

FEDERAL MARITIME COMMISSION

CROCUS INVESTMENTS, LLC AND
CROCUS, FZE,

Complainants,

v.

MARINE TRANSPORT LOGISTICS,
INC., AND ALEKSANDR
SOLOVYEV A/K/A ROYAL
FINANCE GROUP INC.,

Respondents.

Docket No. 15-04

Served: July 16, 2019

BY THE COMMISSION: Michael A. KHOURI, *Chairman*,
Rebecca F. DYE, Louis E. SOLA, and Daniel B. MAFFEI,
Commissioners.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Before the Commission are: (1) Complainants' exceptions to the Administrative Law Judge's (ALJ's) June 17, 2016, Initial Decision, which dismissed with prejudice Complainants' claims,

and (2) Complainants' second petition to reopen the proceedings, remand the entire case, and join the Commission's Bureau of Enforcement (BOE) as a party.

The Commission affirms the Initial Decision in all respects except for the 46 U.S.C. § 41102(c) claim against Respondent Marine Transport Logistics (Marine Transport) regarding the storing or handling of the Formula boat from August 2013 through February 14, 2014. The Commission vacates the Initial Decision as to that claim and remands for further consideration. The Commission denies Complainants' petition.

A. Factual Background

1. Crocus-Solovyev Business Arrangements

Complainants Crocus Investments, LLC, and Crocus, FZE (collectively, Crocus) are in the business of buying boats that they repair and resell overseas through an affiliated company, Middle East Asia Alfa, FZE (Middle East), which has facilities in Dubai, United Arab Emirates. Initial Decision (I.D.) at 2-3.¹ Complainants are owned by Alexander Safonov. *Id.* at 10. Mr. Safonov retained the services of Respondent Aleksandr Solovyev, acting on behalf of his companies and Respondent Marine Transport, to make arrangements to purchase, store, and transport boats that Crocus intended to resell overseas. *Id.* at 12. Mr. Solovyev owns Car Express & Import, Inc. (Car Express), a company that buys vehicles and boats for its customers and arranges to have them transported overseas. *Id.* at 3, 12.

Under their arrangement, Mr. Safonov and Mr. Solovyev would typically "view boats online and [Mr.] Safonov would decide which boats to purchase." *Id.* at 3. Mr. Solovyev would then arrange for the purchase of the boats, and, prior to overseas shipment, their

¹The facts recited here are based on the ALJ's 103 detailed findings, which the Commission adopts. I.D. at 10-19.

storage in a New Jersey warehouse operated by World Express & Connection, Inc. (World Express), a company which Mr. Solovyev also owns. *Id.* at 3, 11-12. Billing and financial arrangements were made through another Solovyev-owned business, Respondent Royal Finance Group, Inc. (Royal Finance). *Id.* at 3. Royal Finance advanced payments on its customers' behalf to make purchases and pay transportation charges. *Id.*

Transportation of Crocus's boats to Dubai was arranged by Mr. Solovyev acting as an agent for Marine Transport, a licensed non-vessel operating common carrier (NVOCC) owned solely by Mr. Solovyev's estranged wife, Alla Solovyeva. *Id.* at 3, 12. Despite these distinct corporate entities, both Mr. Safonov and Mr. Solovyev did not consistently adhere to corporate formalities. *Id.* at 3. For example, it was not unusual for financial obligations owed by one entity to be paid by another. *See id.*

2. Monterey and Chaparral Transported to Dubai and Back to the United States

This case arises from a falling out between Crocus and Respondents over fees for storage and transportation services related to three boats: a Monterey, a Chaparral, and a Formula. *Id.* at 3-7. The Monterey and Chaparral boats were purchased in the spring of 2013 and initially stored at the World Express warehouse. *Id.* at 3-6. Using Marine Transport's NVOCC services, Mr. Safonov had the Monterey and Chaparral shipped to Dubai in May 2013. *Id.* at 3-4.

When Middle East was unable to sell those two boats, it had them shipped back to the United States in May/June 2014. *Id.* at 6. At Mr. Safonov's suggestion, Middle East obtained rate quotes from Mr. Solovyev. *Id.* Mr. Solovyev provided Middle East with quotes from two vessel-operating common carriers (VOCCs)—Hapag-Lloyd and MSC. *Id.* Middle East did not book the boats' return transportation with either of those carriers. Instead Middle East secured return transportation with APL, another VOCC. *Id.*

APL's bill of lading identified Middle East as the shipper and AEC Cargo Services LLC of Dubai as the forwarding agent. *Id.* It listed Marine Transport only as the consignee, meaning it was responsible for accepting delivery when the boats arrived in New Jersey, their final destination. *Id.* APL's notice of arrival addressed to Marine Transport accurately estimated that the boats would arrive on July 12, 2014. *Id.* Marine Transport accepted delivery of the Monterey and Chaparral, paid customs charges and other fees, and had the boats moved to the World Express warehouse so that Crocus would not incur demurrage fees. *Id.*

3. Formula Not Transported Overseas

In August 2013, Mr. Safonov instructed Mr. Solovyev to purchase a Formula boat with the intent of sending it to Dubai for repair and resale. *Id.* at 5. The boat was purchased, and Royal Finance billed Crocus for the Formula's purchase price (\$56,280), delivery of the boat to the intended port of loading (\$3,500), loading/shipping the boat to Dubai (\$12,000), commission (\$500), documentation (\$500), and a trailer (\$4,500). *Id.* at 5, 16-17. Crocus paid Royal Finance for the boat's purchase price and for delivery of the boat to the port of loading, but did not remit the shipping/loading fee, the commission, the documentation fee, or the cost of a trailer. *Id.* at 5, 17. After the Formula was purchased, it was transported to a facility at the port in New Jersey. Hr'g Tr., 96:8-20, May 13, 2016.

