

cc: OS
GC
ALJ(2)
Pub

RECEIVED FEDERAL MARITIME COMMISSION ORIGINAL

2010 JAN -8 P11 4: 53 Formal Docket Number 1898(F)

FEDERAL MARITIME COMMISSION
DSW INTERNATIONAL, INC. A TEXAS CORPORATION
Claimant

v.

COMMONWEALTH SHIPPING, INC. and

ABOU MERHI LINES, LLC. Respondents

**COMPLAINANT DSW'S REPLY
TO RESPONDENT COMMONWEALTH'S ANSWER TO
COMPLAINANT DSW'S AMENDED COMPLAINT**

**AND COMPLAINANT DSW'S RELY
TO RESPONDENT COMMONWEALTH'S BRIEF**

TO THE HONORABLE FEDERAL MARITIME COMMISSION:

The above-named Complainant, DSW International. Inc.(hereinafter "Complainant" or "DSW") files this Complainant's REPLY to Respondent Commonwealth's Answer to Complainant's Amended Complaint, and Complainant's REPLY to Respondent Commonwealth's Brief, and respectively states as follows. Only the Denials, Challenges, and/or Objections raised by Respondent Commonwealth are taken up herewith, and the same paragraph numbers are used for each item.

- I.
 - (1). Commonwealth's challenge to Affiant Arinze Udegbune's standing in this action is groundless. Arinze Udegbune is president and one of the directors of the Complainant corporation. Under the Texas business organization code, corporate directors are elected (or appointed) at or by the shareholders meeting and the corporate officers(including but not limited to the president) are elected (or appointed) by the board of directors. Such elections being intra-corporation matters, the corporation is not required to publish the names of officers or directors. At the time of the filing of the Texas franchise tax, however,

corporations can file public information records listing the names of corporate directors. In the Complainant's Amended Complaint, proof showing the affiant's corporate capacity was produced. Please see Exhibit 3a therein, a copy of the Texas Franchise Tax Public Information Report, which shows Arinze Udegbune as one of the three directors. Please see Exhibit 3c therein, a page from Articles of Incorporation of DSW International, Inc., that indicates Arinze Udegbune was one of the three members of the initial board of directors.

(2) Commonwealth's allegation that Affiant Arinze Udegbune's Affidavit is not based upon Affiant's personal knowledge is groundless. In the Affidavit itself, the affiant does state "that all the facts set forth therein are true and correct and are within his personal knowledge, that the facts stated therein upon information received from others the Complainant believes to be true and correct, and that he signed the above statement in his capacity as the president and representative of DSW International, Inc. as well as in his individual capacity." Further, the Affidavit follows the format and directions suggested by the FMC.

II.

(1) Commonwealth was known to Complainant as a freight forwarder in old terminology. Commonwealth, having represented itself as such some years ago, was known to DSW as such. DSW listed the Commonwealth's FMC number that was provided by Commonwealth on its bills of lading.

III.

(1) Commonwealth's denial of its violation of any provision of the Shipping Act is only self-serving and groundless. Commonwealth did violate a provision of one of the subsections of Section 10 of the Shipping Act, and Commonwealth is one of the two liable parties in this action.

(2) Complainant objects to Commonwealth's challenge that Federal Maritime Commission has no subject matter jurisdiction in this case. Commonwealth's statement, "Even if the cargo

is missing or destroyed, such cargo damage or loss is not a violation of the terms of the Shipping Act,” reveals its mindset of blatant efforts to emasculate the FMC and further reveals its mentality that Commonwealth is a socially and professionally irresponsible business entity. Complainant does hereby assert and support that the FMC does have subject matter jurisdiction in this action.

(3) Complainant does assert that an aggrieved shipper is entitled to make a choice of either a COGSA remedy or the Shipping Act remedy, if either of the two statutes is available. The option of the law is not something the wrongdoer chooses. Incidentally, if Complainant pursued a COGSA remedy, there was sufficient time to file suit in terms of the statute of limitations, at the time Complainant filed this FMC action in March 2009. Complainant respectfully requests that the FMC exercise subject matter jurisdiction in this action.

IV.

(1) Commonwealth’s denial of negligence and its denial of a breach of contract make no sense. Complainant does hereby accuse Commonwealth of committing negligence and breach of contract.

