

cc: AY(2)

ORIGINAL

5152/M-Dismiss

Federal Maritime Commission, Washington D.C.

Informal Docket No. 1923(1)

The Eagles Wings Foundation

(Claimant)

vs.

Chatelain Cargo Services

(Respondent)

Respondent's Verified Response In Opposition to Small Claim Informal Adjudication and Incorporated Motion to Dismiss Complaint based upon the Federal Maritime Commission's Lack of Jurisdiction

A. Response to Allegations contained in Small Claim Form for Informal Adjudication¹

- I. Respondent² is without knowledge as to the allegations contained in paragraph I.
- II. Denied. There are two separate and distinct entities beginning with the wording "Chatelain Cargo Services". Chatelain Cargo Services, Inc. is a Florida corporation that had no involvement whatsoever in the shipment at issue. Chatelain Cargo Services, S.A. is a corporation existing under the laws of Haiti that was the entity referenced on all relevant shipping documents and which was the entity hired by Claimant to receive the cargo in Haiti, clear it through customs and arrange for local transportation of the subject cargo in Haiti.
- III. Denied. This paragraph confuses the corporations discussed in paragraph II herein. Chatelain Cargo Services, S.A., and not Chatelain Cargo Services, Inc., was the entity that was involved with handling the shipment once it arrived in Haiti at all material times. Respondent further denies the value of the cargo as alleged in the Complaint and demands strict proof thereof. Claimant has suffered no damage since the cargo consisted of donated goods and Claimant has produced no commercial invoice or other documentary evidence supporting the damages alleged. Finally, Respondent denies that it failed to deliver a 40' pallet full of donated MRE's as per the terms of the alleged contract between Chatelain Cargo Services, S.A. and The Eagle Wings Foundation.

¹ The Small Claim Form for Informal Adjudication will hereafter be referred to as the Complaint.

² Since it appears that the Complaint has been improperly brought against Chatelain Cargo Services, Inc., Chatelain Cargo Services, Inc. is the entity responding to the Informal Adjudication Complaint in order to preserve its right to respond to the improperly lodged allegations.

- IV. Denied. The container was properly delivered to the World Food Program as per verbal instructions from Jean Charles, the Claimant's local representative. See also Email Correspondence from Yvonne Loup attached hereto as Exhibit "A".
- V. Denied. The statute does not apply to either Chatelain Cargo Services, Inc. or Chatelain Cargo Services, S.A. since the action brought by The Eagle Wings Foundation is nothing more than a breach of contract cause of action over which the Federal Maritime Commission ("FMC") lacks jurisdiction as will be discussed further below.
- VI. Denied. Respondent demands strict proof the value of the cargo as alleged in the Complaint. Claimant has suffered no damage since the cargo consisted of donated goods and Claimant has produced no commercial invoice or other documentary evidence supporting the damages alleged. Respondent further denies that it failed to deliver a 40' pallet full of donated MRE's as per the alleged contract between Chatelain Cargo Services, S.A. and The Eagle Wings Foundation.
- VII. Denied. Respondent does not agree to the informal procedure outlined in Subpart S (46 CFR 502.301-502.305) or any other proceeding before the FMC since the action brought by The Eagle Wings Foundation is nothing more than a breach of contract cause of action over which the Federal Maritime Commission ("FMC") lacks jurisdiction as will be discussed further below.

B. Respondent's Motion to Dismiss the Complaint

1. The FMC lacks subject matter jurisdiction over this matter

Respondent reiterates that it does not consent to any proceeding whatsoever before the FMC, including the informal procedure outlined in Subpart S (46 CFR 502.301-502.305). Case law makes it clear that courts retain primary jurisdiction over breach of contract and negligence cases involving loss or damage to cargo, effectively ousting the FMC of jurisdiction to resolve such disputes. The doctrine of primary jurisdiction provides that ". . . in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." Zima Corp. v. M.V. Roman Pazinski, 493 F.Supp. 268, 277 (S.D.N.Y.

1980)(citations omitted).³ The issue then becomes whether the FMC, rather than the courts, has specialized expertise over the subject matter of the litigation warranting FMC involvement to resolve the dispute.

