FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

EARLEAN EDWARDS DUKART, *Complainant*

v.

OCEAN STAR INTERNATIONAL INC., D/B/A INTERNATIONAL VAN LINES, *Respondent*.

DOCKET NO. 20-03

Served: July 10, 2020

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION GRANTING VOLUNTARY DISMISSAL[1]

I. Introduction

This proceeding arises from a complaint filed with the Federal Maritime Commission ("FMC" or "Commission") in connection with a dispute over a contract to ship household goods from the United States to Belize. Complainant, Earlean Edward Dukart ("ED"), who is *pro se* and representing herself, alleges that Respondent, Ocean Star International Inc. ("Ocean Star"), doing business as International Van Lines, violated sixteen sections of the Shipping Act of 1984, as amended ("Shipping Act").

According to the complaint, Complainant, who was relocating from the United States to Belize, entered into a contract with Ocean Star to ship her household goods by 40 foot container from Denver, Colorado, to Consejo Shores, Belize, for $17,424. Complainant paid Ocean Star a deposit of $3,000 as part of the agreement. Respondent's agent packed, loaded, and transported the shipment to a storage facility to wait for transportation to Belize. Complainant was unhappy with Ocean Star's performance during and after pickup of the household goods and subsequently canceled the contract with Ocean Star. Ocean Star demanded that Complainant pay them for services rendered before the household goods could be released and eventually Complainant paid Ocean Star an additional $2,746 to secure release of her belongings. When Complainant took possession of the shipment, she alleges that many of her items were damaged or missing. Complaint at 2-36.

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

Complainant alleges that Respondent violated 46 U.S.C §§ 41102(a),(b),(c); 41103(a); 41104[2](a)(1), (2)(A), (3), (4)(A), (4)(D), (4)(E), (5), (8), (10); and 41105(1), (2), (4) of the Shipping Act. Complaint at 2. Complainant contends that the Commission has jurisdiction over the complaint pursuant to 46 U.S.C. § 41301 because she suffered injury as a result of Respondent's violation of the Shipping Act and because her dispute falls under the Carriage of Goods by Seas Act ("COGSA"). Complaint at 2. Complainant requests reparations in the amount of $256,241 for lost income, related consequential and incidental damages, actual loss and damage of the shipment, pain and suffering, mental anguish and duress, damage/loss of consortium and associated medical expenses, and punitive damages. Complaint at 38-39. In addition, Complainant requests that the Commission order Respondent to cease and desist from violating the Shipping Act. Complaint at 39.

Ocean Star denied the allegations, asserting in a letter to the Commission in response to the complaint that the shipment was "not an overseas shipment handled by our company," and asked that the complaint be dismissed. Answer/Motion at 2. In response, on March 2, 2020, Complainant filed a document labeled "Response to Respondent's motion" ("Complainant's Response").

On March 30, 2020, an order was served, observing that while *pro se* Respondent had not filed a motion, its answer could be viewed as a motion to dismiss. Order to Brief Motion to Dismiss at 1. The order stated:

> It seems most efficient at this point to treat Respondent's answer as a motion to dismiss and Complainant's response as a response to the motion. However, the parties will be provided an opportunity to file any additional legal or factual arguments and any other exhibits that they would like to be considered regarding the request to dismiss the complaint. The parties should review the issues raised in the initial order and should address whether insurance was purchased for the shipment and whether a claim has been made against the insurance or bond on file with the Federal Maritime Commission.

Order to Brief Motion to Dismiss at 1.

On April 14, 2020, Respondent's new counsel filed a supplemental memorandum in support of motion to dismiss ("Supplemental Motion"). On the same day, *pro se* Complainant filed a document labeled "Status Report" with exhibits attached, in which Complainant addressed statements made in Respondent's answer/motion, recounted challenges impeding her efforts to comply with the orders and to litigate this proceeding, and requested "a continuation of these proceedings." Complainant's Status Report at 1-3.

[2] Complainant incorrectly cites the section 41104 provisions as sections 41104(1), 41104(2)(a), 41104(3), 41104(4)(a)(d)(e), 41104(5), 41104(8) and 41104(10). The correct citations are 41104(a)(1), (2)(A), (3), (4)(A), (4)(D), (4)(E), (5), (8), (10).

On April 16, 2020, an Order Granting Extension to Respond to Motion to Dismiss ("Order Granting Extension") was issued in response to Complainant's status report, stating in part:

> It appears that Complainant's request to continue the proceedings means that she wants the proceeding to continue (not be dismissed) although it could also be read as a request for an extension of time to respond to the motion. In an abundance of caution, Complainant will be granted a short extension of time to file any additional response to the motion to dismiss and supplemental memorandum in support of the motion to dismiss. After this motion is resolved, if the proceeding is not dismissed, a schedule will be issued with time for discovery and briefing of the proceeding. Complainant must file a supplemental response, if any, to the motion to dismiss by April 27, 2020.

