FEDERAL MARITIME COMMISSION

IGOR OVCHINNIKOV, IRINA RZAEVA, AND DENIS NEKIPELOV, *Complainants,* KAIRAT NURGAZINOV, *Claimant,* v. MICHAEL HITRINOV A/K/A MICHAEL KHITRINOV, AND EMPIRE UNITED LINES CO. INC., *Respondents.*	Consolidated Docket Nos. 15-11 & 1973(I)

Served: February 8, 2023

BY THE COMMISSION: Daniel B. MAFFEI, Chairman, Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, Max M. VEKICH, Commissioners.

<u>Order Affirming the Initial Decision on Different Grounds</u>

Before the Commission in this consolidated action are Complainants' Exceptions to the Initial Decision ("I.D.") granting

Respondents' Motion for Judgment on the Pleadings and dismissing with prejudice Complainants' claims. Although the Commission has determined to dismiss with prejudice Complainants' claims, we must also address our concerns that the I.D.'s reasoning is at odds with Commission precedent and policy. Specifically, the I.D. finds that Complainants lack standing to bring their claims and that the Commission lacks subject matter jurisdiction to hear them. The I.D. is mistaken on both points. To the extent that standing is required to bring an action before the Commission, a complainant need only allege a violation of the Shipping Act to meet that requirement. Here, Complainants allege that Respondents violated 46 U.S.C. § 41102(c); thus, they have standing to bring their claims. Complainants further allege that Respondents are subject to § 41102(c); thus, the Commission has the authority to adjudicate Complainants' claims.

However, even with standing, Complainants' claims are not viable. Complainants seek "direct damages" corresponding to the relevant "purchase" price of four vehicles that they allegedly purchased in the United States to be shipped to them via ocean freight, which Complainants never received. The problem with Complainants' request is that Complainants did not actually "purchase" the vehicles from Respondents. By their own account, each Complainant "purchased" one vehicle from an entirely different company, which was never named as a respondent and is unaffiliated with Respondents. Notably, Complainants do not allege that they paid *anything at all* to Respondents; instead, Complainants assert that the ocean freight charges for the relevant cargo was paid by the third-party company to Respondents. Because Complainants did not purchase the vehicles from Respondents, they do not properly state, and could never prove, their claims for damages because there is no alleged causal link between any complained of

conduct and the monetary relief sought. Accordingly, as explained below, the I.D.'s dismissal with prejudice is the correct outcome, as Complainants have failed to state a claim upon which relief could be granted, and amendment of their claims would be futile. For these reasons, the Commission will affirm on different grounds the I.D.'s dismissal of these actions with prejudice.

Respondents' Counsel additionally maintains that this matter is before the Commission on what he characterized as exceptions to the Administrative Law Judge's denial of his motion for an order to show cause why the Commission should not revoke the privilege of Complainants' Counsel, Marcus Nussbaum, to practice before the agency. Respondents' Counsel is incorrect. The Commission's Rules of Practice and Procedure do not contemplate exceptions to such rulings. Exceptions are reserved for initial decisions and other orders of dismissal, and counsel also did not seek (let alone receive) leave to appeal the ruling. To be sure, the Commission has the authority to act on the serious allegations of misconduct against Mr. Nussbaum. The Commission could, for example, issue an order to show cause initiating a *new* proceeding aimed at addressing not only Mr. Nussbaum's alleged misconduct in this action, but also his conduct in other Commission matters, about which the Commission has repeatedly warned him. The Commission is choosing not to proceed in that fashion *at this time*, but may do so in the future.

I. BACKGROUND

A. Facts as Alleged

Dkt. 15-11 Complainants Igor Ovchinnikov, Irina Rzaeva, and Denis Nekipolev, and Dkt. 1953(I) Claimant Kairat Nurgazinov (collectively "Complainants") are residents of Russia and

Kazakhstan. 15-11 Compl., Doc. 1 ¶¶ 1-3.[1] Complainants allege that in mid- to late-2012, they each "purchased" one U.S.-based vehicle from a non-party company called G-Auto Sales, Inc. ("G-Auto") and/or its supposedly affiliated entity, non-party Effect Auto Sales Inc. ("Effect"), both of which sell used vehicles. *See id.* ¶¶ 26, 35, 38, 51, 66.

