

cc O S/OGE  
ORIGINAL Pub  
AL)(2)

RECEIVED

2007-07-16 PM 2:20

OFFICE OF THE CLERK  
FEDERAL MARITIME COMMISSION

BEFORE THE  
FEDERAL MARITIME COMMISSION

Docket No. 07-10

\_\_\_\_\_  
KAWASAKI KISEN KAISHA, LTD. ("K" Line)

v.

FASHION ACCESSORIES SHIPPERS ASSOCIATION, INC.;  
GEMINI SHIPPERS ASSOCIATION, INC.; SARA MAYES; and HAROLD SACHS

\_\_\_\_\_  
RESPONDENTS SACHS' AND MAYES'  
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT

Respondents Harold Sachs ("Sachs") and Sara Mayes ("Mayes") hereby respectfully submit this memorandum of points and authorities in support of their motion to dismiss the complaint.

I. INTRODUCTION

This proceeding arises in connection with a series of service contracts between Complainant Kawasaki Kisen Kaisha, Ltd. ("K"Line") and Respondent Fashion Accessories Shippers Association, Inc. ("FASA") during the period 2001-2006. "K" Line negotiated the provisions of each of these service contracts with FASA, executed each of the service contracts, filed each of the service contracts with the FMC, received the benefits of each of these service contracts, and substantially performed each of the service contracts over a period of approximately five years. However, when a dispute arose between "K" Line and FASA in 2006, "K" Line refused to submit the dispute to arbitration as provided for in each of the service contracts. Instead, "K" Line embarked on an unsuccessful campaign to avoid arbitration at all costs, including complaining to the Department of Justice, seeking an injunction against the

arbitration in federal court, and asking the arbitrator to stay the arbitration. Having failed everywhere else, “K” Line filed the complaint in this proceeding over 11 months after FASA commenced the arbitration.

In the Complaint, “K” Line challenges FASA’s status as a bona fide shippers association capable of entering into a service contract, attacks the validity of two provisions of the service contracts, and apparently seeks to have the service contracts declared unenforceable. “K” Line does not, however, seek reparations, perhaps mindful of Commission decisions indicating that a party may not profit from its own inequitable conduct in violation of the Act. Rather, “K” Line seeks only declaratory relief and cease and desist orders relating to the status of FASA as a shippers’ association, the validity and future enforceability of the challenged provisions in the service contracts at issue, and the pending arbitration.

Despite the fact that this proceeding involves only FASA’s status as a shippers association and the service contracts entered into between “K” Line and FASA, “K” Line has chosen to name two individuals as additional respondents in this proceeding – FASA’s President, Sara Mayes, and FASA’s Executive Director, Harold Sachs. Even a cursory review of the Complaint makes clear that there is no basis or purpose for dragging these individuals into this proceeding, except perhaps to harass and intimidate them. Sachs and Mayes are nothing more than employees of the corporate respondent FASA. Neither Sachs nor Mayes entered into the service contracts with “K” Line in their individual capacity, nor is there any allegation in the Complaint that Sachs or Mayes personally violated The Shipping Act of 1984, as amended (the “Act”). Indeed, the only allegation specifically directed to respondent Sachs is that he is employed as FASA’s Executive Director.

For the reasons set forth more fully below, the Complaint should be dismissed as to Respondents Sachs and Mayes.

## II. THE FACTUAL ALLEGATIONS CONTAINED IN THE COMPLAINT

The Complaint contains the following factual allegations relating to respondents Sachs and Mayes<sup>1</sup>:

FASA is a non-profit corporation operating under the d/b/a “Gemini Shippers Association” (“Gemini”). Complaint at ¶ I.C. Sara Mayes is President of FASA; Harold Sachs is executive director of FASA. Complaint at ¶ I.D.-E.

“K” Line entered into Service Contract No. 14042 signed by “Gemini Shippers Association” (Sara Mayes President) . . . Complaint at ¶ III.B.2. “K” Line entered into Service Contract No. 13473 signed by “Gemini Shippers Association” (Sara Mayes President) . . . Complaint at ¶ III.B.3.