Over the next few months, Mr. Solovyev located two different trailers. *Id.* at 5. Mr. Safonov did not approve of or pay for the first boat trailer, but found the second trailer suitable and paid the invoiced amount (\$4,950) for it. *Id.* at 5, 17. In December 2013, Royal Finance reissued the bill for the shipping/loading of the boat to Dubai, the documentation, and the commission, but there is no evidence that Crocus ever paid these fees. *Id.* at 5.

In early 2014, Mr. Safonov changed his mind about sending the Formula to Dubai because he no longer trusted his business partner at Middle East. *Id.* In an email to Mr. Solovyev dated

February 14, 2014, Mr. Safonov expressed his relief that they did not “have time” to ship the Formula to Dubai. *Id.* In that same email, Mr. Safonov inquired about the documentation needed to ship the Formula to Florida. *Id.* Despite Mr. Safonov’s inquiry about domestic shipment, the Formula remained at the World Express warehouse. *Id.* Apparently, there were no further discussions after February 2014 about shipping the Formula overseas, and the boat was not transported to Dubai or any other overseas location. *See id.* at 5-6.

4. Breakdown of Business Relationship

After the Monterey and Chaparral arrived back from Dubai in July 2014, Mr. Safonov sent several emails asking Mr. Solovyev how much it would cost to ship all three boats from New Jersey to Florida. *Id.* at 6. In emails dated July 24, 2014, and August 3, 2014, Mr. Safonov asked Mr. Solovyev to ship the three boats to Florida. *Id.* Mr. Solovyev replied in an email dated August 13, 2014, in which he demanded payment for storing the three boats and for taking delivery of the Monterey and Chaparral. *Id.* According to the invoice, Crocus owed Solovyev/Royal Finance \$38,859 for 369 days of storage for the Formula and various other fees for customs clearance, loading/unloading and storing the other two boats. *Id.* Mr. Safonov responded by demanding custody of the boats and threatening legal action. *Id.* Their business arrangement deteriorated over the fee dispute and ultimately led to Crocus filing this action seeking reparations. *Id.* at 6-7. World Express, Mr. Solovyev’s facility, sued Crocus in federal district court for non-payment of fees. *World Express & Connection, Inc. v. Crocus Investments, LLC (World Express)*, No. 2:15-CV-08126-KM (D.N.J. Nov. 18, 2015).² Crocus later joined Marine Transport, Mr. Solovyev and Royal Finance as third-party defendants in the federal action. Third-Party Compl., *World Express*, (D.N.J. Sept. 21, 2016).

²As of the date of this Order, that case is still pending in the United States District Court for the District of New Jersey on cross-motions for summary judgment.

B. Procedural History

Crocus filed this action in May 2015 seeking \$416,739 in reparations for Respondents' alleged violations of 46 U.S.C. §§ 41102(c) and 40901(a). Compl. ¶¶ 28-31. The only monetary harm specifically alleged is \$5,500 as overcharges for port fees, customs fees, and other expenses. *See id.* ¶ 22. After completing discovery, the parties briefed their respective positions. The ALJ heard closing arguments in May 2016 and, one month later, issued the Initial Decision dismissing the complaint with prejudice. I.D. at 19-27. All claims related to the Formula were dismissed on jurisdictional grounds, because the ALJ found that the Formula never entered into international commerce and the parties never entered into an agreement to transport the Formula by water from the United States to a foreign port. *Id.* at 1-2, 26. The ALJ also dismissed the § 40901(a) claim and § 41102(c) claims related to the Monterey and Chaparral and to Crocus's inquiries about shipping all three boats from New Jersey to Florida. *Id.* at 24-27.

Late in June 2016, Crocus's counsel was granted leave to withdraw from the case, and its current counsel entered his appearance. In October 2016, Crocus petitioned to reopen the proceedings to submit further evidence and sought additional time to file exceptions. The Commission denied the petition to reopen but extended the exceptions deadline. Crocus filed timely exceptions challenging the ALJ's dismissal of its claims, and Respondents filed a timely response.

Crocus later filed a second petition to reopen the proceedings and also sought to join BOE as a party. Respondents opposed these requests. Several months later, Respondents' counsel moved to withdraw from the case. Crocus did not oppose counsel withdrawing, but moved for sanctions. The Commission granted Respondents' counsel leave to withdraw and denied the request for sanctions. Respondents' current counsel then entered his appearance. Most recently, Crocus filed status reports reasserting certain arguments and referencing filings in *World Express*.

II. DISCUSSION

A. Standard of Review and Burden of Proof

When the Commission reviews exceptions to an ALJ's Initial Decision, it has "all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). It reviews the ALJ's findings de novo, and the Commission can make additional findings. *Id.* The Commission can rely on circumstantial evidence if there is no direct evidence as long as its findings are based on more than speculation. *See Waterman Steamship Corp. v. Gen. Foundries, Inc.*, 26 S.R.R. 1173, 1180, 1993 FMC LEXIS 73, *40 (ALJ 1993), *adopted in relevant part*, 26 S.R.R. 1424, 1994 FMC LEXIS *19 (FMC 1994).

Complainants bear the burden of demonstrating that the Commission has jurisdiction to adjudicate their claims. *River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 188, 201, 1998 FMC LEXIS 16, *7 (ALJ 1998), *aff'd* 28 S.R.R. 751, 1999 FMC LEXIS 32 (FMC 1999). Complainants also bear the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Maher Terminals, LLC v. Port Auth of N.Y. & N.J.*, 33 S.R.R. 821, 841, 2014 FMC LEXIS 35, *41 (FMC 2014). Meeting that burden requires complainants to show that their allegations are more probable than not. *DSW Int'l, Inc. v. Commonwealth Shipping, Inc.*, 32 S.R.R. 763, 765, 2012 FMC LEXIS 32, *3 (FMC 2012) (citing *Hale v. Dep't. of Transp.*, 772 F.2d 882, 885 (Fed. Cir. 1985)). The burden of proof never shifts to the respondents, and if the evidence is evenly balanced, complainants do not prevail. *Maher Terminals*, 33 S.R.R. at 841, 2014 FMC LEXIS at *42.

