

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

PASHA AUTO WAREHOUSING, INC. : CIVIL ACTION
 :
 v. :
 :
 PHILADELPHIA REGIONAL PORT AUTHORITY : No. 96-6779

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

April 21, 1998

Pasha Auto Warehousing, Inc. ("Pasha") filed this declaratory judgment action against Philadelphia Regional Port Authority ("PRPA"), Holt Cargo Systems, Inc. ("Holt"), and two defendants related to Holt. The court dismissed all claims against Holt, and its two related defendants. Holt moved to intervene, but the court denied the motion for intervention, and permitted Holt to participate amicus curiae.

Holt immediately appealed that decision. See 28 U.S.C. § 1291 (1988); United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1179 (3d Cir. 1994). In January, 1998, the court held a status conference, and ordered the parties to brief whether, consistent with Venen v. Sweet, 758 F.2d 117 (3d Cir. 1985), the court retained jurisdiction notwithstanding Holt's appeal of the denial of intervention. Holt's submission regarding jurisdiction stated that Holt believed that the court retained jurisdiction over the matter for the purpose of considering motions to dismiss, and motions for summary judgment. (Holt's Statement Regarding Jurisdiction, p. 1). Holt then filed a motion to dismiss for lack of subject matter jurisdiction in this court on March 16,

1998.

The court received Holt's brief on appeal on April 16, 1998, and learned for the first time that Holt was appealing not only the denial of its motion to intervene and grant of amicus curiae status, but also the district court's subject matter jurisdiction (presumably this court's Order of October 28, 1997), even though Holt stated to this court it retained the authority to determine whether it had subject matter jurisdiction. (Holt's statement Regarding Jurisdiction, p. 1). Holt has failed to file a timely motion to certify an appeal of the October 28, 1997 Order, and there has been no other decision on jurisdiction from which Holt could take an appeal even if it were a party. Therefore, the district court will decide the issue of subject matter jurisdiction because that issue is not properly before the Court of Appeals; it can be decided notwithstanding Holt's proper appeal of the denial of intervention.

BACKGROUND

Defendant PRPA, a public entity of the Commonwealth of Pennsylvania, was formed to promote port development in Southeastern Pennsylvania. PRPA owns marine terminals and other facilities in the Philadelphia Region of the Port District, including property known as Pier 96 South.

Plaintiff Pasha Auto Warehousing, Inc. ("Pasha") entered into a construction and sublease ("Pasha Lease") with PRPA for Pier 96 South. A condition precedent to the Pasha Lease was that the PRPA would construct certain buildings and facilities in and

around Pier 96 South. Pasha and PRPA also entered into an "Interim Lease Agreement," ("Interim Lease"), to govern Pasha's use of the premises until fulfillment of the condition precedent. The Pasha Lease provided that Pasha would have a right to renew its lease under certain conditions, and to request expansion of permitted activities on the Pier 96 South property.

PRPA entered into a subsequent lease agreement ("Holt Lease") with Holt, a Delaware corporation in the business of stevedoring, warehousing and providing terminal services. The Holt Lease encompasses a large parcel of property, including Pier 96 South. The Holt Lease states that the "PRPA shall grant to Holt . . . [the] right . . . to develop Pier 96 South at such time that Pasha . . . either has consented to such grant or no longer has any rights with respect to Pier 96 South." (Holt's Amended Lease with PRPA, Section 24.2(b)(i)). Holt alleges that PRPA failed to disclose the existence of Pasha's Interim Lease. All parties involved agree that the Holt Lease does not create a possessory right in Pier 96 South until the expiration of the Pasha Lease; there is a dispute regarding when the Interim Lease and the Pasha Lease expire.