Order Granting Extension at 1-2.

On April 27, 2020, Complainant filed her supplemental response, arguing that the Commission has jurisdiction over her complaint and attaching booking confirmations as evidence in support of her contention. In addition, Complainant stated:

> As a full understanding of this matter could not be established within the allotted time frame, Complainant would like to withdraw the current complaint, preventing dismissal, to leave open the opportunity to pursue the matter under the proper jurisdiction unless continuation is deemed appropriate and ordered otherwise.

Complainant's Supplemental Response at 1. A request for withdrawal would be considered under Commission Rule 72(a), which addresses voluntary dismissals. 46 C.F.R. § 502.72(a). It appears that if Respondent's motion to dismiss is denied, then Complainant would like the case to continue, so the request for withdrawal is conditioned on the outcome of the motion. Because the request was filed after service of the answer/motion and is not a stipulation, it is considered under Rule 72(a)(3), which provides in pertinent part that "an action may be dismissed at the complainant's request only by order of the presiding officer, on terms the presiding officer considers proper."

For the reasons set forth below, the Commission has personal and subject matter jurisdiction to adjudicate the Shipping Act violations alleged. However, as discussed below, this complaint is subject to dismissal because it does not state a plausible claim for relief under the Shipping Act. Some of the allegations made by Complainant are not Shipping Act claims that can be adjudicated by the Commission. No finding is made as to the allegations of non-Shipping Act violations. If the motion to dismiss were granted, the dismissal would be without prejudice to provide Complainant an opportunity to consider whether the defects could be cured. In deference to Complainant's request, voluntary dismissal without prejudice is granted instead.

II. Arguments of the Parties

Ocean Star seeks a dismissal with prejudice. Ocean Star avers that it "parted ways with ED in July 2018, and did NOT handle an overseas shipment to Belize for ED, but instead released it to another carrier of ED's choosing." Answer/Motion at 1. Ocean Star maintains that at most it "began a business undertaking for Complainant that may have required Ocean Star, at some future date, to act in its capacity as an OTI." Supplemental Motion at 2. Ocean Star avers that it "never actually arranged ocean transportation, made a booking, issued a house bill of lading, or provided any other regulated services for the Complainant." Supplemental Motion at 3.

Ocean Star asserts that Complainant's claims must be dismissed for lack of personal jurisdiction because the Commission has personal jurisdiction limited only to certain parties involved in oceanborne commerce; Ocean Star did not engage in activities regulated by the Shipping Act; and, Complainant "fails to provide affirmative facts showing that the Commission has personal jurisdiction over Ocean Star." Supplemental Motion at 6-11. Ocean Star argues that even "construing the facts in the most generous light to Complainant, the only services that Ocean Star arguably provided in this case was that of an inland freight broker, when the company arranged for the packing, transportation, and storage of the Complainant's goods in Colorado." Supplemental Motion at 10.

Ocean Star further asserts that Complainant's claims must be dismissed for lack of subject matter jurisdiction. Ocean Star contends that the Commission lacks subject matter jurisdiction over any claims in the complaint that invoke COGSA or breach of contract as a basis for jurisdiction as those claims are not violations of the Shipping Act, noting that the Commission's jurisdiction is limited to violations of the Shipping Act. Supplemental Motion at 3. Ocean Star further asserts that it was not acting as a common carrier for this shipment. Supplemental Motion at 16-17.

Ocean Star states that an "entirely independent and distinct grounds for dismissal is that Complainant's complaint does not plausibly allege facts constituting any violation or violations of the Shipping Act" and therefore Complainant fails to plausibly allege facts constituting a violation of the Shipping Act. Supplemental Motion at 17-26.

Complainant contends that the Commission has subject matter jurisdiction because her dispute falls under COGSA as well as the Shipping Act pursuant to 46 U.S.C. § 41301 because she suffered injury as a result of Respondent's violation of the Shipping Act. Complaint at 2. Complainant states that "[Respondent] and entities are obligated to comply with all applicable rules and regulations of the FMC, including the Shipping Act and COGSA." Complaint at 2.

In response to Respondent's argument that it did not act as an OTI, Complainant observes that the "submitted contract entered was to ship household goods from Denver to Belize, not a haphazard relocation to rodent infested storage 18 miles away." Complainant's Supplemental Response at 1. Complainant asserts that the booking confirmations she received from Respondent are evidence that the parties entered into an overseas shipping contract. Complainant's Supplemental Response at 1. Complainant also requests to withdraw the complaint. Complainant's Supplemental Response at 1.

III. Analysis

A. Motion to Dismiss Standard

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 case-law interpreting it." *Cornell v. Princess Cruise Lines, Ltd.*, 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)).

