

FEDERAL MARITIME COMMISSION

DOCKET NO. 14-04

EDAF ANTILLAS, INC.

v.

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

ORDER ON MOTIONS TO DISMISS

This proceeding addresses the unfortunate situation where the cargo of one shipper of a less-than-container load (LCL) shipment is found not to comply with U.S. Customs and Border Protection (CBP) regulations for entry into the country, resulting in a CBP order barring entry of the container and all of its cargo and consequently a delay of the LCL shipments of other innocent shippers whose cargo complies with CBP regulations. The Complaint alleges that complainant Edaf Antillas, Inc. (Edaf Antillas) is such an innocent shipper and that the delay was caused by Respondents' violations of the Shipping Act. Respondents filed motions to dismiss the Complaint. The motions have been fully briefed by the parties.

I. COMPLAINT.

A. Facts.¹

Edaf Antillas is incorporated in Puerto Rico. It is a subsidiary of Editorial Edaf, S.L. (Editorial Edaf), which is incorporated in Spain. Edaf Antillas is engaged in the distribution and marketing of Spanish language books.

¹ The facts stated are derived from the Complaint and exhibits attached to the Complaint. Facts alleged in the Complaint are taken as true when considering the motions to dismiss. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009).

Respondents IFS Neutral Maritime Service (Neutral) and IFS International Forwarding, S.L. (IFS) are affiliated corporations organized under the laws of Spain. Respondent Crowley Caribbean Logistics, LLC (CCL) is a Puerto Rico corporation that is controlled by an entity that is an ocean common carrier within the meaning of 46 U.S.C. § 40102(17). Neutral and CCL are licensed by the Commission as non-vessel-operating common carriers (NVOCCs) and are ocean freight intermediaries within the meaning of 46 U.S.C. § 40102(16) and § 40102(19). FMC OTI List, <http://www2.fmc.gov/oti/NVOCC.aspx>, last visited Oct. 28, 2014. CCL and IFS are alleged to be ocean freight forwarders within the meaning of 46 U.S.C. § 40102(18). Edaf Antillas alleges on information and belief that CCL acts as the agent for IFS and Neutral in San Juan, Puerto Rico, collecting all fees from the consignee and remitting those portions that correspond to services provided by the origin port agents to IFS and Neutral.

On or about July 14, 2013, Editorial Edaf delivered an LCL consignment of books to the care of its forwarding agent Space Cargo, S.L., in Madrid, Spain. The Complaint alleges that Space Cargo engaged IFS and Neutral to transport the shipment by water to San Juan. Space Cargo delivered the books and export-related documentation, including a certificate of compliance with approved wood pallet regulations, a packing list, and a commercial invoice, to Neutral. Neutral consolidated Editorial Edaf's shipment with LCL cargo that Neutral transported for other shippers in container DVRU0610860 and delivered the container to an ocean common carrier² for transportation from the Port of Valencia, Spain, to the Port of San Juan, Puerto Rico. Neutral issued house bill of lading 424555 for Editorial Edaf's shipment in container DVRU0610860, identifying Editorial Edaf as the shipper, Edaf Antillas as the consignee, Valencia as the port of loading, and San Juan as the port of discharge. IFS signed the bill of lading as agent for Neutral. (Complaint Exh. 4.) Edaf Antillas does not believe that Space Cargo delivered any other cargo bound for Puerto Rico to Neutral with Editorial Edaf's shipment.

On July 15, 2013, Edaf Antillas's customs broker in San Juan, Inter-World Customs Broker Inc. (Inter-World), filed an ISF 10+2³ with CBP. On or about July 21, 2013, container DVRU0610860 was loaded aboard the M/V *Caroline Schulte* and departed Valencia for San Juan.

² Edaf Antillas states the container DVRU0610860 was delivered to an "unknown Ocean Common Carrier." (Complaint Claim ¶ E.) CBP requires use of the Standard Carrier Alpha Code (SCAC) assigned to the carrier in the National Motor Freight Traffic Association, Inc., Directory of Standard Multi-Modal Carrier and Tariff Agent Codes to identify carriers. 19 C.F.R. § 4.7a(c)(2)(iii). The SCAC on the CBP entry form for container DVRU0610860 (Complaint Exh. 5) indicates that the vessel-operating common carrier was "CMDU" (CMA-CGM America).

³ An importer of cargo by water is required to file an Importer Security Filing (the Complaint calls this an ISF+10) with Customs and Border Protection no later than 24 hours before the cargo is laden aboard a vessel in a foreign port. See 19 C.F.R. Part 149. See also <http://www.cbp.gov/border-security/ports-entry/cargo-security/importer-security-filing-102>, last visited Oct. 28, 2014.

On August 5, 2013, container DVRU0610860 arrived in San Juan. (Complaint Exh. 5.) On August 13, 2013, CCL notified Edaf Antillas and Inter-World that CBP had selected container DVRU0610860 for intensive inspection. (Complaint Exh. 6.) On August 19, 2013, IFS notified Edaf Antillas that CBP had rejected container DVRU0610860. It is believed that a single pallet transported by Neutral for another shipper in container DVRU0610860 did not comply with CBP wood pallet protocol. (Complaint Exh. 8.) Because of this fact, CBP barred entry into the customs territory of the United States of container DVRU0610860 and all its cargo, including the shipment to Edaf Antillas. (Complaint Exh. 9.)

On August 29, 2013, IFS and Neutral sent a letter to Editorial Edaf outlining the procedure to be followed to cure the non-compliant container. No dates for the execution of these procedures were provided in this letter. Editorial Edaf provided a copy of this letter to Edaf Antillas. On September 5, 2013, CCL advised Inter-World that container DVRU0610860 had not yet departed Puerto Rico. When Inter-World asked why it had not yet been shipped, CCL responded that “re-exportation of said container is being worked upon by the pertinent agencies, including the Shipping line, Customs, etc., and we have not yet received the proper authorization, therefore the same has not yet departed.” (Complaint Exh. 7 (translation).) On September 17, 2013, CBP authorized the movement of container DVRU0610860 to the carrier’s facility. (Complaint Exh. 9.) On September 23, 2013, Editorial Edaf advised Edaf Antillas that container DVRU0610860 had been transported to the island of Sint Maarten, N.A. (St. Martin). Once the non-compliant pallet was replaced, the container and its cargo would be returned to San Juan. (Complaint Exh. 10.) Edaf Antillas alleges that while waiting to take delivery of its cargo after container DVRU0610860 returned to San Juan, Edaf Antillas learned from CCL employees that exportation to St. Martin was delayed due to a dispute among Respondents as to who would pay for the costs of curing the entry and that the container did not leave Puerto Rico until that party paid the costs in advance. (Complaint Claim ¶ W.)