Procedural History

The Related Conspiracy Action. On December 28, 1994, Holt and two related corporations filed a complaint alleging a conspiracy to deprive Holt of its lease rights, and drive Holt out of business. Holt et al. v. Delaware River Port Authority et al., Case No. 94-CV-7778 (E.D. Pa.). There was a dispute in that

related action ("the conspiracy action") about whether the claims were subject to the mandatory jurisdiction of the FMC. The FMC, an independent U.S. regulatory agency, has primary responsibility for enforcing the Shipping Act of 1984 ("the 1984 Act") and the Shipping Act of 1916 ("the 1916 Act"). The 1984 Act provides a comprehensive scheme for regulation of common carriers and marine terminal operators. Pending FMC determination of whether it had exclusive jurisdiction, this court severed and stayed all but three constitutional claims. Holt then voluntarily dismissed the severed claims, and reasserted them in an FMC action.

The defendants in the conspiracy action filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). The court found that, taking all allegations in the complaint as true, Holt could prove no set of facts establishing a procedural due process violation or violation of the terms of the New Jersey-Pennsylvania Amended Interstate Compact to manage the Delaware River Port Region. Before trial, scheduled to start in March, defendants filed a motion for summary judgment. Finding that there was no issue to be presented to a jury, the court granted summary judgment; Holt's appeal is pending.

The Declaratory Judgment Action. Pasha filed a complaint on October 2, 1996, to clarify its rights to Pier 96 South. Its complaint sought a declaratory judgment that: 1) any provisions in any Holt Lease in conflict with the Pasha Lease or the Interim Lease are void; 2) PRPA could not delegate to Holt its discretion over alterations or extensions of the Pasha Lease or Interim

Lease; 3) Pasha has certain rights to Pier 96 South; 4) any PRPA delegation to Holt of the right to agree or veto a request by Pasha to expand its Pier 96 South activities is void; and 5) any veto PRPA granted to Holt over the extension of Pasha's lease is void.

Two of the three Holt defendants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), or pursuant to the doctrine of "primary jurisdiction." Holt argued that the action was subject to the mandatory jurisdiction of the FMC, or, in the alternative, that it was subject to FMC's primary jurisdiction. Pasha argued that it was not a common carrier or a marine terminal, and therefore not subject to the FMC's exclusive jurisdiction, and the primary jurisdiction doctrine was not applicable.

In order to understand the scope of FMC's exclusive and primary jurisdiction, the court invited the FMC to participate amicus curiae. In its brief, the FMC did not allege that any of the action was within its exclusive jurisdiction, but argued that some of the claims fell within its primary jurisdiction. The FMC argued that, to the extent that Pasha's complaint alleges the Holt Lease is void and should be set aside, it "raise[d] issues within the agency's primary jurisdiction." (FMC Brief, p. 13). The FMC admitted that "[a]n action merely for breach or enforcement of a maritime contract, including a marine terminal lease, will not ordinarily engage the Commission's jurisdiction." (FMC Brief, p. 12).

The court determined that claims such as the validity of the

Holt Lease might be subject to the FMC's jurisdiction, but that interpretation of Pasha's lease with PRPA was severable from the validity of the Holt Lease. In order to balance its obligation to exercise the jurisdiction given it by Congress and the FMC's primary jurisdiction, the court granted the motion to dismiss, dismissed all claims against the two defendants related to Holt, but retained jurisdiction over the declaratory judgment action for interpretation of "Pasha's lease interests in Pier 96 South (Count III), and the obligation of PRPA thereunder with regard to lease renewal and expansion of Pasha's permitted activities under the lease (Count IV). Because of its interest in the outcome, Holt may move to intervene in Pasha's action against PRPA." (Order, October 28, 1997). No party sought interlocutory leave to appeal this decision.