"G-Auto/Effect," Complainants continue, contracted with Respondent Michael Hitrinov, a New York resident and alleged owner of Respondent Empire United Lines Co., Inc. ("Empire"), a Commission-licensed non-vessel-operating common carrier ("NVOCC") and warehouse operator, "to secure shipping and warehouse services related to [the] vehicles sold by G-Auto/Effect[.]" *Id.* ¶¶ 4, 6, 36. According to the Hitrinov/Empire-G-Auto/Effect arrangement, Complainants allege, the four vehicles were, at some point, stored in Empire's New Jersey warehouse, and, in November and December 2012, shipped by Empire from the Port of Elizabeth, New Jersey, to a customs bonded warehouse in Kotka, Finland, operated by former Respondent CarCont, which, "upon [Complainants'] information and belief, is [also] owned by Hitrinov." *See id.* ¶¶ 9, 26, 34. G-Auto paid Empire for each vehicle's "[o]cean freight and related charges," and the vehicles were shipped on a Mediterranean Shipping Company ("MSC") vessel pursuant to a service contract between Empire and MSC. *See id.* ¶¶ 33-34, 45, 59, 71. Each corresponding bill of lading designated Empire as the shipper and CarCont as the consignee. *See* Compl. ¶ 36.

The Complaints are unclear as to what, if anything, was supposed to happen with the vehicles after they arrived at CarCont's warehouse in Kotka, Finland. *See generally id.* Nevertheless, Complainants assert, in early 2013 and within days of the vehicles' arrival at CarCont's warehouse, they each "contacted CarCont regarding the release of" the vehicles, and were told that the vehicles

[1] Unless otherwise indicated, the 1953(I) Claim is identical to the 15-11 Complaint. Thus, only the relevant sections of the Complaint are cited herein.

"would not be released" to Complainants. *Id.* ¶¶ 43, 57, 70. Despite Complainants' "multiple requests that CarCont release" the vehicles to them, CarCont told Complainants that "[Empire] would not authorize the release of the [relevant vehicles] because there was an unpaid loan due and owing to [Empire] by the principal of G-Auto/Effect." *Id.* ¶¶ 44, 47, 58. At some point thereafter, Complainants maintain, Respondents Empire and Hitrinov (and former Respondent CarCont)[2] simply converted the vehicles "and have sold [them] to [various] third part[ies] in order to satisfy a loan allegedly due and owing from the principal of Effect/G-Auto to [Empire] and Hitrinov." *Id.* ¶¶ 49, 64, 74.

Nearly three years later, Complainants filed a complaint against Hitrinov and Empire, but not against G-Auto, Effect, or their principal(s). *See* 15-11 Compl. (filed Nov. 12, 2015); 1953(I) Claim (filed Jan. 11, 2016). According to Complainants, Empire violated 46 U.S.C. § 41102(c) in two ways: first, "by failing to provide Complainants and any other necessary parties with: (1) proper and lawful documents of ownership; (2) shipping invoices and house bills of lading; . . . (3) the terms and conditions of transport; [and] (4) failing to deal in good faith and further failing to provide proof of ownership;" and second, "by detaining and converting Complainants' automobiles on the grounds that the principal of G-Auto/Effect owed monies to [R]espondents for reasons not related to the instant shipments."[3]

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[2] Complainants never served former Respondent CarCont and, therefore, the Administrative Law Judge ("ALJ") dismissed CarCont from the action. Complainants do not except to the ALJ's dismissal, nor did they ever serve CarCont.

[3] Complainants initially also alleged claims under 46 U.S.C. §§ 40301, 40302, 40501, 40701(a), 41104(2), 41104(3), 41104(4), 41104(8), 41104(9), 41104(10), 41106(2), and 41106(3), and 46 C.F.R. Part 515. Compl. ¶¶ 24, V(A)-(D). In the I.D., however, the ALJ found that Complainants had abandoned all but their § 41102(c) claims, and, therefore, dismissed them. *See* I.D., Doc. 152 at 68. Complainants do not challenge the dismissal of any of these claims. *See* Complainants' Exceptions, Doc. 173.

As relief, Complainants request "direct damages" corresponding to the "amounts paid for the purchase" of each vehicle, "additional consequential damages," plus, for two Complainants, "additional damages for sums" related to loans obtained to finance the purchase of the vehicle. Compl. ¶¶ VII(A), VIII(B).

B. Procedural History

Much of the tortured procedural history of this proceeding is irrelevant to the issues currently before the Commission. Indeed, the parties filed over 100 motions before the ALJ, all of which were opposed. Accordingly, the Commission recounts here only those motions and orders that bear on the matters at hand.

1. Motions and Orders Below

Respondents filed several early motions in which they explained that G-Auto, the company from which Complainants allegedly purchased the vehicles, is, along with Effect Auto Sales, Inc., and Global Auto, Inc., one of several "related companies owned and/or controlled by a Mr. [Sergey] Kapustin," which Respondents (and, later, Complainants and the ALJ) sometimes collectively refer to as "Kapustin Global Auto Group," "Group," or "Global." *See, e.g.*, Resp'ts' Mot. to Stay, Doc. 13 at 2.

