

Federal Maritime Commission
Washington, D.C.

Edaf Antillas, Inc.,

Docket No. 14-04

Complainant

v.

**Crowley Caribbean Logistics, LLC,
IFS International Forwarding, S.L.
and IFS Neutral Maritime Services,**

Respondents.

**IFS INTERNATIONAL FORWARDING, S.L.'s AND IFS NEUTRAL
MARITIME SERVICE, INC.'S REPLY MEMORANDUM IN SUPPORT OF
THEIR MOTION TO DISMISS THE COMPLAINT**

Respondents IFS International Forwarding, S.L. ("IFS") and IFS Neutral Maritime Service, Inc. ("Neutral") (collectively, "Respondents"), by and through their attorneys, Betancourt, Van Hemmen, Greco & Kenyon LLC, hereby reply to Complainant Edaf Antillas Inc.'s ("Edaf" or "Complainant" herein) Opposition to Respondents' Motion for an Order dismissing Edaf's Complaint.

THE COMMISSION LACKS JURISDICTION OVER EDAF'S CLAIM

Edaf's Complaint must be dismissed because the Commission lacks jurisdiction over Edaf's claims. In point A of it's Opposition to Respondents' Motion, Edaf entirely ignores the cornerstone case setting forth the Commission's lack of authority to adjudicate loss and damage claims stemming from the delayed delivery of cargo. Pilgrim Furniture Co. v.

American-Hawaiian S.S. Co., 2 U.S.M.C. 517 (Feb. 13, 1941). Additionally, Edaf mischaracterizes the Commission's holding in A.N. Deringer, Inc. v. Marlin Marine Servs., Inc., FMC Informal Docket No. 1652(I) (Nov. 14, 1990). Deringer explicitly held that the Commission "has never asserted jurisdiction over damage and loss claims," which, as recognized in Pilgrim Furniture, includes damages for the delayed delivery of cargo. Edaf, through failing to address Pilgrim Furniture and mischaracterizing Deringer, misses the key holdings of those two decisions. The Commission, in both cases, recognized that although the complainants alleged Shipping Act violations, the complainants in fact sought to recover for loss and damage, including loss and damage stemming from the delayed delivery of cargo. In the instant case, Edaf has brought an action seeking to recover for alleged losses stemming from the delayed delivery of its cargo. The Commission, as made plain by the Pilgrim Furniture and Deringer decisions, lacks jurisdiction over such actions. Accordingly, Edaf's Complaint must be dismissed.

**EDAF'S DELAYED DELIVERY CLAIM IS
PROHIBITED BY THE BILL OF LADING**

As set forth above, Edaf has made a claim for damages stemming from the alleged delayed delivery of its cargo, which actions do not fall within the jurisdiction of the Commission. Edaf also admits that claims seeking damages from delayed delivery are "strictly governed by the terms contained on the Bill of Lading." Opposition at p. 2. Yet, Edaf requests the Commission herein to ignore the clear terms in Neutral's bill of lading

prohibiting loss or damage claims stemming from the delayed delivery of cargo. Edaf has provided no legal authority to support this proposition. In fact, the Commission in Pilgrim Furniture found that the bill of lading, which is part of a carrier's legally-filed tariff, controls in cases such as this. Pilgrim Furniture, 2 U.S.M.C. at 518. As set forth in Respondents' moving papers, Neutral's bill of lading expressly precludes recovery for damages stemming from the delayed delivery of cargo. Accordingly, Edaf's claim must be dismissed.

EDAF'S SECTION 10(d)(1) CLAIM FAILS

In the alternative and even assuming the Commission has jurisdiction over Edaf's claims, Edaf's Section 10(d)(1) claim must fail in any event. Edaf's allegations wholly fail to satisfy the pleading standard promulgated in Ashcroft v. Iqbal, 556 U.S. 662 (2009). Iqbal makes clear that "a pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." Id. at 678. If the complainant simply "pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." Id.

