

ORIGINAL

S E R V E D
September 27, 2007
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 02-04

ANCHOR SHIPPING CO.

v.

**ALIANÇA NAVEGAÇÃO E LOGÍSTICA LTDA.,
COLUMBUS LINE, INC. ,
HAMBURG SÜDAMERIKANISCHE
DAMPFSCHIFFAGARTS-GESELLSCHAFT KG, and
CROWLEY AMERICAN TRANSPORT, INC.**

**MEMORANDUM AND ORDER ON
RESPONDENTS' PARTIAL MOTION TO DISMISS AND/OR
FOR SUMMARY JUDGMENT**

This proceeding is currently before me on a Partial Motion to Dismiss and/or for Summary Judgment (Partial Motion) filed April 12, 2007, by respondents Aliança Navegação E Logística Ltda. (Aliança), Columbus Line, Inc. (Columbus), and Hamburg Südamerikanische Dampfschiffagarts-Gesellschaft KG (Hamburg-Süd) (Respondents). On May 1, 2007, I granted Anchor Shipping Co.'s (Anchor) motion for enlargement of time to respond to the Partial Motion, enlarging the time to May 17, 2007, for Anchor to file its reply. On June 1, 2007, I granted the motion for leave to withdraw filed by counsel for Anchor and granted an additional enlargement of time to July 23, 2007, for

Anchor to file its reply, noting that “**NO FURTHER CONTINUANCES FOR THIS PURPOSE WILL BE GRANTED.**” *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, FMC No. 02-04, slip op. at 9 (ALJ June 1, 2007) (Memorandum and Order on Complainant’s Motion for Enlargement of Time) (emphasis in original). Anchor’s attempts to retain new counsel were unsuccessful, and on July 23, 2007, Anchor served its *pro se* Complainant’s Answer to Respondent(s) [*sic*] Partial Motion to Dismiss and/or for Summary Judgment (Complainant’s Answer), followed the next day by a supplement with several affidavits.

On September 13, 2007, new counsel for Anchor served a Notice of Appearance and on September 24, 2007, sent by facsimile a letter *inter alia* requesting leave to file an amended response to the Partial Motion. The letter stated that counsel had consulted the attorney for Respondents and that Respondents opposed the request to file an amended response. This memorandum had been substantially completed when I received that letter. As mandated by the order dated June 1, 2007, the request for leave to file an amended response is denied.

For the reasons stated below, I am granting the Partial Motion in part and denying the Partial Motion in part.

BACKGROUND

I. PROCEDURAL HISTORY.

At the time the events of which Anchor complains occurred, Anchor was a non-vessel-operating common carrier (NVOCC). Respondents Aliança, Columbus, Hamburg-Süd, and Crowley American Transport, Inc., are ocean common carriers. Anchor and Aliança were parties to one or more service contracts in 1999 and 2000. Anchor claims that Aliança and the other Respondents

caused injury to Anchor through misconduct in violation of the Shipping Act of 1984 (Shipping Act), 46 U.S.C. § 40101, *et seq.*

Prior to the commencement of this proceeding, Anchor initiated arbitration against Aliança as required by the terms of their service contract. An arbitrator from the Society of Maritime Arbitrators conducted the arbitration. After reviewing the evidence, the arbitrator issued a decision addressing issues under the service contract and issues under the Shipping Act. The arbitrator found in Anchor's favor, deducted an amount for freight charges and interest she found that Anchor owed Aliança, and awarded Anchor a net of \$381,880.59 in damages, interest, legal expenses, and "Allowance for Party costs leading to the interim Award." (Arbitration between Anchor and Aliança Under Service Contract EC99-0511, Decision and Final Award at 57 (July 31, 2001)). Aliança paid the \$381,880.59 awarded by the arbitrator.

On March 7, 2002, Anchor commenced this proceeding by filing a complaint alleging that Aliança violated numerous sections of the Shipping Act during the term of its service contract with Anchor for essentially the same course of conduct that had been presented to the arbitrator. Anchor sought reparations in the amount of \$1,000,000.00. Aliança moved to dismiss the complaint for failure to state a claim. Aliança also asserted the affirmative defense of issue preclusion or collateral estoppel, arguing that Anchor should be precluded from bringing the complaint before the Commission as the contentions in the complaint had been resolved in the binding arbitration.

