FEDERAL MARITIME COMMISSION

DOCKET NO. 15-11

IGOR OVCHINNIKOV, IRINA RZAEVA, and DENIS NEKIPELOV

v.

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

INFORMAL DOCKET NO. 1953(I)

KAIRAT NURGAZINOV

v.

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

INITIAL DECISION GRANTING RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS[1]

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[1] The initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227. Because of litigation tactics employed by the parties, the records of these proceedings are voluminous (especially for cases raising these claims), several copies of many documents are in the record, and the documents to which this decision refers are spread throughout the record. If a party files exceptions or if the Commission chooses to review the decision, the Commission may find it helpful to require the parties to prepare appendices or a joint appendix better organizing the documents that they believe the Commission will need for review. *See* Fed. R. App. P. 30 and 32(b).

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I. INTRODUCTION AND OVERVIEW.

The complaints in these consolidated proceedings allege violations of the Shipping Act of 1984 by three Respondents. The four Complainants live in countries that were once part of the Union of Soviet Socialist Republics (USSR). Each Complainant alleges that he or she purchased a car from a company owned by a person named Sergey Kapustin. In association with his wife Irina Kapustina and other family members, Kapustin owned and operated several businesses that specialized in selling used cars from the United States to persons in the former republics of the USSR. As explained more fully below, Kapustin has been found by a federal district court to have treated his companies as his alter egos. Therefore, references to Kapustin in this decision are intended to refer also to his companies.

Respondent Empire United Lines Co., Inc. (Empire or EUL) is licensed by the Commission as a non-vessel-operating common carrier (NVOCC). Respondent Michael Hitrinov a/k/a Michael Khitrinov (Hitrinov) is Empire's sole principal and officer. *See Baltic Auto Shipping, Inc. v. Michael Hitrinov a/k/a Michael Khitrinov and Empire United Lines Co., Inc.*, FMC No. 14-16 (ALJ Sept. 15, 2015) (Initial Decision on Respondents' Motion for Partial Summary Decision), exceptions filed, Jan. 15, 2016. Because Hitrinov is Empire's sole principal, at times this decision may refer to them collectively as Empire. The complaints allege that Hitrinov owns CarCont, Ltd. (CarCont), a company located in Kotka, Finland, and is "the Chairperson of the Board of CarCont, with signatory authority and direct control over respondent CarCont." *Igor Ovchinnikov, Irina Rzaeva, and Denis Nekipelov v. Michael Hitrinov a/k/a Michael Khitrinov, Empire United Lines Co., Inc., and CarCont, Ltd.*, FMC No. 15-11, Complaint ¶ 10 (filed Nov. 12, 2015) (*Ovchinnikov v. Empire*, FMC No. 15-11).

Empire made the arrangements for the transportation by water of hundreds of Kapustin cars (including the cars that Complainants claim they bought) from the United States to Kotka, Finland, for eventual delivery to Kapustin customers. Complainants allege that Empire operated as an NVOCC on the shipments and violated the Shipping Act when Empire failed to deliver cars that Complainants claim to have purchased from a Kapustin company. Empire contends that because of its ownership interest in the cars, it was not operating as an NVOCC, but shipped the cars as an owner. Even if it operated as an NVOCC, Empire contends that the contracts of carriage did not require delivery of the cars to Complainants. To understand fully the parties' claims and defenses in this proceeding, it is necessary to understand the relationship between Kapustin and Empire. Therefore, while it is discussed more extensively in the factual background, it is summarized here.

These two Federal Maritime Commission (Commission) proceedings are not the only lawsuits that concern Kapustin's car business, the relationship between Kapustin and Empire, and delivery of cars shipped by Kapustin to Finland. In 2013, three Kapustin companies commenced a civil action in the Eastern District of New York against FMC respondents Hitrinov and Empire, Mediterranean Shipping Company (MSC) (the vessel-operating common carrier (VOCC) that transported the cars), and five John Does. *Global Auto, Inc. v. Hitrinov*, No. 13-cv-2479 (E.D.N.Y.

Apr. 24, 2013) (complaint filed) (Doc. 1).[2] The New York case is no longer being actively litigated. Also in 2013, several disgruntled Kapustin customers (not including these FMC Complainants) commenced a civil action in the District of New Jersey against Kapustin and his companies, Respondents in the Commission proceedings, and other defendants. *Akishev v. Kapustin*, No. 13-cv-07152 (NLH) (AMD) (D.N.J. Nov. 25, 2013) (complaint filed) (Doc. 1). This case is still being actively litigated and now includes some of the claims between Kapustin and Empire originally made in the New York case. These cases are described more fully below.

The parties have made many of the documents filed in the two district courts part of the record in these proceedings. These documents include correspondence generated by Kapustin and Empire during the more than two years that their relationship lasted. These documents are admitted into evidence. I take official notice of the records of both courts, including documents not filed by the parties, but to which this decision refers. 46 C.F.R. § 502.226. Findings in this decision are based primarily on the documentary evidence filed in the two district court cases and subsequently filed by the parties in these proceedings. The parties have also submitted several district court orders in these cases as part of the FMC record.

Evidence in the Commission record and in the district court proceedings demonstrates that Empire loaned Kapustin a total of $450,120.00 to finance Kapustin's purchase of cars in the United States for sale to customers in the former USSR, including the cars that Complainants claim to have purchased from Kapustin. Kapustin and Empire called these "investment vehicles." Because of this financial arrangement between Empire and Kapustin, the relationship between Kapustin and his Kapustin companies and Empire was not a typical shipper-carrier relationship. Empire contends that it did not operate as a common carrier on the shipments because of its ownership interest in the cars and contends that its ownership interest gave it the right to hold a particular car and its title in which it had an interest as collateral until Kapustin paid the loan or Kapustin substituted another car for the first. In a relationship lasting more than two years, the practice evolved to be one where Empire maintained a spreadsheet identifying Kapustin cars shipped to Finland and the value of those cars in which Empire claimed an ownership interest to secure its loan. Kapustin would deliver an investment vehicle and its title to Empire in the United States and Empire would record it on the spreadsheet that it supplied to Kapustin. The investment vehicle would be shipped to Finland, with freight paid by Kapustin, delivered to CarCont, and held at the CarCont warehouse in Finland. CarCont was identified as the consignee on the sea waybills[3] issued by MSC, the VOCC that

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[2] Doc. followed by a number refers to the document number as listed in the district court docket accessible on PACER.

[3] Commission regulations do not define the term "sea waybill." The Maritime Administration offers this definition: "Sea Waybill – Document indicating the goods were loaded onboard when a document of title ([Bill of Lading]) is not needed. Typically used when a company is shipping goods to itself." Maritime Administration Glossary of Shipping Terms, http://www.thesis.xlibx.info/th-other/4312304-8-maritime-administration-glossary-shipping-terms-may-2008-maritime.php (last visited Feb. 16, 2017).

transported Kapustin cars to Finland, and other documents related to the shipments. When Kapustin wanted an investment vehicle released to its affiliate in Finland for eventual delivery to a customer, another investment vehicle and title would be delivered to Empire at its United States facility for shipment to Finland to maintain the value of the investment vehicles in Empire's control at a sufficient level to secure the loan. The investment vehicle in Finland and its title would then be released to Global Cargo Oy,[4] the Kapustin company in Finland, for delivery to a purchaser. An investment vehicle in Finland would not be released to the Kapustin company in Finland until Empire had in its possession another investment vehicle (and its title) sufficient to cover the loan.

The relationship between Empire and Kapustin broke down toward the end of 2012 and the beginning of 2013 at the time when Complainants contend they purchased their cars. Empire contends that Kapustin stopped sending investment vehicles and titles to Empire in the United States to replace investment vehicles in which Empire claims it had a security interest being held in Finland, and that Kapustin did not repay the loan Empire had made. Therefore, Empire states, it did not release investment vehicles that had arrived in Finland, including the investment vehicles that Complainants claim to have purchased, and subsequently sold the investment vehicles to repay the loan it had made to Kapustin.

Respondents did not answer or otherwise respond to the complaints in the time permitted by Commission rules. Complainants filed a motion for initial decision on default against Empire and Hitrinov, but not CarCont, in *Ovchinnikov v. Empire*, FMC No. 15-11. Show cause orders were issued in both proceedings requiring Respondents to answer or otherwise respond to the complaints and to show cause why initial decisions on default should not be entered. Empire responded with motions to stay the proceedings pending a judgment in the New Jersey case. The motions were denied. Because of the delay, Respondents were instructed not to file motions to dismiss, but to file answers and include in the answers any claimed Federal Rule of Civil Procedure Rule 12(b) defenses. *Ovchinnikov v. Empire*, FMC No. 15-11(ALJ Apr. 13, 2016) (Order Granting in Part and Denying in Part Motion for Additional Time in Which to Respond) ("Empire and Hitrinov are ordered to include any defenses that Rule 12(b) permits to be raised by motion in their answer or answers. They may also file a motion or motions addressing the 12(b) defenses with the answer or answers, but must file answers that date."); *Kairat Nurgazinov v. Michael Hitrinov a/k/a Michael Khitrinov, Empire United Lines Co., Inc., and CarCont, Ltd.*, FMC No. 1953(I) (ALJ April 13, 2016) (Notice of Assignment to Small Claims Officer) (*Nurgazinov v. Empire*, FMC No. 1953(I)) (same instruction). Respondents filed a motion to consolidate the two proceedings that was granted. *Ovchinnikov v. Empire*, FMC No. 15-11 (ALJ May 24, 2016) (Order of Consolidation). Empire filed answers including Rule 12(b) defenses to both complaints, then filed a motion for judgment on the pleadings pursuant to Federal Rules of Civil Procedure 12(c) arguing that the Commission lacks subject matter jurisdiction and that the complaints fail to state claims for relief.

Empire asserts a factual attack on the Commission's subject matter jurisdiction over the complaints. When a factual attack is made on the Commission's subject matter jurisdiction, the

[4] "Oy" or "OY" is the Finnish equivalent of "incorporated."

Commission is not obliged to accept the allegations in a complaint as true and may examine the evidence to the contrary and reach its own conclusion on the matter. *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 126, 136 (FMC 2011); 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure Civ.* § 1350 and n.51 (3d ed. 2010). The complainant bears the burden of proving that the Commission has jurisdiction. *The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, FMC No. 06-02, 2007 FMC LEXIS 33, *10 (FMC Aug. 2, 2007).

The evidence in the record establishes that after the cars that Complainants claim they purchased arrived in Finland, Empire and/or CarCont sold the cars and kept the money. Complainants are asking the Commission to order Empire to pay them reparations because Respondents did not deliver the cars to them, but sold the cars to satisfy the debt Empire claims Kapustin owed it.

There are a number of factual disputes between the parties that the Commission does not have subject matter jurisdiction to decide. For example, Empire contends that Complainants did not complete their purchases of the cars. Empire also contends that even if Complainants fulfilled their contracts with Kapustin, Kapustin's sale of the cars violated the terms of the Empire-Kapustin agreement pursuant to which Empire loaned money to Kapustin. These are not Shipping Act claims within the jurisdiction of the Commission, but are similar to claims being litigated by other Kapustin customers in the New Jersey district court.

The Commission only has jurisdiction to enforce the Shipping Act of 1984. For the Commission to issue a reparation award to a complainant, a complainant must establish that a respondent did something or failed to do something in violation of the Shipping Act, and that the complainant suffered an actual injury from the violation. The core of Complainants' argument is that they were (or should have been) identified as consignees on the shipments and that the cars should have been delivered to them. To prevail in these proceedings, Complainants are required to establish that Empire operated as a common carrier on the shipments of the cars and that the contracts of carriage for the ocean transportation required Empire to deliver the cars to Complainants. Put another way, Complainants must prove: (1) that Kapustin, the shipper of the cars, identified Complainants as consignees for the shipments of the cars they claim; and (2) that Empire, operating as an NVOCC, entered into contracts of carriage with Kapustin to deliver the cars to Complainants.

Complainants have failed to establish by a preponderance of the evidence that Kapustin entered into contracts of carriage with Empire that required Empire to deliver the cars to Complainants. Because 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. Complainants have failed to establish that the Commission has subject matter jurisdiction over their complaints. Therefore, the complaints are dismissed with prejudice.

This decision is organized into six sections. Part II describes the parties and relevant non-parties to these proceedings and provides a narrative background of the relationship between

Kapustin and his export business and Empire, the deterioration of that relationship, and the resulting lawsuits. Part III sets forth the controlling authority. Part IV sets forth the findings of fact. Part V summarizes Empire's motion for initial decision on the pleadings and Complainants' opposition. Part VI identifies respondents Empire and Hitrinov as prevailing parties that may be entitled to attorney fees.

II. FACTUAL BACKGROUND.

A. Complainants.

On November 12, 2015, complainants Igor Ovchinnikov, Irina Rzaeva, and Denis Nekipelov filed the Verified Complaint in FMC No. 15-11. The Complaint alleges that Respondents violated 46 U.S.C. §§ 40301, 40302, 40501, 40701, 41102, 41104, and 41106 of the Shipping Act and Commission regulations at 46 C.F.R. Part 515, and that Complainants each suffered direct damages: Ovchinnikov in excess of $28,960.00, Rzaeva in excess of $32,101.00, and Nekipelov in excess of $19,920.00. Complainants further allege that the full extent of their damages can only be determined after discovery has been conducted and interest due to them and the cost of their legal fees calculated. (Complaint at 15-16.)

On January 11, 2016, complainant Kairat Nurgazinov filed the Claim in FMC No. 1953(I) alleging the same violations of the Act by the same Respondents. Nurgazinov seeks a reparations award from Respondents in the amount of $12,900 plus interest and attorney's fees. Nurgazinov requested adjudication of the Claim under the Commission's informal procedures provided at Subpart S of the Commission's Rules of Practice and Procedure. FMC No. 1953(I) was assigned to the undersigned who already had been assigned the substantially identical complaint in FMC No. 15-11. *Nurgazinov v. Empire*, FMC No. 1953(I) (ALJ Jan. 21, 2016) (Notice of Assignment to Small Claims Officer).

Each Complainant alleges that he or she purchased a car from Kapustin company G-Auto Sales Inc. and paid G-Auto Sales for the car and transportation to Finland, but that Empire did not deliver the cars to them in violation of the Shipping Act.

B. Respondents Hitrinov and Empire.

Respondent Empire is licensed by the Commission as an NVOCC. Respondent Hitrinov is Empire's sole principal and officer.

C. Respondent CarCont.

1. Description.

The complaints allege that Hitrinov owns respondent CarCont, a company that owns a warehouse located in Kotka, Finland, and that he is "the Chairperson of the Board of CarCont, with

signatory authority and direct control over respondent CarCont." *Ovchinnikov v. Empire*, FMC No. 15-11, Complaint ¶ 10 (filed Nov. 12, 2015). While Hitrinov denies this claim in the FMC Answer, (Answer ¶ 10), I note that in the Answer to the Amended Complaint in the New York case, Hitrinov admitted to being chairperson of the board of CarCont, but denied having signatory authority and direct control over CarCont. *Global Auto v. Hitrinov*, No. 13-cv-2479, Answer ¶ 12 (E.D.N.Y. Feb. 28, 2014) (Answer and Counterclaims) (Doc. 51). In the final analysis, Hitrinov's control or lack of control over CarCont is irrelevant. Whether or not Hitrinov owned and controlled CarCont, if the contracts of carriage required Empire to deliver the cars to Complainants, Complainants have standing and the Commission has jurisdiction. If the contracts of carriage did not require Empire to deliver the cars to Complainants, the Commission does not have jurisdiction.

2. The claims against CarCont are dismissed pursuant to 46 C.F.R. § 502.113(d) for failure to serve.

In an earlier order, it was noted that CarCont had not received notice of the FMC proceedings.

> On November 18, 2015, the Secretary sent the Complaint and Notice by FedEx to CarCont at the address identified in the Complaint as CarCont's principal place of business: Merituulentie 424, 48310, Kotka, Finland. FedEx was unable to deliver to CarCont and subsequently returned the Complaint and Notice to the Commission.
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> Complainants do not ask for default against CarCont. Furthermore, it does not seem that the record would support a finding that CarCont has notice of this proceeding. Complainants may choose to serve the Complaint on CarCont pursuant to Commission Rule 502.113(c) as they did with Hitrinov and Empire. If Complainants do so, "an affidavit setting forth the method, time and place of service must be filed with the Secretary within five days following service." 46 C.F.R. § 502.113(c) (2015). Otherwise, Commission Rules provide that "[t]he presiding officer may dismiss a complaint that has not been served within thirty (30) days after the complaint was filed." 46 C.F.R. § 502.113(d). Complainants should advise the Commission of their intention regarding CarCont.

Ovchinnikov v. Empire, FMC No. 15-11 (ALJ Mar. 30, 2016) (Notice of Default and Order to Show Cause). Counsel for Complainants was reminded of this matter in the telephone conference on October 5, 2016. *See* 15-11.20161005.Telephone conference, audio recording starting at time 23:20. Despite twice having been instructed to advise the Commission of their intentions regarding CarCont, Complainants have not responded to this inquiry and have not stated their intentions. Therefore, the claims against CarCont are dismissed pursuant to 46 C.F.R. § 502.113(d).

D. Sergey Kapustin and his Affiliates and Their Relationship with Empire.

Sergey Kapustin and his wife Irina Kapustina[5] owned and operated at least four companies (G-Auto Sales, Inc., Effect Auto Sales Inc., Global Auto, Inc., and SK Imports, Inc. a/k/a Global Cars, Inc.) that specialized in selling used cars from the United States to customers in the Commonwealth of Independent States (CIS), former USSR republics. They also owned and operated Global Cargo Oy, a company in Finland that handled Kapustin cars in Finland and delivered the cars to Kapustin customers.

Empire was in business with Kapustin and his companies and loaned money to Kapustin that was used to purchase cars. Empire claims that because of the loans, it had an ownership interest in the cars. In a declaration filed in Kapustin's New York case against Hitrinov, Empire, CarCont, and MSC and made part of the record in this proceeding by Complainants, Hitrinov described the relationship with Kapustin this way (Hitrinov's paragraph numbering).

> 3. In early September 2010, I was contacted by Sergey Kapustin whom I had known from previous business dealings as the owner and individual in control, together with his wife Irina Kapustina, of Global Auto Sales, Effect Auto Sales and G Auto Sales, the plaintiffs in this action. The purpose of Mr. Kapustin's call was to inquire whether EUL wanted to invest in the ownership of some cars that Mr. Kapustin wanted to acquire in the U.S. for re-sale overseas. Mr. Kapustin explained that he needed investors so he could finance the acquisition of a car inventory to offer for sale to customers in Russia and other CIS countries. In short, EUL would put up investment capital which Mr. Kapustin would then use to buy vehicles in the U.S. for resale to overseas customers. In return, Mr. Kapustin proposed that EUL share in profits on the resales of these vehicles.
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> 4. In 2010, Kapustin and I initially discussed a profit-sharing arrangement in which EUL would share in profits from the overseas sale of the vehicles acquired by Global with EUL's funds. However, Mr. Kapustin himself proposed as an alternative that EUL instead be paid a fixed return on its investment of 1.5% per month as its share of the anticipated profits from the re-sale of the vehicles acquired through EUL's investment ("the Investment Vehicles").
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> 5. I was still concerned, however, that EUL needed a way to secure its investment in the Investment Vehicles in the event Kapustin/plaintiffs failed or refused to repay EUL. To address these concerns, Mr. Kapustin and I agreed that EUL would be entitled to a right of possession in any Investment Vehicle (i.e. any vehicle acquired by Kapustin/plaintiffs through the EUL

[5] It is not clear whether Kapustin and Kapustina are still married.

investment) until such time as it was released to a third-party buyer with the consent of EUL. In theory, Kapustin/plaintiffs would sell a vehicle, repay EUL its equity interest in the vehicle and then direct EUL to release the vehicle to final buyer. Since the Investment Vehicles were shipped out of EUL's designated facility in Elizabeth, NJ and into the Carcont OY storage facility in Kotka, Finland, I felt reasonably comfortable that EUL could retain possession and control of the Investment Vehicles in the event Kapustin/plaintiffs breached the agreement or failed or refused to repay EUL.

6. It was further agreed that EUL would be given the documents of title for each vehicle. This assured that no Investment Vehicle could be released without EUL's consent (which would have entailed repayment of EUL's 60% equity stake in the particular vehicle or replenishment, with EUL's consent of the total inventory value). I note that Mr. Kapustin's declaration at paragraph 5 confirms that the title documents for the Investment Vehicles were delivered by plaintiffs to EUL with each vehicle.

(Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A, Doc. 14/1-3 (May 23, 2013, Declaration of Hitrinov).)[6]

In a memorandum and order denying a motion to intervene in the New York case filed by eleven Kapustin customers not including the FMC Complainants, the court described the Kapustin-Empire relationship based in the information before it.