Holt moved to intervene and assert additional claims. Holt's previous 12(b)(1) motion had been filed only on behalf of two of the three related Holt defendants. As a result, the claims against the third Holt defendant had not been dismissed. Pasha moved to strike Holt's motion to intervene, because Holt was already a party to the action. After a conference call, the court granted Pasha's motion to strike, and dismissed the third Holt defendant, consistent with the court's earlier order. In that conference call, the court informed Holt that had it not stricken Holt's motion to intervene, the court would have denied Holt's attempt to assert claims other than with regard to the Pasha Lease. In the subsequent order, the court stated Holt "may

move to intervene to be heard only on the interpretation of Pasha's lease with Philadelphia Regional Port Authority ("PRPA") with respect Pier 96 South (Count III), and the obligation of PRPA to Pasha with regard to lease renewal and expansion of Pasha's permitted activities under the lease (Count IV)." This language mirrored the court's earlier order limiting its jurisdiction in light of the FMC's amicus brief.

Holt again moved to intervene and assert essentially the same "Response, New Matter, and Counterclaims." The court determined that compulsory intervention was not appropriate because Holt's interests with regard to interpretation of the Pasha Lease were adequately protected by PRPA, and allowing Holt to intervene permissively and assert additional issues would unduly delay the adjudication. To allow Holt to state its position with regard to the issues actually to be litigated, the court permitted Holt to "participate amicus curiae, and [to] be heard only on the interpretation of Pasha's lease with Philadelphia Regional Port Authority ("PRPA") with respect to Pier 96 South (Count III), and the obligation of PRPA to Pasha with regard to lease renewal and expansion of Pasha's permitted activities under the lease (Count IV)." This language again tracked the court's earlier order limiting its jurisdiction to avoid conflict with the FMC's exclusive or primary jurisdiction. Holt appealed this denial of intervention.

In light of Holt's appeal on the issue of its intervention, the court ordered the parties to brief whether the court retained

jurisdiction over the merits of the action under Venen v. Sweet, 758 F.2d 117 (3d Cir. 1985). In its Statement Regarding Jurisdiction, Holt asserted that "the prudent course is to stay proceedings after motions to dismiss and summary judgment motions are resolved." (Holt's Statement Regarding Jurisdiction, p. 1). The court interpreted this as an assertion by Holt that the issues in the motions to dismiss and summary judgment were not before the Court of Appeals, and the court could proceed on the merits, consistent with Venen v Sweet, 758 F.2d 117 (3d Cir. 1985). Pasha and PRPA both argued that the court retained jurisdiction, because the determination of the merits of the action "will have no appreciable effect on the appeal." (Pasha's Memorandum in support of the District Court's Jurisdiction, p. 7).

As amicus curiae, Holt moved to dismiss under Fed. R. Civ. P. 12(b)(1), and argued that this action is subject to the FMC's exclusive or primary jurisdiction. Pasha and PRPA responded that the interpretation of the Pasha Lease and the Interim Lease are not subject to the FMC's jurisdiction, either exclusive or primary. The motion to dismiss for lack of subject matter jurisdiction is pending. Holt has conceded this court has jurisdiction to decide the motion to dismiss; until there is an appeal by a party from a motion decided by this court, there is no appellate jurisdiction and the matter may be decided by the district court consistent with Venen v. Sweet.

DISCUSSION

The Court's Jurisdiction in Light of Holt's Appeal

The "filing of a notice of appeal . . . immediately confer[s] jurisdiction on the Court of Appeals and divest[s] the district court of its control over those aspects of the case involved in the appeal." Venen v. Sweet, 758 F.2d 117, 120 (3d Cir. 1985). "This rule prevents 'the confusion and inefficiency which would of necessity result were two courts to be considering the same issue or issues simultaneously.'" Bensalem Tp. v. International Surplus Lines Ins. Co., 38 F.3d 1303, 1314 (3d Cir. 1994) (quoting Venen, 758 F.2d at 121). The Court of Appeals has recognized the district court retains jurisdiction to "fil[e] . . . bonds, . . . to modify, restore, or grant injunctions . . . [or] to issue orders with reference to the record on appeal," as well as in other circumstances notwithstanding an appeal, although "the instances in which such power is retained are limited." Venen, 758 F.2d at 120 n.2.

