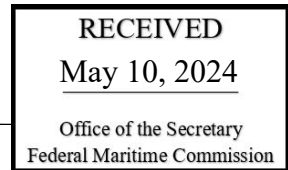


**BEFORE THE
FEDERAL MARITIME COMMISSION**



DOCKET NO. 24-21



PKDC, LLC
Complainant,

v.

CMA CGM S.A
Respondent

VERIFIED COMPLAINT

Complainant, PKDC, LLC (PKDC or Complainant), by and through its attorneys, Sandler, Travis & Rosenberg, P.A., alleges as follows:

I. COMPLAINANT

1. Complainant, PKDC, is a limited liability company existing under the laws of the State of Colorado with its principal place of business at 5641 N Broadway. Complainant may be contacted through its counsel at the numbers and email addresses listed below.

II. RESPONDENT

2. Respondent, CMA CGM S.A. (CMA or Respondent), on information and belief is a corporation existing under the laws of France with a corporate headquarters located at Tour CMA CGM Boulevard Jacques Saade 4, Qua D'Arenc, Marseille, France 13002.

3. On information and belief Respondent does business in the United States through

its agent CMA CGM (America) LLC (CMA America), with a principal place of business at 1 CMA CGM Way, Norfolk Virginia 23502. At all times relevant to this action CMA was responsible for the actions of CMA America.

4. At all times relevant to this action, Respondent was an ocean common carrier as defined by the Shipping Act of 1984, as amended, 46 USC §§ 40102(7) and (18) (the Act) and is identified by Federal Maritime Commission (FMC) number 016541.

III. JURISDICTION AND LEGAL AUTHORITY

5. The FMC has jurisdiction over this matter pursuant to the Act, 46 U.S.C. 40101 *et. seq.*

6. The FMC has personal jurisdiction over Respondent as an ocean common carrier as the term is defined in 46 USC §§ 40102(7) and (18) that has entered into a “service contract” as the term is defined by 46 U.S.C. § 40102(21) with Complainant.

7. In conformity with 46 U.S.C. § 40102(21), Respondent’s service contract with Complainant required Complainant to “commit to providing a certain volume or portion of cargo over a fixed period of time” and for Respondent to commit to “a certain rate or rate schedule and a defined service level, such as assured space ...”

8. While Complainant attempted in good faith to tender the contractually committed quantity of cargo, Respondent systematically refused to provide the assured space and/or the assured space at the agreed upon rates.

9. Respondent’s systematic refusal to meet its quantity and/or rate commitments under the service contract it entered into with Complainant constitutes a failure to establish, observe, and enforce just and reasonable practices relating to receiving, handling, storing, and delivering property of Complainant in violation of 46 U.S.C. § 41102(c).

10. Respondent’s systematic refusal to meet its quantity and/or rate commitments

under the service contract it entered into with Complainant constitutes providing service in the liner trade that was not in accordance with rates, charges, classifications, rules and practices contained in a service contract in violation of 46 U.S.C. § 41104(a)(2).

11. Respondent's systematic refusal to meet its quantity and/or rate commitments under the service contract it entered into with Complainant in favor of shippers willing to pay in excess of the rates set forth in the service contract constitutes giving an undue or unreasonable preference or vantage or imposing an undue or unreasonable prejudice with respect to a port in violation of 46 U.S.C. § 41104(a)(9).

12. Respondent's systematic refusal to meet its quantity and/or rate commitments under the service contract it entered into with Complainant despite Complainant's repeated requests for space constitutes an unreasonable refusal to deal or negotiate in violation of 46 U.S.C. § 41104(a)(10).

13. Respondent's assessment of detention charges related to occurrences outside of Complainant's control in contravention of the incentive principal constitutes a failure to establish, observe, and enforce just and reasonable practices relating to receiving, handling, storing, and delivering property of Complainant in violation of 46 U.S.C. § 41102(c) and 46 CFR § 545.5.

IV. THE MATTERS COMPLAINED OF (ALLEGED FACTS)

a. SERVICE CONTRACT

Quantity

14. Complainant is a U.S. based furniture distributor based in Colorado. Complainant imports furniture from various countries including China, Vietnam, and India. Complainant relies on ocean common carriers, including Respondent, to ship goods to the United States.

15. To ensure the availability of sufficient freight services and protect itself against

shipping rate fluctuations, Complainant enters into service contracts with ocean carriers which provide for a minimum quantity commitment (MQC) and agreed upon rates.