Respondents accept as true that Complainants purchased a vehicle from the Group and acknowledge that per the Empire-Group usual business arrangement, the Group "contracted with Empire to transport [these and other] cars in containers from the United States to a facility in Kotka, Finland operated by CarCont, where the containers were opened and the cars and other cargo de-vanned." *E.g.*, Respt's' Mot. for Additional Time, Doc. 10 at 4. "The vehicles," Respondents continue, "were then picked up by a member of the Kapustin Global Auto Group ([a company called] Global Cargo Oy), after a request for release was made by the Group. This

arrangement existed for years, and involved many cars beyond the few at issue [here].” *Id.*

Further, Respondents assert:

> Empire never dealt with individual customers of the Kapustin Global Auto Group; and had no knowledge as to their identity. This was true as a general matter, and is true here. Neither Complainants nor the Group ever requested Empire to release the vehicles in question and . . . Empire did not know who the individual customers were until well after the cars were sold.

Doc. 13 at 2-3.

Although Complainants objected to the various forms of relief sought in Respondents’ corresponding motions, they never took issue with the above explanation of the relevant parties, or the general business relationship described above.

At the ALJ’s direction, the parties subsequently filed the shipping documents “related to the transportation by water of the vehicles,” and identified, among other things, the relevant common carrier, shipper, consignee(s), port or point of origin, date of shipment, port or point of delivery, and payor for the transportation by water, for each of the four vehicles and pursuant to any bill of lading issued regarding the transportation. *See* Order to File Shipping Documents, Doc. 17; 1953(I) Order to File Shipping Documents (Apr. 27, 2016); Order to Supplement, Doc. 67. The parties’ responsive submissions confirmed what was alleged in the Complaint: the only relevant bills of lading are those issued by MSC, and all four of the bills of lading list Empire as the shipper and CarCont as the consignee. *See, e.g.*, Doc. 78; Doc. 79.

After the actions were consolidated, Respondents moved to dismiss the Complaints, arguing that the Commission lacked subject

matter jurisdiction to adjudicate the claims, and, therefore, that they were entitled to judgment on the pleadings, and/or that Complainants had failed to state a claim for relief (reparations). Order of Consolidation, Doc. 43; Respt's' Mot., Doc. 49. Respondents advance several arguments. First, Respondents maintain that Empire was not acting as an NVOCC for the shipments at issue because it "had a 60 percent ownership interest in each vehicle being transported" and "the arrangement between [Empire] and Global Auto Enterprise was a joint investment agreement." *Id.* at 8. Because Empire was not acting as a Commission-regulated entity in connection with the relevant shipments, Respondents claim, the Commission lacks subject matter jurisdiction over those shipments. *See id.* at 8-9. Additionally, or alternatively, Respondents aver the Commission lacks jurisdiction because Complainants were not shippers or consignees of the vehicles, and because Complainants "lack standing to seek reparations" since if they were harmed, it would only be "as an indirect result of [any] alleged violations." *Id.* at 9-14. Even if the Commission has subject matter jurisdiction, Respondents next argue Complainants fail to state a claim for reparations because they are "strangers to the transaction," and, separately, because the Complaints do not allege sufficient facts to make out a claim. *Id.* at 14-18. Complainants opposed Respondents' Motion. Doc. 60.

2. The Initial Decision

The ALJ granted Respondents' Motion for Judgment on the Pleadings and dismissed the Complaints with prejudice. I.D. Doc. 152. In so doing, the ALJ did not make a finding as to Respondents' first jurisdictional argument, that Empire was not acting as an NVOCC for the shipments at issue. *Id.* at 50. While the Commission has the authority to resolve disputes of fact when subject matter jurisdiction is challenged, the resolution would, according to the ALJ, involve legal questions related to the business relationship between Empire and Mr. Kapustin (Global Auto Group's principal), including resolving who among these entities had the right to sell these and similarly situated vehicles. *Id.* Further, the ALJ wrote,

those matters were then-pending before a federal district court. *Id.* The ALJ did not stay his ruling until the relevant district court decided those issues; instead, he assumed for the purposes of the I.D. that Empire acted as an NVOCC for the shipments at issue. *Id.* at 51.

The ALJ then effectively compressed Respondents' remaining jurisdictional arguments, finding, in relevant part, that because Complainants were not consignees on the shipments, "Complainants do not have standing to challenge Empire's refusal to deliver the cars to them or Empire's ultimate sale of the cars before the Commission. [Thus,] Complainants have failed to establish that the Commission has subject matter jurisdiction over their complaints." *Id.* at 6, 60-67.

The ALJ next analyzed the merits the Complaints' claims. Assuming that the Commission had jurisdiction, the ALJ summarily concluded that: "If it were determined that Complainants were consignees on the shipments, the complaints state claims of violation of [§] 41102(c)." *Id.* at 73.