> EUL helped to finance [Kapustin's] purchase of cars, loaning one or more of [Kapustin's companies] or [Kapustin's companies] principals thousands of dollars. The parties to this action agree on how much was loaned ($450,120.00); exactly when the loans were extended (five dates beginning on Sept. 20, 2010, and ending with two loans on Dec. 13, 2011); and the interest rate (18% annually or 1 1/2% per month). However, the parties disagree as to whom the loans were made. [Kapustin] maintain[s] that Global alone borrowed the money, while Hitrinov claims that the

[6] Appendix A of Complainants' Response consists of a declaration executed by Hitrinov and its seventeen exhibits filed on May 23, 2013, in *Global Auto v. Hitrinov*, No. 13-cv-2479 (E.D.N.Y.), as Document 14. The pages of the declaration and the exhibits are identified at the top with the E.D.N.Y document number. The Declaration is Document 14 and the exhibits are identified as 14-1 (exhibit 1), 14-2 (exhibit 2), etc. The pages of the declaration and each exhibit are also numbered. In this Decision, "Doc. 14/1-3" refers to pages 1-3 of Document 14, the Hitrinov declaration. In this decision, citations to the Declaration are to paragraph numbers; *e.g.*, "Doc. 14 ¶ 3." Citations to the exhibits are by exhibit number; *e.g.*, "Doc. 14-6" refers to exhibit 6 of the Declaration. The pages of each exhibit are also numbered by the court. "Doc. 14-6/3" refers to page 3 of exhibit 6 of Document 14, the Hitrinov declaration.

loan was made to one Sergey Kapustin, and that Kapustin and his wife, Irina, control all three of the [Kapustin company plaintiffs].

Global Auto v. Hitrinov, No. 13-cv-2479, Memorandum at 2 (E.D.N.Y. Nov. 7, 2013) (Memorandum and Order) (Doc. 38) (*see* Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix B.)[7] The evidence in the Commission record supports the court's decision. FF 9-10.

E. Deterioration and End of the Kapustin-Empire Relationship.

According to the declaration Hitrinov filed in the New York case and made part of the record by Complainants, Empire's relationship with Kapustin deteriorated by the end of 2012.

> 31. By late 2012 (November – December), I became increasingly concerned about Kapustin's/plaintiffs' ability and even willingness to abide by our agreement. There were a number of reasons for my concerns. First, I began receiving inquiries from Kapustin/plaintiffs about adding Investment Vehicles to the balance spreadsheets even though it was unclear whether Kapustin/plaintiffs actually owned these vehicles. Second, the parties were increasingly disagreeing on vehicle valuations, with Kapustin/plaintiffs arguing for higher valuations to increase the "balance" available for release of cars. Third, Kapustin/plaintiffs were increasingly in arrears on payment of the $750/vehicle shipping charges. However, my main concern was that Kapustin was trying to sell the Investment Vehicles behind EUL's back; i.e. without repaying any portion of the principal due EUL and without notice to the buyers of EUL's equity interest in those vehicles.
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> 32. On December 27, 2012, I notified Kapustin (at the account@globalautousa.com address)[8] that the relationship was becoming untenable because of Kapustin's/plaintiffs' actions and demanded that Kapustin/plaintiffs repay all amounts due EUL, including unpaid principal, "in 30 da[y]s from today. We will not extend that date." I repeated that 30-day demand later that day. Attached to this declaration as Exhibit "9" are my December 27, 2012 notices to Kapustin/plaintiffs.

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[7] Complainants' counsel in these proceedings was one of the original attorneys representing the Kapustin companies in the New York case. On February 15, 2015, he filed a motion for leave to withdraw. The motion was granted on March 5, 2015. Kapustin filed a motion to intervene in this proceeding to challenge the propriety of his former counsel's representation of Complainants. The motion is denied in a separate order.

[8] The email address account@globalautousa.com is an email address for Global Auto, the Kapustin company that the record indicates handled the transportation arrangements with Empire.

33. On January 16, 2013, I was informed by the warehouse facility in Kotka, Finland (Carcont OY) that Kapustin was encouraging third parties in Finland to claim the Investment Vehicles without regard to EUL's remaining security interest in those same vehicles. I also obtained a copy of an email that Kapustin/plaintiffs had distributed to third parties in Finland and elsewhere, directing them to contact Carcont and suggesting that they take legal action to recover their vehicle from the facility. I became extremely concerned over these actions because they were in complete disregard of our agreement (i.e. no releases without payment of proportionate principal or replenishment of inventory value) and appeared to be an effort to coerce EUL to release vehicles under color of local Finnish law. Attached to this declaration as Exhibit "10" is a translation of the email sent out by Kapustin/plaintiffs directing buyers to contact Carcont to collect their vehicles.

34. I then confronted Kapustin by telephone on or about January 20, 2013. During that telephone conversation, Kapustin confirmed that he no longer intended to abide by the parties existing agreement concerning the Investment Vehicles. He also disavowed any further obligation to repay the outstanding principal due EUL or to make any further profit-sharing payments to EUL. Mr. Kapustin made no attempt during this conversation to make a distinction between the individual plaintiffs [in the New York case] and it was clear to me that he himself made no distinction between the companies and that he spoke on behalf of all three of them.

35. Of equal concern to me was Mr. Kapustin's claim during this telephone call that "he" had actually sold all the Investment Vehicles (again, he did not make any distinction among the individual plaintiffs). If this was true, Kapustin/plaintiffs had presumably been paid in full by buyers of the vehicles and now were seeking to wrest these vehicles from EUL's possession and control without repaying any principal to EUL from the proceeds of sale. In other words, Kapustin/plaintiffs had collected EUL's 60% interest in those vehicles but had no intention of paying that over to EUL as the parties' agreement required.

36. Consequently, on January 28, 2013, I sent an email to Kapustin/plaintiffs (at account@globalautousa.com) and to Kapustin's wife and business partner, Irina Kapustina, expressing my concern that Kapustin/plaintiffs were taking actions "detrimental to our jointly owned assets without my knowledge and consent." I also requested that Kapustin/plaintiffs cease any further actions "which may cause irreparable damages" to the parties and proposed an amicable resolution. Attached to this declaration as Exhibit "11" is a copy of my January 28, 2013 email to Kapustin/plaintiffs.

37. EUL did not receive any payment of principal from Kapustin/plaintiffs after my December 27th demand for payment in full within 30 days.

(Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A, Doc. 14/9-12 (May 23, 2013, Declaration of Hitrinov). *See also* Respondents' [FMC] Motion for Judgment on the Pleadings, Affirmation of Michael Hitrinov ¶¶ 21-26.)

F. The Eastern District of New York Case.

On April 24, 2013, three Kapustin companies – G-Auto Sales, Inc., Effect Auto Sales, Inc., and Global Auto, Inc. – commenced their civil action against FMC respondents Hitrinov and Empire, MSC, and five John Does in the Eastern District of New York. *Global Auto, Inc. v. Hitrinov*, No. 13-cv-2479 (E.D.N.Y. Apr. 24, 2013) (complaint filed) (Doc. 1). This is the case in which the Hitrinov declaration quoted above was filed. The New York complaint alleged that Hitrinov and Empire operated as an NVOCC on Kapustin company shipments of automobiles to Finland. It further alleged that when the Kapustin companies told Empire that it had reached an agreement to ship their vehicles to Finland with other NVOCCs and VOCCs at more favorable rates, Empire and Hitrinov unlawfully seized Kapustin company cars and refused to release them to their intended recipients. The New York Complaint asserted claims for relief pursuant to the Shipping Act, state law claims, and federal law claims, including violation of the Racketeer Influenced and Corrupt Practices Act (RICO). The Kapustin companies filed an Amended Complaint adding CarCont, the third respondent in these Commission proceedings, as a defendant. Empire and Hitrinov filed an answer to the Amended Complaint. Empire included counterclaims against the Kapustin companies based on the Empire loan to Kapustin and Empire's claimed ownership interest in the cars.

On September 27, 2015, the court dismissed the Kapustin companies' New York claims against all defendants for failure to prosecute because the Kapustin companies' attorneys (including FMC Complainants' counsel) had withdrawn as counsel and the corporations could not proceed without an attorney. The court denied a motion filed by Empire and Hitrinov to enjoin the Kapustin companies from asserting the claims that they had made in the New York case as cross-claims in a case filed in New Jersey by the disgruntled customers whose motion to intervene had been denied; therefore, the court dismissed Kapustin companies' claims against Empire without prejudice.

> To the extent that [Kapustin companies'] claims against the EUL Defendants are meritorious, [Kapustin companies'] creditors may wish to pursue those claims in the event they obtain judgment against [Kapustin and his companies]. For that reason, counsel for some of the NJ Plaintiffs have urged the Court to dismiss [Kapustin companies'] claims against the EUL Defendants without prejudice. Since dismissal with prejudice might impede the NJ Plaintiffs' ability to recover on a judgment against Plaintiffs, the Court will dismiss [Kapustin companies'] claims in this action without prejudice.

Global Auto v. Hitrinov, No. 13-cv-2479, Order at 12 (E.D.N.Y. Sept. 30, 2015) (Memorandum and Order) (Doc. 109).

On October 2, 2015, the clerk entered a certificate of default against the Kapustin companies on Empire's counterclaims. *Global Auto v. Hitrinov*, No. 13-cv-2479 (E.D.N.Y. Oct. 2, 2015) (Certificate of Default) (Doc. 110). Empire filed a motion for reconsideration of the dismissal without prejudice. The court denied the motion. *Global Auto v. Hitrinov*, No. 13-cv-2479 (E.D.N.Y. Nov. 19, 2015) (Memorandum and Order) (Doc. 114).

G. The District of New Jersey Case.

On November 25, 2013, the disgruntled Kapustin customers whose motion to intervene in the New York case had been denied commenced a civil action in the District of New Jersey against Kapustin and his companies, Respondents in the Commission proceedings, and other defendants. *Akishev v. Kapustin*, No. 13-cv-07152 (NLH) (AMD) (D.N.J. Nov. 25, 2013) (complaint filed) (Doc. 1). The customers named the following persons as defendants: Sergey Kapustin and Irina Kapustin; Kapustin companies G-Auto Sales, Inc., Global Auto, Inc., Effect Auto Sales, Inc., SK Imports, Inc. a/k/a Global Cars, Inc., and Global Cargo Oy; FMC respondents Hitrinov and Empire; FMC respondent CarCont; and three other named individuals. On April 4, 2014, the Kapustin customers filed an Amended Complaint.

The Amended Complaint alleges that the Kapustin customers are residents of former USSR republics who wanted to purchase "gently used cars from the United States." *Akishev v. Kapustin*, No. 13-cv-07152 (NLH) (AMD), Amended Complaint ¶ 1 (D.N.J. Apr. 4, 2014) (Doc. 27). The Amended Complaint alleges that Defendants engaged in a massive scheme to defraud customers of Kapustin companies who attempted to purchase used cars. The Complaint alleges specific factual allegations regarding each customer/plaintiff's attempt to purchase a car. The Complaint alleges that many of the cars were salvaged vehicles falsely represented as operable. Each customer/plaintiff alleges that he or she suffered damages from the scheme. Ovchinnikov, Rzaeva, Nekipelov, and Nurgazinov, the Complainants in these proceedings, are not Plaintiffs in the New Jersey case and the amended New Jersey Complaint does not set forth any specific allegations regarding the transportation of the four cars that are the subject of the FMC Complaints.[9]

The New Jersey Amended Complaint asserts claims for relief under RICO, 18 U.S.C. § 1962(c), predicated on alleged violation of 18 U.S.C. § 1343 (wire fraud), 18 U.S.C. § 1341 (mail fraud), 18 U.S.C. ¶ 1952 (travel), 18 U.S.C. § 1956 (money laundering), 18 U.S.C. § 1957 (transactions in criminally derived property), and 18 U.S.C. § 1512 (witness tampering); RICO – 18 U.S.C. § 1962(b) predicated on acquisition of an "interest in or control of" an enterprise; RICO – 18 U.S.C. § 1962(c) predicated on employment or association with an enterprise engaged in racketeering; RICO – 18 U.S.C. § 1962(d) predicated on conspiracy to commit RICO violations; N.J.S.A. 56:8-1, *et seq.* (New Jersey Consumer Fraud Act); N.J.A.C. 13:45 A-26A.1 *et seq.* (New

[9] Because FMC Complainants' counsel represented the Kapustin companies in the New York case, it appears that FMC Complainants could not intervene in the New Jersey case, at least with their FMC counsel representing them.

Jersey Motor Vehicle Advertising Regulations); 49 U.S.C. § 32701, *et seq.* (Motor Vehicle Information and Cost Savings Act (the "Odometer Act")); breach of contract; common law fraud; civil conspiracy to commit tort; conversion; unjust enrichment and disgorgement of profits; and imposition of a constructive trust. The New Jersey Amended Complaint does not assert a claim of violation of the Shipping Act and does not purport to be an action on behalf of a class of similarly situated customers of Kapustin companies. With their answer in the New Jersey case, Kapustin defendants filed cross-claims against co-defendants Empire and Hitrinov that are substantially identical to the claims the Kapustin companies had brought against Empire and Hitrinov as Plaintiffs in the New York case. These are the claims that the New York court dismissed without prejudice in the order described above. *Global Auto v. Hitrinov*, No. 13-cv-2479 (E.D.N.Y. Sept. 30, 2015) (Memorandum and Order) (Doc. 109).

The New Jersey court has entered final default judgment in the amount of $2,228,069.29, including damages, costs, and attorney fees, against Kapustin in favor of the disgruntled customers. *Akishev v. Kapustin*, No. 13-cv-07152 (NLH) (AMD), slip op. at 14-15 (D.N.J. Sept. 21, 2015) (Order Granting Plaintiffs' Motion for Final Default Judgment) (Doc. 272) (in the FMC record at Respondents' Motion for Judgment on the Pleadings, Exhibit 25). After three years of litigation, the New Jersey court described the sales operation of Kapustin and his companies as follows.

> Global Auto Enterprise[10] is a group of individuals (four family members and at least one employee) and affiliated entities owned by the same family members who ran a fraudulent internet auto sales scheme. The fraud is commonly known to law enforcement as a "bait and switch" tactic. Global Auto Enterprise targets online and often unsophisticated foreigners from the former Soviet Union by advertising vehicles slightly below the market value on its glamorous websites GlobalAutoUSA.com and EffectAuto.com. In order to lure the victims, Global Defendants provided false odometer readings or did not disclose the mileage at all or withheld the information that the vehicle had been declared "total loss" after an accident or flooded by hurricane Sandy with a "Salvage" title issued. Rather than disclosing the true condition of the car, they assured the victims that the cars were in "excellent" condition. Most vehicles advertised on the websites did not actually belong to any Defendants. Instead, they used images of cars and information about them gathered from other online car sales sites to advertise these vehicles as "bait." Once Plaintiffs wired the purchase price, the "switch" part of the fraud began.
>
> Defendants wrote apologetic emails that they were encountering delays in delivery and refused to issue any refunds. These kinds of "lulling" communications are typical of this type of fraud. Months later, the buyers were offered a different car for just a few thousand more. Buyers – by then desperate to get anything at all out

[10] Global Auto Enterprise was a term the New Jersey court used to describe Kapustin and his companies. The court did not include Empire, Hitrinov, and CarCont in Global Auto Enterprise.

of the deal – wired additional money. [Seven] Plaintiffs . . . were pushed to make several international wire transfers.

After the switch, even [four] Plaintiffs . . . who were seemingly getting a different car for the same price also got hit with unloading fees, port fees, transportation fees, storage fees, customs fees, and other fees, in excess of several thousand dollars, that were not previously disclosed to them. That was also a scheme to push the victims to cancel the purchase and simply retain the proceeds. Global Auto Enterprise refused to release the cars unless those charges are paid.

On April 4, 2014, Plaintiffs filed an Amended Complaint. On June 3, 2014, Plaintiffs filed their Motion for an Order to Freeze the Assets of Defendants and Expedited Discovery Related to Assets pursuant to Federal Rule of Civil Procedure 65 ("Asset Freeze Motion") representing the funds Plaintiffs wired to the bank accounts of corporate Global Defendants. On September 5, 2014, the Court held an evidentiary hearing on the Asset Freeze Motion.

On September 23, 2014, to avoid the immediate freeze of the corporate Global Defendants' bank accounts, Plaintiffs and Global Defendants agreed to and the Court entered the Consent Order, Docket No. 80, to deposit into the registry of the Court $400,000.00 in monthly installments within 90 days of the Consent Order and to provide expedited discovery related to the disposition of Plaintiffs' funds and Defendants' assets.

This turned out to be another lulling technique with this time the Court as the victim as Kapustin would later admit he had no ability to satisfy the terms of the Consent Order at the time it was approved by the Court and entered at his request. On October 7, 2014, in order to evade his obligations under the Consent Order, Defendant Sergey Kapustin filed his Chapter 13 Bankruptcy Petition (Case No. 14-30488).

On October 24, 27, 28, 29 and November 3, 2014, the Court held evidentiary hearings during which it was established that while Global Defendants websites www.globalautousa.com, www.effectauto.com, and www.effectauto.ru ("Websites") advertised over 4,000 vehicles as "in stock", Defendant Kapustin testified only about 14 vehicles were actually owned by the corporate Global Defendants, and some vehicles were sold twice through the Websites to foreign customers using electronic mail communications and international bank wire payments.

Based on the evidence presented the Court made its preliminary finding that plaintiffs had shown by a preponderance of the evidence that the Global Defendants had committed at least two predicate acts of mail and wire fraud in the furtherance of a RICO enterprise through a pattern of racketeering activity conducted operating

through the Internet; on October 27 and October 29, 2014, this Court ordered that the Defendants' corporate bank accounts to be frozen and the Websites to be shut down immediately. (Docket Nos. 106; 110).

On November 4, 2014, corporate Global Defendants filed their Chapter 7 bankruptcy petitions (Global Auto Sales (Case No. 14-32520), Effect Auto Sales, Inc. (Case No. 14-32521), G Auto Sales, Inc. (Case No. 14-32522) and SK Imports, Inc. (Case No. 14-32523). The bankruptcies were subsequently dismissed for bad faith pursuant to Sections 105(a), 305(a), 349 and 707(a) of the Bankruptcy Code.

On February 17, 2015, Plaintiffs moved for sanctions against Global Defendants and their counsel ("Sanctions' Motion") including entering a default judgment as a sanction for their continuing litigation misconduct including numerous fraudulent representations to the Court, dissipation of assets in order to avoid compliance with the Consent Order, concealment of assets in foreign jurisdictions, filing bankruptcy petitions in bad faith for the purpose of invoking the automatic stay and frustrating this Court's jurisdiction, continuing delay resulting in significant prejudice to Plaintiffs.

On April 27, 2015, the Court held an evidentiary hearing and granted the Plaintiffs' Sanctions Motion. On May 27, 2015, Plaintiffs submitted their Application to Assess Damages for Default Judgment. On June 29, 2015, the Court held a hearing on plaintiffs' motion for default judgment, [a putative interveners's] request to intervene, and other issues related to defendants' assets. On July 2, 2015, the Court issued a "freeze order" to prevent Kapustin and the Global defendants from dissipating or otherwise touching their assets in order to halt defendants' fraudulent actions.

On September 4, 2015, the Court held an evidentiary hearing and made the finding that Global Defendants were responsible for executing and masterminding the "bait and switch" fraud scheme targeting online and often unsophisticated foreigners from the former Soviet Union and other countries by advertising vehicles for sale below the market value. Defendant Kapustin, as owner of corporate Global Defendants, exercised complete dominion and control over the corporations and used the corporations as his alter egos for his own purposes, making all the decisions including the decisions to defraud Plaintiffs.

The Court further made its finding that Defendant Sergey Kapustin and the corporate Global Defendants are a group of RICO persons, Global Companies Enterprise, associated in fact for the common purpose of engaging in fraudulent conduct constituting a RICO enterprise defined in 18 U.S.C. § 1961(4) functioning together as a continuing unit, each of them necessary to accomplish each step or aspect of the fraudulent scheme. Defendant Sergey Kapustin and corporate Global

Defendants acted in concert for the shared goal of defrauding overseas car buyers and receiving profits from the fraudulent scheme. This enterprise affected interstate and foreign commerce because it exported vehicles to foreign countries and both sent and received funds through banks in the United States and abroad.

Defendant Sergey Kapustin, who is a person within the meaning of RICO, managed and participated in conduct of the Global Companies Enterprise through a pattern of racketeering activity in violation of 18 U.S.C. §1962(c), including multiple acts of wire fraud, mail fraud, and financial fraud. The Court found that Global Defendants engaged in the pattern of racketeering activity, which included related violations of 18 U.S.C. § 1343 (wire fraud); 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1956 (money laundering); 18 U.S.C. § 1957 (engaging in monetary transactions in property derived from unlawful activity); 18 U.S.C. § 1952 (Travel Act), and 18 U.S.C. § 1912 (witness intimidation), as included in 18 U.S.C. 1961(1).

The pattern of the racketeering activity began no later than some time in 2008 resulting in an investigation by Attorney General for the State of New Jersey Division of Consumer Affairs of deceptive conduct of Global Auto Enterprise, resulting on November 19, 2010, in the consent judgment for injunctive relief, civil penalties, legal fees and restitution to victims. The scheme continued in 2012 when Global Defendants committed predicate acts of racketeering towards Plaintiffs [Ys.], and continued through February 2014, when Defendants committed acts of wire fraud (18 U.S.C. § 1343) towards Plaintiff [P.]. Global Defendants continued the pattern by filing fraudulent bankruptcies. Global Defendants' acts were arranged and ordered so as to exhibit both a relation between the predicate acts and the threat of continuing unlawful activity.