On September 28, 2013, CCL issued Crowley Caribbean Logistics, LLC non-negotiable bill of lading 424555A for Editorial Edaf’s shipment in container DVRU0610860 for its return to San Juan, identifying Editorial Edaf as the shipper, Edaf Antillas as the consignee, St. Martin as the port of loading, and San Juan as the point of discharge. (Complaint Exh. 14.) On September 30, 2013, container DVRU0610860 arrived in San Juan. Inter-World advised CBP that the shipment had arrived, and Edaf Antillas’s goods were cleared for entry into the commerce of the United States. The entry was performed using the entry previously made and not a new one. (See Complaint Exh. 5, CBP Entry N35-0251881-3). On October 11, 2013, Edaf Antillas picked up its shipment from CCL.

After the container was loaded onto the vessel that transported it from St. Martin to Puerto Rico, and either prior to making entry, or subsequent to having obtained the entry, CCL advised Inter-World that CCL had amended the numbering of its house bill of lading to include the letter “A.” Edaf Antillas alleges that Inter-World transmitted in a timely fashion a second ISF 10+2 using the house bill of lading number 424555 originally provided by CCL. Inter-World advised CCL that changing the number from 424555 to 424555A violated CBP’s regulations, which require that an

accurate ISF 10+2 filing be made 24 hours prior to the time a shipment leaves the port of loading. Because of the lateness of CCL's notice of the changed number, Edaf Antillas believes the ISF 10+2 filing is non-compliant. The CBP has up to five years to file an enforcement action for incomplete or late ISF 10+2 filings, and can at any point of time during that five year period assess liquidated damages up to five thousand dollars per violation against the importer of record. (Complaint Claim ¶¶ Q-T.)

Edaf Antillas also alleges that CCL's Invoice 91448, dated August 07, 2013, and prepared on October 02, 2013, erroneously identifies the voyage number, house bill of lading number, and container number. The correct references appear on Customs Entry N35-0251881-3 in handwritten form, dated August 5, 2013, and authorized for delivery on October 9, 2013. (Complaint Exh. 13, CCL Invoice 91448, and Exh. 14, CCL HBL 424555A, prepared on October 02, 2013).

B. Alleged Violations.

Section 10(d)(1)⁴ of the Shipping Act provides: "A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). Edaf Antillas contends that Respondents violated section 10(d)(1) at two points in the transportation of its property in container DVRU0610860. First, Edaf Antillas contends that IFS and Neutral failed to establish reasonable regulations and practices that, if observed and enforced, would have prevented loading a non-compliant wood pallet transported for another shipper into container DVRU0610860 with compliant shipments of Edaf Antillas and other shippers. In the alternative, if IFS and Neutral had established reasonable regulations and practices, they failed to observe and enforce the regulations and practices in a manner that would have prevented loading a non-compliant wood pallet into container DVRU0610860 for the shipment from Spain to San Juan. (Complaint Cause of Action ¶ A.) Second, Edaf Antillas contends that CCL, IFS, and Neutral failed to establish reasonable regulations and practices that, if observed and enforced, would have ensured that when CBP barred the entry of container DVRU0610860, the matter would be cured for reentry and the shipment delivered in a timely and efficient manner. (Complaint Cause of Action ¶ B.) In particular, Edaf Antillas contends that Respondents failed to have reasonable regulations

regarding how expenses incurred in the reexportation and reimportation of non-compliant cargos would be resolved between these regulated parties. . . . Failure to execute the reexportation [of] the non-compliant container within a reasonable period

⁴ "On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill's purpose was to 'reorganize[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law.' H.R. Rep. 109-170, at 2 (2005). The Commission continues to cite provisions of the Act by their former section references. . . ." *Shipco Transport, Inc. v. Jem Logistics, Inc.*, 32 S.R.R. 1855, 1856 n.2 (FMC 2013). I follow that practice in this Initial Decision.

of time lay solely within the control of the regulated parties and outside the control of the Complainant or his agents.

(Complaint Cause of Action ¶ C.)

Edaf Antillas contends: “Respondent CCL violated section 10(d)(1) . . . when [it] failed to notify in a timely, accurate and expeditious fashion Complainant’s Customs Broker with the information solely within Respondent’s possession required [to] complete a compliant [ISF 10+2] filing.” (Complaint Cause of Action ¶ F.)

Section 10(b)(8) of the Act provides: “A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (8) for service pursuant to a tariff, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage.” 46 U.S.C. § 41104. Edaf Antillas contends:

Respondents violated section 10(b)(8) when they required and demanded payment for expenses that would be incurred in curing the defective cargo from one or more of the Respondents and/or the shipper or consignee of the offending cargo. In so doing, Respondents obliged the Complainant to wait until the Respondents resolved payment matters before the container was rendered compliant for entry into the commerce of the United States. Respondents gave an “undue or unreasonable preference or advantage” to both the offending shipper as well as to each of the Respondents to the detriment of shippers whose cargo was compliant and imposed upon each of these shippers an “undue or unreasonable prejudice or disadvantage.”

(Complaint Cause of Action ¶ D.)

Section 10(b)(3) of the Act provides:

A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (3) 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.

46 U.S.C. § 41104. Edaf Antillas contends: “Respondent CCL resorted to unfair or unjustly discriminatory methods when, after the September 5, 2013 email exchange with Complainant, Respondent CCL failed to take reasonable, prudent and sufficient measures to cure the non-compliant container, in violation of section 10(b)(3)” (Complaint Cause of Action ¶ E.)