B. Agency and 46 U.S.C. § 40901(a)**1. Actions Attributable to Marine Transport**

Because Crocus dealt exclusively with Mr. Solovyev in making arrangements for the boats' transportation and storage, and apparently had no direct dealings with other agents, representatives, or employees of Respondent Marine Transport, *see* I.D. at 3-6, before the Commission can determine whether Marine Transport violated the Shipping Act, we first must determine whether Mr. Solovyev was acting as Marine Transport's agent in his dealings with Crocus/Mr. Safonov. *See generally Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 33 S.R.R. 543, 559-60, 2014 FMC LEXIS 1, *30-31 (FMC 2014).

"Agency" is "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Restatement (Third) of Agency* §§ 1.01 (Am. Law Inst. 2006). Agents can act under actual or apparent authority. *Id.* §§ 3.01 and 3.03 (Am. Law Inst. 2006). "Apparent authority" is:

the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.

Mitsui O.S.K. Lines Ltd., 33 S.R.R. at 559-60, 2014 FMC LEXIS at *31 (quoting *Restatement (Third) of Agency* § 2.03)). An agent's status and authority to act can be proven by direct or circumstantial evidence. *Lopez v. Council on American-Islamic Rels. Action Network*, 826 F.3d 492, 497 (D.C. Cir. 2016) (applying Virginia law).

The ALJ's finding that Mr. Solovyev acted as Marine Transport's agent is soundly supported by Mrs. Solovyeva's testimony, the parties' email correspondence, and shipping documents. I.D. at 13-14, 20-21. Crocus has not pointed to any countervailing evidence. *See* Complainants' Br. in Support of Its Exceptions to Initial Decision (Exceptions) at 14, 19-21, Mar. 13, 2017. Instead, Crocus asserts that Mr. Solovyev acted as an ocean freight forwarder (OFF), and not merely as Marine Transport's agent in arranging transportation for the Monterey and Chaparral to and from Dubai. Crocus does not, however, cite any evidence showing, or explain how, Mr. Solovyev acted in his individual capacity and not as Marine Transport's agent in arranging transportation. *See id.* at 15-18. Also, as discussed in further detail below, Crocus's arguments about "ocean freight forwarder" status ignore the Shipping Act's definition of the term.

The evidence shows that Mr. Solovyev had apparent authority to act as Marine Transport's agent and acted in that capacity when arranging for NVOCC services. Marine Transport's owner, Alla Solovyeva, confirmed that her estranged husband, Mr. Solovyev, acted as Marine Transport's agent. Alla Solovyeva Dep., Tr. 18:13-16.³ Mrs. Solovyeva also explained that "any person can act on behalf of my company as a broker." *Id.*, Tr. 18:17-23. Mrs. Solovyeva described Mr. Solovyev as "selling his companies services" and her company's services as well when his clients requested what she termed "ocean freight." *Id.*, Tr. 19:19-25. She also testified that Marine Transport provided Andrey Tretyikov (the principal of Middle East, Crocus's former business associate) with transportation and loading for his boats. *Id.*, Tr. 29:5-6.

Mrs. Solovyeva's testimony is consistent with Mr. Solovyev's description of his role in offering Marine Transport's services. When asked, he admitted that he held himself out as

³Ms. Solovyeva's and Mr. Solovyev's depositions are found at Tab 5 of the Appendix to Complainants' Br. in Support of Its Exceptions to Initial Decision (Complainants' App.), Dec. 5, 2016. Further citations to these transcripts include only the document title and page or line reference.

Marine Transport's agent or representative. Alexander Solovyev Dep., Tr. 37:24-38:3. Mr. Solovyev explained that he acted as an agent in arranging transportation for cars, boats, and other commodities shipped overseas. *Id.*, Tr. 38:4-9. Mr. Solovyev also testified that in his emails to Mr. Safonov/Crocus, he was communicating in his capacity as Marine Transport's agent. *Id.*, Tr. 40:2-5, 48-50.

Email communications also indicate that Mr. Solovyev acted with Marine Transport's apparent authority and held himself out as its representative. In his communications with Mr. Safonov, Mr. Solovyev used the email address mtlworld@mtlworld.com. "MTL" is an acronym for Marine Transport Logistics, and others affiliated with Marine Transport used the same email address/account. I.D. at 11. Mrs. Solovyeva's email account, alla@mtlworld.com, includes the same acronym as do the email addresses of other Marine Transport employees. Alla Solovyeva Dep., Tr. 30:19-20.

The shipping documents for transporting the Monterey and Chaparral to Dubai also indicate that Marine Transport was the principal, not Mr. Solovyev acting independently. Maersk was the VOCC hired to ship the two boats to Dubai, and its master bill of lading lists Marine Transport as the shipper. *See* I.D. at 14, ¶¶ 48, 49, 54-55.

Moreover, it appears that Mr. Safonov understood that Mr. Solovyev was acting for Marine Transport. He stated that he agreed to a proposal "made by Alexander Solovyev with the understanding that Marine Transport . . . will arrange for the shipment of the boats from Dubai . . . and the boats will be picked up and held by [Marine Transport] in the USA." A. Safonov Decl. at ¶¶ 4-5.⁴ It appears, then, that Mr. Safonov presumed that Mr. Solovyev was speaking on Marine Transport's behalf, not in his individual capacity, and understood that services offered would be provided by Marine Transport, not by Mr. Solovyev individually. *See id.*

⁴Mr. Safonov's declaration is found at Complainants' App., tab 9.