Edaf in its Complaint merely quotes Section 10(d)(1) and then concludes that Respondents violated that provision. See "Causes of Action" section of the Complaint ¶¶A-C. Edaf fails to describe in any detail whatsoever what "regulations or practices" of Respondents resulted in the alleged violations of Section 10(d)(1). Edaf merely alleges an

occurrence, and then concludes that such alleged occurrence resulted from the lack of “regulations and practices.” These “threadbare recita[tions] of the elements of a cause of action, supported by mere conclusory statements, do not suffice” to satisfy the pleading standards promulgated by Iqbal. Iqbal at 678. Nothing in Edaf’s opposition papers changes the fatal pleading flaws contained in the Complaint. Accordingly, Edaf’s Section 10(d)(1) claim must be dismissed.

EDAF’S SECTION 10(b)(3) CLAIM FAILS

In the alternative and even assuming the Commission has jurisdiction over Edaf’s claims, Edaf’s Section 10(b)(3) claim must fail in any event. Edaf in its Opposition completely fails to address the elements of a Section 10(b)(3) claim, as exhaustively detailed in co-respondent Crowley Caribbean Logistics’ (“CCL”) moving papers at pages 9 through 11. Moreover, Edaf has never alleged a single fact in its pleadings that IFS and Neutral “retaliated” against Complainant within the meaning of Section 10(b)(3). Therefore, similar to Edaf’s Section 10(d)(1) claim, the Section 10(b)(3) claim utterly fails to satisfy the Iqbal pleading standard. Accordingly, Edaf’s Section 10(b)(3) claim must be dismissed.

EDAF’S SECTION 10(b)(8) CLAIM FAILS

In the alternative and even assuming the Commission has jurisdiction over Edaf’s claims, Edaf’s Section 10(b)(8) claim must fail in any event for the same total failure to satisfy the Iqbal standard as afflicts the Sections 10(d)(1) and (b)(3) claims. Edaf’s

Complaint lacks any factual allegation as against IFS and Neutral for a violation of Section 10(b)(8), and the Opposition provides no additional factual support for Edaf's position. Edaf, apparently realizing it's pleading problem, attempts in its Opposition to use minutiae contained within CCL's affirmative defenses to augment its flawed pleadings as against IFS and Neutral. Nothing in Edaf's Opposition changes the Complaint's terminal flaw of merely "tendering naked assertions devoid of further factual enhancement." Iqbal, 556 U.S. at 678. Accordingly, Edaf's Section 10(b)(8) claim must be dismissed.

EDAF'S LOST ADDITIONAL SALES DAMAGES CLAIM FAILS

Edaf's claimed \$88,000 in damages for lost additional sales must fail as Edaf has not adequately plead a violation of the Act or actual injury. Edaf's Opposition entirely fails to address the fact that the claimed lost additional sales damages are the sort of wholly unforeseeable special or consequential damages that are not allowed under the proximate cause requirements set forth in James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal District, FMC Docket No. 9432 (Aug. 26, 2003). Edaf has completely failed to address certain required factual pleadings, as discussed at pages 12 through 14 of Respondents' moving papers. In particular, Edaf failed to allege any facts that Respondents had notice of special circumstances to support an award of special, unforeseeable consequential damages in this case. Accordingly, Edaf's lost additional sales damages claim must be dismissed.

Edaf's citation of Schoenbaum in support of its lost additional sales damages is inapposite. Schoenbaum was not addressing concepts of special and consequential damages, as is the case here. In fact, as Schoenbaum states, "there apparently is no case in carriage of goods by sea in which consequential damages have been awarded." 1 THOMAS J. SCHOENBAUM, Admiralty and Maritime Law, § 10-39 (4th ed. 2004).

Additionally, Edaf's Opposition completely fails to address Respondents' discussion of Edaf's gross inflation of its lost sales damages claim, contained at pages 14 through 15 of Respondents' moving papers. Since Edaf has completely failed to address that argument, Edaf has conceded the point. Accordingly, Edaf's lost additional sales damages should be dismissed or, in the alternative, dismissed to the extent they exceed \$23,000.

EDAF'S SUPPLY COMMITMENTS DAMAGES CLAIM FAILS

Edaf's claimed \$20,000 in damages for supply commitments must fail as Edaf has not adequately plead a violation of the Act or actual injury. Edaf's Opposition does not change the failure of the Complaint to properly plead a damages claim that satisfies the Iqbal standards. Accordingly, Edaf's supply commitments damages claim must be dismissed.

