

BEFORE THE  
FEDERAL MARITIME COMMISSION

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Docket No. 16-03

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KSB SHIPPING & LOGISTICS LLC

COMPLAINANT,

v.

DIRECT CONTAINER LINE ALSO KNOWN AS VANGUARD LOGISTICS,

RESPONDENT.

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**COMPLAINANT KSB SHIPPING & LOGISTICS LLC'S  
OPPOSITION TO MOTION TO DISMISS**

KSB Shipping & Logistics LLC ("KSB") hereby opposes the Motion to Dismiss filed by the Respondent, Vanguard Logistics Services (USA) Inc. d/b/a Direct Container Line ("Respondent" or "Direct Container Line") on the basis that none of the grounds asserted by the Direct Container Line as justifying dismissal of the Complaint have merit.

Direct Container Line moves to dismiss on the grounds that the Complaint fails to state a cognizable claim for relief. Specifically it asserts that it is impossible to determine from the Complaint what provision of the Shipping Act was violated and what acts Direct Container Line engaged in that constitute a violation of the Act. While the *pro se* Complaint is not artfully drawn, the basis for the claim -- the fact that Direct Container Line released cargo to a consignee without obtaining an original bill of lading and after confirming that the cargo would not be released -- is obvious on its face, as is its allegation that such a release constitutes a violation of

Section 10(d)(1) of the Shipping Act, 46 U.S. § 41102(c). Thus, Direct Container Line's motion to dismiss on those grounds is baseless.<sup>1</sup>

Direct Container Line next asserts that, KSB lacks standing to assert a claim based upon Direct Container Line's unauthorized release of cargo without obtaining an original bill of lading. Direct Container Line's argument that only the owner of the goods may bring an action for wrongful release of cargo and that KSB therefore lacks standing to bring such a claim, ignores well-established Commission and federal court authority recognizing that an ocean freight forwarder acts as an agent for its principal and that, as an agent and a party to the contract with Direct Container Line, KSB may pursue this claim for a Shipping Act violation.

Finally, Direct Container Line asserts that because its unauthorized release of cargo was an accident and an isolated occurrence, there was no Shipping Act violation and therefore the Commission lacks jurisdiction to hear the matter. Again, Direct Container Line's argument ignores binding Commission authority to the contrary. Accordingly, Direct Container Line's Motion to Dismiss must be denied.

### **Relevant Facts**

#### **KSB's Complaint**

KSB is an FMC licensed NVOCC and freight forwarder (License No. 02499 NF) domiciled in the state of New Jersey. *See* KSB Complaint at p. 1.<sup>2</sup> It brings this action as agent on behalf of shippers Rison Incorporated ("Risona") and Bracha Export Corporation d/b/a/

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<sup>1</sup> If the Presiding Judge deems it necessary, KSB is prepared to file an Amended Complaint addressing any procedural shortfalls in the original petition. Fed. R. Civ. P. 15(a) provides that leave to amend a complaint should be freely given when justice so requires. *See also Foman v. Davis*, 371 U.S. 178, 182, (1962) (in absence of bad faith or dilatory motive, leave to amend should be "freely given"); *Ricciutti v. N.Y.C. Transit Authority*, 941 F.2d 119 (2d Cir. 1991) (when complaint is dismissed pursuant to Rule 12(b)(6) and the plaintiff requests permission to file an amended complaint, the request should ordinarily be granted.)

<sup>2</sup> The pages of the 5 page Complaint are not numbered.

Continental (“Bracha”), and as well as the consolidator, R&A International Logistics Incorporated (“R&A”). *Id.*

The Respondent to KSB’s Complaint is Direct Container Line d/b/a Vanguard Logistics. *Id.* Direct Container Line is an FMC licensed NVOCC and freight forwarder. *Id.*

The Complaint asserts that KSB acted as the forwarding agent on behalf of the shippers Risona and Bracha, and the consolidator, R&A. *Id.* at p. 2. The Complaint further asserts that Direct Container Line acted as the NVOCC for the transportation of a container moving from New York to Austria, Vienna. *Id.* at p. 3. Direct Container Line booked the shipment with NYK line and issued its own original bills of lading. *Id.* at p. 2.