16. Complainant entered into a one-year service contract with Respondent covering the 2021-2022 shipping year (Service Contract).

17. The Service Contract as originally signed specified an MQC of 4,000 twenty-foot equivalent units (TEUs) which is equivalent to 2,000 forty-foot equivalent units (FEUs).

18. The Service Contract obliged Complainant to tender the MQC and Respondent to provide sufficient space to carry the MQC allotments.

19. The Service Contract provided not just for port-to-port ocean transport but for Respondent to deliver cargo to locations in Colorado designated by Complainant.

20. Complainant consistently attempted to tender cargo sufficient to meet the MQC as specified in the Service Contract.

21. Despite Complainant's repeated requests, rather than honoring the MQC, Respondent systematically refused to provide sufficient space creating a shortfall in the MQC that increased from week to week.

22. Respondent's systems were set up such that despite Complainant's good faith attempts to make up a previous week's shortage, it was difficult to impossible to do so resulting in an ever-increasing shortage as the service contract progressed.

23. Despite Complainant's attempts to tender the full MQC, by the end of the Service Contract, Respondent had only shipped approximately 1514 TEUs or approximately thirty-seven percent of Respondent's quantity commitment.

24. By the end of the Service Contract, Respondent's Key Account Manager acknowledged in an email that Respondent had "overcommit[ed] and under deliver[ed]."

25. While Respondent required Complainant to sign an amendment at the completion

of the Service Contract reducing the MQC to 1514 TEUs, such amendment does not absolve Respondent of its violations of the Act.

26. As a result of Respondent's systematic refusals to honor its quantity commitments, Complainant was forced to seek alternative carriage at ocean freight rates far in excess of the Service Contract rates.

27. As a result of Respondent's systematic refusals to honor its quantity commitments and Complainant's necessity to book alternate shipping, time sensitive goods often arrived late resulting in lost sales and profits.

28. As a result of Respondent's systematic refusals to honor its quantity commitments which required Respondent to deliver cargo to inland points in Colorado and Complainant's necessity to book alternate shipping which was port to port, Complainant was forced to pay additional fees to move cargo from west coast ports to inland points in Colorado.

29. On information and belief, Respondent's unreasonable practice of refusing space under the Service Contract was a concerted effort to take advantage of extraordinarily high spot market rates by refusing to comply with its contractual agreements in favor of shippers willing to pay a higher price than that set forth in Respondent's Service Contract with Complainant.

30. For example, on several occasions when Respondent refused to provide contractual space requiring Complainant to procure space with other carriers at higher rates, Complainant's cargo traveled on Respondent's ships, demonstrating that Respondent made space for those willing to pay a premium.

31. Additionally, in June of 2021 Respondent emailed Complainant that it could accept Complainant's cargo "but [CMA] we would need to remove someone else in order to make this happen. The cost per container to do this would be \$14,000.00," further demonstrating that Respondent would provide space for those willing to pay a premium.

Rates

32. As originally signed, the Service Contract Respondent entered into with Complainant contained agreed upon shipping rates and clearly stated that they were not subject to Peak Season Surcharges (PSS).

33. While rejecting shipments Complainant attempted to book under the rates contained in their valid Service Contract with Respondent, Respondent engaged in the unreasonable practice of extracting additional costs from Complainant not contemplated in the original Service Contract in order to carry Complainant's cargo. Those additional costs included PSS or "SeaPriority Go (SPGO)" fees. SPGO was a premium service intended for one-of-a-kind priority shipments, and not contract shipments.

34. For example, on July 22, 2021, after months of failing to honor its quantity commitments, Respondent emailed Complainant that Respondent was "moving forward with PSS2/PSS3 for August 1 effective dates. Each PSS [was] \$600 respectively, which totals \$1200." Respondent made clear that if Complainant did not acquiesce, "it [would be] difficult for [CMA] to consistently move volume for PKDC." Because Respondent had already failed to honor its quantity commitments to Complainant under the Service Contract resulting in financial harm, Complainant had no choice but to acquiesce to a contract amendment adding PSS in an attempt to mitigate further harm. Such amendment, however, does not absolve Respondent of its violations of the Act.

35. For example, on September 15, 2021, after months of failing to honor its quantity commitments, Respondent emailed Complainant indicating that Respondent could "offer 15 FEU" but "it is your contract rate + SPGO (\$1800)."