“The authority of the FMC is set out in various provisions of the Shipping Act of 1916, as amended, 46 U.S.C. s 801 et seq., and encompasses the regulation of liner conferences and rates, docking, warehousing, and other practices involving the handling of freight, and the licensing of freight forwarders arranging to ship goods from the United States abroad.” *Id.* at 277. Very importantly, “[t]he FMC does not supervise individual freight shipments, nor regulate the matter of damages for loss of cargo.” *Id.* at 277. Such matters are “well within the traditional competence of the courts. Deference to the FMC in such a case is inappropriate.” *Zima Corp* at 277. See also *Great White Fleet, Ltd. v. Federal Container Line, Inc.*, 1992 WL 367110,*2 (S.D.N.Y.1992)(Court had exclusive jurisdiction over a breach of service contract action); *Dampskibsselskabet Torm A/S v. P. L. Thomas Paper Co.*, 26 A.D.2d 347 (N.Y.A.D. 196)(Breach of contract action involving a statutory violation did not present an issue requiring the expertise of the FMC in resolving the dispute and did not require that issue first be referred to the FMC); *General Elec. Co. v. MV Nedlloyd*, 817 F.2d 1022, 1028 (2nd Cir. 1987)(Negligence case would not be referred to the FMC since there was no grant of authority to the FMC to resolve the matter and immunize a person or organization from common law liability for negligence).

The matter at hand is nothing more than a simple alleged breach of contract, or perhaps alleged negligence, case. Claimant is seeking damages for the alleged non-delivery of cargo by Chatelain Cargo Services, S.A. in breach of a contract. These allegations fit the definition of a

³ Respondent is attaching copies of the case law upon which it primarily relies to this Response and Motion to Dismiss for ease of reference.

breach of contract cause of action which is comprised of the following elements: (1) the existence of a valid contract; (2) a breach of the contract; and (3) damages resulting from the breach. APR Energy, LLC v. Pakistan Power Resources, LLC, 653 F.Supp.2d 1227, 1241 (M.D.Fla. 2009). In fact, courts routinely resolve similar cargo disputes. See as e.g., Fox and Associates, Inc. v. M/V Hanjin Yokohama, 977 F.Supp. 1022 (C.D.Cal.1997)(Court handled breach of contract action under COGSA for loss of cargo); SAT Intern. Corp. v. Great White Fleet (US) Ltd., 2006 WL 661042 (S.D.N.Y. 2006)(Court handled breach of contract action for loss stemming from misdelivery of cargo to an unauthorized individual).

Accordingly, in light of the above, Respondent submits that the FMC lacks subject matter jurisdiction over this case and it should be dismissed. Should The Eagle Wings Foundation wish to pursue this matter it is free to do so in a proper court of law against the proper party.

2. The FMC lacks personal jurisdiction

The Claimant and FMC have brought this action against “Chatelain Cargo Services” which is an entity that does not exist. Instead, there are two separate and distinct entities with the wording “Chatelain Cargo Services” in their name, one arguably subject to regulation by the FMC, the other without. It is the entity which the FMC does not regulate, that being Chatelain Cargo Services, S.A., that was retained to handle the cargo at hand in Haiti. Chatelain Cargo Services, Inc., a Florida corporation, was at no time involved in the transportation of the cargo. It did not issue a bill of lading or any other shipping document which would even remotely suggest its involvement. Further, if the Claimant is arguing that the corporate veil for Chatelain Cargo Services, Inc. and its officers should be pierced, such an action would be unsuccessful based on the facts alleged and evidence submitted by Claimant. Thus, the FMC lacks personal jurisdiction over Chatelain Cargo Services, S.A. and does not have grounds to pursue any form

of recovery from Chatelain Cargo Services, Inc. so that dismissal of this action is further warranted.

Chatelain Cargo Services, Inc. is a Florida corporation and Chatelain Cargo Services, S.A. is a corporation existing under the laws of Haiti. In the affidavits and exhibits submitted in support of the Claimant's Complaint, there are attempts to confuse the actual identity of the corporation Claimant contracted with while, at the same time, making it clear that the only company involved in the shipment was Chatelain Cargo Services, S.A.