Direct Container Line’s destination agent, Cargo Partner Austria, released the cargo to the consignee on the Direct Container Line bill of lading, Cargo Clearing GMBH Austria, without requiring presentation of the original bill of lading. *Id.* at p. 3. It did this despite the fact that Direct Container Line had expressly informed KSB that the shipment was on hold and the cargo should not be released. *Id.*

The consignee, Cargo Clearing GMBH Austria, received the cargo from Direct Container Line’s agent without having paid for it. *Id.* at p. 3. As a result of Direct Container Line’s unauthorized release of the cargo without obtaining an original bill of lading, KSB’s principals incurred losses of \$191,110. *Id.*

Subsequent to the unauthorized release of the cargo, Direct Container Line admitted in writing that its agent, Cargo Partner Austria, had mistakenly released the cargo without obtaining an original bill of lading. *Id.* Although Direct Container Line asked its agent to settle the dispute, neither Cargo Partner Austria nor Direct Container Line have done so. *Id.*

The Complaint alleges that Direct Container Line's unauthorized release of cargo violated Section 10(d)(1) of the Shipping Act. *Id.* at p. 1-2.

### Argument

#### **I. Legal Standards Governing Motions to Dismiss**

Rule 12 of the Commission's Rules of Practice and Procedure state 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 CFR § 502.12. Because the Commission's Rules do not address motions to dismiss for lack of subject matter jurisdiction or for failure to state a claim, Federal Rule 12(b) applies here. *Mitsui OSK Lines Ltd v. Global Link*, 32 S.R.R. 126, 136 (FMC 2011).

In deciding a motion to dismiss, courts must liberally construe all claims, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *See Arencibia v. 2401 Restaurant Corp.*, 699 F. Supp.2d 318, 323 (D.D.C. 2010).

The court may not discount factual allegations, but rather must only determine whether the facts as alleged in the complaint are sufficiently plausible to meet the elements of the moving party's claim. *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 135 (2d Cir. 2013). This standard does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of wrongful conduct. *Id.* at 135, *citing Bell Atlantic v. Twombly*, 550 U.S. 544, 556 (2007). A claim is plausible 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 (2009). Further, "a well-pleaded complaint may proceed even if it strikes a savvy judge that factual proof of the facts is improbable and that recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556.

In construing a motion to dismiss, the court is also required to review allegations raised in the complaint in the light most favorable to the non-moving party. *Newman & Schwartz v. Asplundh*, 102 F.3d 660, 662 (2d Cir. 1996). Thus, in order to survive a motion to dismiss, the complaint need only contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Simon v. Keyspan Corp.*, 694 F.3d 196, 201 (2d Cir. 2012).

In construing the standards governing a motion to dismiss, the Commission similarly recognizes that it construes complaints in the light most favorable to the plaintiff and accepts all well-pled facts alleged in the complaint as true. *Mitsui OSK Lines Ltd v. Global Link*, 32 S.R.R. at 136 (FMC 2011). Further, relying upon *Twombly*, 550 U.S. 544 (2007), the Commission in *Global Link* recognized that 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. *Id.* Ultimately, the test of a complaint’s sufficiency simply is whether the document’s allegations are informative enough to enable the defendant to respond. *Id.*

## **II. The Complaint States a Plausible Claim for Violation of the Shipping Act**

Direct Container Line asserts that KSB’s complaint should be dismissed because it merely states conclusory allegations that Direct Container Line violated the Shipping Act without identifying any specific statutory provisions alleged to have been violated. Direct Container Line’s Motion at 5. Direct Container Line also baldly asserts that it is impossible from reading the Complaint to determine what actions it has taken that constitute Shipping Act violations. *Id.*

Direct Container Line’s contention ignores the plain language of the Complaint. The Complaint expressly alleges that Direct Container Line’s agent released the cargo at issue to the consignee without obtaining the original bill of lading. Complaint at p. 3. The Complaint

further alleges that Direct Container Line's agent released the cargo without obtaining the original bill of lading despite the fact that Direct Container Line was informed that the shipment had been placed on hold and despite the fact that Direct Container Line's representative had provided written assurance to KSB that the cargo would not be released. *Id.* Thus, the Complaint clearly contains sufficient factual allegations to put it on notice of the basis for the claims, and to allow it to respond to the allegations. *Mitsui OSK Lines Ltd v. Global Link*, 32 S.R.R. at 136.