Defendants' acts of mail fraud, wire fraud, and financial fraud were open-ended and occurring on an ongoing and daily basis targeting overseas car buyers from GlobalAutoUSA.com and other websites registered by Global Defendants with the intent to defraud foreign buyers. Plaintiffs were directly and proximately harmed by Global Defendants' predicate acts of racketeering, including wire fraud, mail fraud, and Travel Act violations, which resulted in ascertainable financial losses to the Plaintiffs.

Akishev v. Kapustin, No. 13-cv-07152 (NLH) (AMD), slip op. at 2-9 (D.N.J. Dec. 8, 2016) (Opinion) (Doc. 395) (footnotes omitted), attached to Complainants' Status Report filed with the Commission January 15, 2017.

Currently, Empire has custody in its New Jersey warehouse of fifteen Kapustin cars that had not yet been transported overseas when the Kapustin-Empire relationship ended. The titles of those cars are in the registry of the New Jersey court. The disgruntled Kapustin customers who brought the New Jersey case and other Kapustin judgment creditors assert claims on those cars to satisfy their

judgments or potential judgments. Empire has asserted its ownership right in these cars based on its loan to Kapustin. The court has not yet resolved the issue of whether Empire's loans to Kapustin gave it an ownership interest in the cars. "[T]hrough the assignment of the Global entities' claims against the [Empire] defendants, the 21 plaintiffs [in the New Jersey case] who were victims of Kapustin's and the Global entities' fraud are now prosecuting the claims of the Global entities against the [Empire] defendants." *Akishev v. Kapustin*, No. 13-cv-07152 (NLH) (AMD), slip op. at 23 (D.N.J. Dec. 8, 2016) (Opinion) (Doc. 395), attached to Complainants' Status Report filed with the Commission January 15, 2017.

H. The FMC Proceeding.

1. The FMC Complainants' claims regarding purchase of cars.

Each Complainant alleges that he or she purchased a car from Kapustin company G-Auto Sales Inc. and paid G-Auto Sales Inc. for the car and transportation to Finland.

a. Ovchinnikov.

In the Complaint in FMC No. 15-11 at paragraphs 37 through 49, Ovchinnikov alleges that he purchased a 2009 GMC Acadia, VIN GKLVNED6AJ138200 [*sic*],[11] from Kapustin company G-Auto Sales and received an invoice and copy of the certificate of title.[12] Ovchinnikov alleges he paid the full asking price and ocean freight and related charges to G-Auto. He alleges G-Auto gave the original title to Empire for clearance through customs and passed on the ocean freight and related charges to Empire. The Acadia was shipped from the United States on December 21, 2012, and arrived in the customs bonded warehouse owned by CarCont in Finland on or about January 14, 2013. CarCont told Ovchinnikov that it would not release the Acadia to Ovchinnikov because "there was an unpaid loan due and owing to [Empire] by the principal of G-Auto/Effect." (Complaint ¶ 44.) Ovchinnikov alleges that he later learned that the Acadia was registered with a Russian citizen in St. Petersburg, Russia, and alleges that Respondents "simply converted [the Acadia] and have sold it to a third party in order to satisfy a loan allegedly due and owing from the principal of Effect/G-Auto to [Empire] and Hitrinov." (*Id.* ¶ 49.)

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[11] The title describes the car with VIN 1GKLVNED6AJ138200 as a 2010 GMC Sport Utility. The G-Auto Sales contract-invoice describes the car with that VIN as a 2009 GMC Acadia. The shipping documents describe the car as a 2010 GMC Acadia. *See* FF 81-93. Because the parties describe the car as an "Acadia," I will use that term.

[12] The title submitted into the record had been issued to Ari Fleet LT. On an unstated date, Ari Fleet LT signed over the title of the Acadia to Palisades Dealer Funding LLC LT. On October 11, 2012, Palisades Dealer Funding LLC LT signed over the title of the Acadia to Effect Auto Sales, Inc. Ovchinnikov's name is not on the title of the Acadia. FF 81-86.

b. Rzaeva.

In the Complaint in FMC No. 15-11 at paragraphs 50 through 64, Rzaeva alleges that she purchased a 2011 Jeep Compass, VIN 1J4NF5FB7BD282296, from G-Auto Sales and received an invoice and a copy of the certificate of title.[13] Rzaeva alleges she paid the full asking price and ocean freight and related charges to G-Auto. She alleges G-Auto gave the original title to Empire for clearance through customs and passed on the ocean freight and related charges to Empire. The Jeep was shipped from the United States on November 15, 2012, and arrived in the customs bonded warehouse owned by CarCont in Finland on or about December 11, 2012. On or about December 15, 2012, Rzaeva paid the amount required to Russian Customs authorities for customs clearance/duty for the Jeep. CarCont told Rzaeva that it would not release the Jeep to Rzaeva because "there was an unpaid loan due and owing to [Empire] by the principal of G-Auto/Effect." (*Ovchinnikov v. Empire*, FMC No. 15-11, Complaint ¶ 58.) In March 2013, respondent Hitrinov allegedly contacted Rzaeva and "admitted to her that he converted her automobile because there was an unpaid loan due and owing by the principal of Effect/G-Auto." (*Id.* ¶ 63.) Rzaeva alleges that Respondents "simply converted [the Jeep] and have sold it to a third party in order to satisfy a loan allegedly due and owing from the principal of Effect/G-Auto to [Empire] and Hitrinov." (*Id.* ¶ 64.)

c. Nekipelov.

In the Complaint in FMC No. 15-11 at paragraphs 65 through 74, Nekipelov alleges that he purchased a 2009 Mercedes-Benz C300, VIN WDDGF81X49R073295, from G-Auto Sales and received an invoice and a copy of the certificate of title.[14] Nekipelov alleges he paid the full asking price and the ocean freight and related charges and G-Auto. He alleges G-Auto gave the original title to Empire for clearance through customs and passed on the ocean freight and related charges to Empire. The Mercedes-Benz was shipped from the United States on November 15, 2012, and arrived in the customs bonded warehouse owned by CarCont in Finland on or about December 11, 2012. On or about December 16, 2012, CarCont allegedly told Nekipelov that it would not release the Mercedes-Benz to Nekipelov because "there was an unpaid loan due and owing to [Empire] by the principal of G-Auto/Effect." (*Ovchinnikov v. Empire*, FMC No. 15-11, Complaint ¶ 73.) Nekipelov alleges that Respondents "simply converted [the Mercedes-Benz] and have sold it to a third party in order to satisfy a loan allegedly due and owing from the principal of Effect/G-Auto to [Empire] and Hitrinov." (*Id.* ¶ 74.)

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[13] The title and related documents submitted into the record indicate that Charles T. Pierce was the original owner. Pierce sold the Jeep to Saw Mill Auto Sales which sold the Jeep to Effect Auto Sales. Rzaeva's name is not on the title. FF 94-98.

[14] The certificate of title submitted into the record shows the owner as Daimler Trust. Nekipelov's name is not on the title. FF 107-109.

d. Nurgazinov.

In the Claim filed in FMC No. 1953(I) at III.Q-AA, Nurgazinov alleges that he purchased a Toyota Camry, VIN 4T1BE46K19U306703, from G-Auto and received an invoice. Nurgazinov alleges he paid the full asking price and the ocean freight and related charges and G-Auto/Effect. He alleges G-Auto gave the original title to Empire for clearance through customs and passed on the ocean freight and related charges to Empire.[15] The Camry was shipped from the United States on January 12, 2013, and delivered to CarCont in Finland on January 29, 2013. Nurgazinov alleges that he contacted CarCont on February 5, 2013, and was told that CarCont would not release the Camry to him because there was an unpaid loan due and owing to Empire by Kapustin. Nurgazinov alleges that Respondents "simply converted [the Camry] and have sold it to a third party in order to satisfy a loan allegedly due and owing from the principal of Effect/G-Auto to [Empire] and Hitrinov." (*Nurgazinov v. Empire*, FMC No. 1953(I), Claim ¶ III.AA.)

2. Motions for default and orders for Respondents to show cause why initial decisions on default should not be entered.

Respondents did not answer or other wise respond to the complaints in either FMC No. 15-11 or FMC No. 1953(I). On February 14, 2016, Complainants filed a motion for decision on default against Hitrinov and Empire (but not CarCont) in FMC No. 15-11. The undersigned issued notices of default and orders to show cause in both proceedings. *Ovchinnikov v. Empire*, FMC No. 15-11 (ALJ Mar. 30, 2016) (Notice of Default and Order to Show Cause); *Nurgazinov v. Empire*, FMC No. 1953(I) (ALJ Mar. 30, 2016) (Notice of Default and Order to Show Cause). While the show cause order was pending, on April 14, 2016, Empire filed motions to stay both Commission proceedings pending resolution of the New Jersey case brought against Kapustin and the FMC Respondents by disgruntled Kapustin customers. The motions for stay were denied on April 27, 2016. *Ovchinnikov v. Empire*, FMC No. 15-11 (ALJ Apr. 27, 2016) (Order Denying Respondents' Motion for Stay); *Nurgazinov v. Empire*, FMC No. 1953(I) (ALJ Apr. 27, 2016) (Order Denying Respondents' Motion for Stay).

On May 4, 2016, Empire filed answers to the complaints and responses to the orders to show cause in both proceedings. On May 18, 2016, Complainants filed replies to Empire's responses to the orders to show cause. On May 24, 2016, the orders to show cause were discharged and the motions for initial decision on default were denied in both proceedings. *Ovchinnikov v. Empire*, FMC No. 15-11 (ALJ May 24, 2016) (Order Discharging Order to Show Cause and Denying Motion for Initial Decision on Default); *Nurgazinov v. Empire*, FMC No. 1953(I) (ALJ May 24, 2016) (Order Discharging Order to Show Cause and Denying Motion for Initial Decision on Default). Also on May 24, 2016, FMC No. 1953(I) was consolidated with FMC No. 15-11 and No 15-11 designated

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[15] The title submitted into the record was issued to Toyota Motor Credit Corp. On November 5, 2012, Toyota Motor Credit Corp. signed over the title of the Camry to Effect Auto Sales. Nurgazinov's name is not on the title. FF 120-122.

as the lead case. *Ovchinnikov v. Empire*, FMC No. 15-11 (ALJ May 24, 2016) (Order of Consolidation).

3. Empire's Motion for Judgment on the Pleadings

On June 10, 2016, Empire filed its motion for judgment on the pleadings contending that the Commission does not have subject matter jurisdiction over Complainants' claims. Empire first contends that because it was involved in the joint venture with Kapustin and his companies, Empire shipped the cars as part-owner of the cargo and was not operating as an NVOCC on the shipments. (Motion for Judgment on the Pleadings at 8-9.) Second, Empire contends that even if it were operating as an NVOCC on the shipments, Complainants do not have standing to bring the case and the Commission does not have jurisdiction because Complainants were not "shippers." "Complainants were not shippers or consignees of the vehicles. Nor were they in any way transportation customers of EUL. Rather, they were simply alleged purchasers of goods from Global Auto Enterprise." (*Id.* at 12 (footnotes omitted).) Empire also contends that the complaints fail to state claims upon which relief may be granted. (*Id.* at 14-21.)

On June 24, 2016, Complainants filed their response to the motion for judgment on the pleadings. Complainants contend that G-Auto Sales Inc., one of the Global Auto Enterprise entities, sold the cars to Complainants. Complainants argue that Empire operated as an NVOCC on the shipments. Complainants rely on Commission decisions in *Worldwide Relocations, Inc. – Possible Violations*, 32 S.R.R. 495, 503-507 (FMC 2012); *EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. – Possible Violations*, 32 S.R.R. 1906, 1912-1914 (FMC 2013); and *Anderson International Transport and Owen Anderson – Possible Violations*, 32 S.R.R. 1678, 1684-1686 (FMC 2013). Complainants argue that they were the owners of the cars and were (or should have been) identified as consignees of the shipments and the cars should have been delivered to them.

I. Supplements to the Record Ordered by the Undersigned.

In Respondents' motions for stay filed April 14, 2016, Respondents had denied that the shipments were intended to be delivered to Complainants and denied ever having dealt with any customers of Kapustin. Therefore, the undersigned ordered Complainants and Respondents each to file "all records relating to the ocean transportation" of the four cars at issue. *Ovchinnikov v. Empire*, FMC No. 15-11 (ALJ Apr. 27, 2016) (Order to File Shipping Documents); *Nurgazinov v. Empire*, FMC No. 1953(I) (ALJ Apr. 27, 2016) (Order to File Shipping Documents). The parties filed their responses on May 4 and 5, 2016.

It was still not clear from the records relating to the ocean transportation and the documents filed for and against the motion for judgment on the pleadings whether the Commission has jurisdiction over Complainants' claims. To facilitate the Commission's determination of jurisdiction, an order was entered requiring that:

[E]ach party individually submit the following information for the transportation of each of the four automobiles pursuant to any bill of lading issued regarding the transportation. Each assertion should cite to supporting evidence in the record or attached to the submission.

1. Identify each common carrier that assumed responsibility for transportation of the automobile from the United States to a port or point in a foreign country.

2. For each carrier, identify the shipper or shippers.

3. For each carrier, identify the consignee or consignees.

4. For each carrier, identify the port or point of origin.

5. For each carrier, identify the date the shipment began.

6. For each carrier, identify the port or point of delivery.

7. For each carrier, identify the date of delivery.

8. Identify the entity that directly paid each common carrier for the transportation by water.

9. Did the vessel-operating common carrier transport the cargo pursuant to a service contract with respondent Empire United Lines Co., Inc.?

Ovchinnikov v. Empire, FMC No. 15-11 (ALJ June 29, 2016) (Order for Parties to Supplement the Record). The parties were permitted to respond to each others' responses. *Id.* The parties have filed their responses to the Order and to each other's submission. Their responses are discussed below.

III. CONTROLLING AUTHORITY.

A. Statutory Background.

Complainants filed their FMC complaints pursuant to section 41301(a) of the Act. "A person may file with the . . . Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation." 46 U.S.C. § 41301(a).

The FMC complaints allege that Empire is a non-vessel-operating common carrier within the meaning of the Act. (FMC Complaint ¶¶ 4-6.)

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6). "The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(16).

The Act regulates the conduct of common carriers. The FMC complaints allege that Respondents violated several sections of the Act. (FMC No. 15-11 Complaint ¶ 24 and Complaint Part V; FMC Informal Complaint 1953(I) ¶ III.B and Part V.)[16]

- Sections 40301 and 40302, 46 U.S.C. §§ 40301 and 40302, that apply to certain agreements between or among ocean common carriers, certain agreements between or among marine terminal operators, and certain agreements between or among one or more marine terminal operators and one or more ocean common carriers, and the Act's requirement that those agreements be filed with the Commission.

- Section 40501, 46 U.S.C. § 40501, that sets forth general rate and tariff requirements.

- Section 40701, 46 U.S.C. § 40701, that regulates the rates charged by controlled carriers as defined by section 40102(8) of the Act.

- Section 41102, 46 U.S.C. § 41102(c), that provides: "A common carrier, marine terminal operator, or ocean transportation intermediary 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."

- Section 41104, 46 U.S.C. § 41104, that provides:

  > A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not –
  >
  > * * *
  >
  > (2) provide service in the liner trade that is – (A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a

[16] Violations of sections 40301, 40302, and 40501 are alleged only in paragraphs 24 and III.B, not in Part V of the complaints where Complainants allege violations of the Shipping Act.

service contract entered into under chapter 405 of this title, unless excepted or exempted under section 40103 or 40501(a)(2) of this title.

(3) retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason;

(4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of – (A) rates or charges;

* * *

(8) for service pursuant to a tariff, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage;

(9) for service pursuant to a service contract, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any port;

(10) unreasonably refuse to deal or negotiate.

- Section 41106, 46 U.S.C. § 41106, that provides: "A marine terminal operator may not – . . . (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or (3) unreasonably refuse to deal or negotiate."

The FMC complaints allege that Complainants were injured by Respondents' alleged violations and seek a reparation award for their injuries. The Act defined actual injury.

(a) *Definition.* – In this section, the term "actual injury" includes the loss of interest at commercial rates compounded from the date of injury.

(b) *Basic amount.* – If the complaint was filed within the [three-year] period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part.

46 U.S.C. § 41305. "In any action brought under section 41301, the prevailing party may be awarded reasonable attorney fees." 46 U.S.C. § 41305(e).

B. Evidence and Burden of Persuasion.

Under the Administrative Procedure Act (APA), an administrative law judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d). *See also Steadman v. SEC*, 450 U.S. 91, 102 (1981). All documents provided by the parties in these proceedings in support of their arguments on the motion to dismiss or summary decision are admitted as evidence. This initial decision is based on the FMC complaints, the answers to the complaints, the parties' memoranda, the exhibits filed with the memoranda, and the supplemental evidence and memoranda filed by the parties.

This initial decision on the pleadings addresses only material issues of fact and law. It is not necessary to resolve disagreements on matters not material to the outcome of this proceeding. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-194 (1959); *In re Amrep Corp.*, 102 F.T.C. 1362, 1670 (1983).

A complainant alleging a violation of the Shipping Act "has the initial burden of proof to establish the[] violation[]. The applicable standard of proof is one of substantial evidence, an amount of information that would persuade a reasonable person that the necessary premise is more likely to be true than to be not true." *AHL Shipping Co. v. Kinder Morgan Liquids Terminals, LLC*, FMC No. 04-05, 2005 WL 1596715, at *3 (ALJ June 13, 2005). *See* 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); 46 C.F.R. § 502.155. "[A]s of 1946 the ordinary meaning of burden of proof [in section 556(d)] was burden of persuasion, and we understand the APA's unadorned reference to 'burden of proof' to refer to the burden of persuasion." *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. at 102. "[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose." *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994).

C. Empire's Motion for Judgment on the Pleadings.

Empire filed a motion for judgment on the pleadings arguing that Complainants do not have standing to file the complaints; the Commission does not have subject matter jurisdiction over Complainants' claims; and that the complaints do not state claims upon which relief may be granted. Commission administrative law judges "make and serve initial or recommended decisions," 46 C.F.R. § 502.223, not judgments. *See also* 46 C.F.R. § 502.69(g) (defining motion for summary decision (not judgment) as a dispositive motion). A party may seek Commission review of a

"dismissal of the proceeding in whole or in part." 46 C.F.R. § 502.227(b)(1). In this administrative forum, I find that it is appropriate to treat Empire's motion as a motion for initial decision on the pleadings and use this terminology rather than "judgment" as is used in Rule 12(c).

Beyond referencing that they exist, 46 C.F.R. § 502.69(g), the Commission's Rules of Practice and Procedure, 46 C.F.R. Part 502, do not explicitly provide for motions to dismiss. As stated by the Commission:

> Rule 12 of the Commission's Rules of Practice and Procedure (the Rules) states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules, to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. As the Commission's Rules do not address motions to dismiss for lack of subject matter jurisdiction or failure to state a claim, Federal Rules 12(b)(1) and 12(b)(6) apply in this case. *See, e.g., The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, [FMC No. 06-02, 2007 FMC LEXIS 33, *9-10 (FMC Aug. 2, 2007)].

> > Rule 12(b)(1) permits a party to raise by motion lack of subject matter jurisdiction, and Rule 12(b)(6) permits a party to raise by motion failure to state a claim. With regard to motions to dismiss a complaint for lack of subject matter jurisdiction under Rule 12(b)(1), such motions may assert either a factual attack or a facial attack to jurisdiction.... A factual attack challenges "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." . . . In a facial attack, on the other hand, the court examines whether the complaint has sufficiently alleged subject matter jurisdiction. As it does when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court construes the complaint in the light most favorable to the plaintiff and accepts all well-pled facts alleged . . . in the complaint as true.

Sinaltrainal v. Coca-Cola Company, 578 F.3d 1252, 1260 (11th Cir. 2009).

To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, [556 U.S. 662, 677] (2009). The complaint must be sufficient to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic*, 550 U.S. at 555 (quoting

> *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *see also* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure Civ. § 1215 (3d ed. 2010) ("[T]he test of a complaint's sufficiency simply is whether the document's allegations are detailed and informative enough to enable the defendant to respond.").

Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., 32 S.R.R. 126, 136 (FMC 2011).

> [W]hen a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion, Judicial Code § 37, 28 U. S. C. § 80, Fed. R. Civ. P. 12(b), the court may inquire, by affidavits or otherwise, into the facts as they exist. *Wetmore v. Rymer*, 169 U.S. 115, 120-121; *McNutt v. General Motors Corp.*, 298 U.S. 178, 184 *et seq.*; *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278. As stated in *Gibbs v. Buck*, [307 U.S. 66] 71-72, "As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court."

Land v. Dollar, 330 U.S. 731, 735 n.4 (1947). *See also* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure Civ.* § 1350 and n.51 (3d ed. 2010) ("once a factual attack is made on the federal court's jurisdiction, the district court is not obliged to accept the plaintiff's allegations as true and may examine the evidence to the contrary and reach his or her own conclusion on the matter").