Federal Rule of Civil Procedure 12(b) permits a party to raise, by motion, lack of subject matter jurisdiction (12(b)(1)), lack of personal jurisdiction (12(b)(2)), and failure to state a claim (12(b)(6)). F.R.C.P. 12; *see also Mitsui O.S.K. Lines Ltd.*, 32 S.R.R. at 136. "Proper jurisdiction for a federal court is fundamental and necessary before touching the substantive claims of a lawsuit." *Arena v. Graybar Elec. Co., Inc.*, 669 F.3d 214, 223 (5th Cir. 2012). The "party asserting subject-matter jurisdiction, has the burden of proving its existence by a preponderance of the evidence." *Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading, Inc.*, 697 F.3d 59, 65 (2d Cir. 2012).

At this stage, "Rule 12(b)(6) does not require 'the pleading of specific evidence or extra facts beyond what is needed to make the claim plausible.'" *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 34 S.R.R. 35, 58 (FMC 2015) (quoting *Arista Records LLC v. Doe 3*, 604 F.3d 110, 120-21 (2d Cir. 2010)). Instead, the "complaint's factual allegations 'must be enough to raise a right to relief above the speculative level' and must 'nudge claims across the line from conceivable to plausible.'" *Maher*, 34 S.R.R. at 57-58 (quoting *Cornell*, 33 S.R.R. at 620). However, "[m]ere labels and conclusions or a 'formulaic recitation of the elements of a cause of action' will not suffice, nor will 'naked assertions devoid of further factual enhancement.'" *Maher*, 34 S.R.R. at 58. 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, 678] (2009).

Mitsui O.S.K. Lines Ltd., 32 S.R.R. at 136.

"A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (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*, 556 U.S. at 678. 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."

Cornell, 33 S.R.R. at 620-621 (citations omitted). The Commission has clearly indicated that federal case law interpreting Federal Rule of Civil Procedure 12(b)(6), including *Twombly* and *Iqbal*, continues to apply to motions to dismiss filed in Commission proceedings. *Maher*, 34 S.R.R. at 55; *Cornell*, 33 S.R.R. at 620; *Mitsui O.S.K. Lines Ltd.*, 32 S.R.R. at 136.

B. Discussion

As caselaw provides, before proceeding to the merits of Complainant's allegations, it is first necessary to resolve the question of whether the Commission has jurisdiction to adjudicate this complaint. *See, e.g., Arena*. 669 F.3d at 223-224 (stating that proper jurisdiction is necessary before touching the substantive claims of a case). The party asserting jurisdiction bears the burden to show that jurisdiction is present. *See, e.g., Garanti Finansal*, 697 F.3d at 65.

1. The Commission has Jurisdiction to Adjudicate this Complaint

Ocean Star posits that the Commission lacks jurisdiction over it because it did not act in the capacity of a regulated entity and that at most, it "began a business undertaking for Complainant that may have required Ocean Star, at some future date, to act in its capacity as an OTI." Supplemental Motion at 2. Complainant points to the contract between the parties as evidence that Respondent entered into an agreement with her to ship household goods from Denver to Belize. Complainant's Response at 1.

The Shipping Act provides *inter alia*, that a "person may file with the . . . Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 997-99 (FMC 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co., Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000).

Moreover, Respondent is a common carrier licensed to provide non-vessel operating common carrier ("NVOCC") services and is thus subject to the jurisdiction of the Commission with regard to its activities related to ocean transportation between the United States and a foreign destination.

The Commission has jurisdiction over *matters relating to* transportation by water of cargo between the United States and a foreign country by a common carrier. That jurisdiction 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 Ry. 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*, 32 S.R.R. 126, 2011 FMC LEXIS 12, 56 ("legislative history demonstrates that Congress intended that the Commission have jurisdiction over through transportation, including the inland segment of such transportation").

Respondent's argument that it began a business undertaking for Complainant that merely required Respondent to act in its capacity as an OTI at some future date is not persuasive. *See* Supplemental Motion at 2. The characterization of transportation as a through movement to the ultimate destination is reached by looking at "the original and persisting intention of the shippers which was carried out." *Baltimore & O.S. W.R. Co v. Settle*, 260 U.S. 166 (1922). As the Commission has stated, "the intention of the shipper as to the ultimate destination at the time the cargo starts is the test of its character, though broken, transported by more than one carrier, or moving on through or local bills of lading." *Matson Navigation Co., Inc.–Transport. of Cargoes Between Ports and Points Outside Haw. and Islands Within the St. of Haw.*, 24 S.R.R. 979, 988 (1988) (quoting *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 440 (1935)).