The court denied Holt's motion to intervene, but invited it to participate as amicus curiae. As the court defined that role, Holt would be allowed to cross-examine witnesses, present evidence and witnesses, assert motions, and comment on any issue before the court. The only issue properly on appeal is whether the court erroneously denied Holt's motion to intervene because Holt's interests were adequately protected, and because Holt's introduction of other claims would unduly delay the adjudication. Holt did not seek leave to appeal the district court's October

28, 1997 order on the motion to dismiss.

In an analogous circumstance, the court denied a motion to stay pending appeal of denial of intervention in Harris v. Pernsley, 654 F. Supp. 1057 (E.D. Pa. 1987). The court had allowed the District Attorney ("DA") "objector" status to participate in the action despite denying the DA's motion to intervene. When the DA sought a stay of the consent decree that had been entered pending the outcome of its appeal, the court found there was little likelihood of harm in proceeding, in light of the fact that the DA "was accorded the right to appear and be heard." Harris, 654 F. Supp. at 1062. Holt has been granted the right to call witnesses, present evidence, cross-examine witnesses, and make motions. Holt will not be prejudiced by the court addressing the merits, and has acknowledged as much in its suggestion that the court resolve "motions to dismiss and summary judgment motions" notwithstanding the appeal. No party has "provide[d] any reason to think that [proceeding on the merits] would interfere with, or contradict, the court of appeals' consideration of" the denial of intervention. United States v. Hurley, 63 F.3d 1, 23 (1st Cir. 1995).

The court determines that it continues to retain jurisdiction over the action despite Holt's pending appeal of the court's denial of intervention. The appeal focuses solely on the issue of whether the court was correct that Holt's interests with regard to the Pasha Lease were adequately protected by PRPA, and whether Holt's intervention and introduction of other issues

would unduly delay the adjudication. Neither of these questions touches on the merits of the action. The court has afforded Holt full participation in all proceedings pending the outcome of the appeal. The only distinction between the court's definition of Holt's participation amicus curiae and intervention is the right to appeal a final decision on the merits. However, Holt may move to intervene in order to take an appeal. Halderman v. Pennhurst State School & Hospital, 612 F.2d 131 (3d Cir. 1979). Such a motion would be consistent with the court's "interest[] in Holt's views on the claims being adjudicated." Pasha v. Philadelphia Regional Port Authority, 1997 WL 835415, *7 (E.D. Pa., Dec. 23, 1997). The court finds that proceeding on the merits is not inconsistent with the issues pending before the Court of Appeals.

Holt's Motion to Dismiss

In its Motion to Dismiss for Lack of Subject Matter Jurisdiction and its recently filed appellate brief,¹ Holt argues that the court does not have jurisdiction over this action because it falls under the exclusive or primary jurisdiction of the FMC. The district court must meet its "virtually unflagging obligation . . . to exercise the jurisdiction" given to it by Congress, unless Congress intended for the action to proceed under the FMC's auspices. NY Life Distributors, Inc. v. Adherence

¹ Holt's appellate brief challenging the district court's jurisdiction recycles its recently filed motion to dismiss virtually verbatim. The court is of the view that Holt is attempting to present the issue to both the district court and the Court of Appeals at the same time, in the interest of obtaining a decision in its favor by either court.

Group, Inc., 72 F.3d 371, 377 (3d Cir. 1995). The "inefficiency of parallel or overlapping litigation should be minimized, but that is not a warrant for denying a suitor the access to court that the Congress gave it." Am. Assoc. of Cruise Passengers v. Cunard Line Ltd., 31 F.3d 1184, 1186 (D.C. Cir. 1994).

