IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TIMBAUBA AGRICOLA S.A., VANGUARD INTERNATIONAL, and FRESH 1 MARKETING, Plaintiffs	:	
v.	:	**No. 03-CV-5012**
M/V CAP SAN RAPHAEL, her engines, machinery, tackle, fuel, apparel, etc., HAMBURG-SUDAMERIKANISCHE, COLUMBUS SHIPMANAGEMENT, COMPANIA SUD AMERICANA DE VAPORES S.A., A.P. MOLLER-MAERSK A.S., MAERSK, INC., AKTIESELSKABET DAMPSKIBSSEL SKABET SVENDBORG, DAMPSKIBSSEL SKABET AF 1912 AKTIESELSKAB, and AKTIESELSKABET DAMPSKIBSSELSKABET SEVENDBORG, Defendants	:	

MEMORANDUM OPINION AND ORDER

Rufe, J. **December 2, 2004**

This marine contract case comes before the Court on Defendant Compania Sud Americana De Vapores S.A.'s ("CSAV") Motion for Summary Judgment. For the reasons set forth below, the Motion is granted.

I. BACKGROUND

Plaintiffs Timbauba Agricola S.A., Vanguard International, and Fresh 1 Marketing Inc. ("Plaintiffs") are shippers and exporters and/or importers of fruit. In this case, Timbauba Agricola was the shipper, and Vanguard International and Fresh 1 Marketing were the consignees (receivers) of a cargo of mangoes. The defendants are M/V Cap San Raphael (the "vessel"), and the

following common carriers of merchandise by sea: CSAV, Hamburg-Sudamerikanische, Columbus Shipmanagement, and the Maersk defendants.[1] Plaintiffs allege that these common carriers were owners and/or disponent owners and/or charterers and/or managers and/or operators of the vessel during voyage 4N, which left Suape, Brazil on September 23, 2002 and arrived in Philadelphia, Pennsylvania on October 4, 2002.

The Complaint alleges that all of the defendants (collectively "Defendants") are liable in contract (counts I and III) and tort (counts II and IV) for the destruction of Plaintiffs' shipment of a cargo of mangoes, which Defendants carried on voyage 4N. Plaintiffs allege that they delivered the mangoes to the Defendants in good condition and performed all valid conditions precedent to contracts of carriage. They allege that Defendants accepted the cargo and issued bills of lading,[2] thereby contracting to transport the cargo on voyage 4N and to deliver it in good condition to the consignees. Plaintiffs further allege that Defendants caused delays in the pickup, loading, transportation and/or delivery of the mangoes, in breach of express agreements and contracts of carriage and in violation of Defendants' duties as common carriers. As a result, Plaintiffs allege, the value of the mangoes was seriously impaired upon delivery in Philadelphia.

In its Motion for Summary Judgment, CSAV contends that the Complaint fails to state a claim against CSAV because the Complaint does not identify any bills of lading CSAV issued for shipment of Plaintiffs' mangoes. CSAV further contends that granting Plaintiffs leave to amend

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[1] The Maersk Defendants (A.P. Moller-Maersk A.S., Maersk, Inc., Aktieselskabet Dampskibssel Skabet Svendborg, Dampskibssel Skabet AF 1912 Aktieselskab, and Aktieselskabet Dampskibsselskabet Sevendborg) reached a settlement agreement with Plaintiffs and were dismissed from the case by stipulation on May 17, 2004 [Doc. #21].

[2] A bill of lading is considered both an acknowledgment by a carrier that it received goods for shipping, and a contract for shipment of those goods. West India Indus., Inc. v. Tradex, Tradex Petroleum Serv., 664 F.2d 946, 949 (5th Cir. 1981).

the Complaint at this time would be tantamount to allowing them to add a new claim after the statute of limitations expired.[3] Accordingly, CSAV seeks dismissal of Plaintiffs' claims against CSAV.