“K” Line entered into Service Contract No. 14682 signed by “Gemini Shippers Association” (Sara Mayes President) . . . Complaint at ¶ III.B.4.

“K” Line entered into Service Contract No. 15115 signed by “Gemini Shippers Association” (Sara Mayes President) . . . Complaint at ¶ III.B.5.

“K” Line met with President Sara Mayes in 2006, and informed Mayes that “K” Line had been approached independently by a shipper who had contracted with “K” Line under the umbrella of the Gemini contract. Complaint at ¶ III.B.7. Ms. Mayes agreed to “K” Line’s

---

<sup>1</sup> By characterizing certain allegations of the Complaint as “factual” allegations, respondents do not intend to imply that they believe those allegations are true or accurate. Rather, respondents intend only to distinguish allegations of factual matters – which must be deemed true for the purposes of a motion to dismiss – from legal conclusions, unsupported conclusory statements, or pure speculation, which are not accepted as true in ruling on a motion to dismiss.

offering rates to the shipper, but only if they were higher than “her” rates. Complaint at ¶ III.B.7.

Respondents [presumably, including Mayes and Sachs], through their counsel, advised they would not negotiate with “K” Line for a 2007-2008 service contract unless “K” Line withdrew its defense to the FASA arbitration demands and agreed to the exclusive dealing clause. Complaint at ¶ III.B.9.

Mayes negotiates royalties with carriers, and funnels the money into FASA’s bank account. Complaint at ¶ III.B.18.

### III. THE COMMISSION SHOULD DISMISS THE COMPLAINT AGAINST THE INDIVIDUAL RESPONDENTS

#### A. Legal Standards Applicable to This Motion to Dismiss.

In ruling on a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the factual allegations of the complaint are accepted as true and all reasonable inferences from such allegations are drawn in the light most favorable to the non-movant. *See Cargo One, Inc. v. Cosco Container Lines, Ltd.*, 28 SRR 1635, 1642 (2000). However, legal conclusions, unsupported conclusory statements or speculation need not be accepted as true. *See, e.g., Hirsch v. Arthur Anderson & Co.*, 72 F.3d 1085, 1088, 1092 (2d Cir. 1995) (“conclusory allegations of the legal status of defendants’ acts need not be accepted as true for the purposes of ruling on a motion to dismiss”); *Campbell v. San Antonio*, 43 F.3d 973, 975 (5<sup>th</sup> Cir. 1995) (conclusory facts that merely create suspicion are not accepted as true on motion to dismiss); *DM Research v. College of American Pathologists*, 170 F.3d 53, 55-56 (1<sup>st</sup> Cir. 1999) (plaintiff’s factual allegations must be accepted as true, but bald assertions, subjective characterizations, and legal conclusions are not). Dismissal under Rule 12(b)(6) is appropriate where the factual allegations of the complaint, if accepted as true, are not sufficient to support

the relief requested.<sup>2</sup> See *DM Research v. College of American Pathologists*, 170 F.3d 53 (1<sup>st</sup> Cir. 1999).

B. The Complaint Does Not State a Claim Against Respondent Sachs Upon Which Relief Can Be Granted.

The Complaint contains no factual allegations that Respondent Sachs engaged in any conduct or committed any act that could constitute a violation of The Shipping Act of 1984, as amended (hereinafter, the “Act”). Indeed, the only allegation in the Complaint directly relating to Respondent Sachs is that he is the Executive Director of FASA. The only factual allegation indirectly relating to Sachs is the allegation that respondents, through their counsel, advised they would not negotiate with “K” Line for a 2007-2008 service contract. Neither of these two allegations, even if accepted as true, would be sufficient to support a finding that Sachs violated the Act.

