BEFORE THE

FEDERAL MARITIME COMMISSION

OJ COMMERCE, LLC, *Complainant,* v. HAMBURG SÜDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO. KG and HAMBURG SUD NORTH AMERICA, INC. *Respondents.*	)	**DOCKET NO. 21-11**

MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

Respondents Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft A/S & Co. KG ("HSDG") and Hamburg Sud North America, Inc. submit this memorandum in support of their Motion to Dismiss and/or for Summary Judgment ("Motion"). [1]

I. The Commission Lacks Jurisdiction Over Hamburg Sud North America, Inc.

The complaint must be dismissed in its entirety with respect to Hamburg Sud North America, Inc. ("HSNA") because the Commission lacks personal jurisdiction over HSNA.

[1] To the extent this motion to dismiss relies on material outside of the pleadings, Respondents respectfully request that it be treated as a motion for summary judgment. See, *Marie Carew d/b/a Holiday Shipping v. Maersk Line A/S & John Does*, FMC Docket No. 20-17, Order Denying Motion for Judgment on the Pleadings, April 8, 2021, p. 3 (citing 2 Moore's Federal Practice – Civil §12.38 (2021).

The only provision of the Shipping Act of 1984, as amended (the "Act") that the complaint alleges to have been violated is 46 U.S.C. §41102(c). See Complaint, ¶¶ 5, 17. As noted in paragraph 17 of the complaint, Section 41102(c) prohibits a common carrier or marine terminal operator from failing to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property. The complaint alleges that HSNA is subject to §41102(c) because it is a marine terminal operator. Complaint, ¶ 19.

The Act defines a "marine terminal operator" as:

> …a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49.

46 U.S.C. §40102(14). HSNA does not meet this definition.

HSNA was, until November 1, 2021[2], a wholly-owned subsidiary of HSDG which acted as the U.S. general agent of HSDG. See, Affidavit of Michael Gast, Jr., attached hereto as Exhibit 1, ¶ 2 (hereinafter, "Gast Aff."). HSNA's only business was to act as the general agent of its ocean common carrier parent, HSDG. Gast Aff., ¶ 3. HSNA was not engaged in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49. Gast Aff, ¶ 4. HSNA was not a common carrier in its own right. Gast Aff., ¶ 5.

Because HSNA was not a common carrier or marine terminal operator, it is not subject to §41102(c), and the entire complaint against it must be dismissed with prejudice.

[2] On this date, HSNA became a wholly-owned, indirect subsidiary of Maersk A/S. On January 1, 2022, HSNA was merged into Maersk Agencies USA, Inc., the U.S. subsidiary and general agent of Maersk A/S.

II. The Complaint Must Be Dismissed To The Extent It Involves An Alleged Breach of Service Contract.

The portion of the complaint relating to an alleged breach of service contract must be dismissed with prejudice with respect to both HSDG and HSNA.

One of the alleged violations of Section 41102(c) enumerated in the complaint is the failure to fulfill service obligations under a service contract. Complaint, ¶¶12-14; 27. This is a claim for a breach of contract, not a claim of a violation of the Act. Accordingly, as explained below, the claim must be dismissed.

A. The Commission Lacks Jurisdiction Over Breach of Contract Claims.

Section 40502(f) of the Act provides that:

> Unless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court. The contract dispute resolution forum may not be controlled by or in any way affiliated with a controlled carrier or by the government that owns or controls the carrier.

46 U.S.C. §40502(f).

The Commission, in interpreting §40502(f), has stated:

> We find that as a general matter, allegations essentially comprising contract law claims should be dismissed unless the party alleging the violation successfully rebuts the presumption that the claim is no more than a simple contract breach claim. In contrast, whether the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support such a claim, that the matter is appropriately before the agency.

Cargo One, Inc. v. COSCO Container Lines Co., Ltd., 28 S.R.R. 1635, 1645 (2000)(internal footnotes omitted). Here, the claim is a simple breach of contract claim.

As an initial matter, complainant's counsel has characterized the claim as one for breach of contract in correspondence with respondents. See, Exhibit 2 hereto.

Moreover, complainant has done nothing to rebut the presumption that the claim is one for breach of contract. Paragraphs 12-14 of the complaint allege facts which are the basis for the

claim. Paragraph 27 of the complaint is a conclusory statement that the alleged failure to fulfill the service commitment constitutes a violation of Section 41102(c). In short, there is nothing in the complaint which rebuts the presumption that the claim is one for a breach of contract over which the Commission has no jurisdiction. Accordingly, this portion of the complaint must be dismissed.