Exclusive Jurisdiction

The 1984 Act, 46 U.S.C. app § 1700 et seq., and the 1916 Act, 46 U.S.C. app. § 800 et seq. (collectively "the Shipping Acts" or "the Acts"), clarified the antitrust immunity for international ocean carriers, and granted the Federal Maritime Commission exclusive jurisdiction over the Acts. Seawinds Ltd. v. Nedlloyd Lines, B.V., 80 B.R. 181, 184 (N.D. Cal. 1987), aff'd, 846 F.2d 586 (9th Cir. 1988), cert. denied, 488 U.S. 891 (1988). The "purpose of the relevant portions of the 1916 Act, and its successor, the 1984 Act, [is to] prevent[] discrimination in the provision of terminal facilities." Plaquemines Port Harbor & Terminal District v. FMC, 838 F.2d 536, 543 (D.C. Cir. 1988). In order to protect the shipping industry from "changing interpretations of antitrust laws," Report of the House Committee on Merchant Marine and Fisheries, H.R.Rep. No. 53(I), 98th Cong., 1st Sess. 3-4, reprinted in 1984 U.S.C.C.A.N. 167, 168-69, the Shipping Acts expressly bar private antitrust suits based on conduct prohibited by the Acts. Seawinds, 80 B.R. at 183; A & E Pacific Constr. Co. v. Saipan Stevedore Co., 888 F.2d 68, 71 (9th Cir. 1989); Maritrend, Inc. v. Galveston Wharves, 152 F.R.D. 543, 550 (S.D. Tex. 1993).

In place of "private antitrust lawsuits," the Shipping Acts provide "for an administrative complaint and review process before the FMC, which has exclusive jurisdiction over all such matters." Saipan, 888 F.2d at 71. See also Seawinds, 80 B.R. at 183. Holt argues that if Pasha is a "marine terminal operator" as defined under the Shipping Acts, "the FMC plainly has exclusive jurisdiction over any dispute regarding the Pasha Leases for Pier 96 South." (Holt's Motion to Dismiss, p. 8).

It is unclear to the district court why this is "plain." The Shipping Acts do not give the FMC exclusive jurisdiction over every action involving any marine terminal operator; they only provide exclusive jurisdiction over claims involving possible violation of the Shipping Acts.² All four cases cited by Holt for the proposition that the FMC has exclusive jurisdiction involved alleged anticompetitive behavior in violation of the Shipping Acts.³ See Plaquemines, Port Harbor & Terminal District v. Federal Maritime Commission, 838 F.2d 536, 543-4 (D.C. Cir. 1988) (FMC had jurisdiction over whether the Port allegedly

² If the FMC had exclusive jurisdiction over all claims involving marine terminal operators, the court would have been unable to consider Holt's constitutional claims in Holt Cargo Systems, Inc. v. Delaware River Port Authority, Civil Action No. 94-7778.

³ In its Motion to Dismiss, Holt cited only two cases: A.P. St. Philip, Inc. v. Atlantic Land & Improvement Co., 11 S.R.R. 309 (FMC 1969) ; and Prudential Lines, Inc. v. Continental Grain Co., 21 S.R.R. 133 (I.D. 1981), aff'd, 21 S.R.R. 1172 (FMC 1982). The court has noted that in its appellate brief, Holt has also cited: Plaquemines, Port Harbor & Terminal District v. Federal Maritime Commission, 838 F.2d 536, 543-4 (D.C. Cir. 1988); and Matter of Agreement No. T-2719, 13 S.R.R. 800 (FMC 1973).

discriminated by controlling access to private terminal facilities, but a separate constitutional claim was not within the mandatory jurisdiction of the FMC); A.P. St. Philip, Inc. v. Atlantic Land & Improvement Co., 11 S.R.R. 309 (FMC 1969) (FMC had exclusive jurisdiction over an action involving an exclusive contract between terminal operator and tugboat company); Prudential Lines, Inc. v. Continental Grain Co., 21 S.R.R. 133 (I.D. 1981), aff'd, 21 S.R.R. 1172 (FMC 1982) (FMC had exclusive jurisdiction over marine terminal operator for allegedly refusing to permit goods to be carried by a particular type of barge); Matter of Agreement No. T-2719, 13 S.R.R. 800 (FMC 1973) (FMC did not have personal jurisdiction over a party not a marine terminal operator in a complaint alleging discriminatory grants of berthing rights).

