

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 14-04**

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**EDAF ANTILLAS, INC.**

**v.**

**CROWLEY CARIBBEAN LOGISTICS, LLC;  
IFS INTERNATIONAL FORWARDING, S.L.; and  
IFS NEUTRAL MARITIME SERVICES**

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**RESPONSE TO MOTION TO DISMISS  
BY IFS INTERNATIONAL FORWARDING, S.L.; AND  
IFS NEUTRAL MARITIME SERVICES INC.**

Respondents IFS INTERNATIONAL FORWARDING, S.L.; and IFS NEUTRAL MARITIME SERVICES INC. (IFS and NEUTRAL, respectively) have requested an Order dismissing Edaf Antilla's (EDAF) Complaint *in toto* against IFS and NEUTRAL. In summary, Respondents allege (1) that the Commission lacks jurisdiction over the complaint as the complaint arises under the Carriage of Goods by Sea Act (COGSA) and not under the Shipping Act of 1984; (2) that the delayed delivery claim is prohibited by the language contained in the Bill of Lading; (3) Failure to state a claim upon which relief can be granted; (4) Failure to state a claim for damages upon which relief can be granted; and (5) Claims against Respondent IFS must be dismissed for lack of jurisdiction because IFS is not “an entity regulated by the Shipping Act”.

## DISCUSSION

### **A. Commission Lacks Jurisdiction over EDAF's Claim**

Complainant seeks reparations that arise under the Shipping Act of 1984 for actions wrought by the Respondents. Complainant did not bring the instant action against Respondents to recover for the loss of their cargo. In *Deringer*, the Commission recognized that the Complainant sought the Commission's jurisdiction to circumvent the statute of limitations that barred their claim under the COGSA. Complainant here has presented timely claims pled under specific sections of the Shipping Act that prohibit specific types of conduct by regulated parties. While it is true that delivery of the Complainant's goods was delayed, the Complainant seeks reparations stemming from conduct that is prohibited under the Shipping Act.

### **B. Respondents Falsely Assert that EDAF has Made a "Delayed Delivery Claim" Prohibited by the Bill of Lading.**

Complainant concedes that in Admiralty, a claim for delayed delivery damages is generally strictly governed by the terms contained on the Bill of Lading and by the rules under which it was drafted. However, we again assert that EDAF's claims arise under the Shipping Act of 1984 and that any damages that may have occurred are a consequence of violations of specific Sections of the Shipping Act.

### **C. EDAF has Stated a Claim Upon Which Relief Can Be Granted**

#### **1. The Section 10(d)(1) Claim is Properly Pled.**

IFS and NEUTRAL allege that Complainant's Section 10(d)(1) claim is "merely a formulaic recitation of the elements of the Act" that "draws bald legal conclusions" without

showing any facts to support conclusions that the Respondents failed to “establish, observe, or enforce just and reasonable practices”.<sup>1</sup> Furthermore, Respondents assert that the facts cited to support the claim details the “procedures and communications undertaken to successfully import the cargo.”<sup>2</sup>

Respondents violated Section 10(d)(1) twice. First when their “procedures and communications” failed to trap the cargo containing a non-compliant wood pallet from being loaded into the same container the held the Complainant's cargo. A second violation occurred after U.S. Customs in Puerto Rico denied the entire container entry into the United States. There, Respondents “procedures and communications” were insufficient to cure the non-compliant container in a timely fashion.

## **2. The Section 10(b)(3) Claim is Properly Pled.**

Respondent Crowley Caribbean Logistics LLC (CCL) admitted in its Answer that 428 containers from Spain were processed by it in Puerto Rico in 2013.<sup>3</sup> Many of these, if not all, *may* have been for Respondents IFS and NEUTRAL. While the Complainant's recitation of the pertinent Sections of the Act may seem formulaic, sufficient facts were provided in the Complaint to substantiate their Section 10(b)(3) claim. Complainant had to wait nearly 60 days beyond the original date their cargo should have first been available for delivery. Complainant emailed Respondent CCL repeatedly regarding his cargo. After 29 August 2013, Respondent CCL ceased to acknowledge any of Complainant's requests for information regarding a resolution of the issues. The delay was not resolved until yet another month had passed. These facts should, in and by themselves, be sufficient to establish that Respondents violated Section

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<sup>1</sup> IFS's and NEUTRAL's Motion to Dismiss at page 6.

<sup>2</sup> *Ibid.* at page 6.

<sup>3</sup> CCL's Answer, Ninth Affirmative Defense, at page 7.

10(b)(3) on two separate occasions. Complainant's claim as pled should be sufficient to survive and move onto the next round.