B. The Complaint Fails To State A Claim Under The Act With Respect To The Alleged Breach of Service Contract.

The complaint not only fails to rebut the presumption that the Commission has no jurisdiction over the claim but also fails to plead the alleged violation of the Act sufficiently to withstand a motion to dismiss.

In evaluating whether a complaint states a claim under the Act, the Commission relies on federal case law interpreting Federal Rule 12(b)(6). See *Cornell v. Princess Cruise Lines, Ltd.*, 33 S.R.R. 614, 620 (FMC 2014). To survive a Federal Rule 12(b)(6) challenge, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Bell Atl. 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). "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 677 (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*). The complaint fails to meet these standards.

The complaint contains minimal factual allegations with respect to the performance of the service contract, and a conclusory statement that such facts constitute a violation of Section 41102(c). As explained below, the complaint fails to allege certain facts necessary to sustain an alleged violation of Section 41102(c).

46 C.F.R. §545.4 enumerates five elements that a complainant must prove in order to establish a successful claim for reparations for a violation of Section 41102(c). These are: (a) that the respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary; (b) the claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis; (c) the practice or regulation relates to or is connected with receiving, handling, storing, or delivering property; (d) the practice or regulation is unjust or unreasonable; and (e) the practice or regulation is the proximate cause of the claimed loss. The complaint fails with respect to at least three of these criteria.

First, the facts as alleged do not show that the claimed acts occurred on a normal, customary, and continuous basis. The complaint alleges that complainant "repeatedly" sought to schedule shipments of containers, but that HSDG refused to schedule such shipments. Complaint, ¶13. The complaint does not set forth the dates on which complainant sought to book shipments, or the volume of containers not transported. In addition, an allegation that something occurred "repeatedly" does not constitute factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, *supra.*

Second, as to HSNA, the respondent is not an ocean common carrier or marine terminal operator, as noted above.

In light of the foregoing, the complainant has failed to state a claim under Section 41102(c) insofar as its breach of contract claim is concerned.

C. An Alleged Breach of Service Contract Does Not Fall Within The Scope of Section 41102(c).

The alleged breach of service contract cannot constitute a violation of Section 41102(c) because it does not fall within the scope of that statutory provision.

The Commission has ruled that Section 41102(c) does not relate to the transportation of property. See, e.g., *J.M. Altieri v. Puerto Rico Ports Authority* 7 F.M.C. 416, 419 (ALJ 1962)

(claims for loss of or damage to cargo or for damages due to failure to follow routing instructions do not fall within the Act, citing *Pilgrim Furniture Co., Inc. v. American-Hawaiian Steamship Co.*, 2 U.S.M.C. 517 (1941)); *Bills of Lading – Incorporation of Freight Charges*, 3 U.S.M.C. 111, 113 (USMC 1949)(section 17, second paragraph, is confined to the receiving, handling, storing, or delivering of property, to the exclusion of transportation).

Here, the complaint as it relates to the service contract describes an alleged failure to transport property, and hence is not within the scope of 41102(c). See also, *ANERA and Its Members - Opting Out of Service Contracts*, 28 S.R.R. 1215, 1229 (FMC 1999) (explaining that respondent made "forceful case" that service contract provisions stating line haul rates do not fall within scope of Section 10(d)(1)).

III. Conclusion

For the foregoing reasons, the complaint should be dismissed and/or summary judgment granted in favor of Respondents.

Respectfully submitted,

Wayne R. Rohde
Kathryn Sobotta
COZEN O'CONNOR
1200 Nineteenth Street, NW
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Washington, DC 20036
(202) 463-2507

Dated: January 18, 2022

BEFORE THE

FEDERAL MARITIME COMMISSION

OJ COMMERCE, LLC, *Complainant,* v. HAMBURG SÜDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO. KG and HAMBURG SUD NORTH AMERICA, INC. *Respondents.*	**DOCKET NO. 21-11**

AFFIDAVIT OF MICHAEL GAST, JR.

1. My name is Michael Gast, Jr. I am the Supervisor, Risk Management of Maersk Agency USA, Inc., and previously held that same position with Hamburg Sud North America, Inc. As such, I am familiar with the legal status and operations of Hamburg Sud North America, Inc. ("HSNA").

2. HSNA was, until November 1, 2021, a wholly-owned subsidiary of Hamburg Südamerikanishce Dampfschifffahrts-Gesellschaft A/S ("HSDG") that acted as the U.S. general agent of HSDG. On that date, HSNA became a wholly-owned, indirect subsidiary of Maersk A/S. On January 1, 2022, HSNA was merged into Maersk Agencies USA, Inc., the U.S. subsidiary and general agent of Maersk A/S.