After Aliança filed its motion to dismiss, Anchor filed a motion for leave to file an Amended Complaint adding three additional respondents who Anchor claimed are affiliated with Aliança and were allegedly involved in the activities about which Anchor complains. In its motion to amend, Anchor identified these additional respondents as "Crowley American Transport, Inc., Columbus

Line, Inc., and Hamburg Südamerikanische Dampfschiffahrt,” (Motion to Amend at 2), and described them as “essential parties to the complaint.” (*Id.*).

On May 2, 2002, the presiding administrative law judge granted Aliança’s motion to dismiss. The administrative law judge applied the test set forth in *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1635 (2000), to dismiss Anchor’s complaint:

However, we find it inappropriate and contrary to the intent of the statute that section 8(c) bar any Shipping Act claim which bears some similarity to, overlaps with, or is couched in terms suggesting that the remedy may be available in a breach of contract action. We believe the more appropriate test is whether a complainant’s allegations are inherently a breach of contract claim, or whether they also involve elements peculiar to the Shipping Act. We find that as a general matter, allegations essentially comprising contract law claims should be dismissed unless the party alleging the violations successfully rebuts the presumption that the claim is no more than a simple contract breach claim. In contrast, where 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. (Footnote omitted.) (Emphasis added.)

Anchor Shipping Co. v. Aliança Navegação E Logística Ltda., 29 S.R.R. 1047, 1054 (ALJ 2002) (*Anchor v. Aliança - ALJ*) (quoting *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. at 1645). Based on the circumstances, the administrative law judge found that “the presumption that some of the claims are inherently Shipping Act matters that should be heard by the Commission has been rebutted.” *Id.* at 1055. The administrative law judge also denied Anchor’s motion to amend the complaint.

Anchor appealed the administrative law judge’s decision to the Commission. After briefing by the parties, the Commission vacated the administrative law judge’s dismissal, granted Anchor’s motion to amend “in part,” and remanded the case for further adjudication. The Commission agreed with the administrative law judge that the case is controlled by the *Cargo One* test, but disagreed

with the administrative law judge's application of the test. The Commission held that the fact the service contract between the parties required arbitration:

does not outweigh the Commission's duty to protect the public by ensuring that service contracts are implemented in accordance with the Shipping Act. . . . To preclude Anchor from proceeding with its complaint solely because a private arbitrator previously issued a ruling would be inconsistent with our statutory mandate to hear such complaints.

Anchor Shipping Co. v. Aliança Navegação E Logística Ltda., 30 S.R.R. 991, 998 (2006) (*Anchor v. Aliança - FMC*). The Commission stated that "[o]n remand, we direct the ALJ to address only those allegations involving Shipping Act violations, and any dispute previously addressed by the Arbitrator that are based upon common law breach of contract claims shall remain binding upon the parties." *Id.*, at 999-1000.

After the remand, on June 7, 2006, the Commission's Secretary served the Amended Complaint on Aliança, Crowley American Transport, Inc., Columbus Line, Inc., and Hamburg-Südamerikanische Dampfschiffahrt. These four entities are located at the same address - 465 South Street, Morristown, New Jersey. Aliança, Columbus, and Hamburg-Süd filed answers to the Amended Complaint, but Crowley American Transport, Inc., did not. Anchor filed a motion for default against Hamburg-Süd, the successor in interest to Crowley American Transport *Line*, Inc., (Hamburg-Süd Reply in Opposition to Complainant Motion for Default (received Nov. 3, 2006)), based on the failure of Crowley American Transport, Inc., the party served by the Secretary, to file an answer. This motion was denied, and Crowley American Transport, Inc., was instructed not to file an answer pending clarification of the relationship and responsibilities of the parties that was expected to result through discovery. *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, FMC No. 02-04, slip op. at 7-9 (ALJ Jan. 26, 2007) (Order on Pending Motions and Discovery).

II. PARTIAL MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT.

Respondents' Partial Motion seeks dismissal of four claims and summary judgment on two claims. First, Respondents seek dismissal of the portion of the Amended Complaint alleging that:

Aliança "neglected to amend or cancel service contracts" (Amended Complaint at 3), and that the La Guaria "route was to be included in the contract [ECC99-0511] because it was included in a previous contract (S/C EC99-003) which the respondent had agreed to merge into the new master contract (along with previous S/C EC99-002) (Amended Complaint at 5). Anchor further alleges that "respondent reassured complainant a master contract would be forthcoming and that same would automatically incorporate the two previous contracts" (Amended Complaint at 10).

