

FEDERAL MARITIME COMMISSION

MAVL CAPITAL INC., IAM AL GROUP
INC., AND MAXIM OSTROVSKIY,
COMPLAINANTS

v.

MARINE TRANSPORT LOGISTICS, INC.
AND DMITRY ALPER, *RESPONDENTS*.

Docket No. 16-16

Served: October 29, 2020

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

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This case is before the Commission on Complainants' exceptions to the Administrative Law Judge's (ALJ) sua sponte dismissal of claims alleging that Respondents Marine Transport Logistics, Inc. (MTL) and Dmitry Alper violated 46 U.S.C. §§ 41102(c) and 41104(a)(3) and (10). The dismissed claims relate to a 2006 Mercedes stored in MTL's New Jersey warehouse and three motorcycles stored by a competitor non-vessel-operating common carrier (NVOCC). Complainants allege that Respondents converted the Mercedes by surreptitiously shipping it to Dubai,

United Arab Emirates, where they intended to sell it and keep the proceeds. Complainants further allege that Respondents interfered with Complainants' arrangements to have a competitor NVOCC ship the motorcycles overseas.

The ALJ addressed the Mercedes and motorcycle claims in an Initial Decision Partially Dismissing the Complaint (Initial Decision or I.D.). The ALJ dismissed the § 41102(c) claim regarding the Mercedes for lack of jurisdiction and failure to state a claim. The ALJ dismissed the § 41104(a)(3) claim regarding the motorcycles for failure to state a claim. The ALJ dismissed all remaining claims regarding the Mercedes and motorcycles as abandoned because Complainants did not address those claims in responding to the ALJ's show cause order. Complainants filed exceptions to some, but not all, of the ALJ's findings.

Complainants also petition the Commission for leave to supplement the record with a bill of lading for the Mercedes and a declaration offered to show that MTL assumed responsibility for transporting the Mercedes. MTL opposes the petition, and Complainants seek leave to file a reply.

For the reasons discussed below, the Commission: (1) reverses the ALJ's dismissal of the § 41102(c) claim regarding the Mercedes and remands that claim for further proceedings; (2) affirms the dismissal of the § 41104(a)(10) claim regarding the Mercedes; and (3) affirms the dismissal of the § 41104(a)(3) claim regarding the motorcycles. The Commission denies the petition to submit additional evidence and Complainants' motion for leave to file a reply in support of that petition.

II. BACKGROUND

A. Factual Background

1. Parties

Complainant MAVL Capital Inc. (MAVL) is a New York corporation that imports, repairs, and sells vehicles in the overseas market. Compl. ¶ 1.¹ Complainant IAM & AL Group, Inc. (IAM) is an Indiana corporation that contracted with MTL to transport a 2011 Porsche to a buyer in Kotka, Finland. *Id.* ¶¶ 2, 37-38. Complainant Maxim Ostrovskiy is a principal of both MAVL and IAM and resides in Moscow, Russia. *Id.* ¶ 3. Respondent MTL is a New York corporation and a licensed NVOCC (FMC License No. 018709). *Id.* ¶¶ 4, 6, 9. Respondent Dmitry Alper serves as MTL's Director of Operations and oversees daily operations. *Id.* ¶¶ 5, 7-8.

2. 2006 Mercedes SL65

In December 2012, MAVL imported a 2006 Mercedes SL65 from Germany, retained MTL as the "receiving agent," and had the vehicle delivered to MTL's New Jersey warehouse. *Id.* ¶¶ 27-29.² Complainants imported the Mercedes "so that maintenance could be performed on the vehicle after which it would subsequently be shipped overseas." *Id.* ¶ 27. Mr. Ostrovskiy informed MTL of this plan when MAVL stored the Mercedes in December 2012, but he did not specify a timeline or proposed shipping date at that time. *Id.* ¶ 29; Ostrovskiy Certif. ¶¶ 7-10. Mr. Ostrovskiy provided MTL with the certificate of title which is required for export. Ostrovskiy Certif. ¶ 9.