First, in the Affidavit of Jean Estiva Charles, Mr. Charles states at the outset that he "had numerous face-to-face and phone call contacts with Phillippe Victor Chatelain, a principle of Chatelain Cargo Services, S.A. at his offices in Port au Prince." See Charles Affidavit at pg. 1. Thereafter, Mr. Charles refers only to Chatelain Cargo Services. There is no reference whatsoever in the affidavit to Chatelain Cargo Services, Inc.

Second, in Scott Lewis' Affidavit, also filed in support of the Claimant's Complaint, Mr. Lewis states that he "met with Phillip Chatelain of Chatelian Cargo Services, S.A." See Lewis Affidavit at pg. 1. Mr. Lewis goes on to identify Phillip Chatelain and Chatelian Cargo Services, S.A. collectively as "Chatelain Cargo Service". Notably, Chatelain Cargo Services, Inc. is not included in the "Chatelain Cargo Service" reference. Mr. Lewis attempts to link Chatelain Cargo Services, Inc. and Chatelian Cargo Services, S.A. by virtue of the use of a similar name and alleged ownership interest in both companies by the same individual without providing one iota of evidence linking Chatelain Cargo Services, Inc. to the subject transaction.

Finally, on the authorization form attached as Exhibit "H" to the Complaint, Chatelain Cargo Services, S.A. is specifically identified as the entity with authority to deliver the subject containers. In fact, Scott Lewis, who is President of The Eagles Wings Foundation and who has

submitted an affidavit in favor of Claimant states in the authorization form that "I, Scott Lewis, hereby authorize Chatelain Cargo Services, S.A. to make delivery of my shipment..." See Exhibit "H" to Complaint. How Mr. Lewis is able to state that it was his understanding that he was contracting with Chatelain Cargo Service, Inc in his Affidavit, after having signed a form expressly identifying Chatelain Cargo Services, S.A. as the relevant entity involved in the transportation of the cargo, is beyond comprehension. There is nothing in Exhibit "H" which identifies Chatelain Cargo Services, Inc. in any manner.

As the above makes clear, there is no support whatsoever in the record for holding Chatelain Cargo Services, Inc. accountable, or even involving it in this matter, since it was not involved in the alleged contract for carriage of the cargo. And, if Claimant is requesting that the corporate veil of Chatelain Cargo Services, Inc. be pierced, this would be a virtual impossibility under Florida law and highly improper since there is a notable lack of evidence or even allegations warranting this extreme relief under the stringent test set forth in case law. See U-Haul Intern., Inc. v. Jartran, Inc., 793 F.2d 1034 (9th Cir. 1986)(Lower court's finding that principal shareholder was alter ego of corporation such that corporate veil could be pierced was reversed because, under Florida law, fact that shareholder, who held 85% of corporate stock, heavily subsidized and controlled corporation, including the fact that the shareholder personally guaranteed obligations of the corporation, was insufficient to pierce the corporate veil); Ally v. Naim, 581 So.2d 961 (Fla. 3rd DCA 1991)(Court would not pierce the corporate veil where president and sole shareholder took all corporate net income as personal compensation and did not set any corporate income aside to cover an employee's worker's compensation claim); Barkett v. Hardy, 571 So.2d 13 (Fla. 2nd DCA 1990)(Proof of domination and control of the corporation, absence of corporate formalities, inadequate capitalization, and fact that corporation

was used as a vehicle for personal interest of the shareholder were insufficient to show improper conduct and allow for piercing of the corporate veil); 111 Properties, Inc. v. Lassiter, 605 So.2d 123 (Fla. 4th DCA 1992)(Improper purpose standard was not satisfied where an individual interested in buying a parcel of land formed a corporation solely for the purpose of buying the land, and in order to knowingly conceal his identity from the seller, where the seller disliked the buyer and would not sell to him); Schwartz v. Spectratech Ink Co., 568 So.2d 544 (Fla. 5th DCA 1990)(Court would not pierce the corporate veil and hold individual shareholders liable for the debts of the corporation where invoices were paid with corporate checks, and seller was on notice that the business was organized and corporate officers were doing business on behalf of the corporation, even though there was a discrepancy in the name of the corporation on the corporate checks used to pay the seller and even though shareholders did not hold formal annual meetings).