In its amicus brief on the district court's jurisdiction, the FMC did not argue that this action is subject to its exclusive jurisdiction, but that its "jurisdiction over the relationship among these leases does not turn on whether or not Pasha is a marine terminal operator." (FMC Brief, p. 10). "Resolution of the question of Pasha's status is necessary to a determination of the [FMC's] personal jurisdiction over Pasha, i.e., [the FMC's] jurisdiction to require Pasha to conform to the Shipping Acts." (Id. at 11).

Subsequent to the FMC's brief, this action was significantly limited by the court's order of October 28, 1997, to cover only the interpretation of "Pasha's lease interests in Pier 96 South

(Count III), and the obligation of PRPA thereunder with regard to lease renewal and expansion of Pasha's permitted activities under the lease (Count IV)." (Order, October 28, 1997). This limited declaratory judgment action regarding interpretation of the terms of a contract does not involve any violation of common law or the Shipping Acts. The court believes that the FMC does not have exclusive jurisdiction over this declaratory judgment action, and it would be improper to dismiss for lack of subject matter jurisdiction.

Primary Jurisdiction

The doctrine of primary jurisdiction applies whenever the enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. United States v. Western Pacific R. Co., 352 U.S. 59, 64 (1956). A district court may dismiss a suit, or place it in administrative suspense, "on the ground that [an agency] has primary jurisdiction [over it], i.e., that [the agency] is best suited to make the initial decision on the issues in dispute, even though the district court has subject matter jurisdiction." Allnet Communication Service, Inc. v. National Exchange Carrier Association, Inc., 965 F.2d 1118, 1120 (D.C. Cir. 1992). "The doctrine of primary jurisdiction, despite its name, does not implicate the jurisdiction of a federal court. Rather, it is a principle of judicial administration designed to achieve coordination between administrative agencies and the courts." Puerto Rico Maritime Shipping Auth. v. Valley Freight

Sys., Inc., 856 F.2d 546, 549 (3d Cir. 1988). A court may defer an issue within the agency's expertise, if it "is not merely technical but extends to the policy judgments needed to implement an agency's mandate." Allnet, 965 F.2d at 1120.

The doctrine of primary jurisdiction is based on agency expertise: "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." Far East Conference v. United States, 342 U.S. 570, 574 (1952). The FMC's expertise extends to the promotion of competition among parties subject to the Shipping Acts, and the elimination of discrimination in the provision of terminal services. See Plaquemines Port Harbor & Terminal District v. FMC, 838 F.2d 536, 543 (D.C. Cir. 1988). The interpretation of the Pasha Lease is not within the agency's expertise. The interpretation of the leases in question is well within the conventional experience of a court, not the FMC's traditional area of expertise.

The only Shipping Act provision possibly implicated is the 1984 Act requirement that all agreements "to discuss, fix, or regulate rates or other conditions of service, [or] engage in exclusive, preferential, or cooperative working arrangements" be filed with the FMC and that parties to the agreements operate under them only "in accordance with [their] terms." 46 U.S.C. app. §§ 1703(b), 1704(a), 1709(a)(3). However, this action does not involve an agreement to "discuss, fix or regulate rates or

conditions of service." It involves an exclusive working arrangement only to the extent that any lease is an exclusive contract between the landlord and tenant.

The FMC concedes that the claims involved here do not fall within its primary jurisdiction because its primary jurisdiction does not ordinarily extend to an "action for breach or enforcement of . . . a marine terminal lease." (FMC brief, p. 12), and that the interpretation of lease provisions do not fall within its expertise or outside the court's conventional experience. Even if the FMC's primary jurisdiction extended to whether the parties have actually operated in accordance with the lease, the court has dismissed those issues, and will only adjudicate the interpretation of the Pasha Lease terms, not whether the parties have complied with them.