Further, Direct Container Line's argument ignores the fact that the Complaint explicitly asserts that Direct Container Line's unauthorized cargo release constitutes a violation of Section 10(d)(1) of the Shipping Act. Complaint at pp. 1-2. KSB's assertion that releasing cargo without obtaining an original bill of lading is a Shipping Act violation is grounded in well-established Commission precedent. In *Bimsha Int'l v. Chief Cargo Services Inc.*, 32 S.R.R. 353, 374 (Initial Decision 2011), the Administrative Law Judge considered the exact question presented here, and held that an NVOCC violated Section 10(d)(1) of the Shipping Act when it released shipments without requiring presentation of an original bill of lading. "I find that when Chief Cargo released the shipment to Rich Kids Jeans, the 'notify party,' without requiring presentation of an original bill of lading, it failed to fulfill NVOCC obligations and committed an unjust and unreasonable practice in violation of Section 10(d)(1) of the Act. 46 U.S.C. Section 41102(c)." 32 S.R.R. at 379. The ALJ's finding was affirmed by the Commission. 32 S.R.R. 1861 (FMC 2013) (finding the ALJ's reasoning sound and affirming that carrier's failure to require original bills of lading prior to release of cargo constituted violation of Section 10(d)(1) of the Act). *See also Smart Garments v. Worldlink Logix Services, Inc.*, 32 S.R.R. 294 (FMC 2013) (holding that carrier violated Section 10(d)(1) when it delivered cargo without

obtaining original bills of lading.); *Allied Chemical Corp. v. Companhia de Navagaceo Lloyd Brasileiro*, 775 F.2d 476, 481 (5<sup>th</sup> Cir. 1985) (“the carrier, the issuer of the bill of lading is responsible for releasing the cargo only to the party who presents the original bill of lading. . . . If the carrier delivers the goods to one other than the authorized holder of the bill of lading, the carrier is liable for misdelivery.”)<sup>3</sup>

### **III. As an Agent for the Shipper, KSB Is Entitled to Bring this Action**

Direct Container Line asserts that as, an ocean freight forwarder, KSB lacks standing to assert a claim based upon Direct Container Line’s unauthorized release of cargo without obtaining an original bill of lading. Again, the law is to the contrary.

An ocean freight forwarder or NVOCC acts as the agent for its shipper in its relationship with an ocean carrier. *See, e.g., Nordana Lines A S v. Jamar Shipping, Inc.*, 27 S.R.R. 233, 236 (I.D. 1995) (freight forwarder selected by the shipper acts as the shipper’s agent); *Edalf Antillas, Inc. v. Crowley Caribbean Logistics, LLC*, 33 S.R.R. 1311 (FMC 2014); *Bermuda Container Line, Ltd. v. SHG Int’l Sales Inc.*, 28 S.R.R. 1052, 1053 (FMC 1999) (ocean transportation intermediary acts as agent for principal-shipper in its relationship with carrier); *Kobel v. Hapag-Lloyd, A.G.*, 32 S.R.R. 1720, 1743 (FMC 2013) (NVOCCs are fiduciaries acting on behalf of their principals, the shippers); *Delphi-Delco Electronic Sys. v. M/V Nedlloyd Europa*, 324 F. Supp. 2d 403, 419-20 (.S.D.N.Y. 2004) (“NVOCC is presumed under maritime law to be acting as an agent of the shipper when it arranges to transport cargo with an ocean carrier”).

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<sup>3</sup> The law is also plain that a common carrier such as Direct Container Line may not “immunize itself from the common carrier responsibilities placed upon it by the Act by dissociating ting itself from any of its agents’ activities”). *Corpco Int’l, Inc. v. Straightway, Inc.*, 28 S.R.R. 296, 299 (FMC 1998); *Pacific Champion Express Co. Ltd. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1185, 1190 (FMC 2000) (Section 10(b)(1) is an absolute liability provision and carrier cannot insulate itself from liability by attempting to shift blame to its agents); *Marcella Shipping Co. Ltd.*, 23 S.R.R. 857, 863 (FMC 1986) (giving “short shrift” to argument that carrier can avoid liability under the Shipping Act by blaming s acts upon its agent).