Additionally, the FMC lacks personal jurisdiction over Chatelain Cargo Services, S.A., a company incorporated and existing under the laws of Haiti. Since Chatelain Cargo Services, S.A. was the entity that the Claimant allegedly contracted with, the proper avenue for relief is to pursue an action against this corporation in a court of competent jurisdiction.

Accordingly, Respondent submits that dismissal of the Complaint is further warranted based upon the aforesaid grounds.

3. The Respondent reserves the right to defend this action before the FMC should dismissal of the Complaint not be ordered

Because Respondent believes that the Claimant's Complaint is improperly before the FMC as set forth above, Respondent will not address further factual arguments although it does state that it denies any breach of contract or wrongdoing in connection with the subject shipment. In the event that the FMC determines that it may properly retain jurisdiction over the matter,

Respondent expressly reserves the right to submit supporting affidavits and evidence in support of its case. Respondent also expressly reserves the right to file an action for dismissal in any relevant court, whether trial or appellate, and to seek attorneys fees in connection with the defense of this frivolous Complaint submitted to the FMC.

WHEREFORE, the Respondent respectfully requests that the FMC decline the exercise of jurisdiction over this matter and dismiss the Informal Complaint filed by the Claimant and for whatever other relief this tribunal deems just and proper.

Respectfully submitted this 15th day of July, 2011.

By: 
MICHAEL C. BLACK, ESQUIRE
F.B.N. 0056162
e-mail: mblack@marlaw.com
KATE S. GOODSSELL, ESQUIRE
F.B.N. 0063399
e-mail: kgoodsell@marlaw.com
Attorneys for Respondent
CASSIDY & BLACK, P.A.
7700 North Kendall Drive, Suite 505
Miami, Florida 33156
Telephone: (305) 271-8301
Facsimile: (305) 271-8302

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via Federal Express on this 15th day of July, 2011, to: Scott Lewis, President, The Eagles Wings Foundation, 375 Possum Pass, West Palm Beach, Florida 33413 and Tara E. Neilsen, Settlement Officer, Federal Maritime Commission, Room 932, 800 North Capitol Street, N.W., Washington, D.C. 20573-0001.

VERIFICATION

I, Phillip Victor Chatelain, declare under penalty of perjury under the laws of the United States of America that I have read the foregoing Verified Response In Opposition to Small Claim Informal Adjudication and Incorporated Motion to Dismiss Complaint based upon the Federal Maritime Commission's Lack of Jurisdiction and know the contents thereof and that the foregoing is true and correct.

Place: Port au Prince Haiti

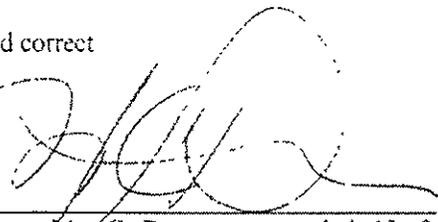
Date: 7/14, 20 11

Signature: 
Name: Phillip Victor Chatelain on behalf of Chatelain Cargo Services, S.A.
Title: President

I, Mia C. Dominguez, declare under penalty of perjury under the laws of the United States of America that I have read the foregoing Verified Response In Opposition to Small Claim Informal Adjudication and Incorporated Motion to Dismiss Complaint based upon the Federal Maritime Commission's Lack of Jurisdiction and know the contents thereof and that the foregoing is true and correct.

Place: Port au Prince Haiti

Date: 7/14, 20 11

Signature: 
Name: Mia C. Dominguez on behalf of Chatelain Cargo Services, Inc.
Title: Secretary

Philippe Victor Chatelain

Subject: FW: petite précision

From: Yvon Loup [<mailto:Yvon.Loup@wfp.org>]

Sent: Monday, March 21, 2011 9:03 AM

To: Philippe Victor Chatelain

Subject: RE: petite précision

Hi Mr. Philippe,

As I explained this morning, we received at the World Food Program, in Cluster #3 Croix des Bouquets the containers GSTU 888905-5 on July 15, 2010. This container was opened in presence of the people in charge at Handicap International as we usually do with all their shipments.

Have a nice day,

Yvon Loup

Air Cargo Movement Officer, Warehouses Manager

WFP Haïti Earthquake Response

Logistics Cluster, Minustah Log Base

Cell: 38 82 04 45

Email: Yvon.loup@wfp.org

EXHIBIT "A "