3. <u>Complainants' Exceptions</u>

Complainants maintain that the ALJ erred by: (1) considering Respondents' motion for judgment on the pleadings as a factual, as opposed to facial, attack "in the absence of permitting Complainants to conduct necessary discovery;" and (2) finding that Complainants lacked standing to bring their claims. *See id.* at 22-30. In support of their Exceptions, Complainants filed 23 appendices spanning 553 pages. Docs. 174, 175.

II. DISCUSSION

A. Standard of Review and Burden of Proof

When the Commission reviews exceptions to an I.D., it has "all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). The Commission reviews the ALJ's findings de novo and can make additional findings where, as here, the ALJ dismissed claims for lack of subject matter jurisdiction or failure to state a claim. *Id.*; *see also Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Dkt. No. 12-02, 2015 FMC LEXIS 43, *110-*11 (FMC Dec. 18, 2015).

The I.D. granted Respondents' motion for judgment on the pleadings, which was brought alongside Respondents' motion to dismiss for failure to state a claim. Motions for judgment on the pleadings are brought under Federal Rule of Civil Procedure 12(c), and motions to dismiss for failure to state a claim are brought under Rule 12(b)(6). The standard of review under these motions "is essentially the same." *See Schuchart v. La Taberna Del Alabardero, Inc.*, 365 F.3d 33, 35 (D.C. Cir. 2004); *see also Samuels v. Safeway, Inc.*, 391 F. Supp. 3d 1, 2 (D.D.C. 2019) (noting that while the standards of review are basically the same, "a Rule 12(b) motion may be based on procedural failures, including lack of subject-matter jurisdiction or a lack of factual allegations to support a claim, [and] a Rule 12(c) motion centers upon the substantive merits of the parties' dispute") (internal quotation and alterations omitted).

On either motion, fact finders are to construe claims liberally, accept as true all well-pleaded facts, and draw all reasonable inferences in the complainant's favor. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although a fact finder "generally may not rely on facts 'outside' the pleadings in deciding [either] motion, . . . it may consider matters incorporated by reference or integral to the claim, items subject to judicial notice, and matters of public record." *United States v. All Assets Held at Bank Julius Baer & Co.*, 772 F.

Supp. 2d 191, 197 (D.D.C. 2011) (internal citations and alterations omitted).

Challenges to subject matter jurisdiction are made under Rule 12(b)(1), and complainants bear the burden of proving by a preponderance of the evidence that the Commission has subject matter jurisdiction to adjudicate their claims. *River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 188, 201, 1998 FMC Lexis 16, *66-67 (ALJ 1998), *aff'd* 28 S.R.R. 751, 1999 FMC Lexis 32, *67 (FMC 1999); *see also* 5 U.S.C. § 556(d); 46 C.F.R. § 502.155.

B. Complainants Have Standing and the Commission Has Subject Matter Jurisdiction to Adjudicate Complainants' Claims

In their Exceptions, Complainants first maintain that the ALJ erred in finding that they lack standing to bring their claims. Doc. 173 at 27-30. Specifically, Complainants argue, the ALJ "erred in delimiting Complainants' standing to sue, by imposing requirements that Complainants (1) demonstrate that they were consignees [on the shipments], and (2) demonstrate that Respondents had a duty to deliver the subject vehicles to Complainants." *Id.* at 27. Complainants are essentially correct.

In the I.D., the ALJ found that "[b]ecause they were not consignees on the shipments, Complainants do not have standing to challenge Empire's refusal to deliver the cars to them or Empire's ultimate sale of the cars before the Commission." Doc. 152 at 6; *see also id.* at 67 ("Complainants have not identified evidence that would support a finding that shipper Kapustin [as principal for Global Auto] intended that they be identified as consignees or that Empire, operating as an NVOCC, agreed to deliver the cars to Complainants. Complainants have not established that they have standing to bring their complaints before the Commission.").

1. Article III Standing Requirements Do Not Apply to Commission Proceedings

It is not clear what the ALJ meant by "standing"—a term that can be used loosely by litigants and tribunals alike. Generally, when used in the context of subject matter jurisdiction, "standing" refers to constitutional standing: the threshold concern for all federal Article III courts, as to whether a case or controversy comprises an actual injury, suffered by the complainant and caused by the complained of conduct, which can be redressed by a favorable ruling. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also* Doc. 152 at 29 (quoting the D.C. Circuit for the proposition that Article III courts lack subject matter jurisdiction when claimants lack standing to pursue their claims).