Moreover, allegations in the Complaint relating to respondent FASA cannot provide a sufficient basis to state a claim against Sachs. Sachs cannot be held personally liable for violating the Act merely because he was employed FASA. “It is not enough merely to show that a person is a corporate officer if a complainant wishes to impose personal liability on such officer.” *CTM International Inc. v. Medtech Enterprises, Inc.*, 28 SRR 1091 (ALJ 1999). In order to properly charge a corporate officer with violating the Act, a complaint must either allege personal – not merely institutional – conduct sufficient to constitute a violation, or allege facts sufficient to justify piercing the corporate veil. *AAEL America Africa Europe Line GMBH v.*

---

<sup>2</sup> The Commission has previously relied on a standard for dismissal requiring that “no relief may be granted under any set of circumstances that could be proved consistent with the allegations contained in a complaint.” See, e.g., *Cargo One, Inc. v. Cosco Container Lines Co., Ltd.*, 28 SRR 1635, 1637, 1642 (2000). This formulation of the standard for dismissal, based primarily on language in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), was recently “retired” by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 1955 (2007).

*Virginia International Trade & Investment Group LLC*, 27 SRR 825, 827 (1996).<sup>3</sup> The Complaint in this case does neither with respect to Respondent Sachs.

Since the Complaint fails to allege a factual basis sufficient to support a finding that Sachs violated the Act, the Complaint against Respondent Sachs should be dismissed for failure to state a claim upon which relief can be granted.

C. The Complaint Does Not State a Claim Against Respondent Mayes Upon Which Relief Can Be Granted.

The Complaint contains no factual allegations that Respondent Mayes engaged in any conduct or committed any act that could constitute a violation of the Act. The only allegations in the Complaint directly relating to Respondent Mayes are that (1) she is the President of FASA, (2) she signed the service contracts at issue in her corporate capacity as President of FASA, d/b/a Gemini Shippers Association, (3) she negotiates royalties with carriers which are paid to FASA, (4) she met with “K” Line in her capacity as President of FASA to discuss the application and performance of the service contract between “K” Line and FASA, and (5) she advised “K” Line, through counsel, that FASA would not negotiate with “K” Line for a new service contract unless “K” Line agreed to [what Complainant characterizes as] an exclusive dealing clause. None of these allegations, even if accepted as true, would be sufficient to support a finding that Mayes violated the Act.

For the reasons discussed more fully above, Respondent Mayes cannot be held personally responsible for violating the Act merely because she acted on behalf of FASA as its President. The Complaint does not allege that Mayes acted in her personal, as opposed to institutional, capacity. To the contrary, the Complaint makes clear that Mayes signed the service contracts

---

<sup>3</sup> The Complaint does not even allege that Sachs is an officer of FASA.

and dealt with “K” Line in her capacity as President of FASA. There are no allegations in the Complaint suggesting that FASA is not a corporation in good standing, that its corporate formalities have not been honored, or that there is any other basis for piercing the corporate veil in order to hold FASA’s employees responsible for FASA’s actions in entering into and enforcing its service contracts with “K” line.

The Complaint appears to be intentionally designed to imply (but not to directly allege) that Respondent Mayes is a “principal” of FASA or is somehow the alter ego of FASA.<sup>4</sup> However, when the Complaint does not contain factual allegations sufficient to state a claim, “periphrastic circumlocutions” and “unsubstantiated conclusions” in the complaint will not defeat a motion to dismiss. *Sheridan v. Int’l. Bhd. of Elec. Workers*, 940 F. Supp. 368 (D. Mass. 1996). The reason for this rule goes to the heart of the adjudicatory process. The requirement that a complaint allege facts sufficient to support a claim goes hand-in-hand with the requirements of Rule 11 of the Federal Rules of Civil Procedure. Rule 11 provides, in pertinent part:

By presenting to the court (whether by signing, filing, submitting or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, ... (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery ....

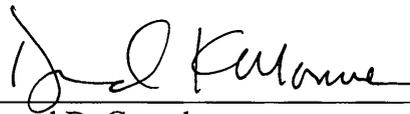
---

<sup>4</sup> The Complaint does not explain what it means by a “principal” of FASA, and does not allege that either Mayes or Sachs are “principals” of FASA. Although not necessary for the resolution of this motion, the fact of the matter is that neither Mayes nor Sachs is a shareholder or owner of FASA.

