

**BEFORE THE
FEDERAL MARITIME COMMISSION**

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

**RESPONDENTS’ REPLY TO COMPLAINANT’S OPPOSITION TO
RESPONDENTS’ MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT**

Respondents Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft A/S & Co. KG (“HSDG”) and Hamburg Sud North America, Inc. (“HSNA”) hereby reply to Complainant’s opposition to Respondents’ Motion to Dismiss and/or for Summary Judgment (the “Motion”).

For the reasons set forth below, the Motion should be granted.

I. Complainant Concedes Their Claim Is A Breach Of Contract Claim Over Which The Commission Lacks Jurisdiction

The Motion seeks to dismiss the complaint to the extent that the complaint states a claim for a breach of a service contract over which the Commission lacks jurisdiction. Complainant’s opposition to the Motion does not deny that a substantial portion of the complaint consists of claims that are inherently breach of contract claims and do not involve elements peculiar to the Shipping Act.

In fact, Complainant's sole argument in response to this aspect of the Motion is to double down on its defective argument and assert that the alleged failure to accept cargo under the service contract occurred repeatedly and thus constitutes a "normal, customary and continuous" practice in violation of the Shipping Act.¹ This argument misses the point.

Even if one or both of Respondents breached the service contract by repeatedly failing to provide space, this would at most demonstrate multiple breaches of the service contract. It does not imbue the alleged conduct with elements peculiar to the Shipping Act. Stated differently, alleging multiple breaches of a service contract does not alter the fact that the claim is one for a breach of the service contract over which the Commission lacks jurisdiction. See, e.g., *Global Link Logistics, Inc. v. Hapag-Lloyd AG*, FMC Docket No. 13-07, p. 24 (ALJ, April 17, 2014)(Commission lacks jurisdiction over dispute arising from course of dealing under service contracts, which was inherently a contract claim and did not involve elements peculiar to Shipping Act).

Accordingly, the Motion should be granted and the complaint dismissed to the extent that it is based on a breach of service contract claim.

II. Complainant Does Nothing To Rebut The Lack Of Jurisdiction Over HSNA

Complainant's response to the Motion insofar as it seeks the dismissal of HSNA is two-fold. First, it concedes that HSNA is not a marine terminal operator, and alleges that HSNA is an ocean transportation intermediary or, alternatively, that Complainant is unsure of the nature of HSNA's business because there has been no discovery conducted as yet. Second, it argues the

¹ In this Reply, Respondents do not directly address arguments advanced in the amended complaint that Complainant seeks leave to file, as that complaint has not yet been accepted. Instead, Respondents focus solely on the original complaint, the Motion, and Complainant's opposition to the Motion. Should leave to amend the complaint be granted, Respondents will file a separate dispositive motion relating to the amended complaint, either as an amended version of the Motion, or as a standalone motion.

Motion should be denied because it did not include a separate list of material facts as to which there is no genuine dispute.

With respect to the first argument, there is no genuine issue of material fact with respect to the status of HSNA. The allegation in the complaint is that HSNA is a marine terminal operator. A sworn statement, which Complainant does not contradict with any evidence, establishes that HSNA is not a marine terminal operator. Complainant's response to the sworn statement is to abandon the verified allegation of the original complaint and replace it with a verified (but unsupported) allegation that HSNA is an ocean transportation intermediary. Apparently uncertain about the validity of that new allegation, Complainant hedges its bets by suggesting that it is uncertain about HSNA's status because it has not yet conducted discovery on that issue.

Opposition at 9.

Complainant's apparent confusion as to the status of HSNA does not create a genuine issue of material fact. The only fact before the Presiding Officer is the undisputed affidavit stating that the allegation in the complaint as to HSNA's status as a regulated entity is untrue.

With respect to the second argument, Complainant is correct that Respondents did not submit a separate statement of material facts not in dispute. Respondents did not do so because there is only one such fact – that HSNA is an agent and not an entity subject to the Shipping Act. In any event, non-compliance with a procedural requirement should not be a basis for denying an otherwise meritorious Motion.

Accordingly, the Motion to dismiss HSNA should be granted.

III. Complainant's Procedural Arguments Are Not A Basis To Deny The Motion

Complainant's opposition devotes considerable effort to arguing that the Motion is premature and that issues of reasonableness typically require development of a factual record. These arguments are not a basis upon which to deny the Motion.

While it is true that reasonableness is generally an issue of fact that requires development of the record, one need not assess the reasonableness of any conduct in order to rule on the Motion. The Motion is based on the fact that HSNA is not a regulated entity and that the bulk of the claims asserted in the original complaint are in fact breach of contract claims over which the Commission lacks jurisdiction. These are not issues that turn on a determination of reasonableness. Hence, no factual record relating to reasonableness is necessary and the Motion is not premature.

IV. Conclusion

For the foregoing reasons, the Motion should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Wayne R. Rohde". The signature is written in a cursive, flowing style.

Wayne R. Rohde
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Dated: February 7, 2022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February, 2022, the foregoing Respondents' Reply to Complainant's Opposition to Respondents' Motion to Dismiss and/or for Summary Judgment was served via electronic mail on:

Shlomo Y. Hecht, Esq.
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and

Aaron Davis, Esq.
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A handwritten signature in black ink, appearing to read "Wayne R. Rohde", is written above a horizontal line.

Wayne R. Rohde