As the Commission recently explained, however, the standing requirements of Article III "are not directly applicable to agency proceedings." *See Stmt. of the Commission on Representative Complaints*, Dkt. 21-13 at 2 n.9 (citing cases). And as to Commission actions specifically, "any person may file a complaint alleging a violation [of Chapter 411 of Title 46]." *Id.* at 1 (emphasis omitted) (citing 46 U.S.C. § 41301(a)); *see also id.* at 2 ("the Commission has long interpreted § 41301(a) to allow any person to file a complaint, even if that person does not allege that it was injured by the alleged violation") (citing, *e.g.*, *Cargill, Inc. v. Waterman Steamship Corp.*, FMC Dkt. No. 79-72, 1981 FMC LEXIS 34, *39 (FMC Nov. 30, 1981) (Complainant "clearly has standing to prosecute a complaint under section 22 of the Shipping Act [of 1916] even if it were not alleging injuries to itself."); *Fed. Mar. Comm'n v. Zim Israel Navigation*, 263 F. Supp. 618, 621 (SDNY 1967) ("Whether or not [Complainants] are entitled to reparations in the proceedings before the Commission . . . they have standing to file the complaint and the Commission has jurisdiction to entertain it."). In other words, to the extent that standing is required to bring a Commission action, a complainant need only allege a violation of the Shipping Act to meet that requirement.

Here, Complainants allege that Respondents violated 46 U.S.C. § 41102(c); thus, they have standing to bring their claims. Complainants are correct that they did not have to establish, or even allege, that they were the consignees on the shipments for them to have standing or for the Commission to have subject matter jurisdiction to adjudicate their claims.[4] *See* Dkt. 21-13; Complainants' Exceptions, Doc. 152 at 27-30.[5]

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[4] To be clear—and given Complainants' incorrect assertions to the contrary—neither the ALJ nor the Commission in this Order makes any finding as to whether Empire was acting as an NVOCC for the purposes of the shipments at issue. Because the Commission finds that the Complaints should be dismissed for failure to state a claim, it need not determine Empire's NVOCC status as to these shipments, and, indeed, Respondents request as much. *See* Doc. 49 at 2 ("Respondents would not object if the Presiding Officer were to dismiss for failure to state a claim without addressing the jurisdictional issues" raised in Respondents' motion for judgment on the pleadings) (citing *Inlet Fish Producers, Inc. v Sea-Land Service, Inc.*, 28 S.R.R. 1631, 1632 (ALJ 2000) ("The general rule is that an agency must first find that it has jurisdiction over the parties and the subject matter of the proceeding before it addresses the merits, unless the facts necessary to resolve the issue of jurisdiction are the same as the facts bearing on the merits").

[5] If the ALJ instead used standing to mean that Complainants lack statutory standing, even if the ALJ were right, statutory standing is not jurisdictional. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014) (statutory standing goes to whether Congress has accorded a particular complainant the right to sue under a statute, but it does not limit the power of the tribunal to adjudicate the case). "As a result, a dismissal for lack of statutory standing is effectively the same as a dismissal for failure to state a claim, and a motion to dismiss on this ground is [properly] brought pursuant to [Federal] Rule 12(b)(6) [for failure to state a claim upon which relief can be granted], rather than Rule 12(b)(1) [for lack of jurisdiction]." *Leyse v. Bank of Am. Nat. Ass'n*, 804 F.3d 316, 320 (3d Cir. 2015) (internal quotations, citations, and alterations omitted). The same result would be true if the ALJ used standing to mean that Complainants were not the proper parties to bring these claims; that is: if Empire committed a Shipping Act violation with respect to the shipments at issue, it did so to the detriment, if any, to Global (for whom it arguably shipped the cargo) and/or CarCont (the consignee), and, therefore, any claims should have been brought by those parties and are not properly brought by Complainants. *See* Doc. 152 at 60-62 (discussing, in the context of the finding that Complainants lacked standing, the contractual relationship between Kapustin, Empire, and CarCont); *see also* Resp'ts' Mot., Doc. 49 at 12-13 ("If anyone has a conceivable Shipping Act claim against [Empire] it is Global Auto Enterprise.").

C. **Complainants Have Failed to State A Claim For Reparations or For Which Relief Can be Granted**

Complainants allege violations of 46 U.S.C. § 41102(c), which prohibits common carriers, marine terminal operators, and ocean transportation intermediaries from "fail[ing] to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." Specifically, Complainants allege that Respondents violated § 41102(c) by (1) "failing to provide Complainants and any other necessary parties with certain shipping documents including "shipping invoices and house bills of lading" and (2) detaining and otherwise refusing to release to Complainants the vehicles that Complainants allegedly bought from G-Auto/Effect. *See* Compl. ¶¶ V(B), V(E).