MTL charged MAVL for storage of the Mercedes pursuant to MTL's NVOCC tariff. *Id.* ¶ 4. The storage charges that MTL

¹The facts recited in this memorandum opinion are taken from the complaint and from documents incorporated by reference in or integral to the complaint, documents subject to official notice under 46 C.F.R. § 502.226(a), and documents treated as an amendment to the complaint. Those documents include a declaration from Mr. Ostrovskiy (Ostrovskiy Certif.) and MTL's tariff.

²MTL did not arrange the Mercedes' transportation from Germany to the United States, and that transportation is not at issue. I.D. at 13.

imposed were consistent with MTL's tariff charges for cargo earmarked for export. *Id.* ¶¶ 4, 11. For example, MAVL received 30 days free storage allowed under the MTL tariff for vehicles "received for US export shipment." *Id.*; Complainants' Show Cause Resp. App. A (MTL Tariff, Rule 2-140). "Beyond 30 days," MTL's tariff establishes rates of \$10.00 per day for vehicles stored at its Bayonne, New Jersey facility. *Id.* The MTL tariff also links 30 days free storage to the need to provide the carrier with the vehicle title without which the "vehicle will not be loaded into a container." *Id.* Following the initial 30-day period, MTL discounted the storage rates for the Mercedes by fifty percent, which Mr. Ostrovskiy attributed to the "parties' ongoing business relationship." Ostrovskiy Certif. ¶ 12.

Six months after the Mercedes arrived in MTL's New Jersey facility, Mr. Ostrovskiy asked MTL to produce the Mercedes for his inspection, but MTL failed to do so. *Id.* ¶ 13. Whereupon Mr. Ostrovskiy directed MTL to release the Mercedes and ship it to Dusseldorf, Germany. *Id.* ¶¶ 14-15. Several months later, Mr. Ostrovskiy learned that MTL had not followed these instructions, but had in fact shipped the Mercedes to Dubai without his knowledge or consent for the purpose of selling it and keeping the proceeds. *Id.* ¶¶ 16-17. According to Complainants, MTL has refused to provide them with documents verifying the sale of the Mercedes or confirming the details of the alleged sales transaction. Compl. ¶¶ 31-35. MTL claimed that the Mercedes was seized and sold consistent with its house bill of lading under a maritime lien for outstanding charges. Ostrovskiy Certif. ¶¶ 5-6.

3. Harley Davidson Motorcycles

MAVL purchased three Harley Davidson motorcycles in June/July 2013 and received the original titles. Compl. ¶¶ 47-48. Having lost confidence in MTL by this time, MAVL/Mr. Ostrovskiy

hired Unitrans-PRA, another NVOCC, to ship the motorcycles overseas, and the motorcycles were stored in Unitrans' facility awaiting shipment. *Id.* ¶ 49. According to Complainants, Mr. Alper fraudulently contacted Unitrans and directed it to "hold" the motorcycles and not to ship them abroad, causing Complainants to incur an additional \$22,920 in storage fees. *Id.* ¶¶ 50-51.³

B. Procedural History

Complainants filed this action in August 2016 seeking over \$180,000 in reparations for alleged violations of 46 U.S.C. §§ 41102(c) and 41104(a)(3) and (10). After Respondents answered the complaint, the ALJ issued a show cause order on September 15, 2016. The ALJ directed Complainants to show cause why the claims regarding the Mercedes and the three motorcycles should not be dismissed for lack of jurisdiction or failure to state a claim because the allegations did not appear to involve ocean-borne transportation of those vehicles between the United States and a foreign port, and in fact the allegations supported a contrary inference. Show Cause Order at 6-7. According to the facts alleged, the ALJ stated, Respondents "unlawfully converted" the Mercedes by removing it from storage in the U.S. and shipping it to Dubai without Complainants' consent. *Id.* at 6. Further, the ALJ stated, the complaint "does not appear to allege a Shipping Act violation by MTL or [Mr.] Alper," because "Complainants do not allege that they hired or paid Respondents to ship Complainants' motorcycles overseas or that Unitrans . . . was Respondents' agent for transporting the motorcycles." *Id.* at 7.