Because Mr. Solovyev was acting with Marine Transport's apparent authority and acquiescence, his actions and communications in dealings with Crocus about NVOCC services related to its three boats are attributable to Marine Transport.

2. Section 40901(a) Claim Against Mr. Solovyev

This agency relationship is fatal to Crocus's 46 U.S.C. § 40901(a) claim against Mr. Solovyev. Section 40901(a) provides that: "A person in the United States may not act as an ocean transportation intermediary unless the person holds an ocean transportation intermediary's license issued by the Federal Maritime Commission." 46 U.S.C. § 40901(a); *Landstar Express Am., Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493, 497 (D.C. Cir. 2009). An agent openly representing a licensed OTI, however, does not have to be separately licensed. *Landstar*, 569 F.3d. at 499.

Crocus alleged that Mr. Solovyev acted as an unlicensed OFF in violation of § 40901(a) and sought payment for those OFF services through Royal Finance. Compl. ¶ 29. The ALJ found that Mr. Solovyev did not operate as an unlicensed OTI because Crocus did not prove that he was acting as anything other than Marine Transport's agent when the Monterey and Chaparral boats were shipped to Dubai. I.D. at 21.

Crocus's exceptions do not identify any legal or factual errors in this determination. *See* Exceptions, 14-17. Adding to the confusion, Crocus does not specify at what point in its dealings with Mr. Solovyev he was allegedly acting as an unlicensed OTI. *See* Exceptions at 14-15; Compl. ¶ 6. At most, Crocus insists that Mr. Solovyev was acting as an unlicensed OFF, and that he had a fiduciary duty to oversee Crocus's interests.

These arguments are unpersuasive. As the ALJ pointed out, under *Landstar*, insofar as Mr. Solovyev was acting as an agent for Marine Transport (a licensed NVOCC) when the latter was acting

as an NVOCC, he was not required to have a license and thus did not violate § 40901(a). Moreover, insofar as Mr. Solovyev was acting as an agent for Marine Transport when it was not acting as an OTI, such as when Marine Transport was acting as a consignee for the shipment of the Monterey and Chaparral from Dubai to the United States, Mr. Solovyev was not acting as an OTI within the scope of § 40901(a). As noted above, Mr. Solovyev *did* act as Marine Transport's agent with respect to arranging transportation and other services for the three boats at issue, and did so openly. Crocus's exceptions do not engage with the ALJ's reasoning regarding agency or otherwise discuss principles of agency vis-à-vis Mr. Solovyev and Marine Transport.

Rather, Crocus focuses on Mr. Solovyev's alleged performance of OFF duties. Exceptions at 15-19. This focus misses the mark for two reasons. First, it does not address the agency-principal relationship between Mr. Solovyev and Marine Transport: the evidence shows that if Mr. Solovyev performed OTI duties, he was doing it as an agent. If the principal was a licensed OTI, the agent did not need a license under § 40901(a). Second, Crocus does not address the statutory definition of ocean freight forwarder, which applies only to those who dispatch shipments from the United States to foreign locations. *Tienshan, Inc. v. Tianjin Hua Feng Transport Agency Co., Ltd.*, 31 S.R.R. 1831, 1843, 2011 FMC 9, *39-42 (ALJ 2011). Further, Crocus's argument that Mr. Solovyev had a duty to oversee its interests is irrelevant to whether he had, or was required to have, an OTI license under § 40901(a).

Finally, although neither Mr. Solovyev or Marine Transport are licensed as OFFs, Crocus did not demonstrate that any of the services that Marine Transport or Mr. Solovyev provided to Crocus were distinctly freight forwarder services as opposed to services that may be provided by an NVOCC. For instance, Crocus does not challenge the ALJ's finding that Marine Transport operated as an NVOCC when the Monterey and Chaparral were transported from the U.S. to Dubai. I.D. at 4.

Because Crocus has not shown that the ALJ erred, we affirm the ALJ's dismissal with prejudice of Crocus's § 40901(a) claim against Mr. Solovyev.

C. Section 41102(c) claims

Crocus also alleged that much of Respondents' conduct regarding the three boats violates 46 U.S.C. § 41102(c). Under 46 U.S.C. § 41102(c), "a common carrier, marine terminal operator, or [OTI] may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." The central question in this case is whether, and when, Marine Transport was a regulated entity – common carrier, marine terminal operator, or OTI – with respect to the conduct at issue. *See Petchem, Inc. v. Canaveral Port Auth.*, 28 F.M.C 281, 287-88 (1986), *aff'd sub nom. Petchem, Inc. v. Fed. Mar. Comm'n.*, 853 F.2d 958 (D.C. Cir. 1988).

Here, Marine Transport has an OTI license from the Commission, specifically, it has an NVOCC license. I.D. at 11. But the fact that Marine Transport is licensed as a regulated entity does not mean that everything it does is subject to § 41102(c). *See Auction Block Co. v. City of Homer (Auction Block I)*, 33 S.R.R. 589, 2014 FMC LEXIS 16 (FMC 2014), *aff'd sub nom. Auction Block Co. v. Fed. Mar. Comm'n (Auction Block II)*, 606 Fed. Appx. 347 (9th Cir. 2015); *see also Petchem*, 28 F.M.C at 290 (publishing a tariff rate does not guarantee the Commission's jurisdiction). There must also be a link between the respondents' regulated status and the conduct that allegedly violates the Shipping Act. *See Auction Block II*, 606 Fed. Appx. at 347-48. That is, the inquiry is whether a respondent was acting as regulated entity with respect to the conduct at issue. When, as here, the regulated status at issue is that of an OTI, the Commission typically looks at whether the respondent acted as such in handling the particular cargo or shipment involved in the alleged Shipping Act violation. *See Century Metal Recycling PVT Ltd. v. Dacon Logistics, LLC*, 32 S.R.R. 1763, 1773, 2013 FMC LEXIS 18

(ALJ 2013), *aff'd* 33 S.R.R. 17, 2013 FMC LEXIS 40 (FMC 2013); *Tienshan* 31 S.R.R. at 1843, 2011 FMC at *39-42.

