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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DIVINE ENTERPRISES, INC.,

Plaintiff,

v.

WALMART dba Sam's Wholesale,
and DOES 1 through 50,
inclusive,

Defendant.

No. 2:21-cv-00209-JAM-JDP

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

Divine Enterprises, Inc. ("Divine"), a trucking company, was hired by now-defunct Svenhard's Swedish Bakery ("Svenhard's") to deliver several truckloads of baked treats to Walmart stores around the country. See First Am. Compl. ("FAC") ¶ 15, ECF No. 16. However, because of Svenhard's bankruptcy, the \$218,643.93 owed to Divine for the transport of goods has gone unpaid. Id. With little hope of recovering from Svenhard's, Divine filed suit against Walmart to obtain the unpaid freight charges. Walmart argues that it has no legal responsibility to pay these charges and moves to dismiss Divine's FAC for failing to state a claim upon which relief can be granted. See Mot. to Dismiss ("Mot."),

1 ECF No. 17.

2 For the reasons set forth below, the Court GRANTS Walmart's
3 Motion to Dismiss.¹

4
5 I. BACKGROUND

6 Divine, the carrier, was hired by Svenhard's, the shipper,
7 to pick up thirty-five loads of baked goods and transport them to
8 Walmart, the consignee. FAC ¶ 19. This was arranged for through
9 the use of bills of lading. FAC ¶¶ 15, 26. The bills of lading
10 are the only form of written contract between Divine and
11 Svenhard's. FAC ¶ 26.

12 Divine picked up the first load of goods from Svenhard's for
13 delivery to Walmart on July 18, 2019, and the last load of goods
14 on October 29, 2019. FAC ¶ 20. When a load of goods was
15 delivered to Walmart, Walmart either placed a stamp or sticker on
16 the front or back of the bills of lading and gave a copy of the
17 bills of lading to Divine's drivers. FAC ¶¶ 32, 33-34. After
18 the copy of the original bill of lading was received at Divine's
19 headquarters, an invoice was submitted along with a copy of the
20 bill of lading to Svenhard's for payment within 90 to 120 days.
21 FAC ¶ 35. The combined cost of the delivery of baked goods is
22 \$218,643.93. FAC ¶ 16. Svenhard's has not paid for any of the
23 loads and Divine can no longer obtain payment from the bakery
24 because it filed for bankruptcy and no longer exists. FAC ¶ 21.

25 On December 24, 2020, Divine filed suit against Walmart to
26

27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for May 18, 2021.

1 recover the costs of delivering Svenhard's baked goods in Placer
2 County Superior Court. See Notice of Removal, ECF No. 1.
3 Walmart removed the matter to federal court on February 3, 2021.
4 Id. On March 26, 2021, Divine filed its FAC. The FAC alleges
5 three claims against Walmart: (1) third party liability of
6 carrier pursuant to an implied-in-fact contract; (2) unjust
7 enrichment; and (3) 49 U.S.C. § 13706 liability. See FAC ¶¶ 48-
8 61. Walmart moves to dismiss the FAC in its entirety, arguing
9 the first claim fails because there is no implied-in-fact
10 contract, the second claims fails because California does not
11 recognize unjust enrichment as a stand-alone cause of action, and
12 the third claim fails because 49 U.S.C. § 13706 is inapplicable
13 here. See generally Mot. Divine opposes the motion. See Opp'n,
14 ECF No. 18. Walmart filed a reply. See Reply, ECF No. 19.

16 II. OPINION

17 A. Legal Standard

18 Federal Rule of Civil Procedure 8(a)(2) requires "a short
19 and plain statement of the claim showing that the pleader is
20 entitled to relief." Fed. R. Civ. P. 8(a)(2). Courts must
21 dismiss a suit if the plaintiff fails to "state a claim upon
22 which relief can be granted." Fed. R. Civ. P. 12(b)(6). To
23 defeat a Rule 12(b)(6) motion to dismiss, a plaintiff must
24 "plead enough facts to state a claim to relief that is plausible
25 on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570
26 (2007). This plausibility standard requires "factual content
27 that allows the court to draw a reasonable inference that the
28 defendant is liable for the misconduct alleged." Ashcroft v.

1 Iqbal, 556 U.S. 662, 678 (2009). At this stage, the court "must
2 accept as true all of the allegations contained in a complaint."
3 Id. But it need not "accept as true a legal conclusion couched
4 as a factual allegation." Id.

5 B. Implied-in-Fact Contract

6 Divine's first claim against Walmart asserts an implied-in-
7 fact contract between the two parties. See FAC ¶¶ 48-54.

8 Divine alleges that this contract makes Walmart, as consignee,
9 the third party responsible for Svenhard's outstanding bills.