Complainants filed a brief in response to the show cause order supplemented with supporting documents. Complainants' additional submissions included: (1) Mr. Ostrovskiy's declaration;

³Complainants also allege that Respondents shipped a Porsche to Dubai without Complainants' consent. Compl. ¶¶ 37-46. The ALJ did not dismiss the claims regarding the Porsche. Rather, those claims are stayed pending the present appeal. I.D. at 28.

(2) excerpts from MTL's tariff; (3) a Maersk bill of lading for transportation of the Mercedes from the U.S. to Dubai; (4) discovery and other documents from *MAVL Capital Inc. v. Marine Transport Logistics Inc.*, Docket No. 13-cv-7110 (E.D.N.Y. Dec. 12, 2013);⁴ and (5) various documents reflecting fees charged and other dealings/communications between the parties. MTL filed a brief in support of the show cause order and an appendix of supporting documents. MTL's appendix includes: (1) the docket sheet and the complaint filed in the related federal court action; and (2) email communications. Mr. Alper also filed a brief in support of the show cause order.

On January 17, 2017, the ALJ dismissed the § 41102(c) claim regarding the Mercedes with prejudice for lack of jurisdiction, finding that MAVL did not have a contract of carriage with MTL for that vehicle. I.D. at 20-21. The ALJ also determined that Complainants failed to state a claim under § 41104(a)(3) with respect to the motorcycles. *Id.* at 26-27. The remaining claims regarding the Mercedes and the motorcycles were dismissed as abandoned. *Id.* at 3.

In timely-filed exceptions, Complainants argue that the Commission has jurisdiction over the § 41102(c) claim regarding the Mercedes because the parties had an implied contract of carriage. Complainants' Br. in Support of its Exceptions to Initial Decision (Exceptions) at 13-20. Complainants also assert that they have a cause of action regarding the Mercedes under § 41104(a)(10) because Respondents refused to negotiate an unspecified debt and sold the Mercedes to satisfy it. *Id.* at 9-12, 16. Complainants do not challenge the ALJ's ruling dismissing the § 41104(a)(3) claim

⁴Almost three years before filing the present Shipping Act complaint, MAVL filed a related action against MTL in federal district court alleging that MTL and other parties violated various federal and state laws by unlawfully asserting a lien against the Mercedes and the Porsche as part of a comprehensive scheme to deprive Complainants of their property and collect bogus payments. The court ultimately dismissed the action. *See MAVL Capital, Inc. v. Marine Transp. Logistics, Inc.*, 130 F. Supp. 3d 726 (E.D.N.Y. 2015).

regarding the motorcycles. Respondents filed separate briefs opposing Complainants' exceptions and argue that the ALJ's decision should be affirmed in all respects. Reply to Complainants' Exceptions to the January 17, 2017 Initial Decision (Exceptions Reply); Respondent Dmitry Alper's Br. in Opposition to Complainants' Exceptions to Initial Decision.

Complainants also petitioned the Commission to reopen the proceedings to allow additional evidence proving they had an implied contract of carriage for the Mercedes. Respondents oppose reopening the proceedings, and Complainants seek leave to file a reply to Respondents' brief opposing their petition.