Holt has alleged in its FMC action that the PRPA has: unreasonably discriminated against Holt in violation of the Holt Lease, the 1984 Act, and the 1916 Act; impeded and sabotaged Holt's development plans for Pier 96 South; prevented government agencies from accepting Holt permits and applications; denied Holt possessory rights to Pier 96 South; prevented Holt from using marine terminal facilities by dredging certain areas; and granted unfair concessions to Holt's competitors.⁴ (FMC brief, p. 7-8). The FMC argues that the court should defer to its primary

⁴ Many of these allegations, if not all, were the subject of the related conspiracy action, Civil Action 94-7778, in which the court recently granted summary judgment.

jurisdiction to the extent that Administrative Law Judge Dolan, before whom the FMC proceeding is pending, would consider the terms of the Pasha Leases in order to determine if PRPA had applied the leases to discriminate against Holt unreasonably.⁵

The court will only define Pasha's and PRPA's rights and obligations under the Pasha Lease and the Interim Lease. The court will not determine: whether the leases have been breached; whether any party will be illegally injured by the performance of any lease; or whether the leases should be set aside as in violation of statutory or common law. The scope of the action has been significantly limited subsequent to and as a result of the FMC's brief; the action does not seek to set aside any agreement, or prohibit any activities. Pasha, having filed this action on October 2, 1996, is still awaiting a determination of the merits of its declaratory judgment complaint. The meaning of its lease provisions remain in doubt, and the implications of the decision cast a shadow on Pasha's lease interests. The court has narrowed the scope of the action to balance the FMC's primary jurisdiction and the court's "virtually unflagging obligation . . . to exercise the jurisdiction" given to it by Congress. NY Life

⁵ Holt filed its complaint before the FMC on May 31, 1996. (FMC Brief, p. 11). Pasha, included as a party in the FMC action, objected to the FMC's exercise of personal jurisdiction over it. An initial decision on whether Pasha is subject to the FMC's personal jurisdiction is due in June, 1998, but a final decision on personal jurisdiction is not expected until October, 1998. (FMC Brief, p. 9, n. 9).

Distributors, 72 F.3d at 377.⁶

CONCLUSION

Consistent with Venen v. Sweet, 758 F.2d 117 (3d Cir. 1985), the court has jurisdiction to proceed on the merits, notwithstanding Holt's appeal of the denial of intervention. The issues on appeal do not implicate those before the court. The interpretation of contractual provisions is not something within the FMC's exclusive or primary jurisdiction, but rather within this court's experience and expertise; it would be inappropriate to dismiss for lack of subject matter jurisdiction.

An appropriate order follows.

⁶ Had the court determined that it lacked subject matter jurisdiction, it would have followed Holt's suggestion "that the Court certify its intent to grant the Motion and place the matter in administrative suspense pending resolution of the appeal pending in or remand of the matter by the Court of Appeals." (Holt's Motion to Dismiss, p. 13). Such a decision would have been consistent with the Court of Appeals' statements in Venen v. Sweet, and would not have nullified the notice of appeal. Venen, 758 F.2d at 123.

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

PASHA AUTO WAREHOUSING, INC. : CIVIL ACTION
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 PHILADELPHIA REGIONAL PORT AUTHORITY : No. 96-6779

ORDER

AND NOW this 21th day of April, 1998, upon consideration of Pasha's Memorandum in support of the District Court's Jurisdiction, PRPA's Memorandum of Law Concerning Jurisdiction, Holt's Statement Regarding Jurisdiction, Holt's Motion to Dismiss under Fed. R. Civ. P. 12(b)(1), Pasha's and PRPA's responses in opposition thereto, it is **ORDERED** that:

1. The court retains jurisdiction over the merits notwithstanding Holt's appeal of the denial of intervention.
2. Holt's Motion to Dismiss is **DENIED**.
3. The parties shall respond to Pasha's motion for summary judgment and PRPA's motion for summary judgment within ten days.

Norma L. Shapiro, J