Fed. R. Civ. P. 11. *See also* 46 C.F.R. § 502.112. A complainant cannot escape the requirements of Rule 11 by attempting to substitute vague and nonspecific insinuations for factual allegations.<sup>5</sup>

Since the Complaint fails to allege a factual basis sufficient to support a finding that Respondent Mayes violated the Act, the Complaint against Respondent Mayes should be dismissed for failure to state a claim upon which relief can be granted.

Respectfully submitted,



---

Edward D. Greenberg  
David K. Monroe  
GALLAND KHARASCH GREENBERG  
FELLMAN & SWIRSKY, PC  
1054 Thirty-First Street, NW  
Washington, DC 20007  
Telephone: 202/342-5200  
Facsimile: 202/342-5219  
Email: [egreenberg@gkglaw.com](mailto:egreenberg@gkglaw.com)  
[dmonroe@gkglaw.com](mailto:dmonroe@gkglaw.com)

---

<sup>5</sup> The Complaint, which is verified by Thomas Aldridge, “K” Lines’ Vice President, contains a number of scandalous and potentially defamatory allegations relating to the unspecified “principals” of FASA. For example, Mr. Aldridge has verified allegations that FASA’s “principals” act, not primarily to get lower rates for FASA’s members, but instead to enrich themselves. Complaint at ¶ III.B.20. Similarly, Mr. Aldridge has verified allegations that FASA’s “principals” transfer to themselves funds rightfully belonging to FASA, noting “the only unknown is how the principals funnel the money to themselves.” Complaint at ¶ III.B.21.

The use of the unspecified term “principals” in the Complaint does not appear to be accidental. Indeed, the Complaint appears carefully crafted to skate as close as possible to the Rule 11 line, allowing innuendo and insinuation to smear the reputations of Respondents Mayes and Sachs, while attempting to retain “plausible deniability” when the veracity of these defamatory statements are disproved. Whether clever pleadings will provide a shield against liability for defamation is an issue to be determined in another forum. But for the purposes of stating a claim against Respondent Mayes and Sachs, the allegations against unspecified “principals” cannot defeat this motion to dismiss.

Jeffrey Daichman  
Robert Sachs  
KANE KESSLER, PC  
1350 Avenue of the Americas  
New York, NY 10019  
Telephone: 212/541-6222  
Facsimile: 212/245-3009  
Email: [jdaichman@kanekessler.com](mailto:jdaichman@kanekessler.com)  
[rsachs@kanekessler.com](mailto:rsachs@kanekessler.com)

Attorneys for Respondents  
FASHION ACCESSORIES SHIPPERS  
ASSOCIATION, INC., GEMINI  
SHIPPERS ASSOCIATION, SARA  
MAYES and HAROLD SACHS

DATE: December 14, 2007

CERTIFICATE OF SERVICE

I do hereby certify that I have delivered a true and correct copy of the foregoing document to the following addressees at the addresses stated by depositing same in the United States mail, first class postage prepaid, and by email transmission (with the exception of Thomas Aldridge of "K" Line America, Inc.), this 14<sup>th</sup> day of December 2007:

Thomas Aldridge, VP Sales  
"K" Line America, Inc.  
890 Mountain Avenue – Suite 200  
Murray Hill, NJ 07974

J.P. Meade  
"K" Line America, Inc.  
6009 Bethlehem road  
Preston, MD 21655  
Email: [John.Meade@us.kline.com](mailto:John.Meade@us.kline.com)

Eliot J. Halperin  
Deana E. Rose  
MANELLI DENISON & SELTER, PLLC  
2000 M Street, NW – Suite 700  
Washington, DC 20036  
Email: [ehalperin@mdslaw.com](mailto:ehalperin@mdslaw.com)  
[drose@mdslaw.com](mailto:drose@mdslaw.com)

And we are providing a courtesy copy of the foregoing document by messenger delivery and by email transmission to ALJ Clay Guthridge as follows:

The Honorable Clay G. Guthridge  
Administrative Law Judge  
Federal Maritime Commission  
800 North Capitol Street, NW  
Washington, DC 20573  
Email: [cguthridge@fmc.gov](mailto:cguthridge@fmc.gov)

*Linda D. Thomas*

---