(Partial Motion at 3-5.) Second, Respondents seek dismissal of Anchor's request for civil penalties.

(Partial Motion at 5. *See* Amended Complaint at 2.) Third, Respondents seek dismissal of all claims alleging respondents violated section 6, sections 7, or section 9 of the Shipping Act. (Partial Motion at 6. *See* Amended Complaint at 6.) Fourth, Respondents seek dismissal of all claims of alleged violation of sections 10(c) of the Shipping Act that relate to alleged activities of the East Coast of South America Discussion Agreement (ESADA) or the Venezuelan Conference beyond those received in arbitration. (Partial Motion at 6-7.)

Respondents seek summary judgment on two claims. First, they seek summary judgment on Anchor's requests for additional reparations beyond those received in the arbitrator's award, arguing that pursuant to the arbitrator's award, Anchor received "all that it could have received from the FMC." (Partial Motion at 8-10.) Second, they seek summary judgment on Anchor's claims that Respondents violated section 10(a)(2) and (3) and section 10(c) of the Shipping Act. (Partial Motion at 10-12.)

DISCUSSION

I. MOTION TO DISMISS.

As stated in an earlier order in this proceeding:

[A motion to dismiss] tests the legal sufficiency of a complaint: dismissal is inappropriate unless the “plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). . . . [I] accept the plaintiff’s factual allegations as true and construe the complaint “liberally,” “grant[ing] plaintiff[] the benefit of all inferences that can be derived from the facts alleged,” *Kowal [v. MCI Communications Corp.]*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)]. At the [motion to dismiss] stage, [I] do not assess “the truth of what is asserted or determin[e] whether a plaintiff has any evidence to back up what is in the complaint.” *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 467 (D.C. Cir. 1991). As the Supreme Court reiterated in a case decided after the district court dismissed this case, Federal Rule of Civil Procedure 8 requires “simply [that] . . . ‘the defendant [give] fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’”¹ This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, [512], 122 S.Ct. 992, 998, 152 L.Ed.2d 1 (2002) (quoting *Conley*, 355 U.S. at 47). That said, [I] accept neither “inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint,” nor “legal conclusions cast in the form of factual allegations.” *Kowal*, 16 F.3d at 1275; *cf.* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 347-48 (2d ed.1990) (explaining that Rule 12(b)(6) dismissal is appropriate where the allegations contradict the claim asserted, e.g., where the allegations in an action for negligence showed that the plaintiff’s own negligence was the sole proximate cause of the injury).

Anchor Shipping Co. v. Aliança Navegação E Logística Ltda., FMC No. 02-04, slip op. at 5-6 (ALJ Jan. 26, 2007) (Order on Pending Motions and Discovery), quoting *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002).

¹ This should read: “Federal Rule of Civil Procedure 8 requires [that the complaint must simply give] ‘the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’”

A. Claims Alleging Combining of Three Service Contracts under an Alleged Oral Agreement Between Anchor and Aliança.

Respondents move for dismissal of Anchor's claims that Aliança neglected to amend or cancel service contracts (Amended Complaint at 3), that the La Guaria route was to be included in a service contract (Amended Complaint at 5), and that Aliança would enter into a master contract incorporating previous contracts (Amended Complaint at 10) on the ground that the Amended Complaint alleges oral contracts, while the Shipping Act requires service contracts to be in writing. (Partial Motion at 3-5.) Aliança attached to its motion a letter from the Commission's General Counsel supporting its argument that service contracts must be in writing and that enforcing oral service contracts would defeat the purpose of the Act. (Partial Motion, Exhibit A.) In its answer to the motion, Anchor argues that "Anchor not only thought the agreements/amendments had been made, but also, the Respondents should not be able to benefit from their own deliberate failure to file the once mutually agreed rates and/or services." (Complainant's Answer at 12.)

Commission regulations place the burden to file service contracts with the Commission "on the carrier party or parties participating or eligible to participate in the service contract." 46 C.F.R. § 530.5(a). Anchor's opposition to the motion suggests that Respondents did not file agreements that they should have filed, which could violate the Shipping Act. Therefore, I will deny the motion to dismiss without prejudice to raising the argument at a later time in the proceeding.