Edaf Antillas contends that it has suffered actual injury as a result of Respondents’ violations of the Act and is entitled to a reparation award. (Complaint Cause of Action ¶¶ G-H.)

II. COMMISSION RULES OF PRACTICE AND PROCEDURE PERMIT CONSIDERATION OF A MOTION TO DISMISS.

Respondents IFS and Neutral move to dismiss the Complaint for lack of jurisdiction and for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). ([IFS and Neutral] Motion to Dismiss the Complaint (IFS/Neutral Mot. Dism.)) CCL filed a supplement stating that it “joins the Motion to Dismiss of [IFS and Neutral] to the extent that the grounds set forth in such Motion apply logically to Respondent CCL as well.” (Supplemental Motion to Dismiss of Respondent Crowley Caribbean Logistics, LLC.) CCL also filed its own motion to dismiss and supporting memorandum. (Memorandum in Support of Motion to Dismiss of Crowley Caribbean Logistics, LLC (CCL Mot. Dism.))

The Commission’s Rules of Practice and Procedure, 46 C.F.R. Part 502, do not explicitly provide for a motion to dismiss for lack of subject matter jurisdiction or a motion to dismiss for failure to state a claim. As stated by the Commission:

Rule 12 of the Commission’s Rules of Practice and Procedure (the Rules) states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission’s Rules, to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. As the Commission’s Rules do not address motions to dismiss for lack of subject matter jurisdiction or failure to state a claim, Federal Rules 12(b)(1) and 12(b)(6) apply in this case. *See, e.g., The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, 2007 WL 2468431 (F.M.C.).

Rule 12(b)(1) permits a party to raise by motion lack of subject matter jurisdiction, and Rule 12(b)(6) permits a party to raise by motion failure to state a claim. With regard to motions to dismiss a complaint for lack of subject matter jurisdiction under Rule 12(b)(1), such motions may assert either a factual attack or a facial attack to jurisdiction. . . . A factual attack challenges “the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered.” . . . In a facial attack, on the other hand, the court examines whether the complaint has sufficiently alleged subject matter jurisdiction. As it does when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court construes the complaint in the light most favorable to the plaintiff and accepts all well-pled facts alleged . . . in the complaint as true.

Sinaltrainal v. Coca-Cola Company, 578 F.3d 1252, 1260 (11th Cir. 2009).

To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim “has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, [556 U.S. 662, 677] (2009). The complaint must be sufficient to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atlantic*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); see also 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure Civ.* § 1215 (3d ed. 2010) (“[T]he test of a complaint’s sufficiency simply is whether the document’s allegations are detailed and informative enough to enable the defendant to respond.”).

Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., 32 S.R.R. 126, 136 (FMC 2011).

[A] plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan v. Allain*, 478 U.S. 265, 286 . . . (1986) (on a motion to dismiss, courts “are not bound to accept as true a legal conclusion couched as a factual allegation”).

Bell Atlantic Corp. v. Twombly, 550 U.S. at 555.

The 12(b)(6) dismissal device – as well as the corollary Rule 8(a)(2) requirement that a pleading contain a “short and plain statement of the claim showing that the pleader is entitled to relief” – is premised upon the principle that the plaintiff must provide the court and defendants with “fair notice of what the claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555 (citing Rule 8(a)). To that end, “allegations in a complaint must be complete enough to enable a reader to understand how each defendant was personally involved in the wrongdoing plaintiff is alleging.” *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 616 (S.D.N.Y. 2012). Consequently, the plaintiff cannot rely upon “a generalized term like ‘defendants’ to obfuscate each defendant’s role in the alleged conduct or the legal theory of liability on which [it] is relying.” *Watkins v. Smith*, No. 12 Civ. 4635 (DLC), 2013 U.S. Dist. LEXIS 24712, 2013 WL 655085, at *9 (S.D.N.Y. Feb. 22, 2013).

Danaher Corp. v. Travelers Indem. Co., No. 10 Civ. 121 (JPO), 2014 U.S. Dist. LEXIS 39300, at *10-11 (S.D.N.Y. Mar. 21, 2014).

Edaf Antillas attached fifteen exhibits to its Complaint.

[O]n a motion to dismiss, a court may consider “documents attached to the complaint as an exhibit or incorporated in it by reference, . . . matters of which judicial notice

may be taken, or . . . documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." Because this standard has been misinterpreted on occasion, we reiterate here that a plaintiff's *reliance* on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough. See [*Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991)].

Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002) (emphasis and ellipses in original) (footnote omitted). Edaf Antillas cited to each of these exhibits and relied on them when it drafted its Complaint. Therefore, I conclude that the exhibits are integral to the Complaint and may be considered in connection with the motions to dismiss without treating them as motions for summary judgment. See Fed. R. Civ. P. 12(d).

III. THE COMPLAINT DOES NOT STATE A CLAIM AGAINST IFS INTERNATIONAL FORWARDING, S.L.

A. The Parties' Arguments.

IFS/Neutral contend that:

Edaf's claims must be dismissed as against IFS in any event because IFS is not an entity that falls within the jurisdiction of the Commission. In order to hold a respondent liable for a breach of the Act, the Act must apply to that respondent. IFS, which operates overseas, is not an entity that is regulated by the Shipping Act, and is not subject to the jurisdiction of the Commission.

Edaf has alleged that IFS is located in Spain. Complaint at 3. Edaf has further alleged that IFS is an ocean freight forwarder. Complaint at 6. Ocean freight forwarders are defined within the Act as a person that "in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers[.]" 46 U.S.C. § 40102(18). IFS, which is plainly not a person in the United States, does not satisfy the definition of an "ocean freight forwarder" under the Act. Accordingly, the Act does not apply to IFS, and IFS is not subject to the jurisdiction of the Commission. Therefore Edaf's claims must be dismissed entirely as against IFS in any event.

(IFS/Neutral Mot. Dism. at 18-19.) Edaf Antillas responds:

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.

(Edaf Opp. to IFS/Neutral Mot. Dism. at 8.)