(2) Complainant objects to Commonwealth’s challenge to DSW’s damage in the amount of \$46,284.30. The amount of the damage is true, correct, and accurate as per the documentary evidence presented in the Complainant’s Amended Complaint.

(3) Commonwealth’s denial for any pre- and post-judgment interest and its objection to the notion of attorney’s fees are both misplaced. The award of both the pre- and post-judgment interest and the award of reasonable and necessary attorneys fees are straight from the provisions of the Shipping Act. Complainant respectfully requests that the FMC award pre- and post-judgment interest as well as reasonable and necessary attorneys fees to the Complainant.

VI

(1) Commonwealth's denial of Complainant's request for "a reliable, experienced, and reputable ocean carrier to transport" makes no sense. Complainant did make such request verbally. In any business transaction under the same or similar circumstances, the customer would have made the same request. Commonwealth's denial sounds like Commonwealth knew or had reason to know that Abou Merhi was NOT "a reliable, experienced, and reputable ocean carrier."

(2) Regarding the two ocean carriers, Grimaldi USA and Abou Merhi, Complainant raised no objections at all at the time Commonwealth was looking for an ocean carrier. Complainant was told that Grimaldi, USA was unable to carry the two motor vehicles, because the ship was congested and lacked space. Only later, after the Complainant's two motor vehicles were declared lost, Complainant became concerned that there could have occurred shenanigans within Abou Merhi or whether or not the cargo was actually loaded aboard Abou Merhi.

IX.

(1) Notwithstanding Commonwealth's assertion of "dramatic literature," etc., the loss of the two motor vehicles was indeed "a tremendous and irrevocable blow" and it would "have drastic and long-lasting unfavorable effects upon [DSW]'s business turnover," was a true and accurate description of DSW's situation.

X.

(1) Despite Commonwealth's denial that it "was no[sic] concerned and did not help," Complainant did feel it received little help from Commonwealth during the time Complainant was in a desperate search to locate the two automobiles. To Complainant, both Commonwealth and Abou Merhi seemed to be acting aloof like a bystander.

XII.

(1) Regarding whether or not the cargo was actually loaded aboard Abou Merhi, Complainant does not have any eyewitness proof, except that Complainant received two bills

of lading from Abou Merhi. Because the two automobiles were spirited away in transit or in the course of ocean transportation between Jacksonville, Florida, and Cotonou, Benin, Complainant was unable to discard the imagination of an unlikely situation in which the cargo was never loaded aboard Abou Merhi.

XIV.

(1) *Res Ipsa Loquitur* is a rule of evidence. Although it is true that the rule is often utilized in tort cases, Complainant believes there is no reason why it should not be applied in a maritime case. Especially, in the instant case, the two automobiles were in exclusive possession, custody, and control of Abou Merhi during the time of the vital importance.

XV.

(1) Complainant finds it difficult to comprehend what Commonwealth means when it says "DSW did not have the time frame to properly file suit in a proper forum." Suffice to say in response that no statute of limitations problem was at issue at the time DSW filed its Complaint with the Federal Maritime Commission.

(2) Commonwealth's allegation that Complainant is only entitled to file a suit under COGSA and that the maximum damages Complainant should receive is \$500 per package is wide off the mark.

XVI.

(1) Complainant cannot accept Commonwealth's denial that it ever violated any provision of the Shipping Act. Section 10(d)(1) of the Shipping Act 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.

It is obvious that Commonwealth failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." If Commonwealth had not violated this section, Complainant's cargo(two motor vehicles) would not have been lost in the process of its receiving, handling,

storing, or delivering the same. See *Anchor Shipping Co. v. Alianca Navegacao E Logistica Ltd.*, 30 SRR 991, 1001(2006); *Rose International, Inc. v. Overseas Moving Network Int'l, Ltd.*, 29 SRR 119, 159(2001). This private action involves a public interest in the ocean transportation of goods and cargos, and the Federal Maritime Commission, the expert administrative agency designated by Congress, is authorized to resolve issues herein to protect public interest and is mandated to prohibit such unfair practices. These are squarely within the jurisdiction of the FMC.