III. DISCUSSION

A. Legal Standards

1. Standard of Review and Burden of Proof

When the Commission reviews exceptions to an ALJ's Initial Decision, it has "all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). The Commission reviews the ALJ's findings de novo and can make additional findings, including in cases where, as here, the ALJ dismissed claims for lack of jurisdiction or failure to state a cause of action. *Id.*; see also *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J. (Maher II)*, FMC Docket No. 12-02, 2015 FMC LEXIS 43, *110-*11 (FMC 2015). Complainants bear the burden of proving by a preponderance of the evidence that the Commission has jurisdiction to adjudicate their claims. *River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 188, 201, 1998 FMC Lexis 16, *66-67 (ALJ 1998), *aff'd* 28 S.R.R. 751, 1999 FMC Lexis 32, *67 (FMC 1999); see also 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Maher Terminals, LLC v. Port Auth of N.Y. & N.J. (Maher I)*, FMC Docket No. 12-02, 2014 FMC LEXIS 35, *41 (FMC 2014).

2. Standards for Dismissal

The ALJ sua sponte ordered Complainants to show cause why the allegations in the complaint regarding the Mercedes and three motorcycles should not be dismissed for lack of subject matter jurisdiction or for failure to state a claim. In the Initial Decision, the ALJ noted that the Commission looks to Federal Rule of Civil Procedure 12(b)(1) when considering dismissals based on lack of subject matter jurisdiction, and to Rule 12(b)(6) when considering dismissals based on failure to state a claim. I.D. at 5.

The ALJ also acknowledged that under Rule 12(b)(1), there are two different types of jurisdictional attacks. In a factual attack, a court may consider matters outside the pleadings. I.D. at 5; *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (“In a factual challenge, the defendant argues ‘that the jurisdictional allegations of the complaint [are] not true,’ providing the trial court the discretion to ‘go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations.’” (quoting *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982))). In that situation, the presumption of truthfulness normally granted allegations does not apply. *Id.*

In a facial attack on subject matter jurisdiction, the court examines whether the complaint has sufficiently alleged subject matter jurisdiction. *See id.* Consequently, complainants have the same procedural protection afforded under Rule 12(b)(6). *Beck*, 848 F.3d at 270. In other words, all well-pleaded allegations are accepted as true and interpreted in the light most favorable to the complainant. *See Erby v. United States*, 424 F. Supp. 2d 180, 182 (D.D.C. 2006).

The ALJ correctly considered the show cause order as a challenge to the pleadings, i.e., a facial challenge. I.D. at 5-6. The jurisdictional and pleading issues were raised sua sponte before any discovery in this case. And the jurisdictional question at issue – whether MAVL was acting as a regulated entity with respect to the conduct at issue – overlaps with the merits of a claim under 46 U.S.C. §§ 41104 and 41102(c), both of which have as elements that

the respondent is a regulated entity. When, as here, jurisdictional facts are intertwined with facts central to the merits of a claim, the Rule 12(b)(6) standard applies. *See Kerns v. United States*, 585 F.3d 187, 192-93 (4th Cir. 2009).

Under Fed. R. Civ. P. 12 (b)(6), the facts alleged are taken as true and all reasonable inferences are drawn in the complainant's favor. *Maher II*, 34 S.R.R. at 54, 2015 FMC LEXIS 43 at *36. The Commission may consider not only factual allegations within the complaint but also documents attached to the complaint, incorporated by reference, or integral to the claims alleged, and matters subject to official notice. *Maher II*, Docket No. 12-02, 2015 FMC LEXIS 43, *36, *110-*111 (FMC 2015).⁵ The Commission's Rules of Practice and Procedure allow it to take "[o]fficial notice of such matters as might be judicially noticed by the courts, or of technical or scientific facts within the general knowledge of the Commission as an expert body." 46 C.F.R. § 502.226(a).

The facts alleged must "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics*, 32 S.R.R. 126, 136 (FMC 2011). The facts alleged must allow the Commission to reasonably infer that respondent may be liable for the conduct alleged and provide "fair notice" of the nature of the claims and bases for asserting them. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009); *Twombly*, 550 U.S. at 555.