> When a defendant makes a Rule 12(b)(1) motion challenging the factual basis of subject matter jurisdiction, courts have required the plaintiff to bear the burden of proving that jurisdiction exists. *See Richmond, Fredericksburg & Potomac R. Co. v. U.S.*, 945 F.2d 765, 768 (4th Cir. 1991). When subject matter jurisdiction is at issue, courts are permitted to consider evidence outside the pleadings without converting the motion to dismiss into a motion for summary judgment. *See id.; Coalition for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003).

The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District, FMC No. 06-02, 2007 FMC LEXIS 33, *10 (FMC Aug. 2, 2007).

D. Subject Matter Jurisdiction and Standing.

Subject matter jurisdiction may be raised at any time and Rule 12 provides that "[f]ailure to state a claim upon which relief can be granted . . . may be raised . . . (B) by a motion under Rule 12(c)." Fed. R. Civ. P. 12(h)(2). "The Commission 'is not a court, and cannot rely . . . on the powers of a court of equity. On the contrary, the law is settled that an administrative agency can exercise only those powers conferred on it by Congress.'" *Trans-Pacific Freight Conference of Japan v. FMB*, 302 F.2d 875, 880 (D.C. Cir. 1962); *International Ass'n of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 734, 743 (FMC 1990). The Commission has jurisdiction over matters relating to "transportation by water of . . . cargo between the United States and a foreign country,"

46 U.S.C. § 40102(6), by a common carrier as defined by the Shipping Act. That jurisdiction essentially begins when a common carrier assumes responsibility for transportation of the cargo and ends when the cargo is delivered to the consignee at the place of destination contemplated by the contract of carriage. *See, e.g., Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23-27 (2004) (finding that federal maritime law applies to the inland portions of international shipments transported under a through bill of lading). *See also, Kawasaki Kisen Kaisha, Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 108 (2010) (finding that ocean transportation occurring under a through bill of lading cannot be separated into ocean and domestic inland transportation); *accord, Mitsui O.S.K. Lines Ltd. v. Global Link Logistics*, 2011 FMC LEXIS 12, 56 (FMC 2011) ("[L]egislative history demonstrates that Congress intended that the Commission have jurisdiction over through transportation including the inland segment of such transportation.")

While any person may file a complaint alleging a violation of the Shipping Act, 46 U.S.C. § 41301(a), a person must have standing to recover reparation for injury. *The Government of the Territory of Guam v. Sea-Land Service, Inc.*, 29 S.R.R. at 902, *quoting Sanrio, Inc. v. Maersk Line*, 19 S.R.R. 907 (ALJ, admin. final 1979). Standing is an element of jurisdiction. "In every case, the jurisdictional requirements of Article III must be present before a court may proceed to the merits. Where both standing and subject matter jurisdiction are at issue, however, a court may inquire into either and, finding it lacking, dismiss the matter without reaching the other." *Moms Against Mercury v. FDA*, 483 F.3d 824, 826 (D.C. Cir. 2007). *See also Hill v. Vanderbilt Capital Advisors, LLC*, 702 F.3d 1220, 1224 (10th Cir. 2012) (standing is a limitation on the authority of a federal court to exercise jurisdiction"). The Commission must determine whether it has jurisdiction over claims made in a complaint.

DISCUSSION

IV. FINDINGS OF FACT.

1. Respondent Empire United Lines Co., Inc. (Empire) is licensed by the Commission as a non-vessel-operating common carrier (NVOCC). Respondent Michael Hitrinov a/k/a Michael Khitrinov (Hitrinov) is Empire's sole principal and officer. *See Baltic Auto Shipping, Inc. v. Michael Hitrinov a/k/a Michael Khitrinov and Empire United Lines Co., Inc.*, FMC No. 14-16 (ALJ Sept. 15, 2015) (Initial Decision on Respondents' Motion for Partial Summary Decision), exceptions filed, Jan. 15, 2016.

2. Mediterranean Shipping Company (USA), Inc. (MSC) is a vessel-operating common carrier (VOCC). http://www2.fmc.gov/agreements/carrier_npage.aspx (last visited Mar. 1, 2017).

3. Empire entered into service contract number 12-535WW with MSC in which Empire certified that its shipper status was that of an NVOCC. (Comp. Opp. to Motion for J/P (filed June 24, 2016) Exhibit F.)

4. Sergey Kapustin and Irina Kapustina are or were husband and wife and control Global Auto, Inc. (Global Auto), G-Auto Sales (G-Auto), Effect Auto Sales, Inc. (Effect Auto), SK Imports, Inc. a/k/a Global Cars, Inc., and Global Cargo Oy. *Akishev v. Kapustin*, No. 13-cv-07152 (NLH) (AMD), slip op. at 1 (D.N.J. Sept. 21, 2015) (Order Granting Plaintiffs' Motion for Final Default Judgment) (Doc. 272) (Respondents' Motion for Judgment on the Pleadings (filed June 10, 2016), Exhibit 25); *Akishev v. Kapustin*, No. 13-cv-07152 (NLH) (AMD), Amended Complaint ¶¶ 28-32 (D.N.J. Apr. 4, 2014) (Doc. 27).

5. Sergey Kapustin, Irina Kapustina, Global Auto, Inc., G-Auto Sales, Effect Auto Sales, Inc., SK Imports, Inc. a/k/a Global Cars, Inc., and Global Cargo Oy are referred to collectively as Kapustin or the Kapustin companies. *See Akishev v. Kapustin*, No. 13-cv-07152 (NLH) (AMD), slip op. at 7 (D.N.J. Dec. 8, 2016) (Opinion) (Doc. 395) ("Defendant Kapustin, as owner of corporate Global Defendants, exercised complete dominion and control over the corporations and used the corporations as his alter egos for his own purposes, making all the decisions including the decisions to defraud Plaintiffs."), attached to Complainants' Status Report filed with the Commission January 17, 2017.

6. Irina Kapustina identifies herself as the president of Effect Auto Sales, Inc. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix C (Declaration of Irina Kapustina ¶ 1).)

7. Sergey Kapustin, Irina Kapustina, Global Auto, Inc., G-Auto Sales, Effect Auto Sales, Inc., SK Imports, Inc. a/k/a Global Cars, Inc., and Global Cargo Oy are engaged in internet sales of automobiles to Europeans. *Akishev v. Kapustin*, No. 13-cv-07152 (NLH) (AMD), slip op. at 2-9 (D.N.J. Dec. 8, 2016) (Opinion) (Doc. 395) (footnotes omitted), attached to Complainants' Status Report filed with the Commission January 15, 2017.

8. CarCont, Ltd., is a company that operates a warehouse in Kotka, Finland. *Ovchinnikov v. Empire*, FMC No. 15-11, Complaint ¶ 9 (filed Nov. 12, 2015).

9. In a case in federal district court between Kapustin and Empire regarding their relationship, the court found:

> Between March 2010 and December 2012, [Kapustin] utilized the services of EUL [Empire] (and by virtue of the Service Agreement, the services of MSC) in shipping cars to Europe. Some of those cars were owned by [Kapustin Global Enterprise], but others "had already been paid for, in whole or in part[,], by [Kapustin's] clients. [E.D.N.Y.] Complaint, ¶ 34. The cars were delivered to EUL's facilities in Elizabeth, New Jersey, loaded into shipping containers, and shipped via MSC vessels to Finland. There, the cars were unloaded and stored in a warehouse owned by Carcont, Ltd. – an entity which, [Kapustin] allege[s] on information and belief, is wholly owned by Hitrinov. Id., ¶ 44.

> In addition to providing these shipping services, EUL helped to finance [Kapustin's] purchase of cars, loaning one or more of [Kapustin Global Enterprise or its principals] thousands of dollars. The parties to this action agree on how much was loaned ($450,120.00); exactly when the loans were extended (five dates beginning on Sept. 20, 2010, and ending with two loans on Dec. 13, 2011); and the interest rate (18% annually or 1 1/2% per month). However, the parties disagree as to whom the loans were made. [Kapustin] maintain[s] that Global alone borrowed the money, while Hitrinov claims that the loan was made to one Sergey Kapustin, and Kapustin and his wife, Irina, control all three of the [Kapustin companies].

Global Auto v. Hitrinov, No. 13-cv-2479, Memorandum at 2 (E.D.N.Y. Nov. 7, 2013) (Memorandum and Order) (Doc. 38) (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix B); Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-5 (records of the loans).) These findings are supported by the Commission record.

10. Kapustin and Empire entered into an agreement pursuant to which Empire would purchase a 60% interest in Kapustin cars. Pursuant to the agreement, the cars would not be sold to customers and Empire would hold the title to cars in which they had an interest. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14 ¶¶ 14-16; Doc. 14-3; Doc. 14-4).)

11. A Global Auto employee named "Svetlana" was the primary Kapustin representative with whom Empire corresponded about the cars transported from the United States to Kotka, Finland, for Kapustin. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14 ¶ 14).)

12. Svetlana corresponded through the email address "account@globalautousa.com." (*E.g.*, emails in Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-3; Doc. 14-4).)

13. Kapustin and Empire agreed that Empire would retain possession of cars and their titles with a total value equal to a 60% interest of the investment vehicles. Before a car would be released in Finland, Kapustin would transfer possession of another car and title to Empire in New Jersey if release of the car in Finland would take Empire's security below 60%. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14 ¶¶ 17-20; Doc. 14-6; Doc. 14-7; Doc 14-8).)

14. Empire maintained, updated, and provided to Kapustin a spreadsheet stating for each investment vehicle transported to Finland the "involve" number; year, make and model of vehicle; VIN; date of receipt in warehouse; date of receipt of title; container in which vehicle

was shipped; "arrived;"[17] dollar amount financed; dollar amount released; and amount still financed. (*E.g.*, Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/88-96); Respondents' Motion for Judgment on the Pleadings, Exhibit 2 (Email dated January 17, 2013, from Alex Krapivin at Empire to account@globalautousa.com and attachment).)[18]

15. The spreadsheet also recorded cars that were transported for Kapustin, but in which Empire did not have a financial interest. These cars were marked on the spreadsheet as "do not put on balance" and no entry was made for dollar amount financed or dollar amount released. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/88-96); Respondents' Motion for Judgment on the Pleadings, Exhibit 2 (Email dated January 17, 2013, from Alex Krapivin at Empire to account@globalautousa.com and attached spreadsheet, spreadsheet at lines 100779 and 100775, listing cars identified in Finding of Fact 72 with notation "do not put on balance").)

16. The first financial transaction between Kapustin and Empire occurred in September 2010 when Empire agreed to purchase a 60% interest in the cars for $45,000. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14 ¶¶ 14-16; Doc. 14-3/1-3).)

17. On September 14, 2010, Svetlana of Global Auto sent an email to Empire stating: "Please find information about the 2 cars below and an [attachment] with Hummer's photos. 2008 Lexus LX 570 pearl white, navigation, technology pkg, laser cruise. 2005 Hummer Limo H-2 black 200 inches long. Please contact Sergey if you have any questions." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-3/1).)

18. On September 17, 2010, Hitrinov sent an email to irina@globalautousa.com stating: "Those cars we ready to buy 60% of ownership. We will not release the cars and hold the Titles. Tjose [*sic*] cars MUST be currently NOT sold to any customers. Please confirm." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-4/2).)

19. On September 20, 2010, Hitrinov sent an email to account@globalautousa.com stating: "Those cars we ready to buy 60% of ownership. We will not release the cars and hold the Titles. Those cars MUST be currently NOT sold to any customers." (Complainants'

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[17] The number in this column corresponds to the Empire booking number on the Dock Receipt/Bill of Lading for the shipment of a container.

[18] The spreadsheets in the filings in district court were poorly copied and are difficult to read. Similar, if not identical, spreadsheets are included in Respondents' Motion for Judgment on the Pleadings, Exhibit 2.

Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-4/2).)

20. On September 20, 2010, Svetlana of Global Auto sent an email to Empire stating: "Per your agreement with our company we are waiting for a payment of $45000.00. After we will be able to submit you an original certificate of title for Lexus, you will release our containers. Thank you." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-3/2).)

21. On September 28, 2010, Svetlana of Global Auto sent an email to Empire stating: "Please be advised that title for Lexus will be delivered to Roma in NJ today (09/28/2010). So, please remove hold from containers that we were talking about earlier. Please confirm the release. Thank you and have a great day." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-3/3).)

22. On January 12, 2011, Svetlana of Global Auto sent an email to Empire stating: "In addition, we dropped 3 more cars. . . . Please give me an updated balance along with how you estimate the price of our stock." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/2).)

23. On June 19, 2011, Svetlana of Global Auto sent an email to Empire stating:

> During next week we expect several containers to arrive in Kotka. Since we do not have enough cars to secure the finance account, we would like to ask your company to unload consolidated containers and those that will arrive soon to Carcont's lot and release them the way you release vehicles from consolidated containers. To avoid any delays with releases we will pay outstanding shipping invoices. In addition, to bring our finance account to a positive balance we will bring cars to load during the week. Please let us know if you have any concerns or call Sergey to discuss and questions.

(Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/3).)

24. On June 20, 2011, Empire representative Alex Krapivin sent a spreadsheet to account@globalautousa.com. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/4-8).)

25. On June 21, 2011, Svetlana of Global Auto sent an email to Empire stating: "According to Alex Krapivin, after we brought you following vehicles [BMW, Ford, Harley Davidson], our company needs additional $9500.00 to be able to get release for [Lexus and Lexus]. We wanted to find out, if it is OK to pay that amount in Kotka. Please let us know."

(Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-7/2).)

26. On July 1, 2011, Svetlana of Global Auto sent an email to Empire stating: "Would you please release the following vehicle [2008 Dodge]. The balance confirmed with Alex." Alex Krapivin and Yuliya Mikhalkevich of Empire confirmed that Dodge could be released. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-7/4-5).)

27. On July 1, 2011, Empire representative Alex Krapivin sent a spreadsheet to account@globalautousa.com. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/9-12).)

28. On July 5, 2011, Svetlana of Global Auto sent an email to Empire stating: "Would you please give me an updated balance. We have another 3 cars ready to be loaded. Masha should confirm that." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/13).)

29. On July 14, 2011, Svetlana of Global Auto sent an email to Empire stating: "Would you please sent me our balance sheet?" (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/14).)

30. On August 4, 2011, Empire representative Yuliya Mikhalkevich sent a spreadsheet to account@globalautousa.com. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/15-19).)

31. On August 11, 2011, Svetlana of Global Auto sent an email to Empire stating:

> Per Sergey's [Kapustin] request we wanted to inform you that currently we have $31372 available for release of vehicle from Carcont. The total amount that we need for current [release] is $54333. The problem is that all those vehicles go to Kazakhstan and towing arrive in Kotka. We are planning to bring 2 additional vehicles for shipment they will be on your facility today: 2008 Mercedes-Benz 320 purchased for $37725.00 . . . 2007 BMW X5 purchased for . . . $24555.00. That will add up to our account additional $37368 and bring account total amount of $68740. We have a delay with titles, they will be sent to us in the beginning of next week. We are asking you if you can release vehicles 3 cars for $54333 due to [emergency] situation with towing to Kazakhstan. I am sending you purchase and payment proof.

(Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-7/6).)

32. On August 15, 2011, Svetlana of Global Auto sent an email to Empire stating: "Would you please send me a table with our status?" (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/20).)

33. On August 15, 2011, Empire representative Yuliya Mikhalkevich sent a spreadsheet to account@globalautousa.com. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/20-24).)

34. On August 16, 2011, Svetlana of Global Auto sent an email to Empire stating: "Mazda Miata was delivered along with a title, would you please add it up in our finance table and send it to me?" (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/25).)

35. On August 16, 2011, Empire representative Yuliya Mikhalkevich sent a spreadsheet to account@globalautousa.com. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/25-29).)

36. On August 17, 2011, Empire representative Yuliya Mikhalkevich sent a spreadsheet to account@globalautousa.com. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/30-34).)

37. On August 23, 2011, Empire representative Yuliya Mikhalkevich sent a spreadsheet to account@globalautousa.com. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/35-39).)

38. On August 26, 2011, Empire representative Yuliya Mikhalkevich sent a spreadsheet to account@globalautousa.com. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/40-45).)

39. On September 14, 2011, Empire representative Alex Krapivin sent a spreadsheet to account@globalautousa.com. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/49-53).)

40. On September 15, 2011, Svetlana of Global Auto sent an email to Empire stating: "Would you please send me updated table for our finance balance?" (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/46).)

41. On September 15, 2011, Svetlana of Global Auto sent an email to Empire stating: "Would you please update our finance account according to Maria's status and send me the table with the new balance." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/47).)

42. On October 17, 2011, Svetlana of Global Auto sent an email to Empire stating: "Alex, would you please send me our updated table?" (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/54).)

43. On October 25, 2011, Svetlana of Global Auto sent an email to Empire stating: "We brought to you some new vehicles, would you please update our table and send it back to me." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/56).)

44. On October 25, 2011, Empire representative Alex Krapivin sent a spreadsheet to account@globalautousa.com. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/56-60).)

45. On November 10, 2011, Svetlana of Global Auto sent an email to Empire stating: "Bill of sale for 2012 Mercedes attached. Would you please update and send new table?" (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/61-62).)

46. On November 15, 2011, Svetlana of Global Auto sent an email to Empire stating: "Alex, would you please send me an updated table?" (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/63).)

47. On November 16, 2011, Empire representative Alex Krapivin sent a spreadsheet to account@globalautousa.com. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/63-68).)

48. On December 12, 2011, Svetlana of Global Auto sent an email to Empire stating: "Would you please send our updated table?" (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/69).)

49. On December 19, 2011, Svetlana of Global Auto sent an email to Empire stating: "Would you please send me our updated table?" (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/70).)

50. On December 23, 2011, Empire representative Alex Krapivin sent a spreadsheet to account@globalautousa.com. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/71-75).)

51. On January 11, 2012, Irina Kapustina, president of Effect Auto Sales, wrote a letter to Empire stating: "Please be advised that Effect Auto Sales will use Carcont Ltd. as an agent for unloading of all our cars including cars with Empire investment. Global Cargo already made agreement for us with Carcont. We do not need any Empire bill of lading. Please consign all the containers and cars to Carcont." (Respondents' Reply to Complainants'

Response to the Presiding Office's Order to Supplement the Record (filed Aug. 9, 2016) Appendix C.6.)

52. On March 23, 2012, Svetlana of Global Auto sent an email to Empire stating: "Mashenka, just to confirm: [Volkswagen CC, Ford Escape, and Jeep Compass] Should be unloaded directly to Global Cargo lot and are not subject for investment." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-8/3).)

53. On March 23, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please note that the following container is not subject for investment and should be unloaded directly to global Cargo lot [2011 Mitsubishi Lancer, 2011 Mitsubishi Outlander, 2010 Dodge Caliber, 2005 Harley Davidson]." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-8/4).)

54. On March 28, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please note that the following container is not subject for investment and should be unloaded directly to global Cargo [1985 American Motors, 2008 Toyota Yaris, 2011 Mitsubishi Outlander]." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-8/6).)

55. On April 3, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please note that the following vehicles are not subject for investment and should loaded as "GLOBAL" cars. [2009 Toyota Venza, 2009 Subaru Forester, 2012 Mitsubishi Eclipse, 2009 [Nissan] Versa, Toyota Yaris]." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-8/7).)

56. On April 5, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please note that the following container is not subject for investment and should be unloaded directly to Global Cargo lot [2011 Mitsubishi Lancer, 2011 Mitsubishi Galant, 2009 Nissan Versa]." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-8/8).)

57. On April 11, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please note that the following vehicles should be loaded as "CARCONT" and are subject to finance: [2009 ME-BE ML 320, 2009 Toyota Camry, 2009 Toyota Camry, 2009 BMW X5, 2009 Volkswagen Touareg]." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-8/10).)

58. On April 16, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please note that the following vehicles are not subject for investment and should be unload directly to Global Cargo: [12 vehicles listed]." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-8/11).)

59. On April 23, 2012, Svetlana of Global Auto sent an email to Empire stating:

> Please note that the following vehicles are not subject for investment and should be unloaded directly to Global Cargo lot:
>
> 1977 Mercury VIN 7Z63S586003
> 2008 Scion XB VIN JTLKE50E581053645
> 2011 Chevrolet HHR VIN 3GNBABFW0BS619505
> 2003 Cadillac Escalade VIN 1GYEK63N63R279314
> 2007 Kawasaki ZX1000D VIN JKAZXCD147A030026
> 2007 Yamaha XVS1100 VIN JYAVP11Y97A010599
> 2006 Harley Davidson VIN 1HD1HDZ156K805374
> 2009 Honda VT750CA VIN JH2RC50759K001310
> 2005 Honda VT1100C VIN 1HFSC18005A901693
> 2007 Honda VT600CD VIN JH2PC214X7M820681.

(Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-8/12).)

60. On April 27, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please note that that 2010 Honda Insight . . . is not a subject for investment and should be loaded as 'GLOBAL' car." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-8/13).)

61. On September 21, 2012, Svetlana of Global Auto sent an email to Empire stating: "The table is missing 2011 Saab 9-4x. Please update the balance and send it back to me." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/76).)