10 See FAC ¶ 49. Specifically, Divine alleges that Walmart
11 "arranged the shipments from [Svenhard's] to Walmart" via the
12 bills of lading, was "aware that [Svenhard's] would be using
13 [Divine]," and was "aware that should [Svenhard's] not pay that
14 [Walmart] would be responsible [] for the freight charges." FAC
15 ¶ 50. Divine further alleges that Walmart, as consignee of all
16 thirty-five loads, "impliedly agreed to pay for these freight
17 charges" should Svenhard's fail to do so. FAC ¶ 51.

18 Walmart advances several reasons why this claim is
19 defective. See Mot. at 5-9. The argument that takes the cake
20 is a simple one that does not require the Court to determine
21 whether certain facts alleged in the FAC are demonstrably false.
22 See Mot. at 5-7. That is: The bills of lading are express,
23 written contracts between Svenhard's and Divine. See Southern
24 Pac. Transp. Co. v. Commercial Metals Co., 456 U.S. 336, 342
25 (1982) ("The bill of lading is the basic transportation contract
26 between the shipper-consignor and the carrier; its terms and
27 conditions bind the shipper and all connecting carriers."). And
28 it is well established that if a dispute is governed by an

1 express contract, the terms of that contract control. See U.S.
2 for Use of Westinghouse Elec. Supply Co. v. Ahearn, 231 F.2d
3 353, 356 (9th Cir. 1955) ("The terms of the express contract
4 control. There cannot be an implied contract either in law or
5 in fact contrary in terms to a controlling express contract.").
6 Here, the express contract makes clear that: (1) the contract is
7 between Svenhard's, the shipper, and Divine, the carrier, as
8 signatories; and (2) the freight charges are to be paid by the
9 shipper. See Bills of Lading, Ex. 3 to FAC, ECF No. 16-3.

10 Divine attempts to rebut this well-established principle of
11 law by contending that the bills of lading are subject to the
12 terms and conditions of the Uniform Domestic Straight Bill of
13 Lading Act ("Bill of Lading Act"). See Opp'n at 1-2. According
14 to Divine, if the shipper does not pay the freight charges, § 7
15 of 45 C.F.R. Pt. 1035.1, App. B, "imposes an obligation on the
16 consignee" to pay them. Id. However, as Walmart points out,
17 Divine omits important language from the bills of lading in its
18 opposition. The bills of lading state that they are "subject to
19 all the terms and conditions of the Uniform Domestic Straight
20 Bill of Lading set forth . . . in the applicable motor carrier
21 classification or tariff if this is a motor carrier shipment."
22 See Bills of Lading. Thus, the shipments were subject to the
23 terms and conditions of an applicable classification or tariff,
24 not to all the provisions of the Bill of Lading Act or its
25 associated regulations. Divine fails to plead any applicable
26 classification or tariff that might allow this Court to find
27 that Walmart is responsible for the unpaid freight charges.
28 Instead, Divine acknowledges that the bills of lading are

1 complete contracts and that there are no terms other than those
2 in the bills of lading attached as Exhibit 3 to the FAC. See
3 FAC ¶¶ 17-20.

4 Divine also argues that Walmart is liable for the freight
5 charges because "pre-paid" was not used on the bills of lading.
6 See Opp'n at 7. This argument is similarly without merit as
7 there is no specific format or language required when drafting
8 bills of lading, and the parties are free to create contractual
9 liability among themselves. See Western Home Transp., Inc. v.
10 Hexco, LLC, 28 F.Supp.3d 959, 963-65 (D.N.D. 2014) ("The
11 shipper/consignor and the carrier are free to vary the terms of
12 their contract as they see fit with respect to liability for
13 freight charges and reflect that either in the bill of lading,
14 agreements outside of the bill of lading, or both.").

15 The language used in the bills of lading is neither
16 contradictory nor ambiguous. These express contracts state, in
17 no uncertain terms, that the contracting parties are Divine and
18 Svenhard's, and the freight charges are to be covered by
19 Svenhard's. Walmart, as consignee, was merely the recipient of
20 the goods. Accordingly, Divine's first claim for liability
21 based on an implied-in-fact contract fails as a matter of law
22 and is DISMISSED WITH PREJUDICE.