**3. The Section 10(b)(8) Claim is Properly Pled**

Respondents IFS and NEUTRAL assert that the Section 10(b)(8) claim must fail because of it lacks the same factual support afflicting our Section 10(b)(3) claim. A key element that Complainant will need in order to prove violations of Section 10(b)(8) is the prejudice or disadvantage suffered by the Complainant when they are compared with other shippers. Respondent CCL admits that they processed 428 containers from Spain during 2013.<sup>4</sup> Thus, during the 60 days that Complainant's cargo was delayed beyond its first visit to Puerto Rico, approximately 70 other containers from Spain were processed. Each container, and each of the cargos contained within, were afforded a preference over the Complainant's cargo. That each of the 70 containers preferred over the one containing the Complainant's cargo might all have been compliant, is not relevant. It would be relevant had the Respondents not violated Section 10(d) (1). Complainant believes that the facts already demonstrate that the *Ceres*, *Volkswagenwerk*, and *New Orleans Stevedoring Company* tests are fulfilled.<sup>5</sup> Dismissing this claim at this stage of the proceedings would be premature.

**D. EDAF has Stated a Claim Upon Which Relief Can Be Granted**

Complainant believes that it can prove actual damages suffered that entitle it to the reparations sought and that these damages are not purely speculative or conjectural. Complainant has adequately pled specific violations of the Shipping Act by the Respondents as well as the actual injuries suffered as a result of these violations.

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<sup>4</sup> CCL's Answer, Ninth Affirmative Defense, at page 7.

<sup>5</sup> *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 27 SRR 1251, 1270-71 (FMC 1997). *Volkswagenwerk v. FMC*, 390 U.S. 261 (1968). *New Orleans Stevedoring Co. v. Board of Commissioners of the Port of New Orleans*, 29 SRR 345, 352 (ALJ 2001), *aff'd*, 29 SRR 1066 (FMC 2002)

Complainant admits that it made a profit on the goods, despite the 60 day delivery delay. However, the profits realized were not as great as they could have been had the goods been delivered on time, and they were realized much later than they would have been had the Respondents not violated the Shipping Act.

**1. Complainant's \$88,000 Lost Additional Sales Damages Should Withstand Scrutiny**

Complainant did not sell the cargo until after it was delivered in October 2013. Complainant expected to sell the cargo in early August 2013. Complainant did not sell the cargo in August or September 2013 because the cargo could not be delivered. The cargo could not be delivered because of the Respondents violation of Section 10(d)(1), the proximate cause of the actual injury suffered, and consequently, they are entitled to reparations from the actual injury directly attributable to the unlawful practice. See James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal District, FMC Docket No. 94-32 (Aug. 26, 2003), citing *Ballmill Lumber v. Port of New York*, 11 F.M.C. 494 (1968).

Although lost profits are not the same as lost sales because, for example, lost sales can imply a failure to fulfill a contractual obligation that a third party relied upon, “[i]f a consignee establishes lost profits by showing lost sales or lost orders, lost profits may be given.” Schoenbaum on Admiralty & Maritime Law, §10-37, p.729, citing *Great American Trading v. A.P.L.*, 641 F Supp. 396, 402 (N.D. Calif., 1986).

**2. Complainant's Alleged \$20,000 Supply Commitments Damages Will Withstand Scrutiny**

Had Complainant taken delivery of his cargo in August 2013, he would have fulfilled a supply commitment with a Fortune 500 company. Complainant sold goods at less than he would have had he received them in August. The difference between what they were sold for in October and what they were expected to be sold for in August was approximately \$20,000.

**3. Complainant's Alleged \$50,000 Loss of Good Will Damages Will Withstand Scrutiny**

Respondents suggest that Complainant's allegation fails to satisfy the *Iqbal* standard. Complainants will prove that this award is quantifiable and not purely speculative. “[D]amages resulting in a loss of market advantage are not necessarily barred provided the amount of the award is based upon a factual basis rather than undue speculation.” *Business Trends Analysts v. The Freedonia Group Inc.* 887 F.2d 399, 404 (2<sup>nd</sup> Cir., 1989) citing *Abeshouse v. Ultragraphics Inc.*, 754 F.2d 467, 470 (2<sup>nd</sup> Cir., 1985).

**4. Complainant's Damages Are Not Limited By COGSA Limitations**

Respondents suggest that should the Commission find Complainant entitled to damages, they must be limited to \$500 per package in accordance with the Carriage of Goods by Sea Act (COGSA) that Respondents allege should govern the shipment at issue. We don't agree that COGSA controls the magnitude of reparations to be assessed for violation under the Shipping Act and we assert that it has no bearing over violations to the Shipping Act in the instant case.

**E. The Commission May Have Jurisdiction over IFS.**

The Complaint recognizes that IFS, “based upon information” available to the Complainant at the time the Complaint was drafted, might be an Ocean Freight Forwarder based in Valencia, Spain. However, we do not possess sufficient facts at this time to be able to evaluate the nature of the corporate relationships and regarding the ownership of shares that may exist now, or have existed in the relevant past between IFS and NEUTRAL. Dismissal would be

premature pending a full and comprehensive discovery into the relationship that existed and may still exist between the Respondents.

**C. Conclusion**

Complainant EDAF respectfully requests that the Complaint not be dismissed with regard to Respondents IFS and NEUTRAL. As shown above, IFS and NUETRAL have not demonstrated that the Commission lacks subject matter jurisdiction over the Respondents or that any of the claims against the Respondents should be dismissed. In the alternative, Complainant respectfully asks the Commission for leave to Amend the Complaint as it deems to be appropriate.

Dated: September 25, 2014

Respectfully submitted,

BY:   
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