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), the Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a mater of law." [4] To avoid summary judgment, the non-moving party must come forth with admissible factual evidence establishing a genuine issue of material fact.[5] In deciding a Motion for Summary Judgment, the Court must construe the facts and inferences in a light most favorable to the non-moving party.[6] The Court must determine whether there are any genuine issues for trial.[7]

III. DISCUSSION

A. Applicable Law

Preliminarily, the Carriage of Goods by Sea Act of 1936, 46 U.S.C. § 1300 et seq. ("COGSA") governs the carriage of goods between foreign and United States ports. Since this case

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[3] While the Complaint alleges two contract and two tort claims, CSAV argues that all the claims are properly considered Carriage of Goods by Sea Act claims, under 46 U.S.C. §1300 et seq. This act sets a one year statute of limitations. The correct characterization of these claims is discussed infra, Part III.A.

[4] Celotex Corp. v. Catrett, 447 U.S. 317, 322 (1986).

[5] Id.

[6] EEOC v. Westinghouse Elec. Corp., 725 F. 2d 211, 216 (3rd Cir. 1983).

[7] Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 249 (1986).

involves liability for cargo damaged during shipment from Brazil to the United States, COGSA governs. COGSA claims for lost or damaged goods are hybrid contract and tort claims, and COGSA provides an exclusive remedy.[8] Because COGSA provides an exclusive remedy, the discussion below will treat all four counts in the Complaint as COGSA claims, rather than common law contract and negligence claims.

B. Failure to State a Claim Against CSAV

CSAV argues that, having failed to identify any bill(s) of lading issued by CSAV in their Complaint, Plaintiffs have failed to state a claim against CSAV upon which relief may be granted. Plaintiffs argue that the Complaint satisfies the liberal pleading requirements of Federal Rule of Civil Procedure 8(a), and states a viable claim against CSAV. The Complaint identified the ship, the voyage number, the cargo, and the consignees; stated that the shipper delivered cargo to Defendants in good condition; and alleged that Defendants executed bills of lading. Plaintiffs believe the Complaint contains sufficient allegations to put CSAV on notice of its potential liability for the mangoes damaged during voyage 4N, despite Plaintiffs' failure to identify the bills of lading CSAV issued by their numbers.

An adequate complaint must allege facts supporting the elements of a claim. In a COGSA case for damaged cargo, a plaintiff's complaint must allege facts supporting two elements: 1) the plaintiff delivered the cargo to the carrier in good condition; and 2) the carrier delivered the cargo to its owner or consignee in damaged condition.[9] A bill of lading serves as prima facie

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[8] Polo Ralph Lauren, L.P. v. Tropical Shipping & Constr. Co., 215 F.3d 1217, 1220-1221 (11th Cir. 2000) ("COGSA affords one cause of action for lost or damaged goods, which, depending on the underlying circumstances, may sound louder in either contract or tort.")

[9] Daewoo Int'l (Am.) Corp. v. Sea-Land Orient Ltd., 196 F.3d 481, 484 (3d Cir. 1999).

evidence that the carrier received the cargo from the shipper in good condition.[10] When the carrier delivers the goods to the recipient, the bill of lading constitutes prima facie evidence that the carrier delivered the cargo in good condition, unless the recipient gives timely notice that the goods were damaged.[11]

Because evidence of a bill of lading is essential to making a COGSA claim, district courts have required plaintiffs to specifically identify every relevant bill of lading in their complaints, even when a single carrier issues each of the bills of lading for cargo shipped on a voyage.[12] Each bill of lading is considered a separate transaction or a separate contract,[13] and each bill of lading only provides evidence of the agreement about and condition of the items carried under that one bill. Here, the Complaint alleges that Defendants accepted mangoes in Brazil and issued bills of lading for the mangoes, "including but not limited to" waybills[14] SSZ147532 (identified in Count I) and

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[10] Id. Additional evidence will be needed for a claim to succeed if the cargo was delivered to the carrier in a sealed container, so that the carrier's bill of lading could only attest to the good condition of the containers, and not to the good condition of the goods contained therein. Id. at 485. See also Caemint Food, Inc. v. Brasileiro, 647 F.2d 347, 352 (2d Cir. 1981). Here, it is not clear from the submissions before the Court whether CSAV was able to inspect the mangoes delivered to it, but for the Court's purpose today, it will accept a cite to a clean bill of lading as sufficient prima facie evidence that the cargo was delivered to CSAV in good condition.