The policy statement of the Shipping Act appears in Section 2 thereof, which declares the purposes of the Shipping Act are, among others, as follows: To establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States, To provide an efficient and economic transportation system in the ocean commerce of the United States that is...in harmony with international shipping practices, and To promote the growth and development of United States exports through competitive and efficient ocean transportation. It is imperative that the Federal Maritime Commission exercise adjudicatory jurisdiction in this type of disputes in order to accomplish its purposes under the Shipping Act.

XVII.

(1) Complainant denies Commonwealth's position that only COGSA remedy was the sole remedy available to the Complainant in this case. Complainant asserts the remedy under the Shipping Act should be available to the Complainant.

XVIII.

(1) Complainant is entitled to demand and receive reparations under the Shipping Act. Complainant did previously file two Motions, and further intend to file a third Motion, for Default Judgment against Abou Merhi.

XIX.

(a) As the invoice, **Exhibit 9a**, attached to the Amended Complaint shows, Complainant

purchased the 2004 Ford from DSW Sports and Imports, a used-car dealer and a separate and independent entity from the Complainant herein. DSW Sports and Imports may have purchased the vehicle at auction from State Farm for less than the price Complainant paid said DSW Sports & Imports.

(b). Complainant finds it difficult to understand what Commonwealth's challenge is about. It was the Complainant that had the truck bed cover and other truck accessories installed in the truck and paid the cost of \$1,300. See Exhibit 9b.

(c) It is difficult for Complainant to comprehend what Commonwealth's objection is about, but it was the Complainant that had additional truck accessories installed and paid the expense of \$1,200. See Exhibit 9c.

(d). As in (a) hereabove, DSW Sports & Imports, the dealer, may have purchased the 2001 Honda for less price, but Complainant as Buyer purchased the vehicle from Seller, DSW Sports & Imports, an independent and separate entity, for \$16,900. See Exhibit 9d.

(e). Port Storage was the storage facility where the vehicles were stored. An agent of Port Storage took the vehicle to Guardian Auto Glass where the windshield was replaced. Subsequent to that transaction, Complainant reimbursed Port Storage \$200 for the price of the windshield. See Exhibit 9e.

(f). Evidence clearly establishes that the Complainant paid the trucking expenses for the two vehicles in the amount of \$1,000 to DF Trucking Co. See Exhibit 9f.

(g). Although the storage bill was billed to and paid by DSW Sports & Imports, Complainant subsequently reimbursed the entire amount of the storage bill to DSW Sports & Imports. See Exhibit 9g.

XX.

(1). Commonwealth's objection to the amount of damages is overruled. The Complainant's evidence is clear and convincing and substantial, and the Complainant stands by the amount of damages that was presented in its Amended Complaint.

(2) Commonwealth's attempt to deny the attorney's fees is groundless. The Shipping Act does expressly provide for attorneys fees in this kind of situation.

XXI.

(1) Commonwealth's challenge to the award of pre-judgment interest is opposed. The Shipping Act does expressly allow the recovery of pre-judgment interest. Commonwealth challenges the award of post-judgment interest, but it adds that if it is allowed, its rate should be at the lower interest rate. Complainant does hereby oppose the challenges, because the Shipping Act expressly allows the recovery of pre- and post-judgment interest and at the rate specified therein.

XXII.

(1) Complainant vigorously opposes Commonwealth's challenge to the FMC subject matter jurisdiction in this action. Please see the third paragraph in the Complainant's REPLY BRIEF to Commonwealth's Brief herebelow.

COMPLAINANT DSW'S REPLY BRIEF TO COMMONWEALTH'S BRIEF

Commonwealth states that the Carriage of Goods by Sea Act is the sole statute that is applicable to the instant action and that the recovery of damages should be subject to the \$500 per package limitation. Complainant's position is that because in this maritime action a VOCC (Abou Merhi Lines, LLC.) and an OTI / NVOCC (Commonwealth Shipping, Inc.) are involved, and the two Respondents violated the terms and provisions of the Shipping Act, Complainant is entitled to have the dispute adjudicated by the Federal Maritime Commission. Additionally, Complainant argues that if two statutes are available to obtain relief for Complainant's loss and damage, the Complainant does have the option to choose the law. Complainant does request that

Complainant be awarded damages, pre-judgment and post-judgment interest, reasonable attorneys fees, and costs of court expended in this action, all under the Shipping Act.