B. Request for Civil Penalties.

In Section III of the Amended Complaint, Anchor seeks the imposition of a civil penalty as a remedy to be imposed if Anchor prevails on its complaint. Respondents seek dismissal on the

ground that a civil penalty may not be awarded in a private complaint case. Anchor responds that the Bureau of Enforcement should be a party in this proceeding.

The Commission has stated that:

Section 13(a) of the 1984 Act provides that whoever violates a provision of the Act “. . . is liable to the United States for a civil penalty.” Section 13(c) further provides that the Commission may, after notice and an opportunity for a hearing, assess each civil penalty provided for [in] the Act, *id.* App. § 1712(c). In addition, Section 11(a) allows a private party to file a complaint alleging a violation of the Act and to seek reparations. *Id.* § 1710(a). This statutory scheme does not contemplate the imposition of civil penalties in a private party complaint proceeding.

California Shipping Line, Inc. v. Yangming Marine Transport Corp., 25 S.R.R. 1213, 1231 (1990).

See also East Coast Columbia Conference, et al., Petition for Investigation, 22 S.R.R. 723, 726 (1984) (1916 Act) (third parties are not part of civil penalty proceedings); *Prudential Lines v. Farrell Lines*, 22 S.R.R. 826, 851 (ALJ Apr. 24, 1984) (1916 Act). (“[P]rivate complainants have no standing in the matter [of civil penalties].”).

In an earlier Order, I referred Anchor’s motion for intervention by the Bureau of Enforcement to the Commission along with Aliança Navegação E Logística Ltda.’s opposition to the motion, as the motion asked me to take an action that is beyond my authority. *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, FMC No. 02-04 (ALJ Apr. 19, 2007) (Memorandum and Order on Complainant’s Motion for Bureau of Enforcement Intervention and Appointment of Mediator or Settlement Judge). At this point, the Bureau of Enforcement has not sought leave to intervene and is not a party in the proceeding. Therefore, the portion of Anchor’s complaint seeking the imposition of a civil penalty in this private action must be dismissed.

C. Claims of Alleged Violations of Sections 6, 7, and 9 of the Shipping Act.

Anchor alleges that Respondents violated sections 6, 7, and 9 of the Shipping Act. (Amended Complaint at 6.) Respondents seek dismissal of these allegations on the ground that “[t]here is no possible set of facts or circumstances as they relate to Respondents that could be viewed as a violation of any of these three sections of the Act.” (Partial Motion at 6.)

Respondents describe section 6 as a procedural provision that sets forth how the Commission processes agreements that are filed with it, and section 7 as a provision that establishes the scope of antitrust immunity under the Act, but does not impose any obligations on Respondents. (Partial Motion at 6.) Respondents’ descriptions are correct.

In establishing the 1984 Act Congress believed that a departure from the application of the antitrust laws to the international shipping liner industry was justified by the distinctive characteristics of that industry; *see, e.g.*, S. Rep. No. 3, 98th Cong. 1st Sess. 8-9, 12 (1983). Section 7 of the 1984 Act generally exempts from the antitrust laws any agreement between ocean common carriers and conduct undertaken pursuant to such agreement. 46 U.S.C. App. § 1706. This antitrust exemption is balanced by section 6 of the 1984 Act which established a new general standard for reviewing agreements and for obtaining injunctive relief to enjoin substantially anticompetitive agreements and by the prohibited acts proscribed in section 10, including section 10(c)(6).

Military Sealift Command v. Sea-Land Service, Inc., 27 S.R.R. 227, 231 (ALJ 1995), *aff’d in part, rev’d in part*, 27 S.R.R. 874 (1996). Therefore, the claims that Respondents violated section 6 and 7 of the Act are dismissed as sections 6 and 7 impose no duties on Respondents.

Respondents correctly state that section 9 of the Act regulates controlled carriers. (Partial Motion at 6.) “Controlled carrier” is defined as “an ocean common carrier that is, or whose operating assets are, directly or indirectly, owned or controlled by a government.” 46 U.S.C. § 40102(8). Respondents claim that no respondent is or has ever been a controlled carrier, (Partial

Motion at 6), and Anchor appears to agree. (Complainant's Answer at 13 ("Section 9 of the Act, pertains to Controlled Carriers, which Respondent's are not classified as being in accordance with the FMC Website. Anchor has no further comments with respect to Respondent's having violated Section 9 of the Act.")) Therefore, the claims that Respondents violated section 9 of the Act are dismissed.