1. Monterey and Chaparral Boats

Crocus's claims related to the Monterey and Chaparral boats involve: (1) transporting the boats from Dubai to the United States; (2) receiving and storing the boats once they reached the United States; and (3) arranging for transporting the boats to Florida.⁵ As described below, we affirm the ALJ's dismissal of these claims.

a. Transporting the Monterey and Chaparral from Dubai to the United States

Crocus alleged that Marine Transport violated § 41102(c) in arranging transportation for the Monterey and Chaparral from Dubai back to the United States. The ALJ dismissed this claim as factually unsupported because Marine Transport was not the NVOCC that handled this transportation, but rather acted as consignee. I.D. at 1, 15-16, 21-24. Because Marine Transport did not act as an OTI during this leg of the transportation, the ALJ held, it did not fall within the ambit of § 41102(c). *Id.*

Crocus challenges the ALJ's dismissal without clearly articulating grounds for overturning the ALJ's decision. *See* Exceptions at 19-20. And the lack of specified error is compounded by Crocus's use of the term "freight forwarder" in a manner that is inconsistent with the Shipping Act definition. While Crocus argues that Marine Transport acted as an OFF for the Dubai-to-U.S. transportation, the statute provides that an OFF is a person who "in the United States, dispatches shipments *from the United States.*" 46

⁵The Monterey and Chaparral boats were first shipped from the United States to Dubai, with Marine Transport operating as the NVOCC, before being transported in the opposite direction. I.D. at 21. But as the ALJ noted, Crocus did not (and does not in its exceptions) argue that Respondents violated § 41102(c) with respect to the United States to Dubai transportation. ALJ I.D. at 1, 21 (citing Hr'g Tr. at 52-54, May 13, 2016).

U.S.C. § 40102(18) (emphasis added). The Monterey and Chaparral were *dispatched from Dubai* to the United State, so Marine Transport could not have been retained as the OFF for that shipment.

On appeal, Crocus also argues that the ALJ failed to consider that Respondent acted as a “local or regional” freight forwarder. Exceptions at 7, 19-21. But the Shipping Act prohibition at issue, § 41102(c), only applies to OTIs, and thus to freight forwarders as defined by Shipping Act. The statutory definition makes no mention of “local or regional” freight forwarders. 46 U.S.C. § 40102(18), and Crocus has cited no authority that would allow the Commission to supplant the statutory definition with one of Crocus’s devising.

Assuming that Crocus is arguing that Marine Transport was an NVOCC on the Dubai-to-U.S. shipment, its only evidence on that point is a declaration from Mr. Safonov. Complainants’ App., Tab 9 (A. Safonov Decl.). Mr. Safonov’s declaration offers his account of information allegedly relayed to him by Middle East. Mr. Safonov states that in April 2014, he told his assistant, Andrey Tretyakov, “to arrange delivery” of the Monterey and Chaparral to the U.S. A. Safonov Decl. at ¶ 2. According to Mr. Safonov, his assistant reported that two companies could deliver the boats “for approximately \$4,000,” but Mr. Solovyev offered “the same delivery” service for only \$1,500. *Id.* Unsurprisingly, Mr. Safonov states that he “agreed” to Mr. Solovyev’s lower price and understood that “Marine Transport . . . w[ould] arrange for the shipment of the boats from Dubai” and pick up the boats in the United States. *Id.*

This declaration is not enough to tip the evidentiary scales in Crocus’s favor. Crocus cites no corroborating evidence that supports Mr. Safonov’s secondhand account of these communications between Middle East and Mr. Solovyev. *See* Exceptions at 19-20. There are no citations to supporting emails, house bills of lading, or other documents showing that Marine Transport actually assumed any responsibility beyond accepting delivery once the boats arrived at the New Jersey port. *See id.* Further, Marine Transport and Mr.

Solovyev deny extending any offer to arrange return transportation. *See* Respondents' Reply to Complainants' Exceptions (Reply) at 13-14, Apr. 4, 2017. Mr. Solovyev states that he relayed offers from two vessel operating common carriers--neither of which Crocus or Middle East retained. *See id.*

Mr. Safonov's account also lacks critical details. *See* A. Safonov Decl. While he states that he made up his mind to accept the offer relayed to Middle East, he does not state whether he or Middle East conveyed their acceptance to Mr. Solovyev or Marine Transport. Mr. Safonov's statement also does not specify terms the parties would have agreed upon had the offer been extended and accepted. Nothing in Mr. Safonov's declaration or anywhere else in the record addresses the shipment date, estimated date of arrival, port or point of departure or arrival, or any other arrangements made for the boats' return. The only concrete term mentioned in Mr. Safonov's statement is the fee Marine Transport purportedly quoted to Middle East. At most, Mr. Safonov's statement could be considered as evidence that Marine Transport/Mr. Solovyev made an offer, but that falls well short of proving that Marine Transport acted as an NVOCC for the boats' return transportation.

Importantly, the bill of lading contradicts Mr. Safonov's statement by listing APL as the VOCC responsible for the boats' return. Middle East is identified as the shipper. The bill of lading mentions Marine Transport only as the consignee, meaning it would accept delivery once the boats reached New Jersey, their final destination. I.D. at 15; *see also* Reply at 14-15. It identifies a different entity – AEC Cargo Services LLC, as “forwarding agent.” I.D. at 15. Crocus argues that the bill of lading is not conclusive evidence and there might be a plausible explanation for the documents' failure to name Marine Transport as the NVOCC.