B. Section 41102(c) Claim Regarding the Mercedes

Complainants allege that Respondents violated 46 U.S.C. § 41102(c) by shipping the Mercedes to an unauthorized foreign port where they intended to sell it and keep the proceeds. Compl. ¶¶ 27-

⁵Like the ALJ, in ruling on Complainants' exceptions, the Commission considers the Ostrovskiy certification as an amendment to the complaint. *See* 46 C.F.R. § 502.66(a) ("Amendments or supplements to any pleading (complaint . . .) will be permitted or rejected, either in the discretion of the Commission or presiding officer.").

30. Section 41102(c) provides that common carriers, marine terminal operators, and ocean transportation intermediaries (including NVOCCs) “may not fail to establish, observe, and enforce just and reasonable regulations and practices related to or connected with receiving, handling, storing or delivering property.” 46 U.S.C. § 41102(c).

The ALJ dismissed Complainant’s § 41102(c) claim regarding the Mercedes because “Complainants do not state facts that would support a finding that they entered into a contract of carriage to transport the Mercedes.” I.D. at 3, 14, 15, 20. The ALJ found the complaint devoid of facts showing that MAVL had a contract with MTL to ship the Mercedes overseas as distinguished from a contract to store it in the United States. *See id.* at 14-15, 20-21. The ALJ was not persuaded by Complainants’ circumstantial evidence or their theory that Respondents’ alleged assertion of a maritime lien against the Mercedes demonstrated a contract of carriage. *See id.* at 15-20. The ALJ’s reasoning in this regard is premised on the notion that parties’ arrangement for storage of the Mercedes was not connected to international ocean transportation.

Because the ALJ premised dismissal largely, if not exclusively, on the absence of a contract of carriage, the parties’ arguments on appeal focus primarily on whether there was an express or implied contract of carriage to ship the Mercedes to overseas. In that vein, they discuss whether MTL had a maritime lien against the Mercedes and whether the alleged conversion occurred in the United States or after the Mercedes arrived in Dubai.

The ALJ erred, however, in framing the question as whether the parties had a contract to ship the Mercedes overseas. Rather, as the Commission explained in *Crocus Investments, LLC v. Marine Transport Logistics, Inc.*, 1 F.M.C. 2d 403, 415 (FMC 2018), the jurisdictional question in § 41102(c) cases is whether the respondent was acting as a regulated entity when it allegedly violated the Shipping Act. In *Crocus*, the Commission held that “[t]he relevant inquiry here is not . . . limited to whether there was a contract for

overseas shipment” and stated that focusing on the existence of a contract or whether the cargo actually left the U.S. for a foreign port “unduly narrows the scope of the inquiry to two factors.” *Id.* “Whether the [cargo] was actually transported to a foreign port or the subject of a contract to do so is highly relevant to this analysis, but not necessarily determinative.” *Id.* The Commission noted that a broad swath of conduct falls within the scope of NVOCC activities. *Id.* (citing 46 C.F.R. 515.2(k)).

Properly framed, the question is whether Respondent MTL was a common carrier with respect to the allegations regarding the Mercedes.⁶ *See Tienshan, Inc. v. Tianjin Hua Feng Transport Agency Co., Ltd.*, FMC No. 08-04, 2011 FMC LEXIS 9, *39 (ALJ Mar. 9, 2011). Common carriers are defined by three traits; they: (1) hold themselves out to the general public as providing transportation by water for passengers or cargo between the United States and a foreign country; (2) assume responsibility for transporting the passengers or cargo from the port or point of receipt to the port or point of destination; and (3) use, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a United States port and a foreign port. 46 U.S.C. § 40102(7) and (17); 46 C.F.R. § 515.2(e) and (k).