B. Discussion.

The Complaint alleges that Space Cargo, Editorial Edaf's forwarding agent in Spain, engaged IFS and Neutral "to consolidate the Complainant's cargo for transportation [to] the port of San Juan, Puerto Rico." (Complaint Claim ¶¶ A-B.) IFS Neutral Maritime Services, an NVOCC licensed by the Commission, issued the bill of lading to Editorial Edaf, thereby assuming responsibility for transporting the cargo. IFS International Forwarding signed the bill of lading as agent for Neutral. (Complaint Exh. 4.)

The Shipping Act defines "ocean freight forwarder" as "a person that – (A) *in the United States*, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(18) (emphasis added). An ocean freight forwarder acts as the agent of the shipper. *Yakov Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R. 1720, 1742-1743 (FMC 2013). The Act defines "shipper" to include:

- (A) a cargo owner;
- (B) the person for whose account the ocean transportation of cargo is provided;
- (C) the person to whom delivery is to be made;
- (D) a shippers' association; or
- (E) a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract.

46 U.S.C. § 40102(22).

Edaf Antillas argues that IFS "might be an Ocean Freight Forwarder based in Valencia, Spain." (Edaf Opp. to IFS/Neutral Mot. Dism. at 8.) The Neutral bill of lading attached to the Complaint establishes that IFS did not operate as an ocean freight forwarder within the meaning of the Act on the shipment from Spain to the United States. First, this shipment was dispatched *to*, not from, the United States; therefore, any person providing services in Spain comparable to those of an ocean freight forwarder in the United States would not be subject to the Shipping Act or to Commission jurisdiction on a complaint alleging violations of the Act in the country of origin.⁵ Second, the record indicates that to the extent IFS may have performed services in Spain that are

⁵ The allegations in the Complaint suggest that Space Cargo performed services analogous to those of an ocean freight forwarder.

subject to Commission jurisdiction, it performed these services as agent for disclosed principal Neutral, the common carrier that transported the shipment as an NVOCC, not for Editorial Edaf, the shipper in Spain, or Edaf Antillas, the consignee in San Juan.

An agent providing NVOCC services on behalf of a disclosed NVOCC principal possesses neither of those two defining characteristics of an NVOCC. An agent acting on behalf of a disclosed NVOCC principal does not hold *itself* out to the general public to provide transportation because it holds out only *in the name of the NVOCC*, subject to that NVOCC's control.

Landstar Express America, Inc. v. FMC, 569 F.3d 493, 497 (D.C. Cir. 2009) (emphasis in original). "A carrier's agent . . . does not transport property." *Trane Co. v. South African Marine Corp. (N.Y.)*, 19 F.M.C. 375, 382 (ALJ 1976).

It is true that "[c]ommon law principles of agency apply to maritime contracts," *Fireman's Fund McGee Marine v. M/V Caroline*, 2004 AMC 430, 433, 2004 WL 287663, at *2 (S.D.N.Y. 2004) (citation omitted), and that "[w]hen an agent makes a contract for a disclosed principal, it becomes neither a party to the contract nor liable for the performance of the contract." *Seguros Banvenez, S.A. v. S/S Oliver Drescher*, 1985 AMC 2168, 2174, 761 F.2d 855, 860 (2 Cir. 1985) (citing Restatement (Second) of Agency §§ 320, 328); *accord Leather's Best, Inc. v. S.S. Mormaclynx*, 1971 AMC 2383, 2391-92, 451 F.2d 800, 808 (2 Cir. 1971); *CMA-CGM (Canada), Inc. v. World Shippers Consultants, Ltd.*, 921 F. Supp.2d 1, 6 (E.D.N.Y. 2013).

Nippon Yusen Kaisha a.k.a. NYK Line v. FIL Lines USA Inc., 12 Civ. 6643, 2013 U.S. Dist. LEXIS 150257 (S.D.N.Y. Oct. 18, 2013) (emphasis added). To the extent IFS performed any NVOCC services in Spain on the shipment from Spain to Puerto Rico, it did so as agent for NVOCC Neutral, its disclosed principal, and was not operating as an NVOCC itself.

The Commission does not have jurisdiction over ocean freight forwarders that perform services on shipments coming to the United States. To the extent that IFS performed any activities in Spain that are regulated by the Shipping Act, the allegations in the Complaint and the shipping documents incorporated into the Complaint demonstrate that it did so as agent for Neutral and would not itself be liable for any violation of the Act. *Nippon Yusen Kaisha a.k.a. NYK Line v. FIL Lines USA Inc.*, *supra*. Therefore, the claim in the Complaint that IFS violated section 10(b)(1) of the Act by its actions in Spain is dismissed for failure to state a claim. When a complaint is dismissed for failure to state a claim, leave to amend need not be given if amendment would be futile. *Cornelius v. Bank of Am., NA*, No. 13-14905, 2014 U.S. App. LEXIS 18396, at *9-10 (11th Cir. Sept. 25, 2014) (per curiam); *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007) (per curiam). Based on the allegations in the Complaint and the evidence in the supporting documents, I conclude that amendment to the Complaint would be futile. Therefore, the dismissal is with prejudice.

As stated in Part I.A above, the Complaint and the exhibits attached to it establish that CBP would not permit container DVRU0610860 to enter the commerce of the United States and that it was transported to St. Martin, a foreign port, which means the container was “dispatche[d] . . . from the United States via a common carrier.” 46 U.S.C. § 40102(18). To the extent that IFS performed any services on this shipment that are arguably the function of an ocean freight forwarder within the meaning of the Act, it performed these services for its principal Neutral, not as an ocean freight forwarder working on behalf of the original shipper Editorial Edaf or Edaf Antillas, the person to whom delivery was ultimately to be made. As agent for Neutral, IFS would not itself be liable for any violation of the Act. *Nippon Yusen Kaisha a.k.a. NYK Line v. FIL Lines USA Inc.*, *supra*. Therefore, the claim in the Complaint that IFS violated section 10(d)(1) of the Act by its actions after CBP barred entry of container DVRU0610860 is dismissed for failure to state a claim. When a complaint is dismissed for failure to state a claim, leave to amend need not be given if amendment would be futile. *Cornelius v. Bank of Am.*, *supra*; *Cockrell v. Sparks*, *supra*. Based on the allegations in the Complaint and the evidence in the supporting documents, I conclude that amendment to the Complaint would be futile. Therefore, the dismissal is with prejudice.