There are two reasons why this argument is not persuasive.

First, Crocus's argument reverses the burden of proof. As the complainant, Crocus has the burden of proving that Marine

Transport was acting as a regulated entity. *River Parishes*, 28 S.R.R. at 201, 1998 FMC LEXIS at *7. And that burden does not shift to the respondents. *Maher Terminals*, 33 S.R.R. at 841, 2014 FMC LEXIS at *42. Crocus cannot meet its burden of proof solely by challenging the strength of Respondents' rebuttal evidence.

Second, Crocus's challenge to the bill of lading is premised on testimony about practices that shippers and carriers could follow—not on any actual communications or actions in this case. Marine Transport's owner, Alla Solovyeva testified that local freight forwarders “*can act* as the regional shipper when the cargo is coming back.” *Id.* (emphasis added). Crocus argues that this is the reason why Marine Transport/Mr. Solovyev were not listed on the bill of lading. Exceptions, 21-22. But Ms. Solovyeva was speaking about her general understanding of possible practices—not the arrangements that Crocus actually made here. A. Solovyeva Dep., Tr. 28:18-25. Tr: 71:11-25. Ms. Solovyeva testified that she had no firsthand information about Crocus, the arrangements it may have made for the boats' return, or offer(s) Mr. Solovyev may have extended. *Id.*, Tr: 31: 9-18, Tr. 23:2-10, Tr. 40:21-23. As she explained, she was not involved in Marine Transport's day-to-day dealings. At most, Mrs. Solovyeva's testimony allows for the possibility that Marine Transport could have taken a hand in arranging the return transportation, but provides no evidence that it actually did so. Speculation about what might have occurred does not prove what actually occurred between the parties.

Because Crocus has not proved that Marine Transport was the NVOCC responsible for the Monterey's and Chaparral's return transportation, we affirm the ALJ's dismissal of Crocus's § 41102(c) claim related to that transportation.

b. Receiving and Storing the Monterey and Chaparral after Transport from Dubai

Crocus also alleged that Marine Transport violated § 41102(c) by: (1) failing to notify Crocus when the two smaller

boats (Monterey and Chaparral) arrived in New Jersey from Dubai; (2) releasing the boats to a non-party (World Express) owned by Mr. Solovyev; and (3) overcharging Crocus for port, storage, and other fees. I.D. at 24, 26. The ALJ dismissed these claims as meritless. *Id.* The ALJ found that Mr. Safonov's emails plainly show that Crocus knew the boats had arrived within five days of their reaching the New Jersey port. *Id.* at 24. The ALJ also found that Marine Transport acted reasonably in moving the boats to avoid demurrage charges. *Id.* at 23-24. As consignee, the ALJ noted, Marine Transport "was potentially liable for demurrage charges that would accrue if the boats were not picked up within the free time allotted by the VOCC." *Id.* at 24. As to storage charges for the Monterey and Chaparral, the ALJ reasoned that [w]hen the Monterey and Chaparral returned to the United States, even if [Marine Transport]" were operating as an NVOCC, the boats were not 'received for US export shipment' and the tariff does not apply." *Id.* at 26.

Crocus does not directly challenge the findings regarding notice of boat arrival and release of the boats to World Express. Instead Crocus focuses on Marine Transport and Mr. Solovyev's alleged status as "local or regional" freight forwarders. Exceptions at 3, 19-23, 32-33. But, as already noted, a "local or regional" freight forwarder does not fall within the scope of § 41102(c) unless it meets the definition of OTI in the Shipping Act. Moreover, Crocus cites no support for its argument that because Marine Transport and AEC (the forwarding agent on the bill of lading) had "overlapping responsibility" for the transport of the Monterey and Chaparral, Marine Transport somehow falls within the statutory definition of freight forwarder.

To the extent Crocus is indirectly challenging the ALJ's findings about the reasonableness of Respondents' taking custody of the Monterey and Chaparral and moving them to the World Express facility, that challenge is without merit. Even if Marine Transport was acting as a regulated entity in that regard, and assuming the conduct amounted to a regulation or practice under § 41102(c), as the ALJ noted, as consignee, Marine Transport

accepted delivery of the Monterey and Chaparral when APL delivered them to New Jersey. I.D. at 24. If Marine Transport had not taken custody of the boats within the VOCC's specified time limits, it was potentially liable for demurrage charges. *Id.* (citing *Capitol Transportation, Inc. v. United States*, 612 F.3d 1312, 1319-21 (1st Cir. 1979)). Demurrage charges would have far exceeded the \$615.70 that Marine Transport paid to secure the release of the container holding Crocus's boats. I.D. at 24. Thus, Marine Transport acted reasonably in taking custody of the boats and moving them to World Express warehouse.

As for the alleged overcharge for storage and other fees, Crocus argues that "the sums set forth in the RFG invoices for the services provided by Solovyev were in excess of the amounts that [Marine Transport] could lawfully charge for such services in its published tariff, as no such evidence exists on the record to the contrary." Exceptions at 3, 22-23, 32. Assuming that this claim is properly brought under § 41102(c), as opposed to other sections of the Shipping Act, it fails for the same reasons as other claims related to the Monterey and Chaparral: Crocus has not met its burden of showing that, once the boats returned from Dubai, Marine Transport was acting as a regulated entity as opposed to acting as a consignee or in some other capacity.

Moreover, as to storage charges in particular, the ALJ pointed out that the tariff rate was the wrong basis for assessing an alleged overcharge, because the tariff only applied to boats received for U.S. export shipment, and the Monterey and Chaparral were not so received. I.D. at 26. Crocus does not appear to challenge this holding on appeal, and it thus has not met its burden of showing an overcharge based on an applicable tariff.