[11] 46 U.S.C. App. § 1303(6).

[12] See Ferrostaal, Inc. v. M/V Yvonne, 10 F. Supp. 2d 610, 613 (E.D. La., 1998) (agreeing with defendants' assertion that a complaint for damages under COGSA must set forth specific bills of lading under which allegedly damaged cargo was shipped); In re Retionis Enter., Inc. of Panama, 45 F. Supp. 2d 365, 367 (S.D.N.Y. 1999)(denying plaintiff's request to amend complaint to include an additional bill of lading for cargo carried on same ship, during the same voyage, and subject to same damage as cargo identified by three bills of lading identified in original complaint, because statute of limitations had expired).

[13] 46 U.S.C. § 1301(b).

[14] While waybills are not identical to bills of lading, both Plaintiffs and CSAV treat them as bills of lading for the purpose of this lawsuit.

SSZ147536 (identified in Count III). The Complaint identified no other bills of lading.[15] CSAV did not issue the identified bills of lading.[16]

Although the Court must construe Rule 8(a)'s "plain statement" requirement liberally, the Court need not credit a plaintiff's "bald assertions" or "legal conclusions" when deciding a motion to dismiss.[17] Regarding its claims against CSAV, Plaintiffs have only made bald assertions that Plaintiff Timbauba Agricola S.A. delivered mangoes to Defendants (collectively) in good condition, that Defendants accepted and agreed to ship the mangoes and deliver them in good condition, and that Plaintiffs Vanguard International and Fresh 1 Marketing Inc. received the mangoes in damaged condition. Plaintiffs failed to identify any bill(s) of lading CSAV issued to them. Furthermore, Plaintiffs did not allege that they gave timely notice of cargo damage to CSAV. Notwithstanding the liberal notice pleading requirements, Plaintiffs have not sufficiently alleged the first or second elements of a COGSA claim against CSAV. Therefore, Plaintiffs have failed to state a claim against CSAV upon which relief may be granted.

C. Amendment of the Complaint is Time Barred.

Plaintiffs ask the Court for leave to amend their Complaint to identify the waybills issued by CSAV.[18] CSAV argues that such an amendment would add new claims to the Complaint,

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[15] Because these bills are contracts between the parties, Plaintiffs should have had all bills of lading in their possession at the time the complaint was filed. These are not documents they would have needed to obtain through discovery.

[16] The Maersk defendants issued the two identified bills of lading. Maersk and CSAV are unrelated entities.

[17] Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997).

[18] Plaintiffs identify two waybills issued by CSAV in their reponse to CSAV's Motion for Summary Judgment: CHIWQPC0000195 and CHIWQPC000196. CSAV does not dispute that it issued these waybills for the transport of mangoes on voyage 4N.

so that the amendment would not relate back to the original Complaint. Since the statute of limitations expired on October 4, 2003,[19] CSAV asks the Court to deny Plaintiffs' request to amend their complaint and instead dismiss all claims against CSAV.

Federal Rule of Civil Procedure 15(c) governs "relation back" of amendments. An amendment of a pleading relates back to the original pleading when the claim asserted in the amendment arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings.[20] In the COGSA context, district courts generally have not allowed plaintiffs to amend complaints to identify additional bills of lading after the statute of limitations has expired, even if the same carrier issued the missing bills of lading and the cited bills of lading.[21] Each bill of lading is considered a separate transaction, and each sets forth the duties and agreements between the parties for a particular subset of goods.[22] Therefore, amendments identifying additional bills of lading do not "relate back" to the original Complaint when filed after the statute of limitations has expired.

Plaintiffs' Complaint identifies two bills of lading, both issued by the Maersk defendants.[23] However, the claims against CSAV clearly arise out of a different transaction than the

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[19] Plaintiffs filed their complaint on September 4, 2003, one month prior to the expiration of the statute of limitations. The complaint was served upon CSAV on November 10, 2003, by international mail.