Commonwealth then argues the unconstitutionality of the statute that established the Federal Maritime Commission and that granted adjudicatory powers to the FMC. In support thereof, Commonwealth further argues that there is no textual support in the Constitution to establish a commission that does not answer to the executive branch and that only a court that has the ability to provide the parties with a jury trial may adjudicate private rights and remedies enforceable in an action for damages.

One of the cases Commonwealth has cited in its brief is *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 US 743(US, 2002). Indeed, this was a definitive case in which the United States Supreme Court upheld the constitutionality of the Federal Maritime Commission and its adjudicatory powers under the Shipping Act. In the decision issued on May 28, 2002, the Supreme Court ruled that state sovereign immunity barred an adjudicative proceeding initiated by a private party against a state-operated port, but it went on to say the FMC “remains free to investigate alleged violations of the Shipping Act, either upon its own initiative or upon information supplied by a private party.” The FMC is constitutional and it does have the right and power to adjudicate the disputes between the private parties. Please see *South Carolina Maritime Services, Inc. v. South Carolina State Ports Authority*, Docket 99-21 (July 18, 2002). The Complainant herein does reiterate that the Federal Maritime Commission is a fully constitutional agency and that it has complete subject matter jurisdiction over the types of disputes as in this action.

WHEREFORE, PREMISES CONSIDERED, Complainant DSW International, Inc. prays that the honorable Federal Maritime Commission grant and award to the Complainant all relief (damages in the amount of \$46,248.30, reasonable and necessary attorneys fees in the amount of \$7,500.00, pre-judgment and post-judgment interest, and costs and expenses of court)

as requested in the Complainant's Amended Complaint, and any further and additional relief to which the Complainant may be justly entitled.

Respectfully submitted,

Date: January 6, 2010

Chae and Associates, PC
Attorneys for the Complainant
DSW International, Inc.

By: /s/ 
Don B. Chae, Attorney at Law
State of Texas Bar Number, 0405610
2828 Forest Lane, Suite 1107,
Dallas, Texas 75234, USA.
(972)484-5580, Fax (972)484-5582

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2010, a true and correct copy of the above and foregoing Complainant's REPLY to Respondent Commonwealth's Response to Complainant's Amended Complaint and Complainant's REPLY to Respondent Commonwealth's Brief has been served upon Francis M. Boyer, Esq., the attorney of record for Commonwealth, by means of facsimile transmission at (904)737-0920, and upon Abou Merhi Lines, LLC. at 13453 N. Main Street Suite 505, Jacksonville, FL 32218, by United States mail.

 /s/ 
Don B. Chae

CHAE AND ASSOCIATES, PC

2828 Forest Lane Suite 1107

Dallas, TX 75234

TEL (972)484-5580, FAX (972)484-5582

RECEIVED

2010 JAN -8 PM 4:55

OFFICE
FEDERAL MARITIME COMM

January 6, 2010

Federal Maritime Commission
Office of the Secretary
800 N. Capitol Street
Washington, DC 20573

RE: Docket Number: 1898(F)
DSW International, Inc., Complainant
v. Commonwealth Shipping, Inc. and Abou Merhi Lines(USA), LLC, Respondents

Filing of the Complainant DSW International, Inc.'s REPLY BRIEF

Dear Secretary:

The above-referenced case is pending before the Honorable Judge Clay Guthridge. In compliance with the judge's order, who ordered that the Complainant herein file a REPLY BRIEF in response to the Respondent's Brief on or before January 8, 2010, the Complainant DSW hereby files this REPLY. The full name of this 10-page pleading herein is **COMPLAINANT DSW'S REPLY TO RESPONDENT COMMONWEALTH'S ANSWER TO COMPLAINANT DSW'S AMENDED COMPLAINT, AND COMPLAINANT DSW'S RELY TO RESPONDENT COMMONWEALTH'S BRIEF.**

I am hereby filing this signed REPLY BRIEF by means of facsimile transmission to your office, and I plan to send 16 copies(including one original) of the REPLY BRIEF under separate cover by United State express mail later today.

Thank you for your assistance.

Very truly yours,



Don B. Chae
Attorney for the Complainant
DSW International, Inc.