3. HSNA's only business was to act as the general agent of its ocean common carrier parent, HSDG.

4. HSNA was not engaged in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49.

5. HSNA was not a common carrier in its own right.

Further affiant sayeth not.

Michael W. Gast, Jr.

NOTARIZATION:

KIM L. EISENHAUER
Commission # 50049445
Notary Public, State of New Jersey
My Commission Expires
November 10, 2026

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of January, 2022, the foregoing Respondents' Motion to Dismiss and Memorandum in Support thereof was served via electronic mail on:

Shlomo Y. Hecht
sam@hechtlawpa.com

and

Aaron Davis, Esq.
davis@valhallalegal.com

Wayne R. Rohde

The Law Offices of
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October 16, 2020

HAMBURG SUEDAMERIKANISCHE
DAMPFSCHIFFFAHRTS-GESELLSCHAFT
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WILLY-BRANDT-STR. 59-65
20457 HAMBURG
GERMANY

HAMBURG SUD NORTH AMERICA,
INC.
465 SOUTH STREET F 3 STE 300
MORRISTOWN NJ 07960
UNITED STATES

Re: NOTICE OF BREACH OF SERVICE AGREEMENT

Dear HAMBURG SUEDAMERIKANISCHE:

Please be advised that the undersigned represents OJ COMMERCE, LLC ("OJC") against HAMBURG SÜDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO KG ("HAMBURG SÜD"), in connection with a breach of Service Contract that was executed between HAMBURG SÜD and OJC. A copy of the agreement is hereby attached.

Pursuant to the "Minimum Volume Commitment" clause of the agreement, [Page 7], HAMBURG SÜD committed to a minimum of 400 TEU between June 23, 2020 and May 31, 2021. Since June 23, 2020, HAMBURG SÜD refused to accept the agreed upon 10 TEUs per week.

OJC hereby provides HAMBURG SÜD notice of breach of the Service Agreement, which has caused significant economic harm to OJC. I hereby demand that HAMBURG SÜD immediately honor the Service Agreement rates and minimum TEU quantities. Failure to cure the breach by October 22, 2020, may result in legal action against you and your affiliates.

Furthermore, OJC will soon be seeking discovery to identify all paper documents, physical items, electronic documents, data, or other evidence and materials within the definition of Rule 34 of the Federal Rules of Civil Procedure that may be relevant to the abovementioned Ligation *as well as to similar claims related to similarly situated plaintiffs* ("Documents"). As part of this process, you must preserve and safeguard, and must not alter, delete, destroy, or discard, any

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paper documents, physical items, or electronic documents and data you have relating to the Litigation and claims above.

This litigation hold notice (the "**Notice**") applies to all paper documents, physical items, and electronic documents and data that may be relevant to the Litigation. Relevant paper documents include correspondence, handwritten notes, telephone logs, calendars, and other business records. **If you are unsure about whether certain documents and data are relevant, you should preserve them.**

You also must take affirmative steps to preserve, and suspend any deletion, overwriting, modification, or other destruction of all relevant electronic documents and data under your control. Electronic data includes correspondence, telephone logs, and other business records, such as emails including Outlook PST/Lotus Notes NSF/ files, voicemails, text messages, instant messages (IMs), calendars, word processing files, spreadsheets, PDFs, JPEGs, PowerPoint presentations, Access, Oracle and other databases, including cloud-based storage, temporary internet files, cookies, .ZIP files, and all other forms of electronic information, wherever it resides, including the Internet. You must preserve this information in its current form, without moving any electronic information or changing any related metadata (for example, a document's creation or last access date).

Your preservation obligation also extends to the preservation of relevant data on external media, including hard drives, DVDs, CDs, USBs, personal home computers, laptops, and mobile devices, including PDAs, cell phones, and tablets. In sum, all paper and electronically stored information must be preserved intact and without modification. **Please note this list is not intended to be exhaustive and you must preserve any and all information relevant to this dispute.**

Please perverse all such evidence and materials until such time as the Litigation is complete and any potential claims are finally disposed of, whether through litigation or other means.

Your failure to preserve relevant data may constitute spoliation of evidence and may subject you to sanctions. *See* e.g., *DeLong v. A-Top Air Conditioning Co.,* 710 So. 2d 706 (Fla. 3d DCA 1998) (affirming dismissal with prejudice of claim where party failed to preserve evidence material to case). We trust you will preserve any and all Documents for the duration of this dispute. In the event a dispute arises out of your failure to preserve Documents, we will rely on this letter as evidence of our request and notice of your preservation obligations.

GOVERN YOURSELF ACCORDINGLY,

Shlomo Y Hecht, Esq.