[20] Fed. R. Civ. P. 15(c)(2).

[21] See In re Retionis Enter., Inc. of Panama, 45 F. Supp. 2d at 367 (see supra note 12 and accompanying text); Ferrostaal, Inc., 10 F. Supp. 2d at 613-614 (prohibiting plaintiff from amending complaint to add new bill of lading after statute of limitations expired, deeming each bill of lading a separate contract and separate transaction).

[22] Id.

[23] Plaintiffs referenced each Maersk bill of lading in a separate count (Count I and Count III). Other than the bill of lading number and the damages claimed under each bill of lading, the language of these two counts is identical. This suggests that the Plaintiffs were aware that COGSA requires them to allege violations of each bill of lading with specificity, and did so when pleading claims against the Maersk defendants.

claims against Maersk. The bills of lading issued by CSAV are contracts with a different party, negotiated with different terms, for the transport of different containers of mangoes. The Court cannot say that the claims arose out of the same conduct because Maersk and CSAV are unrelated entities. Plaintiffs have not alleged that the cargo damage was the result of the two entities acting in concert. Finally, damage to the containers of mangoes shipped by CSAV cannot be considered the same "occurrence" as damage to the mangoes shipped by Maersk, since they were different mangoes, in different shipping containers, being cared for by different shippers, under different contractual terms.

The Court finds that an amended complaint identifying bills of lading issued by CSAV for carriage of Plaintiffs' mangoes would not relate back to the original Complaint. Accordingly, the governing statute of limitations bars such an amendment.[24]

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint against CSAV is insufficient and fails to state a claim upon which relief may be granted. Further, Plaintiffs' proposed amendment would not relate back to the original Complaint; therefore such amendment is time barred by the governing statute of limitations. Accordingly, the Court grants Defendant's Motion for Summary Judgment.

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[24] Plaintiffs argue that their failure to identify the CSAV bills of lading in the Complaint does not bar their Count II and IV negligence claims against CSAV, presumably because such claims would not require identification of bills of lading and/or would be subject to a longer statute of limitations. However, Plaintiffs have not alleged that CSAV had any duty or obligation to protect Plaintiffs' cargo other than the duty imposed by bills of lading. As noted above, COGSA provides an exclusive remedy for damage to cargo shipped between foreign and domestic ports under bills of lading, and the Court considers all four counts in Plaintiffs' Complaint to be COGSA claims. Therefore, COGSA's requirements for a prima facie case and COGSA's one year statute of limitations apply to all four claims.

An appropriate Order follows.

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TIMBAUBA AGRICOLA S.A., VANGUARD INTERNATIONAL, and FRESH 1 MARKETING,	:	
Plaintiffs	:	
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v.	:	**No. 03-CV-5012**
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M/V CAP SAN RAPHAEL, her engines, machinery, tackle, fuel, apparel, etc., HAMBURG-SUDAMERIKANISCHE, COLUMBUS SHIPMANAGEMENT, COMPANIA SUD AMERICANA DE VAPORES S.A., A.P. MOLLER-MAERSK A.S., MAERSK, INC., AKTIESELSKABET DAMPSKIBSSEL SKABET SVENDBORG, DAMPSKIBSSEL SKABET AF 1912 AKTIESELSKAB, and AKTIESELSKABET DAMPSKIBSSELSKABET SEVENDBORG,	:	
Defendants	:	

ORDER

AND NOW, this 2th day of December, 2004, upon consideration of Defendant Compania Sud Americana de Vapores S.A.'s Motion for Summary Judgment [Doc. #26], Plaintiffs' Response thereto [Doc. #29], Defendants's Reply [Doc. #31] and Plaintiff's Sur-reply [Doc. #34], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED:**

1. Defendant Compania Sud Americana de Vapores, S.A.'s Motion for Summary Judgment is **GRANTED**; and

2. Plaintiff's Complaint against Defendant Compania Sud Americana de Vapores, S.A. is **DISMISSED** with **PREJUDICE**.

It is so **ORDERED**.

BY THE COURT:

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CYNTHIA M. RUFE, J.