Respondents moved to dismiss Complainants' claims arguing, in relevant part, that Complainants failed to state a claim for reparations and/or claims for which relief may be granted for two reasons. Respt's' Mot. for J. on the Pleadings, Doc. 49 at 14-16, 17-18. First, Respondents assert, "as their own documents show, Complainants are total strangers to the shipping transactions alleged in the Complaint, and so can have no claim for relief." *Id.* at 14. Second, Respondents continue, "Complainants fail to allege [basic] facts that would entitle them to relief." *Id.*

As an initial matter, Complainants seek "direct damages" corresponding to the relevant vehicle's "purchase" price plus, when incurred, additional damages for sums "arising out of" bank loans taken to pay for the vehicle(s), plus, in the case of Complainant Rzaeva, damages relating to her travel to Kotka, Finland, to try to find "her" vehicle. Compl. ¶ VII(A). A complaint, however, only properly seeks reparations "for an injury to the complainant caused by the [alleged] violation" of Chapter 411 of Title 46. 46 U.S.C. § 41310(a); *see also id.* § 41305(b) (reparations are appropriate only

for "actual injury" to the complainant and "caused by a violation of this part"). The Complaints here seek no such relief.

The problem with Complainants' request is that Complainants did not actually purchase the vehicles from Respondents. By their own account, each Complainant purchased one vehicle "from G-Auto," which was never named as a Respondent and is, by all accounts, unaffiliated with Respondents. Compl. ¶¶ 31, 58, 65. In fact, Complainants do not allege that they paid anything at all to Respondents; instead, Complainants assert, "ocean freight and related charges [were] paid to [Empire] by G-Auto." *Id.* ¶¶ 45, 59, 71. Because Complainants did not purchase the vehicles from Respondents, they do not properly state—and could never prove—their claims for damages as there is no alleged causal link between any complained-of conduct and the monetary relief sought. *See* 46 U.S.C. § 41310; *see also*, *e.g.*, *Iqbal*, 556 U.S. at 663.

There is similarly no causal connection between any alleged violation of the Shipping Act and Complainants' purported injuries, as required to maintain reparations claims. Specifically, Complainants first allege that Respondents violated § 41102(c) by failing to provide various shipping documents. Compl. ¶ V(B). Even assuming (i) that Empire did, in fact, fail to provide this paperwork (which Empire maintains never existed because, according to Empire, it was not acting as an NVOCC), and (ii) that such a failure constitutes a § 41102(c) violation (a proposition for which Complainants cite no authority), this failure is entirely separate from Complainants' having paid for the vehicles, which, again, is what Complainants request reparations for. In other words, even had Empire issued and provided house bills of lading and other now-sought shipping documentation, Complainants would still be out the respective vehicles' purchase prices.

In any event, the Complaints do not include any allegation that the cars were actually meant to be delivered, let alone shipped or released, to Complainants. *See generally* Compl.; Claim. As Respondents point out in their Motion, "the Complaint[s] fail[] to

assert any basis in law or reason why [Empire] (or CarCont) was obligated to release the vehicles or provide the requested shipping documents to Complainants." Doc. 49 at 17; *see also id.* at 17-18 (asserting that had Empire released the vehicles to Complainants, doing so may have actually constituted a § 41102(c) violation since Complainants were not designated as someone to whom the vehicles should be released) (citing *Bimsha International v. Chief Cargo Services, Inc.*, 2013 WL 9808692, at *7 (FMC 2013) (finding that an NVOCC violated § 41102(c) when it released cargo "without the presentation of the original bills of lading," even to the proper "notify party").

Indeed, it is unclear what, if anything, was supposed to happen to the vehicles after their arrival in CarCont's warehouse. Complainants have failed to assert what went wrong here, including as it relates to the receiving, handling, storing, or delivering of the vehicles. As Complainants allege: "G-Auto/Effect contracted with [R]espondents Hitrinov and Empire to secure shipping and warehouse services related to vehicles sold by G-Auto/Effect and destined for Kotka, Finland, with the consignee on each shipping bill of lading designated as . . . CarCont." Compl. ¶ 36. Assuming Complainants refer here to the vehicles at issue (in addition to explaining the parties' general arrangement), the vehicles were to be stored in Empire's New Jersey warehouse until they would be trucked to the Port Elizabeth and shipped via vessel to Kotka, Finland, where they would be unloaded and stored by CarCont. This is exactly what Complainants maintain happened. *See generally* Compl.; Claim.

For these reasons, Complainants have failed to state a claim upon which relief can be granted, and the Complaints should be dismissed. *See* 46 U.S.C. § 41305(b); *Twombly*, 550 U.S. at 555 (claims are only viable when they "raise a right to relief above the speculative level"). Moreover, dismissal with prejudice is appropriate because any amendment to the complaint would be futile. Complainants have produced thousands of pages of exhibits in support of their claims, and not a single page connects the

vehicles' shipment by water from the U.S. to Complainants, let alone evinces that Respondents knew who Complainants were when Complainants requested release of the vehicles.

Accordingly, the Commission upholds the I.D.'s dismissal with prejudice.

