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September 17, 2010					
FEDERAL MARITIME COMMISSION					

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 10-07

RENDEZVOUS INTERNATIONAL

v.

**CHIEF CARGO SERVICES, INC., KAISER APPAREL, INC., EDCO LOGISTICS, INC.,
ORIENTAL LOGISTICS, INC., AND RAZOR ENTERPRISE**

**INITIAL DECISION APPROVING SETTLEMENT AGREEMENT AND
GRANTING REQUEST TO DISMISS COMPLAINT AGAINST
CHIEF CARGO SERVICES, INC. WITHOUT PREJUDICE;¹ and
MEMORANDUM AND ORDER ON MOTION TO DISMISS FILED BY
ORIENTAL LOGISTICS, INC.**

Complainant Rendezvous International commenced this proceeding by filing a formal complaint with the Secretary. Rendezvous International alleges that it is a partnership formed in Pakistan that engages in the business of manufacturing garments. (Complaint ¶ I.) Rendezvous International alleges that Respondents are “corporations and/or business entities formed in the State of New York and doing business in the State of New York” and that Respondents “perform importing services, freight forwarding and handling services, pay duties and freight, and clear shipments of goods through US Customs.” (*Id.* ¶ II.)

Rendezvous International alleges that Respondents carried three shipments of merchandise from Pakistan to the United States on April 24, May 23, and June 5, 2009, and that Respondents violated the Shipping Act of 1984 by fraudulently and unlawfully/wrongfully releasing the shipments to the customer without bills of lading. Rendezvous International cites several sections of the Shipping Act and alleges that as a result of Respondents’ violations of the Act, Rendezvous International suffered actual injury in the sum of \$290,424.91.

¹ The dismissal will become the decision of the Commission in the absence of review by the Commission. Rule 227, Rules of Practice and Procedure, 46 C.F.R. § 502.227.

Rendezvous International also commenced an action based on the same facts in the Supreme Court of the State of New York against Chief Cargo Services, Inc. and Kaiser Apparel, Inc., respondents in this proceeding, and Rich Kids Jeans Corp., an entity that is not a respondent in this proceeding. *Rendezvous Int'l v. Rich Kids Jeans Corp., Chief Cargo Services, Inc., and Kaiser Apparel, Inc.*, No. 10-601198 (N.Y Sup. Ct., Cty. of New York May 10, 2010) (summons issued). (See Chief Cargo Motion to Dismiss Ex. A.) The case has been removed to the federal district court. *Rendezvous Int'l v. Rich Kids Jeans Corp., Chief Cargo Services, Inc., and Kaiser Apparel, Inc.*, No. 10-CV-04100-DAB (S.D.N.Y. May 19, 2010) (Notice of Removal). (See Chief Cargo Motion to Dismiss Ex. B.)

On August 6, 2010, respondent Chief Cargo Services, Inc. (Chief Cargo), a non-vessel-operating common carrier (NVOCC), filed a motion to dismiss the Complaint in this proceeding, and on August 11, 2010, respondent Oriental Logistics, Inc., also an NVOCC, filed a motion to dismiss the Complaint. Rendezvous International has not filed a reply to either motion to dismiss. Accountants for respondents Kaiser Apparel, Inc., and Edco Logistics, Inc., sent unsworn letters to the Commission stating that Kaiser Apparel and Edco Logistics are no longer in business, but Kaiser Apparel and Edco Logistics have not otherwise answered or responded to the Complaint. Respondent Razor Enterprise sent an unsworn letter to the Commission stating that it has no connection to the transaction and that it “is not a party and not even mentioned as a party in any bill of lading or any transaction,” (Letter dated July 28, 2010, from Sam Haq to the Commission), but has not otherwise answered or responded to the Complaint.