36. Respondent's demands for PSS and premium rates resulted in per container ocean

freight rates thousands of dollars in excess of the shipping rates paid by Complainant to Respondent under the Service Contract as originally signed.

b. Demurrage and Detention Charges

37. Throughout 2022, for the containers Complainant was able to ship utilizing Respondent's services, such containers were landed in various ports in California and then shipped to the UPPR Denver Intermodal Terminal (UPPR) via rail to where they were collected and returned by Complainant's logistics providers.

38. Throughout 2022, Respondent assessed, and Complainant paid in excess of one million dollars in charges. In fact, between August and November 2022 alone, Complainant paid in excess of \$1,000,000 in charges assessed by the Respondent.

39. On information and belief, the majority of the charges were unreasonable in that they were assessed in violation of the incentive principal, including when appointments were unavailable, dual move requirements had been instituted, or containers and/or equipment were unavailable.

40. Per 46 U.S.C. § 41102(c), Respondent is statutorily required to establish and enforce reasonable practices with respect to assessment of detention and demurrage charges.

41. Per 46 C.F.R. 545.5(c), in assessing the reasonableness of charges, the FMC will "consider the extent to which the demurrage and detention are serving the primary intended purposes as financial incentives to promote freight fluidity."

42. On information and belief, the majority of the charges were assessed as a result of situations out of Complainant's control and therefore the charges did not serve the primary intended purpose of promotion of freight fluidity and were unreasonable.

43. Complainant and its logistics providers routinely informed Respondent of the issues outside of Complainant's control leading to the assessment of charges.

44. For example, in September 2022 alone, Respondent was sent the following emails:

- On September 8, 2022, Mr. David Faverty, of Complainant's logistic provider TSL, sent an email explaining to Respondent that “[y]ou have run out of reservations. **What's the plan?**”
- On September 14, 2022, Mr. Faverty sent an email explaining that “CMA Team, We have 20 plus empties to terminate today and we are not off to a good start. **Is there a plan to increase reservations for today at the UP Denver?** Or another plan like taking them to CCS? It's imperative that we know soon your plan for empty returns in Denver. Please advise ASAP.”
- On September 14, 2022, Mr. Faverty sent an email to several individuals including CMA representatives explaining, “To all: We are attempting to return CMA empties to UPPR this morning, per CMA instructions. However, **the UPPR is not accepting empties at this time due to CMA not having any reserved space.** We've been in contact with CMA asking for assistance. Until empty return is resolved we will not be able to move any at this time.”
- On September 23, 2022, Mr. Faverty sent an email to CMA explaining “**CMA Team, you are out of reserved space at the UPRR** and we have 30 plus empties that need to terminate today. Please advise if you can redirect to the BNSF or CCS as we have drivers standing by with empties.”
- On September 23, 2022, Mr., Faverty sent an email to various individuals, including CMA and explaining that it “**Seems CMA has run out of reservations for the UPPR** and we have over 25 to terminate. Any chance of redirecting to the BN or CCS.”

45. Despite being aware of the issues, Respondent still assessed in excess of one million dollars in unreasonable charges.

VIII. CAUSATION

46. Respondent's practice of refusing to honor its quantity and rate commitments under the Service Contract directly and proximately caused Complainant injury by forcing Complainant to make alternative shipping arrangements, at substantially higher prices, for cargo that should have been moved under the Service Contract.

47. Respondent's practice of refusing to honor its quantity and rate commitments under

the Service Contract directly and proximately caused Complainant injury by causing delayed shipment of time critical merchandise resulting in lost sales and profits.

48. Respondent's practices of exacting extracontractual charges to carry cargo under the Service Contract directly and proximately caused Complainant injury by forcing Complainant to pay higher prices for shipping cargo that should have been shipped at lower rates under the terms of the Service Contract.

49. Respondent's practice of assessing charges in violation of the incentive principal directly and proximately caused Complainant injury by forcing Complainant to pay unreasonable and illegal charges.

VI. DAMAGES

50. Respondent's refusal to honor its quantity commitments under the Service Contract caused Complainant to expend additional sums for alternative shipping arrangements incurring additional shipping costs and cross docking fees in excess of twelve million dollars.

51. Respondent's unjust and unreasonable imposition of extracontractual charges such as PSS and premium service charges caused Complainant to overpay Respondent for carriage under the Service Contract in excess of one million dollars.