For these reasons, we affirm the ALJ's dismissal of Crocus's § 41102(c) claim related to the receipt and storage of the Monterey and Chaparral.

c. Arranging for transporting the Monterey and Chaparral to Florida

The ALJ dismissed the § 41102(c) claim based on Crocus's July 2014 inquiry about transporting all three boats from New Jersey to Florida for lack of jurisdiction. The ALJ found that any international transportation from Dubai to the United States ended when the Monterey and Chaparral were delivered to Marine Transport in New Jersey. *Id.* at 25. The ALJ pointed out that the contemplated further transportation between New Jersey and Florida was purely domestic and reasoned it was outside the Commission's jurisdiction. *Id.* at 25-26. As support, the ALJ noted that common carriers (of which an NVOCC is a type) for purposes of the Shipping Act must deal with transportation between the United States and a foreign country. *Id.* at 24-25 (citing 46 U.S.C. § 4102(6)).

Crocus does not challenge the ALJ's well-supported findings, and we affirm the dismissal of this claim for the reasons stated by the ALJ.

2. Formula Boat

With respect to the Formula boat, Crocus's claims relate to arrangements regarding: (1) the Formula prior to intended Florida transportation in February 2014; and (2) transporting the boat to Florida. With a limited exception with respect to (1), we affirm the ALJ's dismissal of Crocus's § 41102(c) claims regarding the Formula.

a. Arrangements regarding the Formula prior to February 2014

Crocus alleged that Marine Transport violated § 41102(c) by mishandling its responsibilities and overcharging it for arrangements related to the Formula. *See* Exceptions at 1-2, 6-10. The Formula was stored in a New Jersey warehouse from August

2013 through at least July 2014. I.D. at 17-18. The ALJ dismissed this claim because “[t]he evidence establishes that the third boat never left the United States; therefore, the third boat never entered into international commerce, the Shipping Act does not apply, and the Commission does not have jurisdiction to resolve disputes regarding its handling.” *Id.* at 1-2. The ALJ further found that the parties “never entered into an agreement to transport the Formula by water from the United States to a foreign port.” *Id.* at 26. The ALJ did not otherwise address the merits of Crocus’s claims about the Formula. *See id.*

The parties’ arguments before the ALJ, and on appeal, focused on whether there was an express or implied contract to transport the Formula overseas. In particular, in its exceptions, Crocus argues that there was an implied contract, and Respondents dispute that assertion. Exceptions at 2, 7-13; Reply at 3-12. The parties thus assume (and the I.D. could be read to hold) that the existence of a contract is critical to § 41102(c) liability.

The relevant inquiry here is not, however, limited to whether there was a contract for overseas shipment. Nor was the ALJ’s focus on whether the Formula left the United States or had an agreement for overseas shipment clearly linked to the Shipping Act or precedent, and it unduly narrows the scope of the inquiry to two factors. The approach supported by the text of § 41102(c) and Commission caselaw asks: was the respondent acting as a regulated entity with respect to the conduct at issue? *See supra* at 13-14.

The inquiry here should have been: was Marine Transport acting as an OTI with respect to the Formula boat from August 2013 (when it was purchased) to February 2014 (when Crocus began to inquire about domestic transportation of the boat). This fact-intensive analysis takes into account the statutory definition of OTI (and in particular, NVOCC), and evidence about the parties’ conduct during that time frame. *See, e.g., Worldwide Relocations—Possible Violations of the Shipping Act*, 32 S.R.R. 495, 503, 2012

FMC LEXIS 23, *23-27 (FMC 2012); *Tienshan*, 31 S.R.R. at 1842-43, 2011 FMC LEXIS at *39-42.

Whether the Formula was actually transported to a foreign port or the subject of a contract to do so are highly relevant to this analysis, but not necessarily determinative. For instance, the Commission has determined that a broad swath of conduct falls within the scope of NVOCC activities. *See* 46 C.F.R. § 515.2(k). This determination is made more difficult where, as here, the parties seem to operate without much documentation and/or respect for corporate or other formalities.

Because the ALJ did not clearly apply this analytical approach, the Commission vacates the ALJ's dismissal of the § 41102(c) claim regarding the Formula boat with respect to the time period from August 2013 to February 14, 2014, and remands so that the ALJ can determine whether Marine Transport was acting as an OTI or otherwise address the elements of § 41102(c).

b. Arrangements for transporting the Formula to Florida

Additionally, the ALJ noted that in February 2014, Crocus instructed Respondents to make arrangements for shipping the Formula to Florida. I.D. at 17-18, 26. The ALJ found that any agreement to transport the Formula from New Jersey to Florida was not an agreement to provide transportation between the United States and a foreign country, and that any controversy about that transportation was outside the Commission's jurisdiction. *Id.* at 26.

Crocus's exceptions refer to the requested shipment to Florida but do not take issue with the ALJ's finding. *See* Exceptions at 5.⁶ That finding is well-supported. By February 14, 2014, Mr.

⁶ Although Crocus asserts that the ALJ "penalize[d]" Crocus for eventually concluding that its business associate was a "crook" and deciding to send the Formula to Florida, Exceptions at 12, Crocus does not argue that the Commission has jurisdiction over domestic shipping arrangements.

Safonov had admittedly lost faith in his Dubai employee, and instructed Mr. Solovyev to arrange transportation of the Formula to Florida. I.D. at 17-18. And in July 2014, Crocus instructed Solovyev to send all three boats to Florida. *Id.* at 18. Consequently, any dealings between Crocus and Marine Transport regarding the Formula boat after February 14, 2014, do not involve transportation between the United States and a foreign country, and Marine Transport could not have been acting as an OTI so as to trigger liability under § 41102(c). 46 U.S.C. § 40102.