62. On September 21, 2012, Empire representative Yuliya Mikhalkevich sent a spreadsheet to account@globalautousa.com. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/76-86).)

63. On October 1, 2012, Empire representative Yuliya Mikhalkevich sent a spreadsheet to account@globalautousa.com. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/87-96).)

64. On October 15, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please send me our updated table. I need to have the update to request upcoming releases." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/97).)

65. On October 17, 2012, Empire representative Alex Krapivin sent a CAR LIST OF GLOBAL to account@globalautousa.com. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/98).)

66. On October 17, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please update our table, we delivered 2 more titles to you . . . . Please send me the updated table." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-6/98).)

67. On October 26, 2012, Igor Azikov of Effect Auto Sales sent an email to Empire stating: "Please send us release for 2010 VW CC VIN: WVWML7AN9AE507141. We dropped off 2008 Mercedes-Benz C300 VIN: WDDGF81X49R073295 [19] as a collateral and ready to pay $100 fee." (Respondents' Reply to Complainants' Response to the Presiding Office's Order to Supplement the Record (filed Aug. 9, 2016) Appendix C.9.) [Nekilepov]

68. On January 25, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please be advised that we will deliver several units (approximately 10-20) of 2011 Mitsubishi Outlander for shipping to Kotka. Please put in your records that those vehicles are not subject for investment. They will be delivered to Kotka and released to Global Cargo." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-7/7).)

69. On October 16, 2012, Svetlana of Global Auto sent an email to Empire asking to release a 2008 Mini Cooper. Empire responded: "Did you deliver 6 cars? We only know about 5. When will the 6 cars be delivered?" Svetlana responded "Per Sergey in yesterday's phone conversation you [agreed] to release the vehicle if we deliver only 5 cars. That is why I requested the release. Please confirm." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-7/8).)

70. On October 25, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please be advised that we delivered a title for 2001[20] Jeep Compass VIN#282296 [Rzaeva]. Please release the following vehicle. 2010 Lexus RX 350, 2T2BK1BA3AC027856." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-7/9).)

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[19] Nekilepov claims he purchased 2009 Mercedes-Benz C300 VIN WDDGF81X49R073295. I conclude that the email identification of a 2008 Mercedes Benz is a typographical error.

[20] Rzaeva claims to have purchased 2011 Jeep Compass VIN 1J4NF5FB7BD282296, but the email refers to a 2001 Compass. The six digits listed in the email as the VIN are the same as the last six digits of the VIN for the 2011 Jeep Compass. I conclude that the email identification of a "2001 Jeep Compass" is a typographical error and the email referred to the "2011 Jeep Compass" that Rzaeva contends she purchased.

71. On November 6, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please release the following vehicle. Please note that we brought 2 titles today of 2009 Tiguan . . . and 2009 C Class VIN#073295 [listing 2010 Volkswagen, 2010 Subaru, 2010 Volkswagen to be released]. Empire responded: "Unfortunately balance for investment is not allow us to make those releases. Please put the balance to the required level." Svetlana responded: "Since the balance for investment does not allow to make releases for 3 vehicles, please release the following: [2010 Subaru, 2010 Volkswagen]" (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-7/10-11).)

72. On November 7, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please see a list of vehicles that are going to be delivered to your warehouse today: [Toyota Venza, Toyota Highlander, Honda Insight, Volkswagen Tiguan, Mazda CX-7]. Per your agreement with Sergey please release the following vehicle [Volkswagen CC]." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-7/12).)

73. On December 10, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please be advised that the 2009 Toyota Camry . . . (flooded before) coming back to your warehouse today to be shipped to Kotka. Please put it back to our balance and load into container." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-7/13).)

74. On December 12, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please see a wire transfer confirmation below for $10702.00. $10602 should be applied as a principal payment and $100 as storage fee. Please remove 2009 MERCEDES-BENZ E3504M [*sic*] WDBUF87X89B357864 from the balance and release it from your warehouse along with the title." Alex Krapivin responded: "Please see updated statement. After the wire below your balance is still negative: -$2,783." Svetlana replied: "Please be advised that we are going to deliver 2010 Acura RDX . . . today to your warehouse for shipping. Title will be delivered tomorrow. This car will bring our balance to a positive position. Please apply today's wire $10602 specifically to release MERCEDES-BENZ E3504M [*sic*] WDBUF87X89B357864." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-7/14-15).)

75. On December 13, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please be advised that 2010 Acura RDX . . . is delivered to your warehouse along with the title. Please remove 2009 MERCEDES-BENZ E3504M [*sic*] . . . from the balance and release it from your warehouse along with the title. Please update our balance and send us a new table." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-7/18).)

76. On December 6, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please release the following vehicle. It is not on the balance. [2011 Harley Davidson]." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-8/14).)

77. On December 6, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please release the following vehicle. It is not on the balance. Global Cargo OY. Igor Zadoroznyy [2011 Harley Davidson]." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-8/15).)

78. On December 13, 2012, Svetlana of Global Auto sent an email to Empire stating: "Please release title for 2009 Toyota Venza . . . requested by our insurance company. The vehicle is not on the balance." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-8/16).)

79. Cars in which Empire had a financial interest that were transported for Kapustin (investment vehicles) were delivered to CarCont in Kotka, Finland, and not released to Global Cargo Oy until Empire had acquired possession of other cars and their titles to secure their investment.

80. Cars in which Empire did not have financial interest that were transported for Kapustin were released to Global Cargo Oy.

2010 GMC Acadia VIN 1GKLVNED6AJ138200 – Ovchinnikov

81. On November 12, 2009, the Commonwealth of Virginia issued a car title for 2010 GMC Sport Utility VIN 1GKLVNED6AJ138200 to Ari Fleet LT. (Complainants' Notice of Filing (filed May 4, 2016), Appendix 2.)

82. On an unstated date, Ari Fleet LT signed over the title of the 2010 GMC Acadia to Palisades Dealer Funding LLC LT. (Complainants' Notice of Filing (filed May 4, 2016), Appendix 2.)

83. On August 22, 2012, G-Auto Sales, Inc., issued contract-invoice No. 67779 for 2009 GMC Acadia VIN GKLVNED6AJ138200 [*sic* – *see* n.11] to complainant Ovchinnikov with a stated sale price of $28,900 minus a deposit of $27,500 plus $20 for bank commission, leaving a balance of $1420. (Complainants' Notice of Filing (filed May 4, 2016), Appendix 2.)

84. The G-Auto Sales, Inc., contract-invoice states: "Advance payment of the buyer is not the final purchase of the automobile, but guarantees [its] reservation for the definite term stipulated separately." (Complainants' Notice of Filing (filed May 4, 2016), Appendix 2.)

85. On October 11, 2012, Palisades Dealer Funding LLC LT signed over the title of the 2010 GMC Acadia to Effect Auto Sales, Inc. (Complainants' Notice of Filing (filed May 4, 2016), Appendix 2.)

86. The title for the 2010 GMC Acadia does not identify Ovchinnikov as the owner. (Complainants' Notice of Filing (filed May 4, 2016), Appendix 2.)

87. Empire listed 2010 GMC SLT-2 VIN 1GKLVNED6AJ138200 on its spreadsheet as an "investment vehicle" with a warehouse date of 19 Oct, a title date of 27 Nov, and a balance of $27,489.00. (Respondents' Motion for Judgment on the Pleadings, Exhibit 2 (Email dated January 17, 2013, from Alex Krapivin at Empire to account@globalautousa.com with attached spreadsheet, spreadsheet at line 104211).)

88. On a date unknown, a dock receipt/bill of lading was issued for container TCNU8761450 containing 2010 GMC Acadia VIN 1GKLVNED6AJ138200, 2010 Acura RDX VIN 5J8TB2H29AA000682, and 2010 Toyota Yaris VIN JTDBT4K31A5282314. (Complainants' Notice of Filing (filed May 4, 2016), Appendix 2.)

89. The dock receipt/bill of lading for container TCNU8761450 identified Empire as the shipper, CarCont as the consignee, Kaethe C. Rickmers as the vessel, New York as the port of loading, and Kotka as the port of discharge. (Complainants' Notice of Filing (filed May 4, 2016), Appendix 2.)

90. The dock receipt/bill of lading for container TCNU8761450 gives the booking number as 038EUL1046438. (Complainants' Notice of Filing (filed May 4, 2016), Appendix 2.)

91. MSC issued Sea Waybill No. MSCUAR381789 for booking reference 038EUL1046438 identifying Empire as the shipper; 12-535WW as the service contract; New York as the port of loading; December 12, 2012, as the shipped on board date; Kotka, Finland, as the port of discharge; CarCont as the consignee; and container TCNU8761450 as the cargo containing 2010 GMC Acadia VIN 1GKLVNED6AJ138200, 2010 Acura RDX VIN 5J8TB2H29AA000682, and 2010 Toyota Yaris VIN JTDBT4K31A5282314. (Complainants' Response to Respondents' Motion for Judgment on the Pleadings, Appendix E.)

92. The tracking information for MSC Sea Waybill No. MSCUAR381789 indicates that container TCNU8761450 was released empty to shipper in New York on December 4, 2012, loaded on board December 21, 2012, discharged in Kotka, Finland, on January 11, 2013, out gate full on January 14, 2013, and empty in container yard on January 15, 2013. (Complainants' Notice of Filing (filed May 4, 2016), Appendix 2.)

93. The AES Direct Shipment Record for booking reference 038EUL1046438 and container TCNU8761450 identifies Global Auto Inc. as the shipper and CarCont as the ultimate

consignee. (Complainants' Response to Respondents' Motion for Judgment on the Pleadings, Appendix D.)

2011 Jeep Compass VIN 1J4NF5FB7BD282296 – Rzaeva

94. On July 27, 2012, the state of New York issued a car title for 2011 Jeep Compass VIN 1J4NF5FB7BD282296 to Charles T. Pierce. (Comp. Notice of Filing (May 4, 2016) Appendix 1.)

95. On October 5, 2012, G-Auto Sales, Inc., issued contract-invoice No. 98324 for 2011 Jeep Compass VIN 1J4NF5FB7BD282296 to complainant Rzaeva with a stated sale price state of $15,900 plus $20 for bank commission. (Complainants' Response to Respondents' Motion for Judgment on the Pleadings, Appendix B.)

96. The G-Auto Sales, Inc., contract-invoice states: "Advance payment of the buyer is not the final purchase of the automobile, but guarantees [its] reservation for a definite term stipulated separately." (Complainants' Response to Respondents' Motion for Judgment on the Pleadings, Appendix B.)

97. On October 10, 2012, Pierce signed over the title for the 2011 Jeep Compass to Saw Mill Auto Sales. (Comp. Notice of Filing (May 4, 2016) Appendix 1.)

98. The title for the 2011 Jeep Compass does not identify Rzaeva as the owner. (Comp. Notice of Filing (May 4, 2016) Appendix 1.)

99. On October 24, 2012, Saw Mill Auto Sales issued a Retail Certificate of Sale of the 2011 Jeep Compass to Effect Auto Sales, Inc. (Comp. Notice of Filing (May 4, 2016) Appendix 1.)

100. Empire listed 2011 Jeep Compass VIN 1J4NF5FB7BD282296 on its spreadsheet as an "investment vehicle" with a warehouse date of 18 Oct, a title date of 25 Oct, and a balance of $15,019.00. (Respondents' Motion for Judgment on the Pleadings, Exhibit 2 (Email dated January 17, 2013, from Alex Krapivin at Empire to account@globalautousa.com with attached spreadsheet, spreadsheet at line 103783).)

101. On a date unknown, a dock receipt/bill of lading was issued for container TGHU8737440 containing 2011 Jeep Compass VIN 1J4NF5FB7BD282296 [Rzaeva], 2009 Mercedes-Benz C300 VIN WDDGF81X49R073295 [Nekilepov], and 2009 Volkswagen Tiguan VIN WVGBV75N29W525297. (Comp. Notice of Filing (May 4, 2016) Appendix 1.)

102. The dock receipt/bill of lading for container TGHU8737440 identified Empire as the shipper, CarCont as the consignee, Kaethe C. Rickmers as the vessel, New York as the port of

loading, and Kotka as the port of discharge. (Comp. Notice of Filing (May 4, 2016) Appendix 1.)

103. The dock receipt/bill of lading container TGHU8737440 gives the booking number as 038EUL1039353. (Comp. Notice of Filing (May 4, 2016) Appendix 1.)

104. MSC issued Sea Waybill No. MSCUAR315118 for booking reference 038EUL1039353 identifying Empire as the shipper; 12-535WW as the service contract; New York as the port of loading; November 16, 2012, as the shipped on board date; Kotka, Finland, as the port of discharge; CarCont as the consignee; and container TGHU8737440 as the cargo containing 2011 Jeep Compass VIN 1J4NF5FB7BD282296 [Rzaeva], 2009 Mercedes-Benz C300 VIN WDDGF81X49R073295 [Nekilepov], and 2009 Volkswagen Tiguan VIN WVGBV75N29W525297. (Complainants' Response to Respondents' Motion for Judgment on the Pleadings, Appendix E.)

105. The tracking information for MSC Sea Waybill No. MSCUAR315118 indicates that container TGHU8737440 was released empty to shipper in New York on November 6, 2012, loaded on board November 15, 2012, discharged in Kotka, Finland, on December 7, 2012, out gate full on December 11, 2012, and empty in container yard on December 17, 2012. (Complainants' Notice of Filing (filed May 4, 2016), Appendix 1.)

106. The AES Direct Shipment Record for booking reference 038EUL1039353 and container TGHU8737440 identifies Global Auto Inc. as the shipper and CarCont as the ultimate consignee. (Complainants' Response to Respondents' Motion for Judgment on the Pleadings, Appendix D.)

2009 Mercedes-Benz C300 VIN WDDGF81X49R073295 – Nekipelov

107. On May 14, 2009, the state of New York issued a car title for 2009 Mercedes-Benz C300 VIN WDDGF81X49R073295 to Daimler Trust. (Comp. Notice of Filing (May 4, 2016) Appendix 3.)

108. On June 26, 2012, Daimler Trust transferred the title for 2009 Mercedes-Benz C300 to Effect Auto Sales. (Resp. Reply to Complainants' Response to Ord. Supp. Record (filed August 9, 2016) Appendix C-3.)

109. The title for the 2009 Mercedes-Benz C300 does not identify Nekipelov as the owner. (Comp. Notice of Filing (May 4, 2016) Appendix 3.)

110. On October 24, 2012, G-Auto Sales, Inc., issued contract-invoice No. W4722 for 2009 Mercedes-Benz C300 VIN WDDGF81X49R073295 to complainant Nekipelov with a stated

sale price state of $19,900 plus $20 for bank commission. (Complainants' Response to Respondents' Motion for Judgment on the Pleadings, Appendix B.)[21]

111. The G-Auto Sales, Inc., contract-invoice states: "Advance payment of the buyer is not the final purchase of the automobile, but guarantees [its] reservation for the definite term stipulated separately." (Complainants' Response to Respondents' Motion for Judgment on the Pleadings, Appendix B.)

112. On October 25, 2012, Igor Azikov of Effect Auto Sales sent an email to Hitrinov stating: "We would like to get a release for 2010 VW . . . . We dropped off 2008 [*sic*] Mercedes-Benz C300 VIN WDDGF81X49R073295 as a collateral and ready to pay $100 fee. Please send us release at your earliest convenience." (Respondents' Motion for Judgment on the Pleadings, Exhibit 15 (Email dated October 25, 2012, from Igor Azikov to Hitrinov.))

113. Empire listed 2009 Mercedes-Benz C300 VIN WDDGF81X49R073295 on its spreadsheet as an "investment vehicle" with a warehouse date of 25 Oct, a title date of 6 Nov, and a balance of $18,157.00. (Respondents' Motion for Judgment on the Pleadings, Exhibit 2 (Email dated January 17, 2013, from Alex Krapivin at Empire to account@globalautousa.com with attached spreadsheet, spreadsheet at line 103783).)

114. On a date unknown, a dock receipt/bill of lading was issued for container TGHU8737440 containing 2011 Jeep Compass VIN 1J4NF5FB7BD282296 [Rzaeva], 2009 Mercedes-Benz C300 VIN WDDGF81X49R073295 [Nekilepov], and 2009 Volkswagen Tiguan VIN WVGBV75N29W525297. (Comp. Notice of Filing (May 4, 2016) Appendix 1.)

115. The dock receipt/bill of lading for container TGHU8737440 identified Empire as the shipper, CarCont as the consignee, Kaethe C. Rickmers as the vessel, New York as the port of loading, and Kotka as the port of discharge. (Comp. Notice of Filing (May 4, 2016) Appendix 1.)

116. The dock receipt/bill of lading for container TGHU8737440 gives the booking number as 038EUL1039353. (Comp. Notice of Filing (May 4, 2016) Appendix 1.)

117. MSC issued Sea Waybill No. MSCUAR315118 for booking reference 038EUL1039353 identifying Empire as the shipper; 12-535WW as the service contract; New York as the port of loading; November 16, 2012, as the shipped on board date; Kotka, Finland, as the port of discharge; CarCont as the consignee; and container TGHU8737440 as the cargo containing 2011 Jeep Compass VIN 1J4NF5FB7BD282296 [Rzaeva], 2009 Mercedes-Benz C300 VIN WDDGF81X49R073295 [Nekilepov], and 2009 Volkswagen Tiguan VIN

[21] There is no English translation of this document. For this decision, it is assumed that Nekipelov is the purchaser.

WVGBV75N29W525297. (Complainants' Response to Respondents' Motion for Judgment on the Pleadings, Appendix E.)

118. The tracking information for MSC Sea Waybill No. MSCUAR315118 indicates that container TGHU8737440 was released empty to shipper in New York on November 6, 2012, loaded on board November 15, 2012, discharged in Kotka, Finland, on December 7, 2012, out gate full on December 11, 2012, and empty in container yard on December 17, 2012. (Complainants' Notice of Filing (filed May 4, 2016), Appendix 1.)

119. The AES Direct Shipment Record for booking reference 038EUL1039353 and container TGHU8737440 identifies Global Auto Inc. as the shipper and CarCont as the ultimate consignee. (Complainants' Response to Respondents' Motion for Judgment on the Pleadings, Appendix D.)

2009 Toyota Camry VIN 4T1BE46K19U306703 – Nurgazinov

120. On October 17, 2012, the Commonwealth of Virginia issued a car title for 2009 Toyota Camry VIN 4T1BE46K19U306703 to Toyota Motor Credit Corp. (Respondents' Reply to Complainants' Response to the Presiding Office's Order to Supplement the Record (filed Aug. 9, 2016) Appendix C.4.)

121. On November 5, 2012, Toyota Motor Credit Corp. signed over the title for the 2009 Toyota Camry to Effect Auto Sales, Inc. (Respondents' Reply to Complainants' Response to the Presiding Office's Order to Supplement the Record (filed Aug. 9, 2016) Appendix C.4.)

122. The title for the 2009 Toyota Camry does not identify Nurgazinov as the owner. (Respondents' Reply to Complainants' Response to the Presiding Office's Order to Supplement the Record (filed Aug. 9, 2016) Appendix C.4.)

123. On November 29, 2012, G-Auto Sales, Inc., issued contract-invoice No. 67936 for 2009 Toyota Camry VIN 4T1BE46K19U306703 to complainant Nurgazinov with a stated sale price state of $12,900 minus a deposit of $10,500 plus $20 for bank commission, leaving a balance of $2420. (Complainants' Response to Respondents' Motion for Judgment on the Pleadings, Appendix B.)

124. The G-Auto Sales, Inc., contract-invoice states: "Advance payment of the buyer is not the final purchase of the automobile, but guarantees [its] reservation for the definite term stipulated separately." (Complainants' Response to Respondents' Motion for Judgment on the Pleadings, Appendix B.)

125. Empire listed 2009 Toyota Camry VIN 4T1BE46K19U306703 on its spreadsheet as an "investment vehicle" with a warehouse date of 14 Nov, a title date of 27 Dec, and a balance of $10,700.00. (Respondents' Motion for Judgment on the Pleadings, Exhibit 2 (Email dated

January 17, 2013, from Alex Krapivin at Empire to account@globalautousa.com with attached spreadsheet, spreadsheet at line 104452).)

126. On a date unknown, a dock receipt/bill of lading was issued for container TCKU9873233 containing 2009 Toyota Camry VIN 4T1BE46K19U306703, 2009 BMW X6 VIN 5UXFG43569L223352, 2009 Toyota Prius VIN JTDKB20U897858466, and two engines on pallets. (Complainants' Notice of Filing (FMC No. 1953(I)) (filed May 2, 2016).)

127. The dock receipt/bill of lading for container TCKU9873233 identified Empire as the shipper, CarCont as the consignee, MSC Sarah as the vessel, New York as the port of loading, and Kotka as the port of discharge. (Complainants' Notice of Filing (Inf. No. 1953(I)) (filed May 2, 2016).)

128. The dock receipt/bill of lading for container TCKU9873233 gives the booking number as 038EUL1045297. (Complainants' Notice of Filing (Inf. No. 1953(I)) (filed May 2, 2016).)

