

S E R V E D
September 15, 2016
FEDERAL MARITIME COMMISSION

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DOCKET NO. 16-16

**MAVL CAPITAL INC.,
IAM AL GROUP INC., and MAXIM OSTROVSKIY**

v.

MARINE TRANSPORT LOGISTICS, INC. AND DMITRY ALPER

**ORDER TO SHOW CAUSE WHY
COMPLAINT SHOULD NOT BE PARTIALLY DISMISSED**

I. INTRODUCTION.

On August 5, 2016, complainants MAVL Capital Inc. (MAVL), IAM AL Group Inc. (IAM), and Maxim Ostrovskiy filed this Complaint with the Federal Maritime Commission (FMC or Commission), alleging that respondents Marine Transport Logistics, Inc. (MTL) and Dmitry Alper violated sections 41102(c), 41104(3) and 41104(10) of the Shipping Act of 1984,¹ 46 U.S.C. §§ 41102(c), 41104(3) and 41104(10), and the Commission's regulations at Part 515, in connection with cargo that Complainants allege they intended to ship overseas from the United States.

Complainants state that MAVL is a New York corporation, IAM is an Indiana corporation, and Ostrovskiy is an individual residing in Moscow, Russia. MTL is licensed by the Commission as a non-vessel-operating common carrier (NVOCC).² Complainants state that Alper is a "person" under the provisions of the Shipping Act. Respondents have filed answers denying the allegations in the Complaint and asserting affirmative defenses.

¹ Complainants initially alleged that Respondents violated sections 41102 and 41104 of the Shipping Act but later specified sections 41102(c), 41104(3) and 41104(10) as the provisions alleged to have been violated.

² See <http://www2.fmc.gov/oti/NVOCC.aspx>, last visited September 14, 2016.

Complainants seek damages in an unspecified amount against MTL and Alper. Complainants assert that the “closeness of [MTL and Alper’s] relationship indicates that individual respondent Alper is the alter ego of the corporate entity and piercing the corporate veil is necessary to avoid injustice and fundamental unfairness.” (Complaint ¶ 12.) Complainants state that the alleged conduct by Respondents has caused Complainants to sustain and continue to sustain direct injuries currently in excess of \$180,000 and that the “full extent of [their] damages can only be determined after obtaining discovery in this matter, and after final calculation of interest due and owing to Complainants . . . and calculation of the legal fees incurred by complainants.” (*Id.* ¶ VII.)

The Complaint concerns several vehicles owned by Complainants – a 2006 Mercedes SL65, a 2011 Porsche Panamera, and three Harley Davidson Motorcycles – that Complainants state they intended to export overseas from the United States. As discussed more fully below, it appears that the Complaint does not allege that Respondents engaged in international transportation by water of the Mercedes or the Harley Davidsons. Therefore, Complainants are ordered to show cause why the claims should not be dismissed.

II. CONTROLLING AUTHORITY.

A. Statutory Background.

Complainants filed their Complaint pursuant to section 41301 of the Act. “A person may file with the . . . Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.” 46 U.S.C. § 41301(a).

The Complaint alleges that MTL is an NVOCC licensed by the Commission. (Complaint ¶ 9). “The term ‘non-vessel-operating common carrier’ means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier.” 46 U.S.C. § 40102(16).

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).

The Act prohibits common carriers from taking certain actions. The Complaint alleges that Respondents violated sections 41102(c), 41104(3), and 41104(10) of the Act. (Complaint ¶¶ 51(A)-51(C). Section 41102(c) provides: “No common carrier, ocean transportation intermediary or marine terminal operator may 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). Section 41104 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;

* * *

(10) Unreasonably refuse to deal or negotiate.

46 U.S.C. § 41104.

The Complaint seeks a reparation award in excess of \$180,000, not including attorney fees and interest. Complainants assert that the full amount of reparations due to them arising from the alleged conduct by Respondents can only be ascertained after discovery takes place.

The Act defines actual injury -

(a) *Definition.* – In this section, the term “actual injury” includes the loss of interest at commercial rates compounded from the date of injury.

(b) *Basic amount.* – If the complaint was filed within the period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part.

* * *

(e) *Attorney Fees.* – In any action brought under section 41301, the prevailing party may be awarded reasonable attorney fees.