Recently, in *Crocus*, the Commission vacated the dismissal of a section 41102(c) claim for lack of jurisdiction because the complainant, which had initially entered into an agreement to ship a Formula boat from the United States to Dubai, subsequently asked that the boat be shipped to Florida instead. *Crocus Investments, LLC v. Marine Transport Logistics, Inc.*, 1 F.M.C.2d 403 (FMC 2019). The Commission stated:

> The relevant inquiry here is not, however, limited to whether there was a contract for overseas shipment. Nor was the ALJ's focus on whether the Formula left the United States or had an agreement for overseas shipment clearly linked to the Shipping Act or precedent, and it unduly narrows the scope of the inquiry to two factors. The approach supported by the text of § 41102(c) and Commission caselaw asks: was the respondent acting as a regulated entity with respect to the conduct at issue?
>
> The inquiry here should have been: was Marine Transport acting as an OTI with respect to the Formula boat from August 2013 (when it was purchased) to February 2014 (when Crocus began to inquire about domestic transportation of the boat). This fact-intensive analysis takes into account the statutory definition of OTI (and in particular, NVOCC), and evidence about the parties' conduct during that time frame.
>
> Whether the Formula was actually transported to a foreign port or the subject of a contract to do so are highly relevant to this analysis, but not necessarily determinative. For instance, the Commission has determined that a broad swath of conduct falls within the scope of NVOCC activities.

Crocus, 1 F.M.C.2d at 415 (internal citations omitted).

The Commission has long relied on three factors – holding itself out, assuming responsibility, and transportation by water – to identify a common carrier:

> As a "common carrier" is defined in the Shipping Act, an NVOCC "holds out" to the "general public to provide transportation by water" and "assumes responsibility for the transportation from the port or point of receipt to the port or point of destination." 46 U.S.C. §1702([7]). The Commission has found that no single factor of an entity's operation is determinative of its status as a common carrier. [*River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751, 763 (FMC 1999); *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 62-65 (FMC 1965)]. Rather, the Commission must evaluate the indicia of common carriage on a case-by-case basis. *Id.*

Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd., 29 S.R.R. 119, 162 (FMC 2001).

Here, Complainant alleges that the parties entered into an agreement for Respondent to ship Complainant's household goods from the United States to Belize. In furtherance of that agreement, Complainant paid a deposit to Respondent and Respondent packed, loaded, and transported the shipment to a storage facility while waiting for a shipping container for transportation to Belize. Therefore, substantial efforts were made towards completion of this arrangement for international oceanborne transportation. The fact that Complainant became dissatisfied with Respondent's performance and terminated the contract before Respondent could complete the transportation does not nullify the fact that the intention of the parties at the time of the agreement was for Respondent to provide international ocean transportation from the United States to Belize. The facts alleged are sufficient to support the allegation that Respondent acted as an NVOCC for this shipment until Complainant terminated its services. Accordingly, the complaint plausibly alleges that the Commission has personal jurisdiction to adjudicate the Shipping Act claims alleged in this complaint.

2. The Commission has no Authority to Adjudicate Contract, Tort, and COGSA Claims

Complainant filed this complaint pursuant to 46 U.S.C. § 41301, which allows any person to file a sworn complaint alleging a violation of the Shipping Act and to seek reparations within three years of the occurrence of the violation for actual injury resulting from the violation.

Complainant alleges that she suffered injury as a result of Respondent's violation of certain enumerated sections of the Shipping Act. Complaint at 2. Complainant asserts that "this matter relates to the contracts for carriage of goods by sea from ports of the United States, and thus comes under . . . COGSA, 46 U.S.C. § 30701." Complaint at 2. Complainant further asserts that "Respondent's failure to maintain contractual obligations along with breach of contract, fraud, forgery, deceptive trade practice, gross negligence and intentional misconduct . . . caused damages/losses to the Complainant." Complaint at 38.

Respondent argues that "Complainant has improperly sought to recast common law state contract and tort claims as violations of federal law" and that "the FMC lacks subject matter jurisdiction over any and all claims in the complaint which invoke COGSA as a basis for jurisdiction as well as any and all claims in the complaint which allege pure breach of contract which are not violations of the Shipping Act." Supplemental Motion at 1, 3.

Pursuant to COGSA, jurisdiction over loss and damage claims arising from transportation by ocean is vested in the federal district courts. *Nat'l Auto. Publ'n, Inc. v. U. S. Lines, Inc.*, 486 F.Supp. 1094, 1099 (S.D.N.Y. 1980).

Further, the Commission has no authority to hear Complainant's claims alleging failure to maintain contractual obligations, breach of contract, fraud, deceptive trade practice, gross negligence, and intentional misconduct. As has been long articulated in the Commission's caselaw:

> [The] Commission does not exercise the authority of a court of law or of equity. We administer and enforce the requirements of the Shipping Act and related Acts. When pleadings come before us in which violations of the Act are heavily veiled in common law pleadings it becomes difficult to distill the activities alleged to be in violation of the Act from those which indicate the possible violations of some common law obligation.