129. MSC issued Sea Waybill No. MSCUAR409341 for booking reference 038EUL1045297 identifying Empire as the shipper; 12-535WW as the service contract; New York as the port of loading; January 13, 2013, as the shipped on board date; Kotka, Finland, as the port of discharge; CarCont as the consignee; and container TCKU9873233 as the cargo containing 2009 Toyota Camry VIN 4T1BE46K19U306703, 2009 BMW X6 VIN 5UXFG43569L223352, 2009 Toyota Prius VIN JTDKB20U897858466, and two engines on pallets. (Complainants' Response to Respondents' Motion for Judgment on the Pleadings, Appendix E.)

130. The tracking information for MSC Sea Waybill No. MSCUAR409341 indicates that the departure date for the container was January 13, 2013, with transhipment in Bremerhaven, DE, and port of discharge Kotka, Finland. (Respondents' Response to the Presiding Officer's June 29 Order to Supplement the Record (filed July 26, 2016) Attachment 7D.)

131. The AES Direct Shipment Record for booking reference 038EUL1045297 and container TCKU9873233 identifies Global Auto Inc. as the shipper and CarCont as the ultimate consignee. (Complainants' Response to Respondents' Motion for Judgment on the Pleadings, Appendix D.)

132. On January 28, 2013, Hitrinov sent an email to Sergey Kapustin stating: "It has come to my attention that you have taken actions detrimental to our jointly owned assets without my knowledge and consent. Therefore, I urge you to cease any further steps which may cause irreparable damage to our business venture and contact my office immediately to resolve all outstanding issues. I hope we can resolve this problem amicably." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-11/2).)

133. On February 7, 2013, Irina Kapustina responded by email to Hitrinov, stating: "I understand very well your position and hope that when we return to the USA, we shall achieve an understanding and will continue our cooperation. Namely, cooperation, and that means that one side cannot pronounce a verdict so sharply and stop the entire process in one blink. You have decided that you no longer want to have an ownership in the cars inventory. Ok. We have nothing against it. . . . You no longer wish to add cars to your balance sheet." (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A (Doc. 14-12/2).)

134. Empire sold the cars that Complainants contend they purchased and used the proceeds against the outstanding principal of Empire's loan to Kapustin. (Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix A, Doc. 14/¶ 40 (May 23, 2013, Declaration of Hitrinov) ("Given Kapustin's repudiation of any further performance of our agreement, and fearing that Kapustin/plaintiffs were taking affirmative steps to deprive EUL of its security interest in the Investment Vehicles located in Kotka, I directed that they be removed from that location and ultimately sold to third party buyers to satisfy plaintiffs' indebtedness to EUL. In fact, the sale of all but four units (2 vehicles, a boat, and a boat trailer) has now taken place to buyers in CIS countries, with the proceeds to be applied to the outstanding principal due EUL and any additional amounts due EUL for storage.").)

V. ARGUMENTS IN EMPIRE'S MOTION.

Empire asserts three grounds to support its motion for judgment on the pleadings. First, Empire contends that the Commission lacks jurisdiction because Empire did not operate as an NVOCC on the shipments of the cars claimed by Complainants. Second, Empire contends that Complainants lack standing to bring the claims because Complainants were not parties to the contracts of carriage. Third, Empire contends that the complaints fail to state claims upon which relief may be granted.

A. Subject Matter Jurisdiction over the Allegations in the Complaints Has Not Previously Been Determined.

Before addressing Empire's arguments, it is necessary to respond to Complainants' contention that:

> [T]he question of whether or not the Commission has jurisdiction over this matter has already been answered twice, in the affirmative. First, in the Presiding Officer's Order Denying Respondents' Motion for Stay, dated April 27, 2016 (See Appendix "A"); and second, by the Presiding Officer during the telephonic conference and ensuing ruling on May 3, 2016.

(Opposition at 3.) Complainants do not cite a page in the April 27, 2016, Order, but apparently are referring to the statement "the Commission has jurisdiction over violations of the Shipping Act, not the district court." *Ovchinnikov v. Empire*, FMC No. 15-11, Order at 8 (ALJ Apr. 27, 2016) (Order Denying Respondents' Motion for Stay).

Complainants misconstrue this statement. It merely states that the Commission, not the district court, has subject matter jurisdiction over the Shipping Act. It is not a finding that the Commission has subject matter jurisdiction over the allegations in these complaints. Complainants do not set forth the statement made in the telephone conference that they believe is a finding of subject matter jurisdiction.

Subject matter jurisdiction over the allegations in the complaints has not previously been determined.

B. Empire's Motion for Dismissal on the Ground That It Did Not Operate as an NVOCC Is Denied.

Empire contends that the complaints should be dismissed for lack of subject matter jurisdiction because although Empire is licensed by the Commission as an NVOCC, it did not operate as an NVOCC on the shipments of the four cars that Complainants contend they purchased. If Empire did not operate as an NVOCC on the shipments, Empire argues, it is not subject to the provisions of the Act regulating common carriers for those shipments. Empire bases this argument on its financial interest in the cars.

> As explained above, and as detailed in the Hitrinov Declaration (and Exhibits thereto), the arrangement between EUL and Global Auto Enterprise[22] was a joint investment agreement, under which EUL had a 60 percent ownership interest in each vehicle being transported. EUL did not issue house bills of lading to Global Auto Enterprise for the transportation. Rather, as explained by Mr. Hitrinov, both EUL and Global Auto Enterprise relied on the master bills issued by MSC. Accordingly, EUL was not an NVOCC in relation to these shipments, but rather a beneficial cargo owner transporting cargo for its own account.

(Respondents' Motion for Judgment on the Pleadings at 8.) *See* FF 9.

Complainants contend that determining whether an entity operated as an NVOCC on a shipment is a fact intensive inquiry. Empire holds itself out as an NVOCC. The question is whether it assumed responsibility for the transportation of Complainants' cars.

> Resolution of that factual question requires an examination of an entity's conduct on a particular shipment to determine whether it operated as either an NVOCC or an

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[22] *See* n.10.

> Ocean Freight Forwarder on that shipment. *See, Worldwide Relocations, Inc. – Possible Violations of Sections 8, 10, and 19 of the Shipping Act of 1984 as Well as the Commission's Regulations at 46 C.F.R. 515.13, 515.21, and 520.3*, 32 S.R.R. 495, 503 (FMC 2012); (quoting *Worldwide Relocations, Inc. – Possible Violations*, 31 S.R.R. 1471, 1519 (ALJ 2010)).

(Complainants' Response to Motion for Judgment on the Pleadings at 10.)

Complainants contend that the facts in the record support a finding that Empire operated as an NVOCC on the shipments. First, Empire entered into a service contract with MSC in which it certified its shipper status as an NVOCC, not an owner. MSC transported the cars pursuant to that service contract. Second, the district court in the New York case

> found that there was a "substantial question" regarding whether EUL was authorized to sell the subject automobiles in that EUL was unable to produce a written agreement documenting its rights in the subject automobiles, and in that the aforementioned Mr. Kapustin as shipper of the vehicles to the owners who had purchased them also claimed that the vehicles had been illegally sold.

(Complainants' Response to Motion for Judgment on the Pleadings at 11-12.)

As the New York court found, there is a substantial question of whether Empire was authorized to sell the cars. The Commission does not have jurisdiction to resolve legal question related to the loan between Empire and Kapustin and whether Kapustin had the legal right to sell investment vehicles in which Empire claimed a security interest, whether Empire's rights in investment vehicles outweighed the rights of persons claiming to have purchased an investment vehicle from Kapustin in violation of any Empire/Kapustin agreement, and whether Empire was authorized to sell investment vehicles that Complainants contend they purchased or whether the Empire/Kapustin loan means that Empire had a right to sell investment vehicles. These questions are currently before the New Jersey court where "through the assignment of the [Kapustin] entities' claims against the [Empire] defendants, the 21 plaintiffs [other Kapustin customers in the New Jersey case] who were victims of Kapustin's and the Global entities' fraud are now prosecuting the claims of the Global entities against the [Empire] defendants." *Akishev v. Kapustin*, No. 13-cv-07152 (NLH) (AMD), slip op. at 23 (D.N.J. Dec. 8, 2016) (Opinion) (Doc. 395), attached to Complainants' Status Report filed with the Commission January 15, 2017.

Furthermore, Effect Auto (or Daimler Trust – FF 107-109), not Empire, is identified as the owner of the cars on the titles, Global Auto, not Empire, is identified as the shipper of the cars on the forms filed with Customs, and MSC transported the cars by water pursuant to a service contract in which Empire represented that it was shipping the cars as an NVOCC, not as an owner. Given these facts, despite the authority to resolve issues of fact at this stage when subject matter jurisdiction is challenged, *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. at 136, I conclude

that it is not appropriate to issue an initial decision on the pleadings finding that Empire did not operate as an NVOCC on the shipments of the cars claimed by Complainants.

C. Empire's Motion for Dismissal on the Ground That the Commission Does Not Have Subject Matter Jurisdiction Is Granted.

It is undisputed that the cars Complainants claim to have purchased were transported by water from a port or point in the United States to a port or point in Finland. It is assumed for this portion of the decision that Empire operated as an NVOCC on the shipments to Finland of the four cars claimed by Complainants. It is also undisputed that after the cars arrived in Finland, Empire did not deliver the cars to Complainants, and eventually sold[23] the cars to persons other than Complainants to cover debts Empire alleges are owed to it by Kapustin for the loans that enabled Kapustin to buy the cars. Complainants contend that Empire's failure to deliver the cars to them violated the Shipping Act.

While it is assumed that Empire operated as an NVOCC on the shipments, it is not assumed that Complainants were the consignees of the shipments or that the contracts of carriage required Empire to deliver the cars to Complainants. Complainants have come to the Commission seeking an award of reparations that would compensate them for the money that they lost in their attempt to purchase cars from Kapustin and his companies. The Commission only has jurisdiction to order Empire to compensate Complainants for an actual injury that was proximately caused by a violation of the Shipping Act. 46 U.S.C. § 41305. For Complainants to have standing and for the Commission to have subject matter jurisdiction to determine whether Empire violated the Shipping Act, Complainants must prove by a preponderance of the evidence that they were the consignees on the shipments. For the reasons stated below, Complainants fail to prove they were consignees on the shipments.

1. Motion and opposition.

a. Empire's motion.

Empire contends that the Commission does not have jurisdiction over the complaints because Complainants do not have standing to seek reparations for their claimed injuries.

> Even if the Commission has subject matter jurisdiction over these claims by strangers to the transportation, it is clear that such outside parties have no standing under the Shipping Act to seek reparations for their perceived injuries. The Shipping Act authorizes an award of reparations only to those directly injured by alleged violations, not those whose injuries are secondary, tertiary, or otherwise an indirect result of the alleged violations. In *The Government of the Territory of Guam v. Sea-Land Service,*

[23] Hitrinov says that CarCont sold one of the cars. (Respondents' Motion for Judgment on the Pleadings, Affirmation of Michael Hitrinov ¶ 26.)

Inc., [29] S.R.R 894, 902 (ALJ, Admin. Final 2002), for example, Judge Dolan ruled that only those who paid the ocean freight directly to the carrier could seek reparations. In particular, he held that where the ocean freight was directly paid by mainland shippers, consignees in Guam were ineligible for reparations even though the cost of such ocean freight had been passed on to them. He there explained: "Uniformly, the rule has been deemed to require rejection of reparations claims by persons who . . . claim reparations by arguing that the direct payor passed the charges on to it." To like effect see *Trane Co. v. South African Marine*, 19 FMC 375, 378, n.9 & accompanying text (Init. Dec., adopted 1976) ("complainant must show that that he has paid the freight or has succeeded to the claim in a valid fashion, such as by assignment"); *Tradecheck, LLC v. Sea-Land Service, Inc.*, 27 S.R.R 334 (Settlement Officer 1995) ("Inasmuch as Tradecheck [lacks] any cargo interest, or bill of lading relationship with any of the concerned carriers, it is clear that Tradecheck can demonstrate no actual injury arising from any of the alleged violations"); *Procter & Gamble Manufacturing Co. v Lykes Bros. SS. Co.*, 25 S.R.R 1370, 1371 (Settlement Officer 1991) (Parent company of shipper ineligible to file claim for reparations because the subsidiary "paid the applicable charges and suffered any injury that might have resulted therefrom").

Complainants do not allege that they paid anything directly to Respondents. Quite to the contrary, they assert that Respondents were paid by Global Auto Enterprise. As at most indirect purchasers, Complainants suffered no "actual injury" and are therefore barred from collecting reparations by the "first purchaser" rule applied under the Shipping Act (as well as under federal antitrust law).

(Respondents' Motion for Judgment on the Pleadings at 13-14.)

b. Complainants' opposition.

Complainants argue that even though they are not identified in the shipping documents, they were injured as a result of Empire's violations of the Shipping Act.

Respondents' myopic analysis of cases regarding who may assert claims for violations of the Shipping Act wholly ignores a crucial fact, to wit: that the Complainants herein, although not identified as shippers of record on various shipping documents proffered by Respondents, were directly injured as a result of the Respondents' violations of the Shipping Act. In the first instance, it is not the standing of Complainants to file complaints that raises serious questions herein. Rather it is the subject matter of the activity complained of, that raises questions, namely, whether Respondents' conduct falls within the purview of the sections of the 1984 Act alleged to have been violated. *See, Sea-Land Dominicana, S.A. And Sea-Land of Puerto Rico, Inc. v. Sea-Land Service, Inc.*, 1992 WI 231208, 26 S.R.R 578 (FMC 1992).

> Section 11(a) of the 1984 Act, 46 U.S.C. app. § 1710, provides that "***any***" person may file a complaint to allege a violation of the Act and may seek reparation for ***any*** injury caused ***as a result of that violation***. A contractual relationship between the parties is not required to support a complaint under section 11(a) of the 1984 Act. For the purpose of standing, ***it is sufficient for complainant to allege injury and charge the respondent with its cause***. *See, Cargill, Inc. v. Waterman Steamship Corp.*, 21 S.R.R. 287, 300 (1981) (emphasis added); (supplier to shipper has standing to file complaint under section 22 of the 1916 Act even if not alleging injury to itself); *see also, Chilean Nitrate Sales Corp. v. Port Of San Diego, San Diego Unified Port District*, 1988 WL 340644, FMC No. 1582(I), (By the Commission April 29, 1988) (Order of Remand); *Streak Products, Inc. v. UTI, United States, Inc.*, 2013 WL 9808687, FMC No. 13-04 (ALJ October 23, 2013) (Order Denying Respondent's Motion to Dismiss).

(Complainants' Response to Respondents' Motion for Judgment on the Pleadings at 2-3 (emphasis in original.)

2. June 29, 2016, Order for Parties to Supplement the Record

To facilitate the Commission's determination of jurisdiction, the parties were ordered to identify each common carrier that they contend assumed responsibility for transportation of each car at issue, and for each carrier, identify the shipper or shippers, the consignee or consignees, the port or point of origin, the date the shipment began, the port or point of delivery, the date of delivery, and the entity that directly paid each common carrier for the transportation by water. *Ovchinnikov v. Empire*, FMC No. 15-11 (ALJ June 29, 2016) (Order for Parties to Supplement the Record). In their responses, the parties agree that CarCont was the consignee on the MSC sea waybills for the cars. (Complainants' Response to Order for Parties to Supplement the Record (filed July 26, 2016) at 4 ("With respect to MSC as carrier, for all four vehicles at issue in this matter the consignee is Carcont"); Respondents' Response to the Presiding Officer's June 29 Order to Supplement the Record (filed July 26, 2016) at 7.) No party claims that the cars were not delivered to CarCont as required by the MSC sea waybills.

As Complainants concede, no documents related to the shipments identify Complainants as consignees on the transportation by water from the United States to Finland. Complainants contend that Complainants were (or should have been) consignees on bills of lading issued by (or that should have been issued by) Empire. Empire contends that even if it is assumed that Empire operated as an NVOCC on the shipments, Complainants were not and would not have been the consignees on the shipments.

a. Complainants' response to the June 29, 2016, order and Empire's response to Complainants to the consignee question.

(1) Complainants' response to the Order.

In their response to the June 29, 2016, order, Complainants contend that Empire was obligated to deliver the cars to them as consignees.

> With respect to EUL as carrier, for all four vehicles at issue in this matter the consignees were the Complainants. In support of this response, the Presiding Officer is referred to the following:
>
> A. The contracts of sale for the automobiles between G-Auto Sales, Inc. as seller and each of the Complainants as buyer, referenced above. By virtue of the contracts of sale, the buyers/complainants were the *ultimate* consignees for the automobiles;
>
> B. Additionally, Complainants rely upon the document entitled "U.S. Customs and Border Protection Field Operations, New York Informational Pipeline No. 08-012-NWK", annexed to Complainants' Notice of Filing of May 4, 2016 as Appendix "4", which provides Procedures for Exporting Used Vehicles and explains that respondents were required to provide consignee information to CBP which ". . . must be legible and complete."
>
> C. The Declaration in Support of Order to Show Cause for Preliminary Injunctive Relief, of Irina Kapustina, President of Effect Auto Sales Inc., dated May 29, 2013 (from the matter of *Global Auto Inc. et al., v. Michael Hitrinov et al.*, U.S.D.C. – E.D.N.Y. Docket No.: 13-cv-2479) a copy of which is annexed hereto as Appendix "C", which explains that the subject automobiles ". . . should have been released and the ultimate end purchaser should have received their vehicle in a timely fashion. . ." (p. 5, ¶ "9" of the Declaration of Irina Kapustina); and
>
> D. The Memorandum and Order of the Honorable Sandra L. Townes (Appendix "B" which explains that ". . . the vehicles had already been pre-sold to customers overseas. . ." (p. 4 of the Memorandum and Order).

(Complainants' Response to Order for Parties to Supplement the Record (filed July 26, 2016) at 4-5 (emphasis in original).)

(2) Empire's response to Complainants.

Empire responded to Complainants' arguments "based on the . . . assumption that Empire acted as an NVO with respect to the shipments at issue." (Respondents' Reply to Complainants' Response to the Presiding Officer's Order to Supplement the Record (filed Aug. 8, 2016) at 2.)

> CarCont was also the consignee with respect to Empire. Complainants attempt desperately to appropriate that role, naming themselves as the "ultimate consignees." Whatever Complainants choose to call themselves, they cannot bootstrap themselves into the legal status of consignee by mere nomenclatural legerdemain. As shown in Respondents' Initial Supplement, Complainants stretch the term "consignee," which means the consignee identified on the contract of affreightment, beyond any bounds cognizable under the Shipping Act. Indeed, they themselves recognize the true consignee when they say in their answer to Question 6 that "[w]ith respect to EUL as [assumed] carrier, the point of delivery was: CarCont LTD." If that was the point of delivery, then CarCont was the consignee. Furthermore, as previously identified, the very AESDirect forms incorrectly relied upon by Complainants identify CarCont as the "ultimate consignee." See **Appendix B -4.**

Remarkably, in the roughly nine months this proceeding has been ongoing, through multiple rounds of supplemental documents, as well as appendices/attachments, Complainants have yet to identify a single document, or a single witness statement, tying any of the Complainants to any of the transportation arrangements. Their names do not appear on any of the actual shipping documents; they recognize that they were not a shipper on any documents; and they have made no showing that Empire even knew who they were until well after the transportation was finished. This by itself is dispositive.

The shippers' instructions in this case are also directly contrary to Complainants' position. As addressed above, the only instructions Empire had from Global were contained in the agreed-upon Dock Receipt/Bill of Lading (in some cases titled Master Bill of Lading). Under those instructions, Empire's role as assumed NVO ended when the containers were turned over to CarCont at the port. After that, the transportation was entirely between Global, through its agent Global Cargo Oy, and CarCont. As explained above, at that point all CarCont charges, such as unloading and storage, were for the account of Global. Moreover, when Global wanted the four cars released, it sent a request to CarCont. Kapustin Aff. App. 21. Each plainly requests CarCont to release the vehicle to a specific individual designated by Global Cargo Oy (acting as stated thereon as agent for all Global companies). Neither Complainants, the other purchasers of the same vehicles, nor any other downstream entity was included within the instructions. Thus, CarCont lacked any authority to release the vehicles to Complainants, and they may not be considered consignees.

Complainants' lack of any recognized relationship to the transportation agreements is reinforced by the very documents to which they cite. The invoices from G-Auto are not only unreliable and possibly falsified, but at best constitute agreements for the purchase of goods; they have absolutely no bearing on the transportation arrangements. If those invoices impose a delivery obligation on anyone, it is Global, not Empire. See n.19, above. It is no different than if someone in Argentina bought a wood-burning stove online from Sears and Sears shipped it from the United States to its own warehouse or agent in Argentina for subsequent pickup by or delivery to the customer. Nobody familiar with the Shipping Act would even suggest that the customer is the consignee – ultimate or otherwise.

Complainants' reliance on the CBP document is astonishing. Even apart from the absence of any relationship to the Shipping Act, Empire did indisputably provide consignee information to CBP, properly identifying CarCont as the consignee. Thus, this document supports Respondents, not Complainants.