D. Claims for Alleged Violations of Section 10(c) to the Extent They Relate to Alleged Activities of the East Coast of South America Discussion Agreement or the Venezuelan Conference.

Respondents move to dismiss claims related to alleged activities of the East Coast of South America Discussion Agreement and the Venezuelan Conference on the ground that "[i]f complaint is made with respect to an agreement filed under section 5(a) of the Shipping Act of 1984, the parties to the agreement shall be made respondents." 46 C.F.R. § 502.44. Since Anchor did not name the other members of these agreements as respondents, Respondents argue that claims that relate to the agreements must be dismissed for failure to include necessary and proper parties. (Partial Motion at 6-7.) Anchor responds that it has set forth in section IV, paragraphs G, H, J, K, P, Q, and R, and section V, paragraphs A, B, F, G, I, and J:

how Respondent's [*sic*] had worked in concert between themselves and some of the other members of the discussion groups, to not only not honor the service contract, but also to prohibit/exclude Complainant from being able to shop for a rate anywhere else and by using an ON and OFF Tactic to alienate Complainant's customers.

(Complainant's Answer at 14.)

Anchor's Amended Complaint is not a model of clarity. As is was submitted *pro se*, it is held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 n.2 (D.C. Cir. 2000). Even

when parsed under this relaxed standard, Anchor's Amended Complaint cannot be read to challenge the agreements themselves. The Amended Complaint does not specifically or otherwise name the *agreements* as respondents in this proceeding, does not allege that the agreements violated any provision of the Shipping Act, and does not allege that Aliança and the other respondents engaged in any unlawful activity under the authority of the agreements.

Examining the paragraphs cited on page 14 of Anchor's Answer to the motion, section IV, ¶ G, alleges that Respondents used their knowledge of the shipping industry and their involvement in discussion groups to coerce Anchor into accepting unwarranted amendments to service contracts, but does not allege that the claimed unlawful activity resulted from any concerted activity of any discussion agreement or conference. Section IV, ¶ H, alleges that Respondents were members of at least one discussion group (ECSADA)² that was legitimately filed pursuant to section 5 of the Act, but does not allege that any ESADA activities violated the Act. Section IV, ¶ J, alleges that a business luncheon occurred between representatives of Anchor and Crowley. Section IV, ¶ K alleges that Crowley offered Anchor a service contract to La Guaira. Section IV, ¶ P, alleges that Respondents suspended their to/from WCSA³ service and that for one shipment, Aliança assigned the booking number and Columbus issued the bill of lading under Aliança's service contract number. Section IV, ¶ Q, alleges that Respondents refused to accept booking from Baltimore to La Guaira, but then another employee of a respondent accepted some Baltimore/La Guaria bookings. Neither section J, K, P, nor Q concerns an agreement filed pursuant to section 5(a). Section IV, ¶ R, alleges

² The Amended Complaint does not further identify ECSADA, but apparently it is the East Coast of South America Discussion Agreement, FMC Agreement No. 205-011421 known as ESADA. (See Partial Motion at 7; Complainant's Answer at 13.)

³ I assume this means West Coast South America.

that Respondents refused to accept bookings because of certain unfiled agreements, but Anchor has not alleged that the two discussion agreements, East Coast of South America Discussion Agreement and the Venezuelan Conference, have violated sections 10(a)(2) and (3).

Section V, ¶ A, alleges that Respondent⁴ caused injury to Anchor by operating pursuant to unfiled agreements. Section V, ¶ B, alleges that Respondent became party to an agreement outside any agreement sanctioned or filed with the FMC. Section V, ¶ F, alleges that Respondent used its inside knowledge of at least one discussion group agreement to refuse Anchor's mitigation efforts. Section V, ¶ G, alleges that Respondent refused to extend the contract as a means of settling the dispute and mitigating damages. Section V, ¶ I, alleges that Respondent decided not to accept bookings to La Guaira, while Crowley with possible Venezuelan Conference involvement was offering lower rates to La Guaria. Section V, ¶ J, alleges Respondent became party to agreements "unlikely filed or legitimately filed with the Commission" as required by section 5(a). Neither A, B, F, G, I, nor J concerns an agreement filed pursuant to section 5(a).