European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc., 19 F.M.C. 148, 151 (FMC 1976). *See also Western Overseas Trade and Dev. Corp. v. ANERA*, 26 S.R.R. 874, 884 (FMC 1994) (stating that the Shipping Act prevents the Commission from "hearing those claims, which although couched in terms of alleged violations of the 1984 Act, seek remedies that would otherwise be available in a breach of contract action if the matter were brought before a court."). Accordingly, only claims based on the Shipping Act can be adjudicated by the Commission.

3. Complainant Does Not State a Claim for Relief under the Shipping Act

Respondent asserts as an independent basis for dismissal that "Complainant also fails to allege facts that would constitute violations of the Shipping Act." Supplemental Motion at 17. Complainant does not appear to directly address this portion of the motion to dismiss.

For a number of the complaint's allegations, Complainant misunderstands legal terms, including the types of contracts and relationships necessary to establish a Shipping Act violation. In addition, because a "pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do" (*Iqbal*, 556 U.S. at 678), where the Complainant simply recites the Shipping Act sections she alleges Respondent violated, without alleging actual conduct by Respondent corresponding to the conduct proscribed by those sections, her Shipping Act claims fail to state a plausible claim for relief under the Shipping Act. 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." *Iqbal*, 556 U.S. at 678. As explained more fully below, Complainant's sixteen Shipping Act claims could be dismissed for failure to state a claim for relief.

a. Section 41102(a)

Although Complainant's arguments are not always entirely clear, in the complaint, she appears to focus on the agreement and rates charged to her by Respondent, arguing:

> (1) as Respondents were incapable of executing service provisions, solicitation of the Service Contract itself is an attempt to obtain ocean transport for property at less than rates that would otherwise apply; Respondents method of execution required intermediate movers and storage that were excluded when negotiating the agreement.
>
> (2) based on internal invoices and incriminating correspondence, lower rates previously presented by Respondents attempted to obtain transportation contract at rates they later confirm to have been lower than what was applicable, Respondents additionally imposed other unlisted charges, stated to apply, as they extorted unjust charges and fees for cancellation
>
> (3) improper classification of merchandise being transported, inaccurate or unavailable inventory listing, an accurate Bill of Lading was not generated
>
> (4) false measurements were presented to obtain transport, Respondents subcontracted with Cobra Van Lines represented by Jesse Larrea, under false pretenses; Mr. Larrea arrived with a copy of the Service Contract that had service lines omitted. Mr. Larrea stated that his company was contacted for a simple load and delivery to storage
>
> (5) unfairly and unjustly, the subcontractor obligations were falsely reported; three men and a 26 ft. truck were inadequate, materials for wrapping and packing were not available, this did not coincide with services contracted for; accessibility for a 40' container was not even possible for future loading, neither multiple moves nor storage were discussed or agreed upon.

Complaint at 36-37. Although the complaint as a whole is long and detailed, other sections including the detailed chronological statement of facts does not further clarify the argument.

Respondent contends:

> Complainant's arguments evidently center around Ocean Star's estimate for charges provided to the Complainant and additional charges for packing, inland moving and storage fees, which were allegedly subsequently revised by Ocean Star from the original estimate. *See* Compl. Section IV.A.1(a). Complainant's assertions are a clear misunderstanding of 46 U.S.C. § 41102(a), which prohibits persons from obtaining ocean transportation for property at less than the rates or charges that would otherwise apply. There are no facts alleged to indicate that Ocean Star was attempting to "obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply" from a NVOCC or an ocean common carrier.

Supplemental Motion at 17-18.

> Section 41102(a) states:
>
> > A person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.

46 U.S.C. § 41102(a). The Commission has clarified in its Rules that:

> > An essential element of the offense is use of an "unjust or unfair device or means." In the absence of evidence of bad faith or deceit, the . . . Commission will not infer an "unjust or unfair device or means" from the failure of a shipper to pay ocean freight. An "unjust or unfair device or means" could be inferred where a shipper, in bad faith, induced the carrier to relinquish its possessory lien on the cargo and to transport the cargo without prepayment by the shipper of the applicable freight charges.

46 C.F.R. § 545.2.

Complainant does not allege that through an unjust or unfair device or means Respondent obtained or tried to obtain ocean transportation for property at less than the rates or charges that would normally apply for the ocean transportation. Rather, the complaint identifies problems with the initial estimate, the failure to provide all of the services promised, unpreparedness and lack of competence of the movers, conflicts between what Complainant ordered and what the movers provided, discrepancies in the inventory list of household items, failure to bring a large enough truck or enough movers, and other problems with the execution of the pickup of goods. Complaint at 6-15.

The initial estimate was for a flat rate fee. Scheduling issues led to an inability to pack and ship the household goods overseas in the short timeframe available. Therefore, Complainant reluctantly agreed to move the items into storage. Complaint at 5-7. Eventually, Complainant cancelled the agreement and Respondent charged a lower fee for services rendered. Complaint at 13-19. The Respondent did not transport the cargo overseas and no bill of lading was issued. Although the Complainant alleges significant problems with the shipment, the problems are not related to obtaining ocean transportation at lower rates than would normally apply. Indeed, it appears that Complainant believes she was overcharged for the services provided.

