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April 28, 2016					
FEDERAL	MARITIME	COMMISSION			

FEDERAL MARITIME COMMISSION

DOCKET NO. 16-03

KSB SHIPPING & LOGISTICS LLC

v.

DIRECT CONTAINER LINE a/k/a VANGUARD LOGISTICS

ORDER DENYING MOTION TO DISMISS COMPLAINT IN LIEU OF ANSWER

A motion to dismiss the complaint in lieu of filing an answer was filed by Respondent, Direct Container Line on March 25, 2016. An opposition to the motion to dismiss was filed by Complainant KSB Shipping & Logistics LLC ("KSB Shipping") on April 8, 2016. A reply was filed by Respondent on April 15, 2016.

Direct Container Line contends that the complaint should be dismissed because it fails to meet the *Iqbal* and *Twombly* standard or the Commission's Rules on private party complaints; Complainant admits no injury in fact and has no standing; and the Shipping Act does not apply to a mistake resulting in a contract or tort claim. Motion at 4-10.

KSB Shipping asserts that the motion should be denied because the complaint states a plausible claim for violation of the Shipping Act; as an agent for the shipper, KSB is entitled to bring this action; and Direct Container Line's unauthorized release of cargo constitutes a Shipping Act violation. Opposition at 5-10.

Although the Commission's Rules of Practice and Procedure ("Rules") do not explicitly provide for motions to dismiss, Rule 12 of the Commission's 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. "In evaluating whether a complaint before the Commission states a cognizable claim under the Shipping Act, the Commission has relied on Federal Rules of Civil Procedure 12(b)(6) and the federal caselaw interpreting it." *Cornell v. Princess Cruise Lines, Ltd., Carnival PLC, and Carnival Corp.*, 33 S.R.R. 614, 620 (FMC 2014) (citing *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 126, 136 (FMC 2011)).

The Commission explained:

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,] 129 S. Ct. 1937, 1949 (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., 32 S.R.R. at 136. The Commission explicitly adopted the *Iqbal/Twombly* pleading standard. *Maher Terminals v. The Port Authority of New York and New Jersey*, FMC Dkt. 12-02 (Dec. 18, 2015), slip opinion at 15-16 (“to the extent Maher suggests that the Commission failed to explain its reasoning for adopting the *Iqbal/Twombly* plausibility standard, we take this opportunity to reaffirm that standard as opposed to the ‘no set of facts’ standard or Maher’s undefined fair notice/administrative pleading standard.”)

“A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.” *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555). “When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Iqbal*, 129 S. Ct. at 1950. The Commission explained:

Courts also construe the factual allegations in the complaint in the light most favorable to the plaintiff and must grant the plaintiff the benefit of all inferences that can be derived from the facts as alleged in the complaint. The Commission need not, however, accept any inferences drawn by Complainants that are unsupported by the facts pleaded in the complaint. Moreover, the Commission need not “accept legal conclusions cast in the form of factual allegations.” [*Kowal v. MCI Commc 'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).]

Cornell v. Princess Cruise Lines, Ltd., Carnival PLC, and Carnival Corp., 33 S.R.R. at 620-21 (citations omitted).

The focus at this stage is not with whether Complainant can prevail on its claim, but whether it has adequately pled the claim. *Negron v. USAA Casualty Insurance Co.*, 2014 U.S. Dist. Lexis 125179, *5 (M.D. Tenn. 2014). “What *Twombly* and *Iqbal* teach is that where there are other plausible explanations, it is not sufficient to speculate in a complaint and particularly to base that

speculation on no facts at all.” *CIBA Vision Corp. v. De Spirito*, 2010 U.S. Dist. Lexis 11386, *22-23 (N.D. Ga. 2010). For purposes of evaluating the motion to dismiss, the facts presented by Complainant are presumed true.