DISCUSSION

I. **COMPLAINANTS AND RESPONDENTS JOINT STIPULATION TO DISMISS THE COMPLAINT WITHOUT PREJUDICE.**

A. **Background.**

On August 21, 2010, Rendezvous International and Chief Cargo filed “Complainants and Respondents Joint Stipulation to Dismiss the Complaint Without Prejudice” (punctuation as in original). The Joint Stipulation cites to the case pending in the federal district court in New York. The Joint Stipulation includes a Settlement Agreement “between Rendezvous International (Claimant) and Chief Cargo Services, Inc, (Respondent).” Rendezvous International “has not filed opposition to [Chief Cargo’s] motion [to dismiss] in lieu of this agreement by the parties to withdraw this claim in the FMC without prejudice.” (Joint Stipulation to Dismiss at 2.) The Settlement Agreement states that:

Claimant and [Chief Cargo] wish to withdraw the FMC claim without prejudice to continuing with claims filed by Claimant against [Chief Cargo] and Rich Kids Jeans Corporation, in the United States District Court, Southern District of New York under Docket No. 1:10-cv-04100-DAB.

Now, therefore, it is agreed as follows:

1. The parties agree to dismiss the pending FMC claim, Docket No. 10-07, without prejudice;
2. The claim against [Chief Cargo] and Rich Kids Jeans Corporation shall proceed in the action filed in United States District Court, Southern District of New York, Docket No. 1:10-cv-04100-DAB;
3. Each party shall bear its own costs, including attorneys fees;
4. Nothing in this agreement is intended to waive or modify any rights that may exist between the parties; and
5. This Agreement may be signed in counterparts.

(Complainants and Respondents Joint Stipulation to Dismiss the Complaint Without Prejudice Part IV.) The Stipulation is signed by attorneys for Rendezvous International and Chief Cargo. No other party (or attorney) signed the Stipulation. No other Respondent has filed a reply to the Joint Stipulation.

Because the Joint Stipulation did not make clear whether Rendezvous International intended to dismiss without prejudice as to all Respondents or only as to Chief Cargo, on August 30, 2010, I issued an Order requiring Rendezvous International to make its intentions clear. The Order required a response by September 1, 2010. *Rendezvous Int'l v. Chief Cargo Services, Inc.*, FMC No. 10-07 (ALJ Aug. 30, 2010) (Order to Supplement the Record).

When Rendezvous International did not respond to the August 30 Order, on September 2, 2010, this Office sent the August 30 Order to counsel for Rendezvous International a second time. On September 3, 2010, counsel for Rendezvous International sent an email to the email address of this office (judges@fmc.gov) stating:

We are attorneys for claimant, Rendezvous International. We acknowledge receipt of "Order to Supplement The Record", dated August 30, 2010.

Notice of Intention to Withdraw Action

The Joint Stipulation made is intended to withdraw the complaint filed in the FMC Court by the Claimant, Rendezvous International against all Respondents in the FMC Court claim under Docket No. 10-07.

This document is intended to be used in lieu of a formal notice to withdraw action.
Thank you for your courtesy

(Email dated September 3, 2010, from Allen M. Schwartz to judges@fmc.gov.)

On September 3, 2010, the Assistant Secretary responded to the email, stating:

Thank you for your email. Upon consideration, the email is not sufficient and we need to have you do a formal filing in response to the ALJ's Order of August 30, 2010. Pursuant to our rules of practice and procedure at 46 CFR 502, your filing should (1) take the same format as your recent filing (the Motion to Dismiss) including the case caption (2) should indicate what you indicate in the email below (that the intent is for the stipulation to dismiss the complaint to apply to all respondents in the proceeding), (3) should be signed, (4) should be served on the other parties to the proceeding and include a certificate of service. (5) Please send us an original and 4 copies. I encourage you to send the document to us via email or fax as well so that the Judge can proceed as quickly as possible.

Feel free to call me if you have any questions[.]

(Email dated September 3, 2010, from Rachel E. Dicken to counsel for Rendezvous International.) When the Assistant Secretary spoke to counsel for Rendezvous International on September 8, 2010, and learned that he had not seen the September 3 email, the Assistant Secretary sent the email again. As of September 17, 2010, Rendezvous International has not complied with the August 30 Order or the Assistant Secretary's request. Because of Rendezvous International's failure to comply, I am constrained to treat the Joint Stipulation as a request to dismiss the complaint against Chief Cargo only.

B. Discussion.

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Service, Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*)). See also *Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981). Using language borrowed in part from the Administrative Procedure Act,² Rule 91 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement "where time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.91(b).

The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based

² "The agency shall give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c).

upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976)).

“While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation.”
Id.

If a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval.

Id. at 1093.