46 U.S.C. § 41305.

B. Evidence and Burden of Persuasion.

A complainant alleging a violation of the Shipping Act “has the initial burden of proof to establish the[] violation[]. The applicable standard of proof is one of substantial evidence, an amount of information that would persuade a reasonable person that the necessary premise is more

likely to be true than to be not true.” *AHL Shipping Company v. Kinder Morgan Liquids Terminals, LLC*, FMC No. 04-05, 2005 WL 1596715, at *3 (ALJ June 13, 2005). See 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); 46 C.F.R. § 502.155. “[A]s of 1946 the ordinary meaning of burden of proof [in section 556(d)] was burden of persuasion, and we understand the APA’s unadorned reference to ‘burden of proof’ to refer to the burden of persuasion.” *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. at 102. “[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose.” *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994).

III. COMPLAINANTS ARE ORDERED TO SHOW CAUSE WHY THEIR COMPLAINT RELATED TO THE 2006 MERCEDES SL65 AND THE THREE HARLEY DAVISON MOTORCYCLES SHOULD NOT BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION OR FOR FAILURE TO STATE A CLAIM.

A. A Commission Administrative Law Judge Has Discretion to Dismiss a Case *Sua Sponte*.

“The Commission ‘is not a court, and cannot rely . . . on the powers of a court of equity. On the contrary, the law is settled that an administrative agency can exercise only those powers conferred on it by Congress.’” *Trans-Pacific Freight Conference of Japan v. FMB*, 302 F.2d 875, 880 (D.C. Cir. 1962). The Commission has jurisdiction over matters relating to “transportation by water of . . . cargo between the United States and a foreign country,” 46 U.S.C. § 40102(6), by a common carrier as defined by the Shipping Act. That jurisdiction essentially begins when a common carrier assumes responsibility for transportation of the cargo and ends when the cargo is delivered to the consignee at the place of destination contemplated by the contract of carriage. See, e.g., *Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23-27 (2004) (finding that federal maritime law applies to the inland portions of international shipments transported under a through bill of lading). See also, *Kawasaki Kisen Kaisha, Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 108 (2010) (finding that ocean transportation occurring under a through bill of lading cannot be separated into ocean and domestic inland transportation); accord, *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics*, 2011 FMC LEXIS 12, 56 (FMC 2011) (“[L]egislative history demonstrates that Congress intended that the Commission have jurisdiction over through transportation including the inland segment of such transportation.”) The Commission must determine whether it has jurisdiction over claims made in a complaint.

The Commission may dismiss a complaint over which it does not have jurisdiction or that fails to state a claim.

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).

Respondents have not filed a motion to dismiss the Complaint. "It is elementary law that a tribunal should determine its jurisdiction before addressing the merits of a controversy brought before it. This principle is especially relevant when the tribunal has limited jurisdiction such as this

Commission.” *Crowley Liner Serv., Inc. and Trailer Bridge, Inc. v. Puerto Rico Ports Auth.*, 29 S.R.R. 394, 396 (ALJ 2001) (citing *The Government of the Territory of Guam v. Sea-Land Serv., Inc.*, 28 S.R.R. 252, 265 (FMC 1998); *River Parishes Co. Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751, 762 (1999); *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, 28 S.R.R. 1512, 1519 (ALJ, 2000)). “It is also elemental that parties, such as complainants in the instant case, who invoke the jurisdiction of a tribunal such as the Commission, have the burden of showing that jurisdiction lies.” *Crowley Liner Services, Supra*, 29 S.R.R. at 396 (citing *River Parishes*, 28 S.R.R. at 201 (ALJ 1998, affirmed 28 S.R.R. 751 (FMC 1999)); *GAAR v. Quirk*, 86 F.3d 451, 453 (5th Cir. 1996); *Aetna Casualty & Surety Co. et al.*, 796 F.2d 770, 773 (5th Cir. 1986)). In addition, Complainants have the initial burden of proof to establish that the alleged violations occurred. See *AHL Shipping Company, Supra*, 2005 WL 1596715 at *3.

Sua sponte dismissal may be appropriate in this case because “[l]ack of subject matter jurisdiction, unlike many other objections to jurisdiction of a particular court, cannot be waived. It may be raised at any time by a party to an action, or by the court *sua sponte*.” *Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 485 (8th Cir. 1993). See also, *In re Ben Carter*, 618 F.2d 1093, 1100 (5th Cir. 1980) (“Subject matter jurisdiction is limited by the Constitution and the Congress, and cannot be expanded by judicial interpretation or by the acts or consent of the parties to a case.”) The Complaint may also fail to state a claim upon which relief can be granted.