IV. THE COMPLAINT DOES NOT STATE A CLAIM OF VIOLATION OF SECTION 10(b)(3).

A. The Parties’ Arguments.

Regarding the 10(b)(3) claims as stated in paragraph E of the Causes of Action section of the Complaint, IFS/Neutral contend:

Edaf has not set forth a single fact that IFS and Neutral retaliated against Edaf in any manner whatsoever or for any reason whatsoever. Edaf’s entirely unsupported legal conclusion that Respondents “retaliated” against Edaf or resorted to “unfair or unjust discriminatory methods” must fail, particularly because the Complaint is entirely bereft of any facts remotely supporting same.

(IFS/Neutral Mot. Dism. at 9-10.) Edaf Antillas responds:

CCL admitted in its Answer that 428 containers from Spain were processed by it in Puerto Rico in 2013. 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 10(b)(3) on

two separate occasions. Complainant's claim as pled should be sufficient to survive and move onto the next round.

(Edaf Opp. to IFS/Neutral Mot. Dism. at 4-5 (footnote omitted). *See also* Complaint Causes of Action ¶¶ A-C.)

In its motion, CCL first contends that the obligation to transport container DVRU0610860 belonged to IFS, not CCL; therefore, it could not have violated section 10(b)(3). (CCL Mot. Dism. at 9.) Even if responsibility were imposed on CCL, the Complaint does not set forth any facts on which a conclusion that CCL retaliated against Edaf Antillas could be based.

The Commission has expressly ruled that a complainant cannot make out a claim under Section 10(b)(3) unless it demonstrates retaliation by respondent for complainant patronizing another carrier or for filing a complaint. In *California Shipping Lines, Inc. v. Yangming Marine Transport Corp.*, 25 SRR 1213, 1224-25 (FMC 1990) – when current 10(b)(3) was denominated as 10(b)(5) – the Commission flatly rejected argument that “a carrier can violate section 10(b)(5) without retaliating against anybody,” ruling instead that “section 10(b)(5) of the 1984 Act applies solely to retaliatory acts of a carrier against a shipper who has sought the services of another carrier”

(*Id.* at 10 (footnotes omitted).)

Edaf Antillas responds:

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, Respondent CCL ceased to acknowledge any of Complainant's requests regarding the resolution matter. The delay was not resolved until yet another month had passed. These facts should, in and by themselves, be sufficient to establish that CCL violated Section 10(b)(3). Complainant's claim as pled should be sufficient to survive and move onto the next round.

(Edaf Opp. to CCL Mot. Dism. at 4.)

B. Discussion

Section 10(b)(3) of the Act provides:

A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (3) 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.

46 U.S.C. § 41104. I first note that the Complaint states: “*Respondent CCL* resorted to unfair or unjustly discriminatory methods when, after the September 5, 2013 email exchange with Complainant, Respondent CCL failed to take reasonable, prudent and sufficient measures to cure the non-compliant container, in violation of section 10(b)(3)” (Complaint Cause of Action ¶ E (emphasis added).) The Complaint does not allege that IFS or Neutral committed acts alleged to violate section 10(b)(3). See *Sikhs for Justice v. Nath*, 893 F. Supp. at 616 (“allegations in a complaint must be complete enough to enable a reader to understand how each defendant was personally involved in the wrongdoing plaintiff is alleging”). Nevertheless, the Complaint and documents attached to the Complaint demonstrate that CCL was acting as Neutral’s agent on this shipment. Therefore, Neutral would bear responsibility for a section 10(b)(3) violation committed by CCL when acting as Neutral’s agent. *Landstar Express America, Inc. v. FMC*, 569 F.3d at 497.

Edaf Antillas contends that its claim is based on CCL’s failure “to take reasonable, prudent and sufficient measures to cure the non-compliant container.” (Complaint Cause of Action ¶ E.) As CCL states, the Commission has held that section 10(b)(3) “applies solely to retaliatory acts of a carrier against a shipper who has sought the services of another carrier.” *California Shipping Lines, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213, 1225 (FMC 1990). The Complaint does not allege any Respondent failed to take reasonable, prudent, and sufficient measures “to cure the non-compliant container” in retaliation against Editorial Edaf or Edaf Antillas for patronizing another carrier. Edaf Antillas does not allege that any Respondent took any action against it because Editorial Edaf or Edaf Antillas patronized another carrier. Therefore, the claim in the Complaint that Respondents violated section 10(b)(3) of the Act by their actions after CBP barred entry of container DVRU0610860 is dismissed for failure to state a claim. When a complaint is dismissed for failure to state a claim, leave to amend need not be given if amendment would be futile. *Cornelius v. Bank of Am.*, *supra*; *Cockrell v. Sparks*, *supra*. Based on the allegations in the Complaint and the evidence in the supporting documents, I conclude that amendment to the Complaint would be futile. Therefore, the dismissal is with prejudice.

V. THE COMPLAINT DOES NOT STATE A CLAIM OF VIOLATION OF SECTION 10(b)(8).

A. The Parties’ Arguments.

IFS/Neutral contend:

Section 10(b)(8) states that a common carrier may not “for service pursuant to a tariff, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage.” Edaf merely recites this legal conclusion. As recognized by the Supreme Court in *Iqbal*, . . . legal conclusions couched as factual allegations are not enough to survive a motion to dismiss for

failure to state a claim upon which relief can be granted, and Edaf's Section 10(b)(8) claim must be dismissed.

(IFS/Neutral Mot. Dism. at 10.) Edaf Antillas responds:

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. 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 Marine Terminal, Inc. v. Maryland Port Administration*, 27 SRR 1251, 1270-1271 (FMC 1997); *Volkswagenwerk v. FMC*, 390 U.S. 261 (1968); and *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)] tests are fulfilled.

(Edaf Opp. to IFS/Neutral Mot. Dism. at 5 (footnotes omitted).)