When dealing with alleged common carriers or NVOCCs under § 41102(c), the Shipping Act’s common carrier definition forms the basis for a “fact-intensive analysis” that considers the parties’ conduct and actual arrangements during the relevant time frame. *Crocus*, 1 F.M.C. 2d. at 415 (citing *Worldwide Relocations—Possible Violations of the Shipping Act*, 32 S.R.R. 495, 503, 2012 FMC LEXIS 23, *13-*14 (FMC 2012)). The Commission’s well-defined methodology for deciding common carrier status considers

⁶Section 41102(c) applies to common carriers, marine terminal operators, and ocean transportation intermediaries. There are two types of ocean transportation intermediary: ocean freight forwarders and NVOCCs. 46 U.S.C. § 40102(20). Because an NVOCC is a type of common carrier, and because there is no indication that MTL is a marine terminal operator or ocean freight forwarder, the “regulated entity” question here involves the definition of common carrier.

the totality of circumstances and their combined effect. *Worldwide*, 32 S.R.R. at 503, 2012 FMC LEXIS 23, *13-*14.

Here, MTL's alleged actions regarding the Mercedes meet all criteria that define a common carrier. MTL unquestionably held itself out as a common carrier; it is registered with the Commission as a licensed NVOCC and publishes an NVOCC tariff.⁷ I.D. at 3-5; MTL Tariff at 1; *see also Crocus*, 1 F.M.C. 2d at 410; *Tienshan*, 2011 FMC LEXIS 9, at *39-*42.

Taking Complainants' allegations as true, MTL also assumed responsibility for the Mercedes when it agreed to store it and tacitly understood that MAVL would eventually have the Mercedes shipped abroad. Compl. ¶¶ 27-29. When MTL accepted delivery of the Mercedes in early December 2012, Mr. Ostrovskiy told MTL that MAVL would eventually have the car shipped back to Germany after inspecting it and ordering repair parts. *Id.* MTL acknowledged that the Mercedes was earmarked for export by granting MAVL the same 30 days free storage it allows cargo destined for export under its NVOCC tariff. MTL's tariff allows "30 days free storage starting from the date of arrival of the vehicle at the warehouse, in order to allow time to provide the Carrier with the vehicle title, absent which the vehicle will not be loaded into a container." MTL Tariff, Rule 2-140. According to Mr. Ostrovskiy, MAVL had an on-going business relationship with MTL Ostrovskiy Certif. ¶ 12, so MTL presumably knew that MAVL is in the vehicle export/import business and likely to ship the Mercedes abroad at some point.

Further support for MTL having assumed responsibility for transportation comes from the undisputed allegations and evidence that MTL actually shipped the Mercedes overseas as an NVOCC. Complainants allege that MTL shipped the Mercedes to Dubai. *See*

⁷Marine Transport Logistic Inc. (Org. No. 018709) is listed on the Commission's website as a registered NVOCC. (<https://www2.fmc.gov/oti/NVOCC.aspx>, last visited October 14, 2020).

Compl. ¶¶ 27-31. A bill of lading issued by Maersk for the Mercedes' shipment⁸ shows MTL listed as the shipper, which would be consistent with it acting as an NVOCC.⁹ *See* 46 U.S.C. § 40102(7) and (17).

As for the third element of the common carrier definition, Complainants allege that the Mercedes was transported between a United States port and a foreign port. Compl. ¶ 31; Ostrovskiy Certif. ¶¶ 16-17. This is further demonstrated by the Maersk bill of lading for the Mercedes.

In sum, at this stage of the proceedings, Complainants have adequately alleged that MTL was acting as an NVOCC with respect to the Mercedes. The Commission therefore reverses the ALJ's dismissal of the § 41102(c) claim regarding the Mercedes and remands it for further proceedings, during which Complainants would need to prove all the elements of their § 41102(c) claim under the Commission's interpretative regulations at 46 C.F.R. § 545.4.¹⁰

⁸The Commission may consider the Maersk bill of lading because it is referenced in the Complaint, Compl. ¶ 34, and the Commission can also take official notice of information printed on the Maersk bill of lading. *See* 46 C.F.R. § 502.226(a). A copy of the Maersk bill of lading was filed as an exhibit to Complainants' Show Cause Resp., Ex. B.