Because Respondent did not ship the cargo overseas, no bill of lading was generated, and it did not obtain ocean transportation for the shipment. Complainant does not allege what rates should have been paid by Respondent for ocean transportation as opposed to what rates were paid (and could not, as the relationship ended prior to that point). Thus, the complaint does not allege sufficient factual matter to state a plausible section 41102(a) claim.

b. Section 41102(b)

Complainant alleges that section 41102(b) was violated because "(1) services that were executed were not in accordance to the original Service Contract, nor the second altered version presented by the subcontractor (2) second contract is a violation by [its] existence; omissions, deletions and changes of service provisions are not in accordance to the Service Contract." Complaint at 37.

Respondent asserts that:

> Even construing Complainant's factual allegations in the most sympathetic light, not only did Ocean Star not operate as a common carrier, but Ocean Star did not operate under any agreements required to be filed under section 40302 or 40305 of the Shipping Act. In her arguments, Complainant appears to reference a contractual agreement between the parties as evidence of a violation, which she incorrectly refers to as a "Service Contract." *See* Compl. Section IV.A.1(b). Yet the "agreements" cited in § 41102(b) are ocean common carrier agreements and MTO agreements, and the Complaint fails to provide any factual basis to allege a violation of the same.

Supplemental Motion at 18-19.

Although *pro se* Complainant entered into an agreement with Ocean Star, that agreement was not a service contract as defined by the Shipping Act.

> The term "service contract" means a written contract, other than a bill of lading or receipt, between one or more shippers, on the one hand, and an individual ocean common carrier or an agreement between or among ocean common carriers, on the other, in which – (A) the shipper or shippers commit to providing a certain volume or portion of cargo over a fixed time period; and (B) the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features.

46 U.S.C. § 40102(21).

Section 41102(b) provides that a "person may not operate under an agreement required to be filed under section 40302 or 40305." 46 U.S.C. § 41102(b). Sections 40302 and 40305 govern agreements "between or among ocean common carriers," "between or among marine terminal operators, or between or among one or more marine terminal operators and one or more ocean common carriers," and assessment agreements. *See* 46 U.S.C. § 40301. Neither Complainant nor Respondent is an ocean common carrier (vessel-operating-common carrier) or marine terminal operator. *See* 46 U.S.C. § 40102(18). The service contract referred to in this section is not the contract between individual consumers and NVOCC for a specific shipment but rather the contract between common carriers. Therefore, the provisions of section 41102(b) do not apply to the parties. Complainant's section 41102(b) allegation thus does not state a plausible claim for relief.

c. Section 41102(c)

Complainant asserts a violation of section 41102(c) based on: "(a) storage was neither desired nor contracted (b) property was severely mishandled by subcontractors that were no more than three men and a rental truck (c) items were improperly stored at a public storage facility in a shared space resulting in damages and loss of property (d) property not delivered; Complainant retrieval was demanded." Complaint at 37.

Respondent contends:

> Complainant has not presented any facts that indicate that Ocean Star's alleged conduct was "normal, customary, often repeated, systematic, uniform, habitual, and continuous." Instead, the Complaint describes a single nexus of events between Complainant and Ocean Star. Moreover, the Complainant's lengthy recounting of alleged facts about storage and handling issues focus on deficient storage and handling practices of the third-parties, not the conduct of Ocean Star. *See* Compl. Section IV.A.1(c).

Supplemental Motion at 19.

Section 41102(c) provides that a "common carrier, ocean transportation intermediary or marine terminal operator may not 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).

One of the required elements under section 41102(c) is that "[t]he claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis." *See* 46 C.F.R. § 545.4. Complainant does not allege, and there is nothing in the record to suggest, that any of the alleged acts by Respondent are "occurring on a normal, customary, and continuous basis," as opposed to something that occurred solely on this shipment, so this element is not met. More information would be needed to adjudicate the other elements, such as whether the conduct was unreasonable. Accordingly, Complainant's section 41102(c) claim does not state a plausible claim for relief.

d. Section 41103(a)

Complainant asserts:

> (a) upon mandate for property retrieval, Respondents demanded coordination with a professional team, this information was utilized detrimentally preventing transportation via a different company. i) dates are "scheduled" without coordination or communication with ED ii) failure to appear to release items on more than one scheduled date iii) false invoices are submitted, payment options are change[d], policies regarding release are altered creating undue delays (1) ACH payment for deposit was made on 4.30.2018, it cleared and was accepted on 5.1.2108 to commence scheduling services to be rendered; the cancellation ransom ACH submitted pended 5 to 7 days to clear. iv) failed to advise they were using

> public storage that could not accommodate access for a 40' container demanding extra services for release and loading.

Complaint at 37.