Generally, when examining settlements, the Commission looks to see if the settlement has a reasonable basis and reflects the careful consideration by the parties of such factors as the relative strengths of their positions weighed against the risks and costs of continued litigation. Furthermore, if it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement.

American Warehousing of New York, Inc. v. Port Auth. of New York and New Jersey, 31 S.R.R. 686, 687 (FMC 2009) (quoting *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia - New Zealand Conference and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted)). See also *Freeman v. Mediterranean Shipping Co.*, 31 S.R.R. 336, 337 (ALJ 2008). “When determining whether to approve a settlement agreement it is not necessary to make final determinations of violations or lack of violations since to do so might discourage parties from even attempting to propose settlement in the first place.” *American Warehousing of New York, Inc. v. Port Auth. of New York and New Jersey*, 31 S.R.R. at 687 (citing *Old Ben Coal*, 18 S.R.R. at 1093).

Unlike many, if not most, settlement agreements, the Settlement Agreement between Rendezvous International and Chief Cargo does not resolve their dispute, but merely dismisses the Commission proceeding without prejudice to Rendezvous International’s right to proceed against Chief Cargo and the other Defendants in the parallel case pending in the United States district court in New York. The Settlement Agreement appears to have a reasonable basis and reflects the careful

consideration by the parties, does not appear to violate any law or policy, and appears to be free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable. Therefore, the Settlement Agreement is approved and the Complaint against Chief Cargo dismissed without prejudice.

II. MOTION TO DISMISS IN LIEU OF ANSWER FILED BY RESPONDENT ORIENTAL LOGISTICS, INC.

On August 11, 2010, respondent Oriental Logistics, Inc., an NVOCC, filed a motion to dismiss the Complaint claiming lack of subject matter jurisdiction. Oriental Logistics also relies on the case Rendezvous International commenced in the New York court. Oriental Logistics states that:

In its complaint, Rendezvous International contends that the “Respondents fraudulently and unlawfully/wrongfully released shipments without Bills of Lading to the Customer.” In the Supreme Court of the State of New York, County of New York action . . . , the only defendants listed are Rich Kids Jeans Corp., Chief Cargo Services, Inc. and Kaiser Apparel, Inc. . . . This case was removed from the state jurisdiction to the federal jurisdiction.

The same 3 defendants appear in the United States District Court Southern District of New York action

The only connection Oriental Logistics, Inc., has with any of the defendants is the physical location of its offices. There is no other nexus. In the [New York court case], Oriental Logistics is not a party.

The appropriate forum for this action is the Federal Court as this matter is a contractual dispute between the Petitioner and Respondents Rich Kids Jeans Corp., Chief Cargo Services, Inc., and Kaiser Apparel, Inc.

(Oriental Logistics Motion to Dismiss in Lieu of Answer at 2.) Counsel for Oriental Logistics included an “Attorney Verification” stating that counsel had read the motion

and know the contents thereof, and the same is true to my knowledge, except those matters which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief as to those matters therein not stated upon my own knowledge is based upon the foregoing facts contained in the file.

(Oriental Logistics Motion to Dismiss in Lieu of Answer at 3.) Rendezvous International has not filed a reply to Oriental Logistics’s motion to dismiss.

The Commission’s Rules of Practice and Procedure (Rules) do not explicitly provide for a motion to dismiss for failure to state a claim. The Rules do provide that “[i]n proceedings under this

part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice.” 46 C.F.R. § 502.12. Civil Rule 12(b)(6) permits a pleader to raise by motion failure to state a claim. Fed. R. Civ. P. 12(b)(6). I find that it is consistent with sound administrative practice to follow Rule 12(b)(6).

The standards for motions to dismiss are well established.