⁹Respondents argue that their alleged role in shipping the Mercedes is not relevant because if they committed conversion (which they deny), the unlawful act occurred while the car was still stored in New Jersey. *See* Respondent Marine Transport Logistic Inc.'s Br. in Support of the Order to Show Cause, 3-5, Oct. 17, 2016. Whether and where the alleged conversion occurred might be relevant to the merits of the § 41102(c) claim but is less relevant to whether MTL acted as an NVOCC with respect to the Mercedes.

¹⁰On remand, the ALJ may also need to address whether and on what basis the Complainants can pursue a § 41102(c) claim against Mr. Alper. Section 41102(c) governs the conduct of regulated entities, not individuals. Complainants allege that Mr. Alper acted as MTL's alter ego, that their actions are one and the same, and that it would be unjust not to pierce the corporate veil and hold him accountable for alleged Shipping Act violations. Compl. ¶¶ 12-16.

C. Section 41104(a)(3) Claim Regarding the Motorcycles

Complainants also allege that Respondents retaliated against them in violation of 46 U.S.C. § 41104(a)(3) by directing another NVOCC (Unitrans) not to ship Complainant's motorcycles. Section 41104(a)(3) provides that a

common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . 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.

The ALJ noted that under this section, the “unfair or unjustly discriminatory methods” at issue refer to practices designed to stifle outside competition. I.D. at 16. The ALJ dismissed the 46 U.S.C. § 41104(a)(3) claims regarding the motorcycles with prejudice for failure to state a claim because, according to the ALJ, the allegations did not implicate such competition. *Id.* at 26-27.

Complainants did not, however, challenge the dismissal of the § 41104(a)(3) claims regarding the motorcycles in their exceptions. *See* Exceptions at 9-28. Nor do they mention the motorcycles in any of their numerous additional filings subsequent to the Initial Decision. Because Complainants did not challenge this dismissal in their exceptions, the Commission affirms this aspect of the Initial Decision. *See* 46 C.F.R. § 502.227(a)(1), (3).

D. Claims Dismissed as Abandoned

In the Initial Decision, the ALJ dismissed several claims as abandoned because Complainants did not address them in response

to the order to show cause. I.D. at 3. The ALJ correctly dismissed as abandoned any 46 U.S.C. §§ 41104(a)(10) and § 41102(c) claims regarding the motorcycles because Complainants did not allege violations of those statutory prohibitions vis-à-vis the motorcycles. *See id.* at 8, 25. Moreover, Complainants did not challenge these dismissals in their exceptions.

The ALJ also dismissed as abandoned Complainants' claim that Respondents violated § 41104(a)(10) with respect to the Mercedes. I.D. at 3, 8. On appeal, Complainants argue that the ALJ erred in dismissing this claim. According to Complainants, the complaint together with the Ostrovskiy certification sufficiently alleges that "MTL refused to deal or negotiate with respect to any monies that were purportedly due and owing to MTL for reasons unrelated to the Mercedes, and unilaterally decided to sell the Mercedes to satisfy an alleged debt." Exceptions at 16. Complainants also argue that the Ostrovskiy certification alleges that MTL refused to offer any explanation as to the whereabouts of the vehicle." *Id.*

Given that the ALJ's show cause order focused on subject matter jurisdiction and Complainants may have thought that the show cause order was limited to jurisdictional concerns, the Commission will assume that Complainants did not intentionally abandon the § 41104(a)(10) claim. The result, however, is the same because Complainants failed to state a § 41104(a)(10) claim with respect to the Mercedes. Section 41104(a)(10) prohibits common carriers from "unreasonably refus[ing] to deal or negotiate." 46 U.S.C. § 41104(a)(10). Proving unlawful refusal to negotiate under § 41104(a)(10) requires the complainant to show that: (1) the respondent is a common carrier; (2) who actually refused to deal or negotiate; and (3) in doing so acted unreasonably. *Canaveral Port Auth. -- Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, 29 S.R.R. 1436, 1448 (FMC 2003).