52. Respondent's assessment of unjust and unreasonable charges caused Complainant to pay in excess of one million dollars in unreasonable charges.

53. Respondent's unjust and unreasonable practices as alleged herein caused additional significant financial harm as a result of delays in shipping time-sensitive merchandise resulting in lost sales and profits in an amount to be determined at trial.

VII. CAUSES OF ACTION

COUNT I: VIOLATION OF 46 U.S.C. § 41102(c)

54. Complainant repeats and realleges each allegation set forth above as is fully set forth herein.

55. Respondent's practices alleged herein including systematically refusing to meet its commitments to Complainant and coercing extracontractual payments from Complainant including for PSS and premium services, constitute a failure to establish, observe, and enforce just and reasonable practices relating to receiving, adding, storing and delivering Complainant's property in violation of 46 U.S.C. § 41102(c).

COUNT II: VIOLATION OF 46 U.S.C. § 41102(c) & 46 C.F.R § 545.5

56. Complainant repeats and realleges each allegation set forth above as is fully set forth herein.

57. Respondent's practices alleged herein including assessing charges in violation of the incentive principal constitute a failure to establish, observe, and enforce just and reasonable practices relating to receiving, adding, storing and delivering Complainant's property in violation of 46 U.S.C. § 41102(c).

COUNT III: VIOLATION OF 46 U.S.C. § 41104(a)(2)

58. Complainant repeats and realleges each allegation set forth above as is fully set forth herein.

59. Respondent's unreasonable practices alleged herein including systematically refusing to meet its service commitments to Complainant and extracting extracontractual payments from Complainant including for PSS and premium services, constitute a failure to establish, observe, and enforce just and reasonable practices relating to receiving, handling, storing and delivering Complainant's property in violation of 46 U.S.C. § 41104(a)(2).

COUNT IV: VIOLATION OF 46 U.S.C. § 41104(a)(9)

60. Complainant repeats and realleges each allegation set forth above as is fully set forth herein.

61. Respondent's unreasonable practices alleged herein including systematically refusing to meet its service commitments to Complainant under the Service Contract constitute an undue or unreasonable preference or vantage or imposing an undue or unreasonable prejudice with respect to a port in violation of 46 U.S.C. § 41104(a)(9).

COUNT V: VIOLATION OF 46 U.S.C. § 41104(a)(10)

62. Complainant repeats and realleges each allegation set forth above as is fully set forth herein.

63. Respondent's unreasonable practices alleged herein including systematically refusing to meet its service commitments to Complainant constitute an unreasonable refusal to deal with Complainant in violation of 46 U.S.C. § 41104(a)(10).

VII. PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests that CMA be ordered to answer this Complaint pursuant to 46 U.S.C. Section 41301(b) and prayers for relief as follows:

1. An investigation pursuant to 46 U.S.C. 41301(c) into the matters alleged in this Complaint.
2. An order after investigation pursuant to 46 U.S.C. 41301(c) finding that Respondent has violated the provisions outlined herein.
3. An Order compelling Respondent to cease and desist from violating the Shipping Act as outlined herein and requiring Respondent to put into place practices to preclude future violations.

4. An Order requiring Respondent to pay Complainant reparations for the unlawful practices outlined herein in an amount to be proven pursuant to 46 U.S.C. 41305, with interest pursuant to 46 U.S.C. 41305(A), Complainant's reasonable attorney's fees, as the prevailing party pursuant to 46 U.S.C. 41305(e), and any other amounts the FMC determines to be just and proper.
5. Such other further relief as the FMC determines to be just and proper.

VIII REQUEST FOR ORAL HEARING

Complainant requests an oral hearing in Washington, D.C.

Respectfully submitted,

SANDLER, TRAVIS & ROSENBERG, P.A.

Attorneys for Plaintiff

675 Third Avenue, Suite 1805-06

New York, New York 10017

Telephone: (212) 549-0137

By: /s/ Jason M. Kenner
JASON M. KENNER

/s/ Andrew Margolis
ANDREW MARGOLIS

VERIFICATION

I, Bill Smith, am authorized to make this verification on behalf of PKDC, LLC. I have read the forgoing Verified Complaint and believe to the best of my knowledge, information and belief including information received from other agents and employees of PKDC, LLC, that the facts stated herein are true and correct. I declare under the penalty of perjury that the forgoing is true and correct.

A handwritten signature in black ink, appearing to read "Bill Smith", is written over a horizontal line.

May 10, 2024