CCL first contends that this section applies to service pursuant to a tariff and the Complaint does not allege that Respondents provided service pursuant to a tariff. Second, even if IFS/Neutral transported the cargo pursuant to a tariff, CCL did not. Third, CCL contends that Edaf Antillas:

has failed to plead the essential elements of a Section 10(b)(8) claim. In *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 27 SRR 1251, 1270-71 (FMC 1997), the Commission explained that a complainant must establish four things in order to make out a claim of unreasonable preference or prejudice: (1) two parties are similarly situated or in a competitive relationship; (2) the parties were accorded different treatment; (3) the unequal treatment is not justified by differences in transportation factors; and (4) the resulting prejudice or disadvantage is the proximate cause of injury. Complainant has failed to adequately plead any of these.

(CCL Mot. Dism. at 11.) Edaf Antillas "has not identified any party in similar circumstances that received better treatment to Complainant's detriment." (*Id.* at 12.)

Edaf Antillas responds that the container was transported under someone's tariff. (Edaf Opp. to CCL Mot. Dism. at 4.)

Furthermore, CCL itself has asserted that parties “in similar circumstances [. . .] received better treatment to Complainant’s detriment.”⁶¹ CCL admits that they processed 428 containers from Spain during 2013. Thus, during the 60 days that Complainant’s cargo was delayed beyond its first visit to Puerto Rico, CCL processed approximately 70 other containers from Spain. 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.

(*Id.* at 4-5.)

B. Discussion.

Edaf Antillas fails to meet the *Ceres* elements. Regarding the first element, Edaf Antillas and shippers whose shipments were not blocked by CBP for not complying with regulations are not similarly situated. The appropriate comparison is with the other innocent LCL shippers whose shipments were barred from entry because they were shipped in container DVRU0610860. All innocent shipments in container DVRU0610860 were treated the same; that is, all the shipments were exported to St. Martin with the container and all returned to San Juan with the container. There is no allegation or evidence that any compliant shipment in container DVRU0610860 was removed before shipping the container to St. Martin, (*see* Complaint Exh. 9 (“merchandise refused by USDA”)), or that in any similar circumstance, compliant shipments in containers with a shipment that was not in compliance were treated any differently than Edaf Antillas’s shipment. Regarding the third *Ceres* element, to the extent that it is appropriate to compare Edaf Antillas with shippers whose shipments were not barred by CBP, the difference is justified by transportation factors: CBP barred entry of non-compliant shipments and permitted entry of compliant shipments. Therefore, the claim in the Complaint that Respondents violated section 10(b)(8) of the Act by their actions after CBP barred entry of container DVRU0610860 is dismissed for failure to state a claim. When a complaint is dismissed for failure to state a claim, leave to amend need not be given if amendment would be futile. *Cornelius v. Bank of Am., supra*; *Cockrell v. Sparks, supra*. Based on the allegations in the Complaint and the evidence in the supporting documents, I conclude that amendment to the Complaint would be futile. Therefore, the dismissal is with prejudice.

VI. THE COMPLAINT STATES CLAIMS OF VIOLATION OF SECTION 10(d)(1).

A. The Parties’ Arguments.

Neutral raises a number of different arguments. It first contends that Edaf Antillas’s claim is based on “alleged delayed delivery of its cargo of books” and that “the Commission lacks

⁶ CCL actually stated: “Complainant has not identified any party in similar circumstances that received better treatment to Complainant’s detriment.” (CCL Mot. Dism. at 12.) Edaf Antillas’s editing of this sentence conveys a meaning the opposite of what CCL stated.

jurisdiction to hear claims for loss or damage stemming from the delayed delivery of cargo.” (IFS/Neutral Mot. Dism. at 1-2.) “The instant case . . . is an action seeking recovery for loss or damage stemming from an alleged delayed delivery, and therefore does not arise under the Shipping Act. Accordingly, Edaf’s claims must be dismissed for lack of jurisdiction.” (*Id.* at 3-4.) Edaf Antillas responds: “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.” (Edaf Opp. to IFS/Neutral Mot. Dism. at 3.)

Neutral contends that the Neutral bill of lading expressly prohibits Edaf Antillas from asserting a claim for damages due to delay of the cargo.

Provisions such as this one, have long been held valid and recognized by the federal courts as sufficient to release carriers from liability for damages due to delay. Accordingly, Respondents are entitled to rely on their contractual defense, and therefore may not be held liable for any potential damages suffered by Edaf due to the delay alleged in this matter. Edaf’s Complaint should therefore be dismissed.

(IFS/Neutral Mot. Dism. at 5.) While conceding 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,” Edaf Antillas contends that its claims are based on violations of specific sections of the Shipping Act. (Edaf Opp. to IFS/Neutral Mot. Dism. at 3.)

Neutral contends that the Complaint fails to state a claim upon which relief can be granted. Regarding the 10(d)(1) claim as stated in paragraphs A-C of the “Causes of Action” section of the Complaint, Neutral contends that “Edaf accurately quotes [section 10(d)(1)], then draws the bald legal conclusions that IFS and Neutral either failed to have reasonable practices in place, or failed to observe any such practices.” (IFS/Neutral Mot. Dism. at 7.)

Edaf does not allege any facts showing that IFS and Neutral failed to establish, observe, or enforce just and reasonable practices with respect to the Cargo. To the contrary, the Complaint details the very procedures and communications undertaken to successfully import the Cargo. Edaf alleges that [CBP] selected the container containing the Cargo for intensive inspection on or about August 13, 2013, (Complaint at H) which resulted in the container’s removal to [St. Martin]. Edaf alleges receiving a message from CCL on September 5, 2013, explaining that the container containing Edaf’s Cargo had not yet been re-exported to Puerto Rico due to a lack of proper authorization to do so, and that CCL was working with Customs, amongst others, to alleviate the problem. Complaint at Exhibit 7. Edaf further alleges that its shipper received a letter “that detailed a procedure that would be followed to cure” the alleged importation problem. Complaint at K. Edaf further alleges that the container was not authorized by CBP to be moved until September 17, 2013. Complaint at Exhibit 9. Furthermore, just a few days later,

Edaf alleges receiving an email explaining that “the container is already in ST Maarten cargo to be inspected and will be departing the next weekend with one day transit. Thus, we hope to have the container in Puerto Rico by Monday, September 30.” Complaint at Exhibit 10. Edaf alleges that this delivery in fact occurred (Complaint at O), and picked up the Cargo on October 11. Complaint at V.