The complaint, however, merely recites the statutory language of § 41104(a) without alleging facts suggesting that MTL

refused to deal or negotiate and that any such refusal was unreasonable. Compl. ¶¶ 18, V.B. At most, Complainants allege that MTL failed to follow the legal prerequisites for a sale and did not provide sale documentation to Complainants. Even drawing inferences in Complainants favor, these allegations do not suggest an unreasonable refusal to deal. The Ostrovskiy certification provides additional detail about MTL's alleged refusal to provide the vehicle for inspection, but taking this as true, it is not at all clear that Mr. Ostrovskiy was alleging an unreasonable refusal to deal.

Moreover, neither the allegations in the complaint nor the Ostrovskiy declaration match Complainant's new § 41104(a)(10) argument in their Exceptions, which is that it was an unreasonable refusal to deal for MTL to sell the Mercedes to satisfy an unrelated debt. Exceptions at 16. But Complainants already made this allegation in their complaint as part of their § 41102(c) claim. Compl. ¶ V.C ("MTL and Alper have violated 46 U.S.C. 41102(c) by exercising a purported maritime lien for monies allegedly owed to third parties, and by detaining, misdelivering, and converting Complainants' automobiles in order to sell them overseas for a profit."). In short, Complainants' allegations and their shifting theories in their Exceptions are insufficient to provide Respondents with fair notice of the nature and basis for their § 41104(a)(10) claim.

Moreover, the Commission agrees with the ALJ that dismissal of this claim should be with prejudice. Although the Commission typically allows amendments liberally, *Maher II*, 2015 FMC LEXIS 43 at *115, Complainants have already had an opportunity to correct the deficiencies in their § 41104(a)(10) claim but failed to do so. The ALJ allowed Complainants to supplement their complaint with the Ostrovskiy certification filed in response to the Show Cause Order. Despite that opportunity, Complainants failed to include factual allegations supporting their § 41104(a)(10) claim. Additionally, Complainants litigated the underlying events in district court for several years before bringing the Shipping Act

claims before the Commission and thus had ample opportunity to develop the factual basis for their claims.

For all these reasons, the Commission affirms the ALJ's dismissal with prejudice of the § 41104(a)(10) claim regarding the Mercedes for failure to state a claim.

E. Complainants' Rule 230 Petition

After the exceptions were briefed, Complainants petitioned the Commission under Rule 230 to reopen the proceedings so they could submit an MTL bill of lading for the Mercedes. According to Complainants, the bill of lading contradicts some of Respondents' arguments that the Commission lacks jurisdiction under § 41102(c). Respondents oppose reopening the proceedings to allow this additional evidence and argue that the evidence is not new and is irrelevant in any event. Reply to Complainants' Pet. for Leave to Supplement Exceptions, 3-4, Mar. 9, 2017.

Because the Commission finds that Complainants have sufficiently alleged that MTL is an NVOCC with respect to the Mercedes, the proffered bill of lading is not necessary for the Commission to decide this appeal. The Commission therefore denies Complainants' Rule 230 petition as moot. Insofar as the bill of lading may be relevant to MTL's NVOCC status or any other issue, Complainants will have the opportunity to offer it as evidence in future proceedings before the ALJ. Finally, the Commission denies Complainants' motion for leave to submit a reply in support of their petition because the Commission did not request a reply and Complainants have not shown extraordinary circumstances. 46 C.F.R. § 502.71(c).

IV. CONCLUSION

The Commission hereby:

(1) reverses the dismissal of the § 41102(c) claim regarding the Mercedes and remands that claim for further proceedings;

(2) affirms the dismissal with prejudice of the § 41104(a)(3) claim regarding the motorcycles;

(3) affirms the dismissal with prejudice of the § 41104(a)(10) claim regarding the Mercedes;

(4) denies Complainants' Rule 230 petition as moot; and

(5) denies Complainants' motion to file a reply in support of the Rule 230 petition.

By the Commission.

Rachel E. Dickon
Secretary