Acting in its capacity as an ocean freight forwarder, KSB contracted with Direct Container Line on behalf of the shippers, suppliers and consolidators of cargo, Risona, Bracha Export Corp., and R&A. See Complaint at p. 2. The law is well established that an agent which is a party to a contract made by itself on behalf of its principal may bring suit on that contract in its own name. *Lubbock Feed Lots, Inc .v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 258 (5<sup>th</sup> Cir. 1980), citing, *Restatement (Second) of Agency*, Section 364; see also *Global Aerospace, Inc. v. Platinum Jet Management*, 488 Fed. Appx., 338, 339 (11<sup>th</sup> Cir. 2012) (agent who acted as such during the course of transaction involved in litigation may sue for damages suffered by principal); *Bache & Co. v. Internat'l Controls Corp.*, 324 F. Supp. 998, 1004 (S.D.N.Y. 1971) (agent who contracted in his own name allowed to sue without joining principal); *Mitsui & Co. v. Puerto Rico Water Res. Auth*, 528 F. Supp. 768, 777 (D.P.R. 1981) (agent who has contracted in his own name for principal, or who acted as an agent during the course of the transaction involved in the litigation, may sue for damages suffered by principal).

In light of the above, Direct Container Line's Motion to Dismiss on the grounds that KSB lacks standing to pursue its claim must be rejected.

#### **IV. Direct Container Line's Unauthorized Release of Cargo Constitutes a Shipping Act Violation**

Direct Container Line asserts that KSB's Complaint must be dismissed because Direct Container Line's unauthorized release of KSB's cargo constitutes a breach of contract or negligence, rather than a Shipping Act violation. Direct Container Line's Motion at p. 2. Direct Container Line further contends that because the improvident release was a "mistake," the Commission lacks subject matter jurisdiction over the claim. *Id* at 9.

Direct Container Line's argument fails because it ignores binding Commission precedent. In *Kobel v. Hapag-Lloyd, A.G.*, 32 S.R.R. 1720, 1743 (FMC 2013), the Commission considered

and rejected the very argument that Direct Container Line now advances. Specifically, the Commission rejected the carrier's argument that violations with respect to a single shipment could not constitute a failure to observe just and reasonable rules and practices pursuant to section 10(d)(1) of the Act. The Commission's common sense determination, consistent with the language of the Shipping Act and the policy goals to be advanced thereby, was that a violation of the Act occurs if a carrier fails to: 1) "establish" just and reasonable regulations and practices; 2) "observe" just and reasonable regulations and practices; or 3) "enforce" just and reasonable regulations and practices." *Id.* at 1730. Thus, a common carrier can be held liable for a violation of Section 10(d)(1) of the Act, regardless of whether the failure occurred for a single shipment or multiple shipments. *Id.* at 1735. In so holding, the Commission made explicit that "[a] single failure is still a failure and thus a violation of section 10(d)(1) regardless of whether there was only one failure or whether the single failure is part of a sequence of failures or multiple failures." *Id.* at 1736; *see also Smart Garments v. Worldlink, Logix Services, Inc.*, 32 S.R.R. 294 (FMC 2013)(entering default judgment; if carrier establishes just and reasonable regulations and practices but fails to observe and enforce those regulations and practices, then it violates section 10(d) (1) regardless of whether single or multiple shipments involved); *Chief Cargo Service Inc. v. FMC.*, 586 Fed. App'x., 730, 732 (2d Cir. 2014) (deferring to FMC's holding that even isolated instances of releasing cargo without requiring presentation of an original bill of lading constitutes Shipping Act violation and confers subject matter jurisdiction upon Commission); *Paul Houben v. World Moving Services, Inc.*, 31 S.R.R. 1400 (FMC 2010) (violation of Section 10(d)(1) regardless of whether it involves a single shipment or multiple shipments).

The Commission further dismissed as inconsistent with the plain language of Section 10(d)(1) the notion that because the actions purportedly occurred by mistake, they could not constitute a violation of the Shipping Act.

Finally, it does not appear from the plain language of section 10(d)(1) that “accidental” conduct can somehow make it just and reasonable, contrary to Hapag-Lloyd’s allegation . . . . No language of section 10(d)(1) indicates that only an intentional or willful failure would constitute a violation. If that were the intent of Congress, we believe that Congress would have drafted the provision differently.

*Id.* at 1731.

### Conclusion

Direct Container Line’s Motion to Dismiss ignores the plain language of the Complaint and well established Commission and federal court precedent. Accordingly, its Motion to Dismiss should be denied.

Respectfully Submitted,



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DATE: April 8, 2016

CERTIFICATE OF SERVICE

I do hereby certify that I have delivered a true and correct copy of the foregoing document to the following addressees at the addresses stated by depositing same in the United States mail, first class postage prepaid, and/or via email transmission, this 8<sup>th</sup> day of April, 2016:

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