The complaint was filed while Complainant was acting *pro se*. Complainant has since obtained counsel who has offered to file an amended complaint, if needed. Opposition at 2 n.l. As explained below, the complaint is sufficient, however, if it were not, Complainant would be given leave to amend.

Respondent first objects that the complaint “offers a series of conclusory allegations without a single statutory citation, not any allegations of pattern or practice.” Motion at 4. Complainant asserts that 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” and that “Direct Container Line’s agent released 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.” Opposition at 5-6.

The first page of the complaint alleges “violation of Shipping Act of 1984, as amended violation of section 10 (d) (1).” Complaint at 1-2. The Complaint goes on to provide four pages of factual allegations and attaches relevant documents including emails, bill of lading, packing slips, and other details regarding the shipment at issue. Respondent has not established that the complaint lacks sufficient factual allegations or that it fails to identify the alleged statutory violation.

Next, Respondent asserts that Complainant does not have standing to bring this action as it “was not the party that suffered any loss or damages as a result of the alleged mistake at issue in the Complaint,” and was neither the shipper, nor consignee, and did not own the cargo. Motion at 6. Respondent argues that “Complainant admits that it has not suffered an injury in fact and its Complaint should therefore be dismissed.” Motion at 8. Complainant asserts that an “ocean freight forwarder or NVOCC acts as the agent for its shipper in its relationship with an ocean carrier” and 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.” Opposition at 7-8. “A person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part.” 46 U.S.C. § 41301(a). Respondent has not established that the complaint should be dismissed at this time for lack of standing.

Finally, the Respondent asserts that the allegations are inherently breach of contract or tort claims and that in a case of mistake, accident, or negligence, the Commission should dismiss the complaint for lack of subject-matter jurisdiction. Complainant contends that Respondent’s argument fails because it ignores binding Commission precedent. Opposition at 8-9. The complaint alleges violations of the Shipping Act and Respondent has not established that the complaint should be dismissed.

Complainant moves to exclude exhibits attached to the complaint on the basis that they are “unauthenticated documents and contain[] no testimonial evidence either laying a foundation for the admission of such documents or independently substantiating the alleged violations.” Motion at 10. These objections go to the weight and admissibility of the evidence which are more appropriately addressed at a later stage of the proceeding.

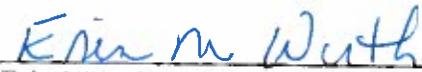
Respondent’s answer is due by May 9, 2016. 46 C.F.R. § 62(b). As explained in the initial order issued on February 18, 2106, the initial decision is to be issued by February 13, 2017, and discovery must be completed within 150 days of the service of a respondent’s answer. The parties are required to meet and confer: (a) to establish a proposed schedule for the completion of discovery, including initial disclosures and discovery related to experts; (b) to resolve to the fullest extent possible disputes relating to discovery matters; and (c) to expedite, limit, or eliminate discovery by use of admissions, stipulations, and other techniques. 46 C.F.R. § 502.201.

In addition, within fifteen days of the service of a respondent’s answer, the parties “must participate in a preliminary conference with the Commission’s Office of Consumer Affairs and Dispute Resolution Services (CADRS) as to whether the matter may be resolved through mediation. The preliminary conference may be conducted either in person or via telephone, video conference, or other forum.” 46 C.F.R. § 502.64.

The parties shall file a joint status report, indicating whether each party has contacted CADRS and whether the parties have agreed to engage in mediation. The parties are directed *not* to state the parties’ positions on whether to agree to mediation or their settlement positions in the joint status report. As part of the joint status report, the parties must submit a joint proposed schedule which concludes discovery within 150 days of service of the answer and allows issuance of the initial decision within one year. Parties are reminded that courtesy copies of all filings should be emailed to judges@fmc.gov.

IV.

For the above-stated reasons, it is hereby **ORDERED** that the motion to dismiss filed by the Respondent be **DENIED**. Respondent shall file its answer by May 9, 2016.



Erin M. Wirth
Administrative Law Judge