Accepting all of Edaf’s allegations as true, Edaf has simply established, if anything, that Respondents did have practices and procedures in place in accordance with Section 10(d)(1). Edaf remained in close and frequent correspondence with CCL, and in fact received the Cargo, complete and undamaged, after it had been cleared through Customs in Puerto Rico. Edaf’s factual allegations actually support Respondents’ position, Edaf’s unsupported legal conclusions to the contrary. Accordingly, Edaf’s Section 10(d)(1) claim must be dismissed.

(*Id.* at 7-8.)

Edaf Antillas responds:

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, Respondents¹⁾ “procedures and communications” were insufficient to cure the non-compliant container in a timely fashion.

(Edaf Opp. to IFS/Neutral Mot. Dism. at 4. *See also* Complaint Causes of Action ¶¶ A-C.)

CCL argues that section 10(d)(1) does not apply to it on this shipment. CCL contends that these sections apply to common carriers, marine terminal operators, and ocean transportation intermediaries as defined by the Shipping Act.

CCL in this case was none of those. Rather, as Complainant itself admits (Compl. ¶ U), CCL was merely an agent for the IFS Respondents.

Because Complainant has not alleged that CCL acted as an MTO, and by definition CCL was not acting as an ocean freight forwarder (which applies only to export shipments), the only question[] is whether CCL was acting as a “common carrier.” We show below that it was not.

(CCL Mot. Dism. at 5.)

The Act defines common carrier.

The term “common carrier”– (A) means a person that – (I) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6).

CCL does not meet either of the two criteria set out in the definition of a common carrier. Most obviously, CCL did not take responsibility for the transportation from origin to destination. CCL had nothing to do with the cargo at origin, or indeed until after the cargo was unloaded in Puerto Rico. Complainant itself avers that the cargo was delivered for shipment not to CCL, but to IFS. And it was IFS, not CCL, that issued the bill of lading to Complainant’s shipper. Thus, CCL was not a “common carrier” with respect to the transaction at bar. *See Landstar*, 569 F.3d at 497 (“[a]n agent of a disclosed principal . . . does not ordinarily assume responsibility for the transportation of the cargo as the principal bears the burden of liability”).

(CCL Mot. Dism. at 6 (footnotes omitted).)

Edaf Antillas responds:

While CCL may have had nothing to do with the cargo at origin (a presumption that at this stage in the proceedings, while plausible, we cannot make) it is certain that CCL played a role, perhaps a prominent one, in how that cargo was mishandled on both of the occasions that the container was unloaded in Puerto Rico. . . . Even if CCL were found not to be under the Commission’s subject matter jurisdiction for the purposes of the movement from Spain to Puerto Rico, which are not yet able to answer at this stage in these proceedings, we certainly cannot obviate any role CCL might have played in the exportation of the container from Puerto Rico, a U.S. port, to [St. Martin], a foreign port. Thus, any argument against the Commission exercising subject matter jurisdiction over CCL would be premature at this stage in the proceedings.

(Edaf Opp. to CCL Mot. Dism. at 3.)

B. Discussion.

Respondents contend that the Commission does not have jurisdiction over the Complaint because Edaf Antillas’s claim is one “for loss or damage stemming from the delayed delivery of cargo.” (Edaf Mot. Dism. at 1-2.) When a respondent asserts that claims for cargo loss are not within the Commission’s jurisdiction, “the appropriate test for the Commission’s jurisdiction is

whether Complainants' allegations 'also involve elements peculiar to the Shipping Act.' *Cargo One, Inc. v. COSCO Container Lines Company, Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000)." *Yakov Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R. at 1728. "[T]he questions relevant to section 10(d)(1) are: (1) whether [the regulated party] established just and reasonable regulations and practices with respect to [the alleged violation]; and (2) whether [the regulated party] failed to observe and enforce [the] just and reasonable regulations and practices" *Yakov Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R. at 1739.

Edaf Antillas alleges violations of section 10(d)(1) at two different points in the transportation of its goods. The first point is when Neutral loaded Edaf Antillas's cargo into a container with the shipment of another shipper that did not comply with CBP entry requirements. Edaf Antillas contends that Neutral failed to establish reasonable regulations and practices that, if observed and enforced, would have prevented loading a non-compliant wood pallet being transported for another shipper into container DVRU0610860 with CBP-compliant shipments. In the alternative, if Neutral has established reasonable regulations and practices that should prevent this occurrence, it failed to observe and enforce the regulations and practices in a manner that would have prevented loading a non-compliant wood pallet into container DVRU0610860 for the shipment from Spain to San Juan and the consequent delay of Edaf Antillas's shipment. (Complaint Causes of Action ¶ A.) These allegations are detailed and informative enough to enable Neutral to respond. *Mitsui v. Global Link*, 32 S.R.R. at 136. The Complaint states a claim that Neutral violated section 10(d)(1) when it loaded container DVRU0610860.

The Complaint does not state a claim that CCL was involved in this activity, however. The Complaint alleges that "CCL acts as the agents for Respondents IFS and Neutral and collects all fees from the Consignee, remitting those portions that correspond to services provided by IFS and Neutral." (Complaint Claim ¶ U.) These activities took place in Puerto Rico. There is no claim that CCL engaged in any activity in Spain in connection with this shipment and the Complaint alleges that IFS and Neutral loaded the container in Spain, but does not allege any act by CCL. (Complaint Causes of Action ¶ A.) This claim does not enable CCL to understand how it was involved in the alleged wrongdoing in Spain. *See Sikhs for Justice v. Nath*, 893 F. Supp. at 616 ("allegations in a complaint must be complete enough to enable a reader to understand how each defendant was personally involved in the wrongdoing plaintiff is alleging"). Furthermore, nothing in the documents attached to the Complaint suggests that CCL was involved in this activity. Therefore, to the extent Edaf Antillas claims that CCL violated section 10(d)(1) when container DVRU0610860 was loaded in Spain, that claim is dismissed for failure to state a claim. When a complaint is dismissed for failure to state a claim, leave to amend need not be given if amendment would be futile. *Cornelius v. Bank of Am., supra*; *Cockrell v. Sparks, supra*. Based on the allegations in the Complaint and the evidence in the supporting documents, I conclude that amendment to the Complaint would be futile. Therefore, the dismissal is with prejudice.