23 C. Unjust Enrichment

24 Divine's second claim against Walmart is for unjust
25 enrichment. See FAC ¶¶ 55-57. Walmart argues that this claim
26 fails because California law does not recognize a stand-alone
27 claim for unjust enrichment. See Mot. at 9. The Court agrees.
28 "California does not recognize unjust enrichment as a separate

1 cause of action." Castillo v. Toll Bros., Inc., 197 Cal.App.4th
2 1172, at 1210 (2011). Divine concedes as much by failing to
3 contest this argument in its opposition brief. See Ardente,
4 Inc. v. Shanley, 2010 WL 546485, at *6 (N.D. Cal. 2010)
5 ("Plaintiff fails to respond to this argument and therefore
6 concedes it through silence."); see also E.D. Cal. L.R. 230(c).

7 Moreover, "[a]s a matter of law, a quasi-contract action
8 for unjust enrichment does not lie where [] express binding
9 agreements exist and define the parties' rights." Mosier v.
10 Stonefield Josephson, Inc., 815 F.3d 1161, 1172 (9th Cir. 2016)
11 (quoting Cal. Med. Ass'n, Inc. v. Aetna U.S. Healthcare of Cal.,
12 Inc., 94 Cal.App.4th 151, 172 (2001)).

13 Accordingly, Divine's second claim for unjust enrichment
14 fails as a matter of law and is DISMISSED WITH PREJUDICE.

15 D. Section 13706

16 Divine's third claim alleges that Walmart must pay for the
17 shipping costs under 49 U.S.C. § 13706, which sets forth tariff
18 requirements for certain transportation. See FAC ¶¶ 58-61.
19 However, "nothing in the [Interstate Commerce Act ("ICA")]
20 suggests that Congress intended to impose absolute liability
21 upon a consignee for freight charges." In re Penn-Dixie Steel
22 Corp., 6 B.R. 817, 820 (S.D.N.Y. 1980), aff'd 10 B.R. 878
23 (S.D.N.Y. 1981). In fact, carriers are often barred from
24 recovering from a consignee under the ICA where its policy
25 against rate discrimination has not been violated. Id. And
26 where, as here, there is no question as to the amount of freight
27 charges, discrimination is not involved, and the question is
28 only who is responsible for payment, then the purpose of the ICA

1 is not frustrated by preventing a carrier from collecting
2 freight charges from the consignee and making it look solely to
3 the shipper. Id.

4 The FAC and the bills of lading make it abundantly clear
5 that Divine must look solely to Svenhard's for the shipping
6 costs. Svenhard's alone contracted with Divine for its carrier
7 services via the bills of lading. See Bills of Lading (signed
8 by Svenhard's and Divine and clearly stating freight charges are
9 to be paid by shipper). And Divine billed Svenhard's directly
10 for the freight charges, once the goods were delivered to
11 Walmart. See FAC ¶ 35 ("[Divine] would submit the invoice along
12 with a copy of the bill of lading to [Svenhard's] for payment
13 [to be paid] within 90 to 120 days by [Svenhard's]"). There
14 are no facts alleged in the FAC that indicate that Divine was
15 looking to Walmart for payment.

16 As in In re Penn-Dixie, "[t]he short and long of the matter
17 is that [Divine's] arrangement with [Svenhard's] contemplated
18 that only [Svenhard's] would be held liable for freight
19 charges." 6 B.R. at 821. Divine and Svenhard's were free to
20 make this arrangement among themselves without contravening any
21 provision of the ICA. Id. The fact that Svenhard's has filed
22 for bankruptcy changes nothing. "[T]he ICA does not insure
23 collection in every instance." Id. Divine does not assert a
24 legally viable claim against Walmart under 49 U.S.C. § 13706.

25 Accordingly, Divine's third claim for § 13706 liability is
26 DISMISSED WITH PREJUDICE.

27 E. Sanctions

28 Walmart exceeded the Court's five-page limit on reply

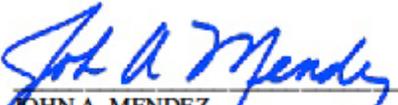
1 memoranda. See Reply; see also Order re Filing Requirements
2 ("Order"), ECF No. 4-2. Violations of the Court's standing order
3 require the offending counsel (not the client) to pay \$50.00 per
4 page over the page limit to the Clerk of the Court. Order at 1.
5 Moreover, the Court will not consider arguments made past the
6 page limit. Id. In total, Walmart's reply memorandum exceeded
7 the Court's page limit by 3 pages. Walmart's counsel must
8 therefore send a check payable to the Clerk for the Eastern
9 District of California for \$150.00 no later than seven days from
10 the date of this order.

11
12 III. ORDER

13 For the reasons set forth above, the Court GRANTS Walmart's
14 Motion to Dismiss. Divine's claims against it are DISMISSED WITH
15 PREJUDICE.

16 IT IS SO ORDERED.

17 Dated: June 2, 2021

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20 JOHN A. MENDEZ,
21 UNITED STATES DISTRICT JUDGE
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