Respondents are correct that section 502.44 requires all parties to a challenged agreement that has been filed under section 5(a) to be made parties to a proceeding. Since I have found that the Amended Complaint does not allege any Shipping Act violation against any agreement or discussion group, no portion of the Amended Complaint should be dismissed for failure to name parties to an agreement as provided by Rule 502.44.

⁴ Section V of the Amended Complaint sets forth allegations against "respondent" in the singular. It is not clear if Anchor intended to refer to a single respondent (presumably Aliança), or this is a typographical error. Given the context of the sentence, it appears that Anchor is alleging that Respondents entered into unfiled agreements among themselves in violation of 10(a)(2) and (3).

II. MOTION FOR SUMMARY JUDGMENT.

Summary judgment is appropriate when the pleadings and the record demonstrate that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The party seeking summary judgment may support its motion by “identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). I must view the facts in the light most favorable to the non-movant, giving the non-movant the benefit of all justifiable inferences derived from the evidence in the record. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A motion for summary judgment should be granted only when genuine issues of material fact do not exist. See *McKenna Trucking Co., Inc. v. A.P. Moller-Maersk Line and Maersk Inc.*, 27 S.R.R. 1045, 1052 (1997).

Before deciding a motion for summary judgment, the parties must be afforded an opportunity to conduct reasonable discovery. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (holding that summary judgment is only appropriate “after adequate time for discovery”); *First Chicago Int’l v. United Exchange Co.*, 836 F.2d 1375, 1380 (D.C. Cir. 1988) (holding that a motion for summary judgment is premature when the plaintiff is not given a reasonable opportunity to conduct discovery on the merits).

Carolina Marine Handling, Inc. v. South Carolina State Ports Authority, 30 S.R.R. 1243, 1244 (2006).

A. Request for Reparations Beyond the Damages Received in Arbitration.

In its Amended Complaint, Anchor acknowledges that it:

received an arbitration award, under SMA Rules, pursuant to The Federal [Arbitration] Act and in accordance with The Shipping Act, covering proven contract damages related to breach [of the service contract]. The complainant suffered and

continues to suffer consequential damages not reached by the arbitration award to include, lost profits since May 6, 2000 (formally [sic] over \$100K/year), payroll for the president of the company since May 6, 2000, for rightfully pursuing enforcement of the laws and regulations governing his contract, and personally having to monitor the complete arbitration including drafting and filing this complaint and later having to pursue [sic] this complaint, the numerous other financial setback's [sic] caused through carrier misconduct, plus, an undetermined amount of income complainant was likely to earn and produce over time, as consequence of goodwill, investments in the company and number of other intangible benefits the complainant would have realized had the respondent acted in good faith.

(Amended Complaint at 10-11.) Anchor seeks reparations in the amount of \$1,000,000.00. (*Id.* at 11.)

Pursuant to the Shipping Act, “[a] person may file with the . . . Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.” 46 U.S.C. 40301(a). “If the complaint was filed within the period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.” 46 U.S.C. § 40305(b). The burden of proving entitlement to reparations rests with Anchor. *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. 8, 13 (2003) (“the burden of proof shall be on the proponent of the rule or order.” 46 C.F.R. § 502.155. *See also Boston Shipping Ass’n v. Federal Maritime Comm’n*, 706 F.2d 1231, 1239 (1st Cir. 1983) (burden of proof in complaint cases)). “The Commission has always held that the mere proof of a violation of law without proof of pecuniary loss and without a showing of proximate causation [does] not warrant an award of reparation.” *Guam v. Sea-Land Service, Inc.*, 29 S.R.R. 1509, 1562-1563 (ALJ 2003).

As the Federal Maritime Board explained long ago: “(a) damages⁵ must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.”

James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist., 30 S.R.R. at 13, quoting *Waterman v. Stockholms Rederiaktiebolag Svea*, 3 FMB 248, 249 (1950).

Chief Judge Kline canvassed the Commission’s general principles on the law of damages and concluded as follows:

The statements of the Commission in [*California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213 (Oct. 19, 1990)] and the other cited cases are in the mainstream of the law of damages as followed by the courts, for example, regarding the principles that the fact of injury must be shown with reasonable certainty, that the amount can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences, the principle that the damages must be foreseeable or proximate or, in contract law, within the contemplation of the parties at the time they entered into the contract, the fact that speculative damages are not allowed, and that regarding claims for lost profits, there must be reasonable certainty so that the court can be satisfied that the wrongful act caused the loss of profits.

Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co., Inc., 26 S.R.R. 788, 798-799 (ALJ 1992) (footnote omitted).

Respondents argue that any reparations that the Commission might award would duplicate the damages awarded by the arbitrator. Respondents cite *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), for the proposition that:

Where, as here, the employer has prevailed at arbitration, there, of course, can be no duplicative recovery. But even in cases where the employee has first prevailed, judicial relief can be structured to avoid such windfall gains. Furthermore, if the relief obtained by the employee at arbitration were fully equivalent to that obtainable

⁵ Reparations under the Shipping Act and damages are synonymous. See *Federal Maritime Com'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 775 (2002) (Breyer, J., dissenting).

under Title VII, there would be no further relief for the court to grant and hence no need for the employee to institute suit.

415 U.S. at 51 n.14 (citations omitted). (*See* Partial Motion at 10.) Respondents conclude that “[t]he award of further reparations to Anchor here is precluded by the arbitration award and by the Shipping Act’s limitations on what can be awarded by the FMC. Summary judgment is therefore appropriate.”

(*Id.*)

Respondents’ basic statement of the law is correct: As the Supreme Court made clear in *Alexander*, the Commission cannot award reparations to Anchor for any actual injury for which it has already received an award of damages from the arbitrator. Under principles of *res judicata*, this restriction would extend to claims for damages that could have been raised before the arbitrator. *See Roboserve, Inc. v. Kato Kagaku Co.*, 121 F.3d 1027, 1034-1035 (7th Cir. 1997) (claims for damages from an alleged wrong must be brought in the same action); *see id.* at 1035 (“Once a transaction has caused injury, all claims arising from that transaction must be brought in one suit or lost.” *Lim v. Central DuPage Hosp.*, 972 F.2d 758, 763 (7th Cir. 1992), *quoting In re Energy Cooperative*, 814 F.2d 1226, 1230 (7th Cir. 1987.”).

Based on the record to this point, however, summary judgment is not appropriate. Respondents’ motion assumes, but does not demonstrate, that Anchor could not prove entitlement to reparations for alleged violations of the Shipping Act that were not or could not have been brought before the arbitrator. While Anchor may not receive “duplicative recovery,” it is not clear that if Anchor demonstrates that Respondents violated the Shipping Act and if Anchor demonstrates that it suffered an actual injury as a result of the violation, the arbitrator awarded damages that covered that injury. As the Court said in *Alexander*, “judicial relief can be structured to avoid . . . windfall

gains.” *Alexander v. Gardner-Denver Co.*, 415 U.S. at 51 n.14. In a future procedural order, I will set forth the procedure that the parties should follow addressing this issue.

B. Claims that Respondents Violated Sections 10(c)(1), 10(a)(2), and 10(a)(3).

Respondents claim that:

the common thread of [Anchor’s] allegations is that respondents concertedly acted in a manner that violated Section 10(c)(1) and did so under agreements that were not filed with the FMC and thus violated Sections 10(a)(2) and (3) of the Act. Assuming, arguendo, the truth of all the factual allegations related to any alleged conspiracy among respondents, under applicable FMC regulations, these allegations must be dismissed because such conduct does not violate the Shipping Act of 1984.

(Partial Motion at 11.) An affidavit is attached to the motion averring that Respondents Aliança, Columbus, and Hamburg-Süd are subsidiaries of the same parent. (Partial Motion, Exhibit C.) Respondents argue that the fact that agreements between or among wholly-owned subsidiaries and/or their parents are exempt from the requirements of the Act, *see* 46 C.F.R. § 535.307, means that “any alleged concerted activities under such alleged agreements are exempt from violating section 10(c) of the Act. (Partial Motion at 11.)

As noted above, after the Commission remanded this proceeding on June 7, 2006, the Secretary served the Amended Complaint on Respondents and Crowley American Transport, Inc. Crowley American Transport, Inc. did not file an answer, and Anchor filed a motion for default against Hamburg-Süd, the successor in interest to Crowley American Transport *Line*, Inc., (Hamburg-Süd Reply in Opposition to Complainant Motion for Default (received Nov. 3, 2006)), based on the failure of Crowley American Transport, Inc., the party served by the Secretary, to file an answer. This motion was denied, and Crowley American Transport, Inc., was instructed not to file an answer pending clarification of the relationship and responsibilities of the parties expected

to result through discovery. *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, FMC No. 02-04, slip op. at 7-9 (ALJ Jan. 26, 2007) (Order on Pending Motions and Discovery). While Crowley was instructed not to file an answer, the complaint against it was not dismissed; therefore, it is still a party, and apparently, its relationship to the other parties and responsibilities have not yet been clarified through discovery. (See Complainant's Answer at 16 ("Once complainant receives its discovery, perhaps Anchor will be able to better clarify its complaint allegations."))