EDAF'S LOSS OF GOOD WILL DAMAGES CLAIM FAILS

Edaf's claimed \$50,000 in damages for the loss of good will must also fail as Edaf has not adequately plead a violation of the Shipping Act, actual injury, or any facts supporting

a loss of good will damages claim. Edaf's Opposition is completely bereft of additional factual allegations in support of its claim on this point. In fact, the only legal authority Edaf cites concerns the need to prove "loss of market advantage" to support a loss of good will damages claim.¹ Business Trends Analysts, Inc. v. Freedonia Group, Inc., 887 F.2d 399 (2d Cir. 1989). Edaf's Complaint alleges no factual allegations concerning a "loss of market advantage." To the contrary, the entirety of Edaf's allegations supporting its claim to loss of good will damages consists of the following: "Complainant requests damages to good will in the amount of \$50,000.00." Complaint, ¶H13. Edaf's Complaint thus falls well short of the Iqbal pleading standard. Accordingly, Edaf's loss of good will damages claim must be dismissed.

EDAF'S DAMAGES ARE LIMITED TO \$500 PER PACKAGE IN ANY EVENT

In the alternative, in the event the Commission finds that it has jurisdiction over Edaf's claims, Edaf's damages are limited to \$500 per package as per the clear terms of Neutral's bill of lading. Edaf's brief Opposition on this point cites no authority for the proposition that the limitation terms contained within a carrier's bill of lading should be ignored. Edaf simply states "we don't agree." Opposition at p. 6. Accordingly, in the event the Commission finds Edaf is entitled to damages, they must be limited in accordance with the terms contained in Neutral's bill of lading.

¹ In the cited decision, the Second Circuit in fact overturned the district judge's award of damages. 887 F.2d at 404-05.

THE COMMISSION LACKS JURISDICTION OVER IFS

Edaf's claims against IFS must be dismissed because IFS is not subject to the jurisdiction of the Commission. Edaf's Opposition acknowledges that Edaf itself plead facts proving the Commission's lack of jurisdiction over IFS. Opposition at p. 6. Edaf is bound by the allegations it has plead, and cannot walk away from them when those allegations no longer become convenient to its case. See White v. ARCO/Polymers, Inc., 720 F.2d 1391, 1396 (5th Cir. 1983); AMEX Assurance Co. v. Caripides, 179 F. Supp.2d 309, 323 (S.D.N.Y. 2002). Further, Edaf's request for "full and comprehensive discovery" is entirely irrelevant in view of Edaf's pleadings on this issue. It is plain on the face of the pleadings that IFS is not subject to the Commission's jurisdiction. Valencia-based IFS clearly falls outside the definition of an ocean freight forwarder (see 46 U.S.C. § 40102(18)), therefore the Commission lacks jurisdiction over IFS. Accordingly, Edaf's claims against IFS must be dismissed in their entirety.

CONCLUSION

For the aforementioned reasons, the Commission should dismiss Edaf's claims against IFS and Neutral in toto, or in the alternative as discussed in Respondents' moving papers.

Dated: October 2, 2014

Respectfully Submitted,



Todd P. Kenyon

Joshua S. Parks

Betancourt, Van Hemmen, Greco & Kenyon LLC

151 Bodman Place, Suite 200

Red Bank, NJ 07701

Tel.: 732-530-4646

Fax: 732-530-9536

Email: tkenyon@bvgklaw.com

Email: jparks@bvgklaw.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing IFS International Forwarding, S.L.'s and IFS Neutral Maritime Service, Inc.'s Reply Memorandum in Support of Their Motion to Dismiss the Complaint upon the following addressees by e-mail:

Carlos E. Matos Malec, Esq.
Edaf Antillas, Inc.
P.O. Box 11249
San Juan, PR 00922-1249
(787) 707-1792
carlos@forsapr.com

Eric C. Jeffrey, Esq.
Lindsey M. Nelson, Esq.
Nixon Peabody LLP
401 Ninth Street, N.W., Suite 900
Washington, D.C. 20004-2128
(202) 585-8000
ejeffrey@nixonpeabody.com
lnelson@nixonpeabody.com

Dated: October 2, 2014



Joshua S. Parks