Accordingly, the Commission affirms the ALJ's dismissal of Crocus's § 41102(c) claim regarding the Formula boat as it relates to any conduct that occurred after February 14, 2014.

A. Crocus's Second Petition to Reopen the Proceedings

1. Standard for Reopening the Proceedings

The Commission has "clear authority" and broad discretion under Commission Rule 230 "to reopen a proceeding for the purpose of taking additional evidence." *Anderson Int'l Transp.--Possible Violations of Sections 8(a) & 19 of the Shipping Act of 1984*, 31 S.R.R. 1091, 1093, 2009 FMC LEXIS 33, *7 (FMC 2009); 46 C.F.R. § 502.230(d). Commission precedent favors making decisions on the "most complete record available." *Anderson*, 31 S.R.R. at 1093, 2009 FMC LEXIS at *7 (citation omitted). This preference is grounded in the Commission's responsibility to "inquire into and consider all relevant facts." *See Michigan Consolidated Gas Co. v. Fed. Power Comm'n*, 283 F.2d 204, 226 (D.C. Cir. 1960).

The moving party must explain "the grounds [that] require[d] reopening the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing." 46 C.F.R. § 502.230(a). Submitting evidence previously available to the moving party is not grounds for reopening the proceedings. *See Rose Int'l, Inc. v. Overseas Moving Network Int'l*,

Ltd., 29 S.R.R. 119, 159-60, 2001 FMC LEXIS 39, *125 (FMC 2001). If complainants knew about the evidence before the record closed and have not shown any material changes of fact or law after the record closed, their petition to reopen the proceeding “must fail.” *Id.*

2. Crocus has not established a basis for reopening the record.

Crocus seeks to reopen the record so it can offer additional evidence allegedly showing: (1) that it had a contract to ship the Formula overseas and, (2) that Mr. Solovyev was acting as an unlicensed OFF in arranging to ship the Monterey and Chaparral from the U.S. to Dubai. Complainants’ Second Pet. to Reopen the Proceedings (Pet.) at 1-2, Sept. 27, 2017. Crocus claims that this additional evidence also shows that Respondents are not credible, altered or falsified evidence and withheld relevant documents. *Id.*

The new evidence proffered includes bank statements and cancelled checks from Royal Finance’s account with Citibank and records from the New York Department of Motor Vehicles (NYDMV). *Id.* at 2. Crocus claims that it first obtained these documents in July 2017. *Id.* The bank records allegedly came into Crocus’s possession through a subpoena served on Citibank in the *World Express* federal court case, and the NYDMV records were produced under a Freedom of Information law request to New York State seeking records on Car Express. *Id.* Car Express is owned by Mr. Solovyev but it is not named as a party to this action.

Respondents dispute Crocus’s allegations about what the new evidence will allegedly show and specifically deny as “completely false” the allegations that they altered evidence, withheld relevant documents, or have misrepresented material facts. Respondents’ Reply to Complainants’ Second Pet. to Reopen Proceedings (Pet. Reply) at 7-8, Oct. 10, 2017. Respondents also explain that Crocus is misreading notations on cancelled checks and relying on that misinterpretation to erroneously link checks to the

wrong transaction. *Id.* at 10-14. Finally, Respondents explain that the NYDMV records proffered relate to claims that are not in this case. *Id.*

Crocus fails to point any intervening change in the law or material facts that warrant reopening the proceedings. Rule 230 requires the petitioning party to explain “the grounds requiring reopening of the proceeding, including material changes of fact or law alleged to have occurred since the conclusion of the hearing.” *Rose Int’l*, 29 S.R.R. at 159-60, 2001 FMC LEXIS at *125. *Compare Anderson*, 31 S.R.R. at 1093 (granting Rule 230 petition proffering “directly relevant and material” evidence that “addresses a key finding which the ALJ was otherwise unable to make given the evidence then available”).

Even if the Commission looks beyond that critical omission, there is no valid basis for allowing additional evidence as to § 40901(a). Crocus asserts that Royal Finance bank records show that Royal Finance acted as an unlicensed OFF in billing or processing payments for the U.S. to Dubai shipment. But, as explained above, the weight of evidence establishes that Mr. Solovyev openly acted as Marine Transport’s agent, and Crocus acknowledges that he acted in that capacity in arranging the U.S. to Dubai transportation for the Monterey and Chaparral. Because Mr. Solovyev, even if acting via Royal Finance, acted as Marine Transport’s agent and did not perform services outside the purview of an NVOCC, he did not need a license from the Commission. Crocus’s proffered evidence is not material to the § 40901(a) claim.

The Commission also need not reopen the record to allow evidence purportedly showing Crocus had a contract to ship the Formula overseas. Pet., 1-2. Because the Commission is vacating and remanding the § 41102(c) claim regarding the Formula with respect to August 2013-February 2014, the Commission denies the petition to reopen in this regard as moot. The ALJ may consider the propriety of considering this evidence on remand.

Finally, there is no reason to join BOE as a party to this case. It can monitor the proceedings and intervene of its own accord if it decides that doing so is appropriate. And the request to remand the entire case for consideration of new evidence is now moot.

III. CONCLUSION

The Commission hereby:

(1) vacates the ALJ's dismissal of Crocus's 46 U.S.C. § 41102(c) claim with respect to storage or other arrangements for the Formula from August 2013 to February 14, 2014 and remands that claim to the ALJ for further consideration consistent with the Final Rule issued by the Commission on December 12, 2018;

(2) affirms the Initial Decision in all other respects and dismisses all other claims against Respondents with prejudice; and

(3) denies Crocus's petition to reopen the proceedings and all relief requested in that petition.

By the Commission.

Rachel E. Dickon
Secretary