D. Complainants' Contention that the ALJ Improperly Construed Respondents' Motion as a Factual Attack on Subject Matter Jurisdiction

Complainants additionally argue that the ALJ "erred in construing [R]espondents' motion to dismiss as a 'factual' attack upon subject matter jurisdiction in the absence of allowing [C]omplainants to conduct the very discovery necessary to obtain evidence and facts to fully oppose defendants' [sic] motion." Doc. 152 at 26. Complainants' argument makes little sense.

To be sure, and as the Commission has previously explained, there is a difference between a factual attack and facial attack to a tribunal's subject matter jurisdiction, the latter of which involves accepting as true all well-pleaded facts. *See, e.g.*, *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 2011 WL 7144008, at *11-12 (FMC 2011) (citing *Sinaltrainal v. Coca-Cola Company*, 578 F.3d 1252, 1260 (11th Cir. 2009)). Here, however, the ALJ's conclusion regarding subject matter jurisdiction was grounded in the ALJ's finding that Complainants are not the consignees of the relevant cargo, which is *exactly what Complainants allege in their Complaints*. *Compare* Doc. 152 at 6, 60-67 *with* Compl. ¶ 36 ("At all times mentioned herein, G-Auto/Effect contracted with [R]espondents . . . to secure shipping and warehouse services related to vehicles sold by G-Auto/Effect and destined for Kotka, Finland, *with the consignee on each shipping bill of lading designated as Defendant [sic] CarCont*.") (emphasis supplied). In other words, even if the ALJ considered matters outside of the pleadings such that Respondents' attack was construed as a factual one, any error was harmless: Complainants' allegations regarding the identity of the

consignee(s) were accepted as true, which would have been the case if Respondents' motion were instead treated as a facial attack.

Accordingly, although Complainants are correct that the Commission has subject matter jurisdiction, their exceptions here are without merit.

E. Complainants' Remaining Exceptions

Complainants additionally argue that "as a licensed ocean transportation intermediary, Respondents had a statutory duty to know, and in fact did know, that Complainants were the ultimate consignees for the subject vehicles." Doc. 173 at 30.

As an initial matter, although Complainants maintain that Respondents were under some "statutory duty," they fail to cite the statute from which this supposed duty arises. *See id.* at 30-44. More importantly, Complainants discuss at length regulations administered by agencies other than the Commission, with no explanation of how any supposed failure to comply with these other agencies' regulations constitutes a violation of 46 U.S.C. § 41102(c) (or any other provision of the Shipping Act). *See id.* (detailing regulations enforced by the Bureau of Industry and Security and U.S. Customs and Border Patrol, respectively). In other words, even if Complainants are correct that Respondents were under some duty to know who (or what) the ultimate consignee is or was, their efforts here are wasted as the relevant question is whether Respondents violated the Shipping Act or the Commission's implementing regulations.

Complainants' contentions that the ALJ made several "material errors" and "omitted certain material facts" are similarly misguided. Doc. 173 at 50-56. Even assuming that Complainants accurately stated certain facts that the ALJ supposedly got wrong (and they did not), nothing listed in these pages was material to the ALJ's findings. *See, e.g.*, *id.* at 50 (maintaining that an obvious typographical error is a material error); *id.* at 50 n.15 (same); *id.* at

49 (falsely, or at least misleadingly, asserting that there was no formal discovery before the ALJ rendered his opinion); *id.* at 50-52 (maintaining that Respondents were deliberately misrepresenting information to the U.S. Census Bureau).

III. <u>Respondents' Counsel's Motion For An Order To Show Cause Is Not Before The Commission</u>

When the action was still pending before the ALJ, Respondents' Counsel moved for an order to show cause as to why Complainants' Counsels' privilege of practicing before the Commission should not be revoked. Doc. 112. The next day, Complainants' Counsel, Mr. Nussbaum, opposed the motion and, in the same filing, cross-moved for an order to show cause as to why Respondents' Counsel should not be suspended from practicing before the Commission for at least six months and why he should not be "personally removed" as Respondents' Counsel. Doc. 114.

The ALJ summarily denied both motions, finding that because each counsel had other matters pending before an ALJ and/or the Commission itself, the claims "should be directed to the Commission, not to an administrative law judge in an individual case." Doc. 124 at 4. The ALJ therefore "denied [the motions] without prejudice to the parties presenting the arguments to the Commission in a more appropriate manner." *Id.*

Respondents' Counsel filed what they characterize as exceptions to the ALJ's decision. Doc. 128. This filing, however, does not cite to any Commission regulation allowing for exceptions to such a ruling. *See id.* Indeed, exceptions are reserved for initial decisions and other orders of dismissal of the proceeding in whole or in part. 46 C.F.R. § 502.227; *see also id.* § 502.221 (governing appeals from a ruling of presiding officer "other than orders of dismissal in whole or in part," and requiring that "any party seeking to appeal [such an order] must file [with the presiding officer] a motion for leave to appeal"); *accord id.* § 502.94 ("all claims for relief or other affirmative action by the Commission . . . must be by

written petition"). Respondents' Counsel did not seek leave from the ALJ to appeal the ruling. Accordingly, these so-called exceptions, and Respondents' Counsel's underlying motion, are not properly before the Commission.[6]

