier Status of Shanghai Hai Hua Shipping Co.*, 29 SRR 842, 847 FMC 2002) (Mistaken reference to a filing as a "motion" rather than a "petition" held irrelevant).

[7] Both Mr. Nussbaum and Mr. Katz use the same email address, so it can be confusing as to who is communicating via that address in a particular instance.

In accordance with the Presiding Officer's April 27 Order, EUL reviewed its files as carefully as it could within the short time frame permitted. It continues to review its files (something that is not easy for a small firm with limited resources and no network source of emails), and will produce anything that results.[8] Further, as the undersigned informed Counsel for Complainants, EUL has gone an extra mile (or two) and has collected additional documents from third parties such as MSC, as identified below. Respondents offered in advance to produce these to Complainants, but Counsel for Complainants figuratively turned up his nose at them. The documents have recently been received by EUL, and Respondents stand ready, willing and able to produce them.

Complainants simply set out a list of document types and ask, where are they? In no case do they explain why such documents are necessary or relevant given Respondents' acknowledgment of certain facts. Respondents again explain, this time in greater detail.

- Quotes of Freight Rates. EUL did not in its search turn up any such documents for the vehicles at issue. Such documents would not be found for many shipments, as EUL and Global Auto Enterprise operated by general agreement on a fixed rate of $750/vehicle, as evidenced by both the real and fake invoices. EUL would stipulate that this was the rate applicable to the vehicles at issue.
- Shipping Agreements. Respondents are aware of no such documents for these vehicles, except as reflected in MSC's bills of lading, which have already been produced.

[8] Complainants' reproduction of the recordkeeping requirements for OTIs is irrelevant. The issue here is not whether the Respondents have kept good records, but rather whether they have such documents in their possession and control. The block quote also addresses documents that are relevant only to Ocean Freight Forwarders, such as special contracts, further emphasizing Complainants' lack of care in addressing legal and factual issues.

- Booking Confirmations. EUL has obtained copies of the booking confirmations from MSC, and as stated above, will gladly produce them.
- Bills of Lading. Respondents have produced all of the bills of lading for the four shipments. As Mr. Hitrinov explained in his Declaration, and Complainants' Counsel knows, EUL did not issue bills of lading to Global Auto Enterprise. Rather, EUL and Global Auto Enterprise agreed that EUL would have a 60 percent equity interest in the vehicles, and so EUL shipped them for its own account, with the MSC bill of lading acting as the sole transportation document.
- Dock Receipts. Provided in May.
- Invoices. Provided in May.
- Payments for Transportation. Respondents have already acknowledged repeatedly that they were paid the $750/car for these vehicles by Global Auto Enterprise.
- "Validated" Certificates of Title. Respondents have already produced the only Titles they have (or believe they have ever had) for these vehicles – those original Titles provided to them by Counsel's employer. We understand that the reference to "validated" Titles means copies bearing a Customs stamp. Respondents did not find any stamped copies and believes that Customs during that time period frequently failed to perform the stamping. In any event, such "validated" titles would add nothing of import, as the only difference would be an unilluminating Customs stamp that adds no relevant information.
- Export Declarations. Already provided.
- Import Declarations. EUL does not arrange and does not normally receive import declarations. EUL has obtained copies from a third party and is ready to produce them.

- Notices of Arrival. EUL has not identified any such notices in its files, but has obtained equivalent documents (MSC releases to CarCont) from MSC and is perfectly prepared to produce them if Complainants' Counsel consents.

In sum, Respondents have made as much of a search as they reasonably can, and continue to search for additional documents (which they will produce when, and if, identified). It is also unclear what, if any, benefit Complainants expect from such documents given Respondents' acknowledgment of many of the facts they might possibly show.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Respondents' Motion to Strike Complainants' Reply to a Reply by express courier to the following:

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Seth M. Katz, Esq.
P.O. Box 245599
Brooklyn, NY 11224

Dated at Washington, DC, this 23nd day of June, 2016.

Eric C. Jeffrey
Counsel for Respondents