Although Respondents' affidavit attached to its motion provide evidence that Aliança, Columbus, and Hamburg-Süd are wholly-owned subsidiaries and/or their parents, it is silent as to Crowley. In an earlier filing, Hamburg-Süd represented that "there is no corporate entity related to Hamburg-Süd named Crowley American Transport, Inc." (Hamburg-Süd Reply in Opposition to Complainant Motion for Default (received Nov. 3, 2006)). Exhibit J attached to Anchor's Answer to the Partial Motion is a letter from the vice president of Crowley American Transport, Inc., to the president of Anchor with an attached Consent to Assignment of the Service Contract between Crowley American Transport, Inc., and Anchor to Hamburg-Süd. The assignment was to be effective November 1, 1999. (Complainant's Answer, Exhibit J.) November 1, 1999, is within the period in which Anchor alleges Respondents were violating the Shipping Act. (Amended Complaint at 3). Even assuming that an agreement among Aliança, Columbus, and Hamburg-Süd would be exempt from the Act pursuant to 46 C.F.R. § 535.307, an agreement among Aliança, Columbus, Hamburg-Süd, and *Crowley American Transport, Inc.*, which Hamburg-Süd says is not a related corporate entity, would not be exempt from the Act pursuant to section 535.307. Therefore, Respondents' motion for summary judgment on Anchor's claims that Respondents violated section 10(c)(1) and sections 10(a)(2) and (3) and of the Shipping Act must be denied.

O R D E R

Upon consideration of the request of complainant Anchor Shipping Co. for leave to file an amended response to the Partial Motion to Dismiss and/or for Summary Judgment filed by respondents Aliança Navegação E Logística Ltda., Columbus Line, Inc., and Hamburg Südamerikanische Dampfschiffahrt-Gesellschaft KG, it is hereby

ORDERED that the request be **DENIED**.

Upon consideration of the Partial Motion to Dismiss and/or for Summary Judgment filed by respondents Aliança Navegação E Logística Ltda., Columbus Line, Inc., and Hamburg Südamerikanische Dampfschiffahrt-Gesellschaft KG, complainant Anchor Shipping Co.'s Answer to Respondents' Partial Motion to Dismiss and/or for Summary Judgment, Supplement to Complainant's Answer (Reply) to Respondents' Partial Motion to Dismiss and/or for Summary Judgment, the record herein, and for the reasons stated above, it is hereby

ORDERED that Respondents' motion to dismiss Anchor Shipping Co.'s claims alleging combining of three service contracts under an alleged oral agreement between Anchor and Aliança be **DENIED** without prejudice to raising the argument at a later time in the proceeding. It is

FURTHER ORDERED that Respondents' motion to dismiss Anchor Shipping Co.'s claims for imposition of civil penalties be **GRANTED**. Civil penalties may not be imposed as part of this proceeding. It is

FURTHER ORDERED that Respondents' motion to dismiss Anchor Shipping Co.'s claims that Respondents violated sections 6, 7, and 9 of the Shipping Act be **GRANTED**. It is

FURTHER ORDERED that Respondents' motion to dismiss Anchor Shipping Co.'s claims regarding alleged violations of section 10(c) to the extent they relate to alleged activities of the East Coast of South America Discussion Agreement or the Venezuelan Conference be **DENIED**. It is

FURTHER ORDERED that Respondents' motion for summary judgment on Anchor Shipping Co.'s claim for reparations beyond the damages awarded by the arbitrator in Arbitration between Anchor and Aliança Under Service Contract EC99-0511, Decision and Final Award (July 31, 2001) be **DENIED**. It is

FURTHER ORDERED that Respondents' motion for summary judgment on Anchor Shipping Co.'s claim that Respondents violated section 10(c)(1) and sections 10(a)(2) and (3) of the Shipping Act be **DENIED**.



Clay G. Guthridge
Administrative Law Judge