That is not to say, however, that the Commission is without authority to address the serious allegations of misconduct lodged against Mr. Nussbaum, which center on Mr. Nussbaum having allegedly: (1) falsified evidence in an attempt to support Complainants' claims; (2) gotten the template for these documents only as a result of his having previously represented Mr. Kapustin and his criminal enterprises; (3) used these and other confidentially-gotten documents from, and to the detriment of, Mr. Kapustin; (4) misrepresented facts and the parties' arguments; and (5) acted extremely uncivilly. *See* Doc. 112; *see also* Doc. 145.

The Commission takes seriously these grave accusations, and has already warned Mr. Nussbaum about similar behavior. Most recently, for example, in now-closed Dkt. 20-12, Mr. Nussbaum, among other things, repeatedly misquoted the record to support his client's claims and attacked the ALJ as advocating for the opposing side. *See Andrew v. Marine Transport Logistics*, FMC Dkt. 20-12, Complainants' Exceptions, Doc. 38; *see also id.* Complainants' Proposed Findings of Fact, Doc. 31. Some three years before that, the Commission was compelled to direct Mr. Nussbaum "not to file any pleading, motion or other document that does not meet the [46 C.F.R.] § 502.6 verification requirements or fails to comply with the ABA Model Rules," after it found that "Mr. Nussbaum c[ame] close to admitting that nothing more than speculation underlies [his] motion when he argues that the Commission should decide [a] seminal issue by speculating that one of Respondents' attorneys altered evidence but has no evidence that either attorney added information to the document or did so with intent to mislead

[6] Neither did Respondents' Counsel file a petition for the same relief with the Commission, despite the ALJ's having written that such requests for relief should not be brought "in an individual case."

anyone." *Crocus Investments, LLC v. Marine Transport Logistics, Inc.*, FMC Dkt. 15-04, 2018 WL 2113084, at *1, *8 (FMC 2018). Indeed, the Commission noted that such conduct "bears the unmistakable hallmarks of other pleadings filed by Mr. Nussbaum in this case and other proceedings before the Commission," and warned him that, "[f]urther violation of these rules may result in sanctions by the Commission." *Id.* *1, *8. So too here is the record replete with possibly inappropriate conduct. *See, e.g.*, Complainants' Opp'n and Cross-Motion, Doc. 114 (nominally opposing Respondents' Counsel's motion before the ALJ, but dedicating the entirety of that filing to Mr. Nussbaum's own cross-motion); Complainants' Resp. to Order to Supplement, Doc. 218 (similarly failing to deny this and other serious alleged misconduct); *accord id.* at 3 (incorrectly maintaining that the ALJ "finally and conclusively resolved" the issues raised by Respondents' Counsel's motion, and, therefore "relitigation of [these] issues would be barred by res judicata"); *id.* at 5 (failing to deny the allegations of forgery and (perhaps correctly) maintaining that such allegations "should . . . be supported by a credible forensic examiner"); *id.* at 9-10 (continuing to rely on an asserted waiver of attorney-client privilege supposedly executed by Mr. Kapustin, Mr. Nussbaum's former client, which was written (and signed) in English despite elsewhere maintaining that Kapustin cannot speak (or write) in English).

Although Respondents' Counsel's underlying motion is not properly before the Commission, we note that the agency has the authority to act on Mr. Nussbaum's apparent misconduct in this and all actions before the Commission. It could, for example, initiate a new proceeding that addresses Mr. Nussbaum's concerning conduct across of all of his Commission actions. *See* 46 C.F.R. § 502.91 ("The Commission may institute a proceeding by order to show cause."); *id.* § 502.26 ("An attorney practicing before the Commission is expected to conform to the standards of conduct set forth in the American Bar Association's Model Rules of Professional Conduct in addition to the specific requirements of this chapter."); *Polydoroff v. I.C.C.*, 773 F.2d 372, 374 (D.C. Cir. 1985) ("There can be little doubt that the [Interstate Commerce]

Commission, like any other institution in which lawyers or other professionals participate, has authority to police the behavior of practitioners appearing before it.”).

As noted, however, Respondents’ Counsel’s underlying motion is not properly before the Commission. The Commission cannot emphasize strongly enough, however, that it retains the option to exercise all lawful authority with respect to Mr. Nussbaum’s conduct.

IV. CONCLUSION

Accordingly, the Commission **AFFIRMS ON DIFFERENT GROUNDS** the Initial Decision.

THEREFORE, IT IS ORDERED that Complainants’ Complaint and Claim be **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that this proceeding be **DISCONTINUED**.

By the Commission.

William Cody
Secretary