Second, Edaf Antillas contends that Respondents failed to establish reasonable regulations and practices that, if observed and enforced, would have ensured that when CBP barred the entry of container DVRU0610860, the matter would be cured for reentry and the shipment delivered in a

timely and efficient manner, (Complaint Cause of Action ¶ B), and in particular, regulations regarding how expenses incurred in the reexportation and reimportation of non-compliant cargos would be resolved between these regulated parties. (Complaint Cause of Action ¶ C.) Regarding Neutral, the entity responsible for transportation from Editorial Edaf in Spain for delivery to Edaf Antillas in San Juan, these allegations are detailed and informative enough to enable Neutral to respond. *Mitsui v. Global Link*, 32 S.R.R. at 136.

CCL issued a bill of lading assuming responsibility for transporting Editorial Edaf's shipment in container DVRU0610860 for its return from St. Martin to San Juan, identifying Editorial Edaf as the shipper, Edaf Antillas as the consignee, St. Martin as the port of loading, and San Juan as the point of discharge. (Complaint Exh. 14.) Therefore, CCL operated as a common carrier on the shipment. It is not clear whether CCL was involved at all in the dispute about payment for transportation that allegedly delayed the shipment from San Juan to St. Martin and its return, or whether its transportation role commenced after that dispute had been resolved. Nevertheless, the allegations in the Complaint are detailed and informative enough to enable CCL to respond. *Mitsui v. Global Link*, 32 S.R.R. at 136. Discovery may clarify CCL's role. Accordingly, the motion to dismiss this claim against CCL is denied.

Edaf Antillas contends: "Respondent CCL violated section 10(d)(1) . . . when [it] failed to notify in a timely, accurate and expeditious fashion Complainant's Customs Broker with the information solely within Respondent's possession required [to] complete a compliant [ISF 10+2] filing." (Complaint Cause of Action ¶ F.) As noted above, CCL assumed the responsibility for transportation of container DVRU0610860 from St. Martin to San Juan. The allegations in the Complaint are detailed and informative enough to enable CCL to respond. *Mitsui v. Global Link*, 32 S.R.R. at 136. While the allegations do not appear to claim that Edaf Antillas suffered injury from the alleged violation, Edaf Antillas believes it may be injured in the future. (See Complaint Claim ¶¶ Q-T.) With the caveat that damages must be proven with reasonable certainty and speculative damages are not allowed, *Tractors and Farm Equip. Ltd. v. Cosmos Shipping Co., Inc.*, 26 S.R.R. 788, 798-799 (ALJ 1992), the motion to dismiss this claim against CCL is denied.

VII. THE MOTION TO DISMISS THE CLAIM FOR REPARATIONS IS DENIED.

A. The Parties' Arguments.

Neutral contends that "Edaf has also failed to state a claim for damages upon which relief can be granted. Edaf's damages allegations do not arise above the mere speculative level and fail to meet the *Iqbal* pleading standards discussed above." (IFS/Neutral Mot. Dism. at 10.) Neutral challenges each of the elements of damage Edaf Antillas alleges in the Complaint. Edaf Antillas responds that it has adequately pleaded its violations that the actual injuries resulting from the violations. (Edaf Opp. to IFS/Neutral Mot. Dism. at 6.)

Neutral contends that assuming Edaf Antillas is able to prove that Respondents violated the Shipping Act, its damages are limited to \$500 per package by the Carriage of Goods by Sea Act, 46 U.S.C. § 1302 (COGSA), and as provided on the bill of lading that governs the shipment at issue.

(IFS/Neutral Mot. Dism. at 17.) Edaf Antillas responds that “[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.” (Edaf Opp. to IFS/Neutral Mot. Dism. at 6.)

B. Discussion.

As concluded above, Edaf Antillas has stated claims of violations of section 10(d)(1) of the Act. The Act provides that if a complainant proves a violation, the Commission “shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part. . . .” 46 U.S.C. § 41305(b). Whether Respondents “actually did cause [Edaf Antillas’s] damages through their conduct is a question of fact, not properly addressed in a 12(b)(6) motion.” *Marjac, LLC v. Trenk*, Civ. Ac. No. 06-1440 (JAG), 2006 U.S. Dist. LEXIS 91574, at *29 n.8 (D.N.J. Dec. 19, 2006). Therefore, the motion to dismiss the claim for damages is denied.

ORDER⁷

Upon consideration of the motions to dismiss filed by respondents IFS Neutral Maritime Service, IFS International Forwarding, S.L., and Crowley Caribbean Logistics, LLC, the oppositions thereto, and the record herein, and for the reason set forth above, it is hereby

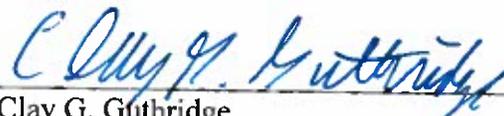
ORDERED that the claims against respondent IFS International Forwarding, S.L., be **DISMISSED** with prejudice. It is

FURTHER ORDERED that the claims of violation of section 10(b)(3) of the Shipping Act, 46 U.S.C. § 41104(3), be **DISMISSED** with prejudice. It is

FURTHER ORDERED that the claims of violation of section 10(b)(8) of the Shipping Act, 46 U.S.C. § 41104(8), be **DISMISSED** with prejudice. It is

FURTHER ORDERED that the claims that respondent Crowley Caribbean Logistics, LLC, violated section 10(d)(1) of the Shipping Act, 46 U.S.C. § 41102(c), in the loading and shipment of container DVRU0610860 from Spain to Puerto Rico be **DISMISSED** with prejudice. It is

FURTHER ORDERED that in all other respects, the motions to dismiss be **DENIED**.



Clay G. Guthridge
Administrative Law Judge

⁷ The dismissals will become final in thirty days unless a party appeals the dismissals or the Commission reviews the dismissals on its own motion. 46 C.F.R. §§ 502.227(b) and (c).