B. The Complaint Does Not Appear to Set Forth Facts Alleging That Respondents Were Involved in Transporting Cargo by Water Between the United States and a Foreign Port of the 2006 Mercedes SL65 or the Harley Davidson Motorcycles.

1. The 2006 Mercedes SL65.

Based on Complainants’ allegations, it appears that the dispute between the parties regarding the 2006 Mercedes SL65 does not involve transportation by water of the Mercedes between the United States and a foreign port. Complainants allege that they “requested that MTL act as Complainants’ ‘receiving agent’ and store [the] 2006 Mercedes SL65 . . . imported to the United States by Complainants so that maintenance could be performed on the vehicle after which it would subsequently be shipped overseas [at a time to be determined by Complainants].” (Complaint ¶ 27.) Complainants state they arranged to store the Mercedes MTL’s warehouse, (*id.* ¶ 28), and that they intended to ship the vehicle to Germany at a later date to be determined after Complainants inspected the vehicle and ordered custom parts to repair the vehicle. (*Id.* ¶ 29.) Complainants state that MTL charged them \$150 a month to store the Mercedes. (*Id.* ¶ 30.) According to the Complaint, *before* they instructed Respondents to export the Mercedes, Respondents “unlawfully converted this vehicle and shipped it to the United Arab Emirates on or about August 24, 2013, without the permission or direction of the Complainants.” (*Id.* ¶¶ 31-32.) Therefore, it appears that the Complaint alleges that MTL stole the Mercedes while it was stored in MTL’s warehouse, not while MTL was transporting it internationally by water. The Complaint does not appear to allege a Shipping Act violation by MTL or Alper.

2. Three Harley Davidson Motorcycles.

Complainants allege that they purchased a 2004 Harley Davidson FXDXI, a 2007 Harley Davidson FXD, and a 2000 Harley Davidson XL883 and took possession of the motorcycles and their titles. (Complaint ¶¶ 47-48.) Complainants do not allege that Respondents ever had possession of the motorcycles, but that:

As a result of MTL's previous failures to deliver complainants' vehicles to their overseas destinations, complainants *retained the services of another NVOCC not a party to this action* and known as Unitrans-PRA ("Unitrans"), and Harley #'s "1", "2", and "3" were delivered to the Unitrans' storage facility for shipment overseas.

(*Id.* ¶ 49 (emphasis added).) "On or about September 6, 2013, respondent Alper contacted Unitrans on behalf of MTL via email, and directed Unitrans to refrain from shipping Harley #'s '1', '2', and '3' and to 'hold' that cargo." (*Id.* ¶ 50.) Complainants do not allege that they hired or paid Respondents to ship Complainants' motorcycles overseas or that Unitrans, a different NVOCC, was Respondents' agent for transporting the motorcycles. The Complaint does not appear to allege a Shipping Act violation by MTL or Alper.

IV. ORDER TO SHOW CAUSE.

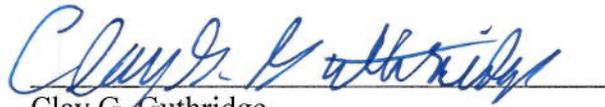
Regarding the 2006 Mercedes SL65 and the three Harley Davidson motorcycles, it does not appear that the Complaint alleges conduct by Respondents that violates the Shipping Act. Therefore, it does not appear that the Commission has jurisdiction to adjudicate the portions of the Complaint involving the Mercedes and the three Harley Davidsons. Based on the allegations of the Verified Complaint and for the reasons stated above, it is hereby

ORDERED that on or before October 3, 2016, Complainants show cause why the allegations in their Complaint regarding the 2006 Mercedes SL65 and the 2004 Harley Davidson FXDXI, the 2007 Harley Davidson FXD, and the 2000 Harley Davidson XL883 should not be dismissed for lack of subject matter jurisdiction or for failure to state a claim upon which relief can be granted. It is

FURTHER ORDERED that on or before October 17, 2016, Respondents file a response to Complainants' response to this Order. I note that Respondents have separate counsel. Respondents may file a joint response or individual responses. It is

FURTHER ORDERED that on or before October 24, 2016, Complainants may file a reply to Respondents' response(s). The reply is limited to addressing issues raised in Respondents' response(s).

The parties may delay submission of the joint status report required by the Initial Order pending resolution of this issue.


Clay G. Guthridge
Administrative Law Judge