> Respondent alleges:
>
> While it is patently unclear what exactly the Complainant is alleging, these allegations generally appear to relate to scheduling issues, alleged changes in payment options and invoices, and the alleged failure to advise the Complainant of the ownership of warehouse facilities. None of these allegations relate to the improper disclosure or receipt of information by Ocean Star, as a violation of § 41103(a)(1) would require. Further, it remains entirely unclear and implausible how Ocean Star requesting coordination with its employees, and/or with the transportation companies with which it has arranged freight, would disclose information "used to the detriment or prejudice of the shipper."

Supplemental Motion at 20 (citation omitted).

> Section 41103(a)(1) states that:
>
> (a) A common carrier, marine terminal operator or ocean freight forwarder either alone or in conjunction with any other person, directly or indirectly, may not knowingly disclose, offer, solicit, or receive any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier, without the consent of the shipper or consignee, if the information – (1) may be used to the detriment or prejudice of the shipper, the consignee, or any common carrier;

46 U.S.C. § 41103(a)(1).

Successful ocean shipments require coordination with employees, agents, and contractors. There are no allegations here that there was information disclosed to Complainant's competitor or someone who might reasonably be expected to act to the detriment or prejudice of Complainant. Indeed, in reading the complaint, the lack of coordination between the Respondent's local movers, storage facility, and new movers appears to be one of the concerns. The objection, here, seems to focus on the handling of the shipment, not the sharing of information. Complainant's section 41103(a)(1) claim thus does not state a plausible claim for relief.

e. Section 41104

Complainant merely recites the provisions of the nine section 41104 allegations, for example by stating that "allow[ing] a person to obtain property transportation at less than established rates by means of false billing, classification, weighing, measurement or any unfair or unjust means. All were violated to obtain contractual agreements with ED as well as respective subcontractors." Complaint at 37-38.

Respondent asserts that "Ocean Star did not arrange for ocean transportation at all with respect to Complainant;" "Ocean Star did not act in the capacity as a common carrier, provide ocean transportation, or charge the Complainant any ocean freight at all;" "Ocean Star's attempts to provide services to Complainant were delayed repeatedly by Complainant's own delays and failure to coordinate;" and that there are no allegations that Ocean Star violated the cited provisions. Supplemental Motion at 21-22.

Section 41104 governs operations by common carriers. The section 41104 provisions Complainant alleges Respondent violated provide as follows:

> (a) A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not –
>
> > (1) allow a person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or any other unjust or unfair device or means;
> >
> > (2) provide service in the liner trade that is –
> > (A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title; . . .
> >
> > (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;
> >
> > (4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of –
> > (A) rates or charges; . . .
> > (D) loading and landing of freight; or
> > (E) adjustment and settlement of claims;
> >
> > (5) for service pursuant to a service contract, engage in any unfair or unjustly discriminatory practice in the matter of rates or charges with respect to any port; . . .
> >
> > (8) for service pursuant to a tariff, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage; . . .
> >
> > (10) Unreasonably refuse to deal or negotiate.

46 U.S.C. § 41104.

Complainant provides a formulaic recitation of the elements of these 41104 sections but does not identify specific conduct by Respondent that violated the sections, except for allegations

of a failure to deal or communicate. However, it is clear from the detailed complaint that there was fairly regular communication, including many misunderstandings and missed calls, but not a refusal to deal.

As an example, in the chronological recitation of facts, Complainant alleges that Respondent "failed to communicate in any manner." Complaint at 14. However, the complaint also outlines many and continuing instances of communication, for example that she "is ultimately connected to someone identified as the department supervisor," and a few days later "many exchanges ensue." Complaint at 14, 16. At another point, Complainant states that she "abruptly terminates the exchange" and "refuses to communicate outside of written word at this point" although "[e]mail exchanges begin again." Complaint at 19. This does not demonstrate a failure to communicate but rather unhappiness with the means of communication and the content of communication.

As another example, the parties talk past each other when Complainant is seeking the return of her goods and Respondent is seeking payment. Complainant reports that on June 20, 2018, Respondent's representative indicates that "[w]e have been trying to call you and it goes straight to voicemail. Please confirm you are paying the invoice. Once payment is received we can orchestrate a time & date to meet at the storage unit." Complaint at 19. Complainant asserts that "attempts to communicate, deal or negotiate are refused." Complaint at 19. However, Complainant then states that she received correspondence from Respondent asking if she had made payment and the following day Respondent requests confirmation of payment. Complaint at 19.

Later in June 2018, Complainant is staying at a location with limited cellular and internet access as she attempts to coordinate the removal of her belongings from storage. Complaint at 21. On June 28, 2018, she alleges "unjust and unreasonable refusal to deal or negotiate in the matter of release of said shipment" but acknowledges that on June 29, 2018, she and Respondent's representative "attempt to exchange phone calls. Poor reception interferes." Complaint at 21. Accepting the factual allegations in the complaint, Respondent continued to communicate and deal with Complainant until her goods were released to her. The facts asserted do not plausibly allege a failure to deal under the Shipping Act.