When considering a Rule 12(b)(6) motion to dismiss, the Court accepts as true all factual allegations in the complaint and draws inferences from these allegations in the light most favorable to the plaintiff. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984); *Easton v. Sundram*, 947 F.2d 1011, 1014-15 (2d Cir. 1991), cert. denied, 504 U.S. 911 (1992). Dismissal is warranted only if, under any set of facts that the plaintiff can prove consistent with the allegations, it is clear that no relief can be granted. *See Hishon v. King & Spalding*, 467 U.S. (1984); *Frasier v. General Elec. Co.*, 930 F.2d 1004, 1007 (2d Cir. 1991). “The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims.” *United States v. Yale New Haven Hosp.*, 727 F. Supp. 784, 786 (D. Conn. 1990) (citing *Scheuer*, 416 U.S. at 232). Thus, a motion to dismiss under 12(b)(6) should not be granted “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994) (citations and internal quotations omitted), cert. denied, 513 U.S. 816 (1994). In its review of a 12(b)(6) motion to dismiss, the Court may consider “only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken.” *Samuels v. Air Transport Local 504*, 992 F.2d 12, 15 (2d Cir. 1993).

Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Auth., 335 F. Supp. 2d 275, 279 (D. Conn. 2004).

Oriental Logistics relies on factual assertions set forth in its motion to dismiss. A motion is not a pleading. *A. Bauer Mechanical, Inc. v. Joint Arbitration Bd. of Plumbing*, 562 F.3d 784, 790 (7th Cir. 2009). Therefore, I am unable to rely on the facts stated in the motion when ruling on the motion to dismiss.

The Civil Rules also provide:

If, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Fed. R. Civ. P. 12(d). Oriental Logistics seems to be claiming that it had no connection to the shipments that are the subject of Rendezvous International's Complaint. If that is true, this proceeding should not continue against Oriental Logistics. Therefore, I will treat Oriental Logistics's motion to dismiss as a motion for summary judgment.

I will require additional evidence from Oriental Logistics, however. The critical issue is whether Oriental Logistics had any connection to the shipments at issue, but the motion does not explicitly state that. Therefore, assuming it is true, on or before September 24, 2010, Oriental Logistics shall file an affidavit (or declaration pursuant to 28 U.S.C. § 1746) signed by an officer, director, or other representative of Oriental Logistics with first hand knowledge of the facts stating Oriental Logistics's connection or lack of connection to the shipments that are the subject of Rendezvous International's complaint.

On or before October 1, 2010, Rendezvous International may file a traversing affidavit or evidence. As set forth above, Rendezvous International has failed to respond to the August 30 Order despite receiving service of the Order and receiving requests for a response from the Assistant Secretary. Therefore, Rendezvous International is put on notice that failure to file a traversing affidavit or evidence on or before October 1, 2010, will be construed as admission of the facts stated in Oriental Logistics's affidavit.

Upon receipt of the submissions required above, I will rule on Oriental Logistics's motion to dismiss, treating it as if it were a motion for summary judgment. Oriental Logistics need not file a supplemental brief.

III RESPONDENTS KAISER APPAREL, INC., EDCO LOGISTICS, INC., AND RAZOR ENTERPRISE.

On or before October 1, 2010, Rendezvous International shall submit a proposed scheduling order for its Complaint against respondents Kaiser Apparel, Inc., Edco Logistics, Inc., and Razor Enterprise.

O R D E R

Upon consideration of Complainants and Respondents Joint Stipulation to Dismiss the Complaint Without Prejudice and for the reasons stated above, it is hereby

ORDERED that the Settlement Agreement between complainant Rendezvous International and respondent Chief Cargo Services, Inc., be **APPROVED**. It is

FURTHER ORDERED that the Motion to Dismiss in Lieu of Answer filed by respondent Chief Cargo Services, Inc., be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this proceeding against Chief Cargo Services, Inc., be **DISMISSED WITHOUT PREJUDICE**.

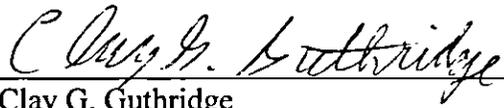
Upon consideration of the Motion to Dismiss in Lieu of Answer Filed by respondent Oriental Logistics, Inc., and for the reasons stated above, it is hereby

ORDERED that the motion to dismiss be treated as a motion for summary judgment under Rule 56. It is

FURTHER ORDERED that on or before September 24, 2010, Oriental Logistics, Inc., file the affidavit described in Part II above. It is

FURTHER ORDERED that on or before October 1, 2010, Rendezvous International file the affidavit or evidence described in Part II above. It is

FURTHER ORDERED that on or before October 1, 2010, Rendezvous International file the proposed scheduling order described in Part III above.



Clay G. Guthridge
Administrative Law Judge