Complainants next toss into the ring a Declaration of Irina Kapustina in a totally different matter, which reads curiously much more like a legal memorandum than a statement by a fact witness. We see no basis on which to admit, much less rely upon, such a document. In any event, it is hardly surprising that a person accused of failing to deliver vehicles and actually selling the same vehicles to multiple customers (as occurred here) would make such statements without of course providing any supporting evidence) in order to shift blame elsewhere. Furthermore, Ms. Kapustina states that she is making the Declaration in her capacity as President of Effect Auto, not G-Auto (para. 1) and confirms that the cars were owned by Effect Auto, ***not*** G-Auto. This actually disproves Complainants' theory that they were consignees by virtue of invoices from G-Auto.

Moreover, if one examines the statement closely, it actually says nothing of relevance, even as misquoted by Complainants. Ms. Kapustina first says that the automobiles "should have been released." That is true only if Global requested release and met the prerequisites to release. Global did neither. As previously noted, it is truly remarkable that Complainants have not identified even a single document or other shred of evidence showing that ***anyone*** – much less Global – ever made a request to Empire for release of these cars. Given that Complainants' counsel was Global's counsel at that time and in the EDNY litigation, the absence of any such evidence is virtually conclusive proof to the contrary. Moreover, Complainants have misleadingly elided the beginning of the statement, which reads: "***Our*** vehicles should have been released. . . ." (Emphasis added). See **Appendix B -9.** When the quote is thus corrected, it becomes quite clear that Ms. Kapustina is talking about release to Global, not to unidentified persons who might have purchased the cars from a different entity (or been one of several to do so).

Ms. Kapustina also says that "the ultimate end purchaser should have received their vehicle in a timely fashion." They certainly should have, but it was Global, not Empire, that was obligated to deliver the cars to the Complainants (see n.19, above); and it was Global, not Empire, that failed both to request release and to meet the requirements for release. Had Global done so, it would have received the vehicles and would have been able to timely deliver them to Complainants (or to the other buyers to whom Global sold the same vehicles).

Moreover, the Kapustina allegations in this Declaration are flatly contrary to: (i) her own letter to Mr. Hitrinov admitting Empire's ownership interest in the Investment Vehicles, Kapustin Aff. App. 3. (ii) the Affirmation of Mr. Kapustin, head of the Global Auto Enterprise, stating that Empire was well within its rights to retain the vehicles Kapustin Aff. Para. 13, 14, 61. and (iii) the letter from Ms. Kapustina to Mr. Hitrinov stating that Global would use CarCont as its agent. **Appendix C-6.**

Complainants cite a statement in the Townes Memorandum II to the effect that the vehicles had already been pre-sold to customers overseas. **See Appendix B-7.** This is another instance of Complainants' misdirection by redaction. As the more fulsome quote shows, Judge Townes was not stating facts, or otherwise giving the statements her imprimatur, but merely reciting what was said in Plaintiffs' motion (which she denied) for a TRO and preliminary injunction, and the specific term "pre-sold" was taken directly from declarations by Plaintiffs in support of their motion (as shown by the quotation marks employed by Judge Townes):

> Plaintiffs [Kapustin companies] moved for a temporary restraining order and preliminary injunction, seeking a mandatory injunction directing Defendants [Empire] to release, or cause the storage facilities having possession of the cars to release, the automobiles listed in Exhibit C to the Complaint. In support of their motion, Plaintiffs filed three nearly identical declarations [from Ms. Kapustina, Mr. Kapustin, and Mr. Goloverya]. All three declarations state that, on various dates between March 2010 and December 2012, the declarant entered into multiple separate contracts with EUL to ship vehicles to Finland. At the time the vehicles were delivered to EUL, the vehicles had already been 'pre-sold to customers overseas.' Kapustina Dec., ¶ 6; Kapustin Dec, ¶ 6; Goloverya Dec., ¶ 6." **Appendix B-7**, at p.4.

Moreover, as discussed above and in Respondents' Initial Supplement, there is considerable doubt about these "sales." According to Mr. Kapustin, each of the Complainants still owes money for the vehicle, and so has a "reservation" rather than a purchase. He also alleges that the invoices have been falsified. Moreover, at least

some of the vehicles have invoice dates well before Effect Auto obtained ownership. And each of the cars was also "pre-sold" by Global to at least one other person. In any event, any such sale was totally unknown to Empire and contrary to its agreement with Global. Hitrinov Aff. para. 32; Kapustin para. 29, 30.

In any event, we have already shown that these purported "invoices" are not maritime contracts and have no relevance to answering the question at hand – who was the consignee? Complainants' position thus boils down to the claim that a common carrier is required to deliver cargo, regardless of the shipper's instructions, to persons of whose existence he is totally unaware, who do not have the original contract of affreightment and whose names do not appear on any single transportation document (or on any other document provided to the common carrier, here Empire).

(*Id.* at 15-20 (footnotes omitted).)

b. Empire's response to the June 29, 2016, order and Complainants' response to Empire.

(1) Empire's response to the Order.

Empire contends that assuming it operated as an NVOCC on the shipments, CarCont was the consignee for each car.

Although Complainants have referred to themselves as the "ultimate consignees," they have pointed to nothing, other than their purported and disputed "ownership" of the vehicles, to bootstrap themselves into that label. A consignee for ocean shipping purposes is understood as follows:

"**Consignee** – is a key entity in the shipping chain and this field reflects the name and address details of the person or company that is legally allowed to receive the cargo covered in the bill of lading. This may or may not be the actual owner or recipient of the cargo."

Complainants are certainly not listed as "consignee" on any bill of lading or other shipping document. Indeed, they are not listed ***at all*** on any of the shipping documents. And the AES Forms that Complainants incorrectly rely upon specifically identify the "ultimate consignee" as CarCont Ltd., as do the import declarations. As elaborated upon in Respondents' Reply Complainants are nothing more than (disputed) purchasers of goods that Global shipped to itself (Global CarCont [*sic*] Oy) in Finland.

(Respondents' Response to the Presiding Officer's June 29 Order to Supplement the Record (filed July 26, 2016) at 7-8.)

(2) Complainants' response to Empire.

Complainants contend that Empire was an NVOCC on the shipments and that Complainants were the consignees.

> It is respectfully submitted that the inquiry posed simply, clearly, and directly seeks identification of the consignee(s) of the subject vehicles for each carrier.
>
> Once again, in lieu of simply providing a clear and cogent answer directly responsive to the Presiding Officer' inquiry, Respondents continue to 'waffle' on the issue of EUL as carrier, despite the admissions contained in Respondents' own documents.
>
> Apart from the foregoing, it is noted that Respondents have identified CarCont LTD ("Carcont") as consignee for both EUL and MSC as carriers.
>
> True to form, however, Respondents have once again gratuitously inserted "argument", even going so far as to provide their own didactic pronouncements as to definition of terms, in a continued attempt to prejudice and usurp the Presiding Officer's role as finder of fact.
>
> Without engaging in a point-by-point refutation of the improper argument gratuitously proffered by Respondents which is once again, wholly unrelated to the inquiry posed, suffice it to say that Complainants alleged inability to "point" to documents identifying Complainants as "consignee" arises out of the fact that the documents listing Carcont as consignee are incorrect, and were purposely drafted as such by EUL as part of the overriding scheme to defraud Complainants.
>
> Additionally, and with regard to Respondents' similarly gratuitous and grossly unrelated reference to Respondents' Reply on their Motion for Judgment on the Pleadings, to the extent that Respondents continue to rely upon the fraudulently created affirmation of Respondent Hitrinov and that of a proven fraud and pathological liar, Mr. Kapustin, Complainants will not burden the Court by restating the obvious lack of credibility that lies in each of these affirmations, other than to note Respondents' circular argument, and convoluted representations purposely inserted to frustrate and obfuscate the issues and to avoid responding to the Presiding Officer's inquiry.
>
> It is further noted that with respect to attachments 5A, 5B, 5C and 5D, these documents are written in a foreign language for which no certified English translation has been provided and must this be rejected by the presiding Officer, inclusive of any purported "argument" made thereon.

(Complainants' Reply to Respondents' Response to Order for Parties to Supplement the Record (filed August 9, 2016) at 13-14.)

3. Complainants have not proven they were consignees.

Complainants' claims are premised on the contention that the contracts of carriage required Empire to deliver the cars to them – that they were consignees on these shipments. A complainant has the burden of establishing that the Commission has subject matter jurisdiction over a claim, including the complainant's standing to bring the claim. In these two proceedings alleging that Empire violated the Shipping Act by failing to deliver the cars to Complainants, Complainants must establish that the contracts of carriage required Empire to deliver the cars to Complainants. Complainants concede that no documents in the record identify them as consignees, but contend that their status as consignees "arises out of the fact that the documents listing CarCont as consignee are incorrect, and were purposely drafted as such by EUL as part of the overriding scheme to defraud Complainants." Complainants do not explain whether they mean that Empire was complicit in the overriding scheme described by the New Jersey court by which Kapustin defrauded his customers or that Empire had its own overriding scheme to defraud Complainants.

Based on the cases cited in its motion at 13-14, Empire argues that because Complainants did not directly pay the freight to Empire, but paid it to Kapustin who then paid Empire, Complainants do not have standing. Except for the principle that a complainant must have standing, those cases are inapposite. Complainants in those cases were seeking a refund of alleged freight overcharges. Absent an assignment from the person who paid the freight directly to the carrier, the person who paid the freight to an intermediary is not entitled to reparations for the overcharges. *Guam v. Sea-Land*, 29 S.R.R at 902; *Procter & Gamble v Lykes*, 25 S.R.R at1371; *Tradecheck v. Sea-Land*, 27 S.R.R at 334 and n.4; *Trane v. South African Marine*, 19 F.M.C. at 378 n.9. While Complainants herein do not allege that they paid the freight directly to Empire, Complainants do not seek a reparation award for freight overcharges, but as alleged consignees who did not receive their shipments. The Act defines "shipper" to include "the person to whom delivery is to be made." 46 U.S.C. § 40102(22)(C). If Complainants were able to demonstrate that they were consignees, that the carrier failed to deliver the cars to them, and the failure to deliver the cars to them violated the Shipping Act, they might be eligible to receive a reparation award even though they did not pay freight directly to the carrier. *See Adebisi A. Adenariwo v. BDP International, Zim Integrated Shipping, Ltd. and its agent (Lansal) et al*, FMC No. 1921(I), Final Order on Remand (FMC Feb. 14, 2017) (reparation award to consignee/complainant when carrier's refusal to release cargo violated Shipping Act); *Tienshan, Inc. v. Tianjin Hua Feng Transport Agency Co., Ltd.*, 31 S.R.R. 1831, 1833 (ALJ 2011) (consignee as complainant), Notice Not to Review, April 12, 2011.

If, as assumed for this part of the Initial Decision, Empire operated as an NVOCC on the shipments of the cars that Complainants claim to have purchased, Kapustin was the shipper. Empire and the Kapustin companies entered into a contract of carriage for Empire to transport the cars by water to Finland. Contract law requires three elements for the formation of a contract – (1) an offer, (2) an acceptance, and (3) consideration. *Vinmar Inc. v. China Ocean Shipping Company*, 26 S.R.R.

420, 423 (FMC 1992). A contract between a shipper and a common carrier as defined by the Act includes the identification of the consignee – the person to whom delivery will be made to accomplish the transportation by water.

Addressing Complainants' claim that they were or should have been consignees, I first note that Kapustin is on record as explicitly instructing Empire to consign cars to CarCont. On January 11, 2012, Irina Kapustina, president of Effect Auto Sales, wrote a letter to Empire stating:

> Please be advised that Effect Auto Sales will use Carcont Ltd. as an agent for unloading of all out cars including cars with Empire investment. Global Cargo[24] already made agreement for us with Carcont. We do not need any Empire bill of lading. Please consign all the containers and cars to Carcont.

FF 51. Nothing in the correspondence between Kapustin and Empire casts any doubt that this was their practice until the relationship ended.

The findings of fact paragraphs 1-82 based on the email and other correspondence between Empire representatives and Global Auto representatives provide a comprehensive picture of the relationship between Kapustin and Empire and of how they handled shipments of cars from the United States to Finland during their business relationship. As found by the district courts in New York and New Jersey and demonstrated by contemporaneous documents in the FMC record, Empire loaned $450,120.00 to Kapustin that Kapustin used to purchase cars in the United States for shipment to his customers overseas. FF 9. Apparently Kapustin also had other sources of money, as Empire did not have an interest in all of the cars that Kapustin shipped, only in those that were identified by Kapustin and Empire as investment vehicles. Kapustin delivered cars and their titles to Empire in New Jersey. Empire would list the cars on its spreadsheet either as investment vehicles with a value indicated or not as investment vehicles identified with the notation "do not put on balance" and no value listed. Empire regularly provided updated spreadsheets to Kapustin identifying the cars in which it claimed an interest and the dollar value of that car and the cars in which it did not have an interest. Empire and Kapustin both relied on these spreadsheets. Upon arrival in Finland, investment vehicles would be delivered to CarCont, ending the ocean transportation of the vehicles, and held in the CarCont warehouse. When Kapustin delivered additional investment vehicles to Empire in New Jersey, investment vehicles in Finland would be released to Global Cargo Oy for eventual delivery to purchasers. *See, e.g.*, FF 67, 70. Vehicles that were not investment vehicles were released immediately by CarCont to Global Cargo Oy. FF 15. CarCont invoiced Global Cargo Oy for the unloading, customs, and storage fees. (Respondents' Reply to Complainants' Response to the June 29, 2016, Order to Supplement the Record at 198-237.)

The shipping documents in the record regarding the cars that Complainants claim to have purchased is consistent with Irina Kapustin's written instruction to "consign all the containers and

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[24] Global Cargo is the Kapustin company in Finland. FF 4.

cars to Carcont," FF 51, and the Kapustin/Empire course of conduct for over their two-year relationship. Each of the cars claimed by Complainants is identified on the Empire spreadsheet as an investment vehicle. FF 87 – GMC Acadia (Ovchinnikov); FF 100 – Jeep Compass (Rzaeva); FF 113 – Mercedes Benz (Nekipelov); FF 125 – Toyota Camry (Nurgazinov). Two of the four cars claimed by Complainants are explicitly identified in emails in the record from Svetlana of Global Auto as investment vehicles delivered to Empire in New Jersey to replace investment vehicles to be released in Finland. FF 70 – Jeep Compass (Rzaeva); FF 71 – Mercedes Benz (Nekipelov). The dock receipt/bill of lading for the container carrying each car identifies Empire as the shipper and CarCont as the consignee. FF 89 – GMC Acadia (Ovchinnikov); FF 102 – Jeep Compass (Rzaeva); FF 114 – Mercedes Benz (Nekipelov); FF 127 – Toyota Camry (Nurgazinov). Each car was transported from the United States to Finland pursuant to a sea waybill issued by MSC identifying Empire as the shipper and CarCont as the consignee. FF 91 – GMC Acadia (Ovchinnikov); FF 104 – Jeep Compass (Rzaeva); FF 117 – Mercedes Benz (Nekipelov); FF 129 – Toyota Camry (Nurgazinov). The tracking information for each shipment indicates that each container was discharged in Finland, went out the gate full, and was returned empty. FF 92 – GMC Acadia (Ovchinnikov); FF 105 – Jeep Compass (Rzaeva); FF 118 – Mercedes Benz (Nekipelov); FF 130 – Toyota Camry (Nurgazinov). The AES Direct Shipment Record for each car identifies Global Auto Inc. as the shipper and CarCont as the ultimate consignee. FF 93 – GMC Acadia (Ovchinnikov); FF 106 – Jeep Compass (Rzaeva); FF 119 – Mercedes Benz (Nekipelov); FF 131 – Toyota Camry (Nurgazinov). Each car was delivered to CarCont as required by the MSC sea waybill.

It would have been necessary for two events to have occurred for the contract of carriage to change this established procedure and identify Complainants as consignees on the contracts. First, shipper Kapustin would have had to tell carrier Empire that Kapustin wanted the four cars delivered to Complainants, not to CarCont. Second, assuming Kapustin did tell Empire it wanted these four cars to be delivered to Complainants as consignees, Empire would have had to accept the offer and agree to deliver the cars to Complainants. The burden of persuasion is on Complainants to show that Kapustin and Empire intended to treat the shipment of the four cars claimed by Complainants differently from the other investment vehicles shipped during their two year relationship.

In their response to the June 29, 2016, order to supplement the record, Complainants contend that four factors support their claims that they should have been identified as consignees and that the cars should have been delivered to them. These factors taken individually or together do not prove by a preponderance of the evidence that Complainants were intended to be consignees on the shipments and the cars should have been delivered to them.

Factors A and D are addressed together because they concern ownership of the cars.

A. The contracts of sale for the automobiles between G-Auto Sales, Inc. as seller and each of the Complainants as buyer, referenced above. By virtue of the contracts of sale, the buyers/complainants were the *ultimate* consignees for the automobiles.

D. The Memorandum and Order of the Honorable Sandra L. Townes (Appendix "B" which explains that ". . . the vehicles had already been pre-sold to customers overseas. . ." (p. 4 of the Memorandum and Order).

Complainants contend that they purchased the cars they claim as proved by:

unassailable documentary evidence, in the form of invoices executed by G-Auto Sales Inc., the sellers of the subject vehicles . . . as well as the records of wire transfers executed by Complainants reflecting payment for the subject vehicles . . . . Further, Respondents' apparent disavowal of knowledge or information concerning the purchase of the subject vehicles by Complainants from G-Auto Sales Inc. ("G-Auto") is palpably irrelevant in that there exists no reason as to why Respondents, who were consigned to have acted merely as the shipper of said automobiles would have such information in the first instance.

Respondents have falsely, fraudulently, and disingenuously claimed the existence of an alleged 'joint venture' between EUL and Mr. Hitrinov, and a specious entity euphemistically referred to by Respondents as the "Global Auto Enterprise". In so doing, Respondents have sought to conflate what were and are completely separate entities into a single alleged "conglomerate" despite the abject absence of a single document, communication, or any item of proof whatsoever as to the existence of said alleged 'joint venture'. Such attempted conflation, however, flies directly in the face of the facts that (1) the seller of the subject automobiles is plainly indicated on the aforementioned invoices as "G-Auto Sales Inc." and not some spurious alter ego manufactured by Respondents in a desperate attempt to succeed on their instant failed motion; (2) the aforementioned wire transfers were identically made out to "G-Auto Sales Inc.", thus further effectively eviscerating any false and fallacious claims as to either who the seller of the automobiles was, or the purchaser/owner.[25]

Neither is Respondents' false claim of ownership of the subject automobiles buttressed by reference to a loan allegedly made by Mr. Hitrinov to a wholly separate entity, to wit: Global Auto USA, Inc. Indeed, even assuming, arguendo, that the so-called conglomerate purchased the subject vehicles, the latter fails to obviate the proof that Complainants were the ultimate purchaser of the subject automobiles and owner of same prior to their being shipped.

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[25] The New Jersey court found that "Defendant Kapustin, as owner of corporate Global Defendants, exercised complete dominion and control over the corporations and used the corporations as his alter egos for his own purposes, making all the decisions including the decisions to defraud Plaintiffs." *Akishev v. Kapustin*, No. 13-cv-07152 (NLH) (AMD), slip op. at 9 (D.N.J. Dec. 8, 2016) (Opinion) (Doc. 395) (footnotes omitted), attached to Complainants' Status Report filed with the Commission January 15, 2017.

(Complainants' Response to Respondents' Motion for Judgment on the Pleadings at 6-7.) Complainants contend that the Kapustin company invoices and other documents demonstrate that they own the four cars they claim. (Complainants' Response to Respondents' Motion for Judgment on the Pleadings at 6-8.)

Each Complainant alleges that he or she purchased the car and has documents from a Kapustin company indicating a contract of sale, but no Complainant has a title or copy of a title indicating that ownership had been transferred to them. *See* FF 81-86 (Ovchinnikov); FF 94-98 (Rzaeva); FF 107-109 (Nekipelov); FF 120-122 (Nurgazinov). Although the New York court found that Kapustin pre-sold cars to customers overseas, the court did not find that Complainants purchased the cars that they claim. Furthermore, as recently stated by the New Jersey court: "As noted below, in yet another permutation of the extensive fraud scheme and whether he owned or had access to the car or not, Kapustin, by his own admission under oath, would often sell the same car to two different victims." *Akishev v. Kapustin*, No. 13-cv-07152 (NLH) (AMD), slip op. at 4 n.2 (D.N.J. Dec. 8, 2016) (Opinion) (Doc. 395), attached to Complainants' Status Report filed with the Commission January 15, 2017.)

Empire states that because Kapustin has a history of selling the same car more than once, discrepancies between Complainants' documents and their statements, and inconsistencies within Kapustin documents about which Kapustin company owned a car, there is "considerable doubt" about whether Complainants actually purchased the cars that they claim. (Respondents' Motion for Judgment on the Pleadings at 12 n.14.

> Indeed, as also discussed in greater detail in Respondents' Reply on Judgment on the Pleadings, the evidence shows that Complainants are not actually owners of the vehicles. Even apart from lacking the legal requirement of title, the Affirmations of Mr. Hitrinov and Mr. Kapustin, along with the documents, indicates that none of the Complainants has paid in full; rather, each Complainant still owes money to Global Auto Enterprise, including for the very transportation at issue here. And each of the cars was also "purchased" by someone else, which purchase is supported by invoices just like those put forward by Complainants.