The other sections of 41104 do not appear to apply either. The complaint does not indicate how Respondent allowed any person to obtain ocean transportation at less than the applicable tariff rates, such that the prohibitions under 41104(a)(1) apply; how Respondent provided service in the liner trade that was not in accordance with its tariff provisions, such that the prohibitions under 41104(a)(2)(A) apply; how Respondent retaliated against Complainant with regard to cargo space accommodations or discriminated against her in any way, such that the prohibitions under 41104(a)(3)and (4) apply; that the shipment moved under the terms of a service contract, such that the prohibitions under 41104(a)(5), which govern service contracts, apply in this case; or how Respondent accorded a preference or advantage or imposed a prejudice or disadvantage to anyone, in violation of 41104(a)(8). Because Complainant fired Respondent prior to any ocean transportation occurring, there are no allegations regarding whether this would have been transported via tariff or service contract because the transportation ended prior to that point. The complaint does not allege a plausible claim for relief under section 41104.

f. Section 41105

Complainant merely recites the three 41105 sections alleged without providing any detail. Complaint at 38. Respondent asserts that "Complainant's allegations entirely misconstrue [and] misunderstand the behavior that is prohibited under § 41105." Supplemental Motion at 25.

Section 41105 prohibits a "conference or group of two or more common carriers" from engaging in certain enumerated conduct. Respondent is the only entity alleged in this complaint to have committed the Shipping Act violations. Complainant does not allege that a conference or a group of two or more common carriers engaged in the alleged conduct. Thus, the prohibitions under section 41105 do not apply to the allegations and the complaint does not state a plausible claim for relief under section 41105.

C. Conclusion

For the reasons discussed above, it is found that the Commission has personal and subject matter jurisdiction over the Shipping Act violations alleged in this complaint, but that the complaint fails to state a plausible claim for relief under the Shipping Act.

Complainant has not requested an amendment to her pleadings and does not assert any grounds for permitting an amendment. Given that most of Complainant's claims are based on Respondent's alleged failure to perform under the parties' agreement, it is not clear that an amendment would cure the deficiency in her pleadings. Therefore, the complaint could be dismissed without prejudice for failure to state a claim under the Shipping Act.

It is noted that Complainant requests reparations in the amount of $256,241 for lost income, related consequential and incidental damages, actual loss and damage of the shipment, pain and suffering, mental anguish and duress, damage/loss of consortium and associated medical expenses, and punitive damages as well as a cease and desist order. Complaint at 38-39. As explained in the initial order, pursuant to the Shipping Act, reparations may be awarded for actual damages. 46 U.S.C. § 41305(b). "Actual damages" means "compensation for the actual loss or injuries sustained by reason of the wrongdoing." *Tractors & Farm Equip. Ltd. v. Cosmos Shipping Co., Inc.*, 26 S.R.R. 788, 798 (ALJ 1992) (citing *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213, 1230 (FMC 1990)). "It exclude[s] punitive or exemplary damages." *Tractors & Farm*, 26 S.R.R. at 798. The parties have been advised that damages from pain and suffering, mental anguish and duress, damage/loss of consortium, and punitive damages are generally not available in Commission proceedings. *Lima v. Fastway Moving and Storage, Inc.*, 34 S.R.R. 1097, 1101 (ALJ 2018) *aff'd in part and vacated-in-part* 1 F.M.C.2d 400, 400 (FMC 2019).

D. Voluntary Dismissal

The request to withdraw, filed after the motion to dismiss had been fully briefed, was conditioned on the motion to dismiss being granted. Therefore, it was most efficient to consider the motion to dismiss and then address the withdrawal request. This decision clarifies for the parties that the Commission has jurisdiction over the Shipping Act allegations in the complaint and identifies the challenges to moving forward on these claims before the Federal Maritime Commission. Given the findings above, the request to voluntarily dismiss the claim without

prejudice is granted. The motion to dismiss for failure to state a claim would be an alternate basis to dismiss the proceeding without prejudice.

Although Complainant's complaint here at the FMC has been dismissed, no position is taken as to the substantive merits of Complainant's claims or her ability to pursue those claims in another forum. It is merely found that a proceeding filed at the Federal Maritime Commission alleging Shipping Act violations does not provide redress for the allegations in the complaint.

IV. Order

Upon consideration of the record herein, the arguments of the parties, and the conclusions and findings set forth above, it is hereby

ORDERED that Complainant Earlean Edwards Dukart's request to withdraw or voluntarily dismiss the proceeding be **GRANTED**. The complaint is hereby **DISMISSED WITHOUT PREJUDICE**. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED**.

Erin M. Wirth

Erin M. Wirth
Chief Administrative Law Judge