(Respondents' Response to the Presiding Officer's June 29 Order to Supplement the Record (filed July 26, 2016) at 8. *See also* Respondents' Reply to Complainants' Response to the Presiding Officer's Order to Supplement the Record (filed Aug. 8, 2016) at 19-20.)

As discussed at length above, the Commission does not have jurisdiction to resolve Empire's claim that its loans to Kapustin gave it an ownership interest in the investment vehicles that prevented Kapustin from selling the vehicles, that Empire's claim that this claimed ownership interest gave its rights superior to purchasers of investment vehicles, or that Complainants completed their purchases of the cars from Kapustin. Evidence presented to the Commission could conclusively prove that Complainants fully paid what Kapustin charged for the cars, but this would not resolve the issue of whether the Kapustin/Empire relationship permitted Kapustin to sell cars in

which Empire claimed an interest or if Kapustin did sell cars in violation of the agreement, whether Empire (whose money was used to purchase the cars) or customers who purchased those cars had superior rights in the cars. This question is before the New Jersey court in the case filed by other Kapustin customers in the context of whether investment vehicles still in Empire's possession in New Jersey should be sold for the benefit of the plaintiff customers who have a judgment against Kapustin or Empire that loaned Kapustin the money to purchase the vehicles or may be sold by Empire to pay back its loan to Kapustin. *Id.* at 23.

Ownership of the cars is not relevant for Shipping Act purposes, however, and need not be determined by the Commission. Proof that ownership of the cars conveyed to each Complainant does not make it more or less likely that Kapustin wanted the cars to be delivered directly to Complainants and instructed Empire to deliver the cars directly to Complainants. A person who sells cars to overseas customers could have legitimate reasons for delivering the cars to its overseas affiliate, not the purchaser, such as verifying that the car is in proper working order after the transportation and before it is delivered to the customer. As the district court found, Kapustin also could have an illegitimate reason – the same car had been sold to two persons.

Proof that ownership conveyed to each Complainant also does not make it more or less likely that Empire entered into a contract of carriage to deliver the cars to Complainants; that is, even if Kapustin instructed Empire to deliver these four cars to Complainants, Empire agreed to deliver them to Complainants. The contemporaneous records indicate that at the time the cars were delivered to Empire in New Jersey, Empire considered them to be investment vehicles to be held in New Jersey or Finland until replacement investment vehicles were delivered to Empire in New Jersey. Whether Empire's claim against Kapustin is legally correct or incorrect, it is not plausible to believe that Empire would agree to treat these four cars differently from the hundreds of investment vehicles previously shipped and deliver them to Complainants instead of holding them until their value was replaced in New Jersey.[26]

Complainants rely on Customs and Border Protection procedures to support their contention that they should have been identified as consignees.

> B. Additionally, Complainants rely upon the document entitled "U.S. Customs and Border Protection Field Operations, New York Informational Pipeline No. 08-012-NWK", annexed to Complainants' Notice of Filing of May 4, 2016 as Appendix "4", which provides Procedures for Exporting Used

[26] On September 6, 2016, counsel for Complainants sought issuance of a subpoena *duces tecum* that would require Customs and Border Protection (CPB) to produce copies of the titles of the cars in its possession, apparently expecting the titles in CPB's possession to conflict with the copies already filed by the parties and prove that title had transferred to Complainants. On October 5, 2016, the undersigned held a telephone conference with counsel about this subpoena. Because proof of ownership of the cars would not make it more or less likely that Complainants were consignees on the shipments, the subpoenas were not signed.

Vehicles and explains that respondents were required to provide consignee information to CBP which ". . . must be legible and complete."

The CBP Informational Pipeline states:

- Required documentation consists of the original certificate of title, a duplicate of the certificate of title (front and back) and a dock receipt, bill of lading or Intent to Export form, which must contain identifying vehicle information and endorsement by the export carrier which indicates the carrier's receipt and possession of the vehicle.

- Dock Receipts must not be altered in any way. Original Pier/Date stamps, VIN Numbers and Shipper/Consignee information must be legible and complete.

(Complainants' Notice of Filing (May 4, 2016), Appendix 4 p. 2.)

The dock receipts, MSC sea waybills, and AES Direct Shipment Records issued for the shipments of the cars that Complainants claim legibly and completely identifies CarCont as the consignee of each shipment. The requirements set forth in the CBP Informational Pipeline do not provide evidence that Kapustin intended for Complainants to be consignees on the shipments.

Complainants contend that the Declaration of Irina Kapustina, Kapustin's wife, filed in the New York case provides support for identifying Complainants as consignees.

C. The Declaration in Support of Order to Show Cause for Preliminary Injunctive Relief, of Irina Kapustina, President of Effect Auto Sales Inc., dated May 29, 2013 (from the matter of *Global Auto Inc. et al., v. Michael Hitrinov et al.*, U.S.D.C. – E.D.N.Y. Docket No.: 13-cv-2479) a copy of which is annexed hereto as Appendix "C", which explains that the subject automobiles ". . . should have been released and the ultimate end purchaser should have received their vehicle in a timely fashion. . ." (p. 5, ¶ "9" of the Declaration of Irina Kapustina).

Irina Kapustina's declaration was one of three nearly identical declarations filed with the New York court, *Global Auto v. Hitrinov*, No. 13-cv-2479, Memorandum at 2 (E.D.N.Y. Nov. 7, 2013) (Memorandum and Order) (Doc. 38) (*see* Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix C), in support of the Kapustin companies' motion for a preliminary injunction at a time. The declarations were signed at a time when FMC Complainants' counsel represented the Kapustin companies.

In her declaration, Kapustina states:

> In Michael Hitrinov's declaration in support of his claim that there was an agreement that he and/or EUL would have an ownership stake in the vehicles, he states that "he was concerned about his investment" and therefore, agreed with Plaintiffs, that EUL would be given certificates of title to each vehicle. . . . This is a false and misleading impression, that the act of possessing certificate of title was a negotiated act that was to secure and protect EUL and/or Hitrinov from Plaintiff's from selling vehicles without their knowledge. EUL obtained certificate of title for all of the vehicles because they are and were required to so by law. U.S. Customs requires that the shipper must be in possession of the original title before a vehicle may be exported.

(Complainants' Response to Order for Parties to Supplement the Record (filed July 27, 2016) Appendix C ¶ 2.) At no point in the declaration does Kapustina state that the Kapustin instructed Empire to deliver *any* cars directly to Kapustin customers upon arrival in Finland, much less the cars that Complainants claim; that is, Kapustina does not state that Kapustin intended for their customers (including Complainants) to be consignees of the ocean shipments of the cars. In the face of several emails from Svetlana at Global Auto to Empire regarding titles, many of which link the delivery of titles to Empire to the release of investment vehicles in Finland, Kapustina is not credible when she claims that delivery of the car titles was not for Empire's protection. *See* FF 20, 21, 31, 34, 66, 70 (Jeep Compass claimed by complainant Rzaeva), 71, 74, 75.

4. Conclusion.

The contemporaneous records of the Kapustin-Empire relationship indicate that Kapustin and Empire had established a process pursuant to which Empire would secure its loan to Kapustin by maintaining an inventory of investment vehicles with value approximating the loan. New investment vehicles would be substituted in New Jersey for vehicles in Finland before they would be released to Global Cargo Oy, Kapustin's company in Finland, for delivery to a customer. To maintain this inventory, cars were consigned for the ocean transportation to CarCont in Finland, not to Global Cargo Oy.

Complainants have the burden of presenting evidence that would establish unlike the other Kapustin cars shipped to Finland, Complainants were intended to be the consignees for the shipments of the four cars. Complainants have not identified evidence that would support a finding that shipper Kapustin 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. Therefore, the complaints are dismissed.

D. Claims That Respondents Violated Sections 40301, 40302, 40501, 40701(a), 41104(2), 41101(3), 41104(4), 41104(8), 41104(9), 41104(10), 41104(11), 41106(2), and 41106(3) Are Dismissed with Prejudice.

Assuming that it were determined that the record supports Commission subject matter jurisdiction over the complaints, Complainants have abandoned claims of violation of most of the sections alleged by failing to respond to the arguments in Respondents' motion for judgment on the pleadings. For two sections, the complaints fail to state claims for relief.

1. Complainants abandoned claims of violation of sections 40301, 40302, 40501, 40701(a), 41104(2), 41101(3), 41104(4), 41104(8), 41104(9), 41104(11), 41106(2), and 41106(3).

Complainants alleged that Respondents violated sections 40301, 40302, 40501, 40701(a), 41102(c), 41104(2), 41101(3), 41104(4), 41104(8), 41104(9), 41104(11), 41106(2), and 41106(3) of the Shipping Act. Empire moves for judgment on the pleadings on all of these claims except sections 40301, 40302, and 40501. Complainants did not respond to Empire's arguments for dismissal of these sections in their opposition to the motion. In their response to the motion, Complainants did not argue that Empire violated sections 40301, 40302, and 40501, and the evidence in the record does not suggest that it did..

> [A party's] failure to brief and argue [an] issue is grounds for finding that the issue has been abandoned. *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1030 (5th Cir. 1982) (citing *U.S. v. Indiana Bonding & Surety Co.*, 625 F.2d 26, 29 (5th Cir. 1980) (finding that "even though [an] issue was listed as one of the defendant's contentions in the pretrial order, and was thus presumably triable, [the defendant's] failure to present evidence in support of the defense before the district court precludes our review of it [on appeal]")). *Cf. McMaster v. United States*, 177 F.3d 936, 940-41 (11th Cir. 1999) (noting that a claim may be considered abandoned when the allegation is included in the plaintiff's complaint, but he fails to present any argument concerning this claim to the district court); *Lyes v. City of Riviera Beach, Fla.*, 126 F.3d 1380, 1388 (11th Cir. 1997) (noting that "'the onus is upon the parties to formulate arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned'") (citation omitted), *reh'g granted and vacated by*, 136 F.3d 1295 (1998), reinstated by, 166 F.3d 1332, 1336 (11th Cir. 1999) (*en banc*); *Road Sprinkler Fitters Local Union No. 669 v. Indep. Sprinkler Corp.*, 10 F.3d 1563, 1568 (11th Cir. 1994) (concluding that a district court "could properly treat as abandoned a claim alleged in the complaint but not even raised as a ground for summary judgment").

Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1326 (11th Cir. 2000).

a. Sections 40301 and 40302.

In paragraph 24 of FMC No. 15-11 and Part III.B of Inf. No. 1953(I) of the Complaints, Complainants allege that Respondents violated sections 40301 and 40302 of the Act. Sections 40301 and 40302 apply to certain agreements between or among ocean common carriers, certain agreements between or among marine terminal operators, and certain agreements between or among one or more marine terminal operators and one or more ocean common carriers, and the Act's requirement that those agreements be filed with the Commission. The complaints do not address these sections in Part V where Complainants allege violations of the Shipping Act.

While Empire did not address these sections in their motion for initial decision on the pleadings, Complainants did not argue that Empire violated these sections. Furthermore, nothing in the record suggests that Empire entered into the kind of agreement regulated by these sections. Therefore, Complainants are deemed to have abandoned the claims. The claims that Empire violated sections 40301 and 40302 are dismissed with prejudice.

b. Section 40501.

In paragraph 24 of FMC No. 15-11 and Part III.B of Inf. No. 1953(I) of the Complaints, Complainants allege that Respondents violated section 40501 of the Act. Section 40501 sets forth general rate and tariff requirements. The complaints do not address these sections in Part V.

While Empire did not address this section in its motion for initial decision on the pleadings, Complainants did not argue that Empire violated these sections. Therefore, Complainants are deemed to have abandoned the claims. The claims that Empire violated section 40501 are dismissed with prejudice.

c. Section 40701(a).

The complaints allege that Respondents violated section 40701(a) of the Act. Section 40701(a) controls the activities of controlled carriers. The Act defines the term controlled carrier.

> The term "controlled carrier" means an ocean common carrier that is, or whose operating assets are, directly or indirectly, owned or controlled by a government, with ownership or control by a government being deemed to exist for a carrier if –
>
> (A) a majority of the interest in the carrier is owned or controlled in any manner by that government, an agency of that government, or a public or private person controlled by that government; or
>
> (B) that government has the right to appoint or disapprove the appointment of a majority of the directors, the chief operating officer, or the chief executive officer of the carrier.

46 U.S.C. § 40102(8).

Empire moves for initial decision on the pleadings, arguing that the complaints do not allege that Empire is a controlled carrier as defined by the Act. (Respondents' Motion for Judgment on the Pleadings at 16-17). Complainants do not respond to this argument. Therefore, Complainants are deemed to have abandoned the claims. The claims that Empire violated section 40701(a) are dismissed with prejudice.

d. Section 41104(2).

The complaints allege that Respondents violated section 41102(2) of the Act. Section 41102(2) prohibits a common carrier from providing service in the liner trade that is not in accordance with the rates, charges, classifications, rules, and practices contained in a published tariff or a service contract or under a tariff or service contract that has been suspended or prohibited.

Empire moves for initial decision on the pleadings because Complainants do not allege that Empire operated in a liner trade or that the transportation was provided under a tariff or service arrangement. Empire also contends that there is no nexus between the alleged violation and the loss of the cars. (Respondents' Motion for Judgment on the Pleadings at 19). Complainants do not respond to these arguments. Therefore, Complainants are deemed to have abandoned the claims. The claims that Empire violated section 41104(2) are dismissed with prejudice.

e. Section 41104(3).

The complaints allege that Respondents violated section 41102(3) of the Act. Section 41102(3) prohibits a common carrier from "retaliat[ing] against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason." 46 U.S.C. § 41102(3).

Empire argues that section 41102(3) "applies only to retaliatory acts of a carrier against a shipper who has sought the services of another carrier," (Respondents' Motion for Judgment on the Pleadings at 19, *citing Edaf Antilles, Inc. v. Crowley Caribbean Logistics LLC*, 33 S.R.R. 710, 720-721 (ALJ, Admin. Final 2014), and move for judgment because Complainants do not allege Empire retaliated because a Complainant patronized another shipper. Complainants do not respond to this argument. Therefore, Complainants are deemed to have abandoned the claims. The claims that Empire violated section 41104(3) are dismissed with prejudice.

f. Sections 41104(4), (8), and (9).

The complaints allege that Respondents violated sections 41102(4), (8), and (9) of the Act. Sections 41102(4), (8), and (9) prohibit a common carrier from engaging in any unfair or unjustly

discriminatory practice or giving any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage.

Empire contends that a complainant alleging violation of one of these sections must establish that (1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury. (Respondents' Motion for Judgment on the Pleadings at 20, *citing Ceres Marine Terminal, Inc. v. Md. Port Admin.*, 27 S.R.R. 1251, 1270 (FMC 1997).) Empire moves for initial decision on the pleadings because Complainants do not allege that any other similarly situated person received better treatment that was not justified by transportation factors and have not explained how any different treatment was the proximate cause of their alleged injuries. Complainants do not respond to this argument. Therefore, Complainants are deemed to have abandoned the claims. The claims that Empire violated sections 41104(4), (8), and (9) are dismissed with prejudice.

g. Section 41104(11).[27]

The complaints allege that Respondents violated section 41104(11) of the Act. Section 41104(11) prohibits a common carrier from knowingly and willfully accepting cargo from or transporting cargo for the account of an ocean transportation intermediary that does not have a tariff and a bond, insurance, or other surety as required by section 40902 of the Act.

Empire argues that the complaints do not identify any NVOCC with or without a tariff and a bond for which Respondents are alleged to have transported cargo. (Respondents' Motion for Judgment on the Pleadings at 21.) Complainants do not respond to this argument. Therefore, Complainants are deemed to have abandoned the claims. The claims that Empire violated section 41104(11) are dismissed with prejudice.

h. Sections 41106(2) and (3).

The complaints allege that Respondents violated sections 41106(2) and (3) of the Act. Sections 41106(2) and (3) prohibit marine terminal operators from giving an unreasonable preference and refusing to deal.

Empire argues that the complaints do not allege that Empire is a marine terminal operator. (Respondents' Motion for Judgment on the Pleadings at 21.) Complainants do not respond to this argument. Therefore, Complainants are deemed to have abandoned the claims. The claims that Empire violated sections 41106(2) and (3) are dismissed with prejudice.

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[27] The complaints cite twice to section 41104(10), but then quote the language of section 41104(11). FMC No. 15-11 Complaint V.C and V.C.(vi); Inf. No. 1953(I) Claim V.C and V.C.(vi).

2. The Complaints Fail to State Claims of Violations of Section 41104(10).

The complaints allege that Respondents violated sections 41104(10) of the Act. Section 41104(10) prohibits a common carrier from unreasonably refusing to deal or negotiate.

> The Act does not guarantee the right to enter into a contract, much less a contract with any specific terms; such a right has not existed either before or since the passage of OSRA. All that is required is that common carriers, ocean transportation intermediaries and marine terminal operators refrain from "shutting out" any person for reasons having no relation to legitimate transportation-related factors.

New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans, 29 S.R.R. 345, 351 (ALJ 2001), *aff'd*, 29 S.R.R. 1066 (FMC 2002).

Empire contends that Complainants do not identify what Empire refused to negotiate or what obligation they had to negotiate, and argue that the complaints merely paraphrase the language of the Act and state legal conclusions. (Respondents' Motion for Judgment on the Pleadings at 20.) Complainants respond that to prove a violation, a complainant:

> must establish that the respondent is a common carrier within the meaning of the Act. Second, a complainant must establish that the common carrier unreasonably refused to deal or negotiate with the complainant. "This requires a two-part inquiry: whether [the common carrier] refused to deal or negotiate, and, if so, whether its refusal was unreasonable." *See, Global Link [Logistics], Inc. v. Hapag-Lloyd [AG]*, 2014 WL 5316345, FMC No. 13-07 (ALJ April 17, 2014) (Initial Decision Granting Respondent's Motion to Dismiss).
>
> It is respectfully submitted that the facts as pleaded in the Complaint, speak for themselves on this issue. It is undisputed that Respondents [EUL] and Hitrinov are "a common carrier". As set forth in detail in the Complaint, the Complainants contacted Respondents to obtain release of the vehicles. Subsequent thereto, the Respondents not only refused to release the vehicles, but stated that the vehicles would not be released due to an alleged loan to Mr. Kapustin, completely unrelated to the ocean freight for these vehicles. After Complainants' multiple requests and attempts to obtain release of the vehicles, the Respondents then converted the subject automobiles and sold them to third parties.

(Complainants' Response to Motion at 6.)

Construing the complaints in the light most favorable to Complainants and accepting all well-pleaded facts alleged in the complaints as true, the complaints do not make a claim that Complainants ever attempted to ship any cargo internationally by water or that Empire shut them out of opportunities for international transportation of cargo by water for reasons having no relation to

legitimate transportation-related factors. Therefore, the complaints fail to state claims of violation of section 41104(10). The claims that Empire violated sections 41104(10) are dismissed with prejudice.

3. Section 41102(c).

If it were determined that Complainants were consignees on the shipments, the complaints state claims of violation of section 41102(c).

VI. ATTORNEY FEES.

"In any action brought under section 41301, the prevailing party may be awarded reasonable attorney fees." 46 U.S.C. § 41305(e). I find that because the complaints have been dismissed, respondents Michael Hitrinov a/k/a Michael Khitrinov and Empire United Lines Co., Inc., are prevailing parties in this proceeding and may be awarded reasonable attorney fees. "In order to recover attorney fees, the prevailing party must file a petition within 30 days after a decision becomes final. For purposes of this section, a decision is considered final when the time for seeking judicial review has expired or when a court appeal has terminated." 46 C.F.R. § 502.254(c)(1). *See also Organization and Functions; Rules of Practice and Procedure; Attorney Fees, Final rule*, 81 Fed. Reg. 10508 (Mar. 1, 2016).

ORDER

Upon consideration of Respondents' Motion for Judgment on the Pleadings, Complainants' opposition thereto, the other filings by the parties directed to the motion for judgment on the pleadings, the record herein, and for the reasons stated above, it is hereby

ORDERED that the claims against respondent CarCont, Ltd., be **DISMISSED** pursuant to 46 C.F.R. § 502.113(d). It is

FURTHER ORDERED the Motion for Judgment on the Pleadings filed by respondents Michael Hitrinov a/k/a Michael Khitrinov and Empire United Lines Co., Inc. be **GRANTED**. It is

FURTHER ORDERED that the complaint filed in *Igor Ovchinnikov, Irina Rzaeva, and Denis Nekipelov v. Michael Hitrinov a/k/a Michael Khitrinov, Empire United Lines Co., Inc., and CarCont, Ltd.*, FMC No. 15-11 be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that the claim filed in *Kairat Nurgazinov v. Michael Hitrinov a/k/a Michael Khitrinov, Empire United Lines Co., Inc., and CarCont, Ltd.*, FMC No. 1953(I) be **DISMISSED WITH PREJUDICE**.

Clay G. Guthridge
Administrative Law Judge