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UNITED STATES DISTRICT COURT
Northern District of California

MITSUI O.S.K. LINES, LTD.,

No. C 11-02861 MEJ

Plaintiff,

**ORDER RE DEFENDANT AMERICAN
GLOBAL LOGISTICS, LLC'S
MOTION TO DISMISS**

v.

SEAMASTER LOGISTICS, INC. ET AL,

[Docket No. 18]

Defendant(s).

I. INTRODUCTION

Pending before the Court is Defendant American Global Logistics, LLC's ("AGL") Motion to Dismiss Plaintiff Mitsui O.S.K. Lines, LTD's ("MOL") Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 18. MOL has filed an Opposition (Dkt. No. 35), to which AGL filed a Reply (Dkt. No. 36). Defendants Seamaster Logistics, Inc. ("Seamaster"), and Summit Logistics International, Inc. ("Summit") join in AGL's Motion. Dkt. No. 34. The Court finds this matter suitable for disposition without oral argument and therefore **VACATES** the hearing set for October 20, 2011. *See* Civil L. R. 7-1(b). After carefully considering the parties' arguments and controlling legal authorities, the Court **GRANTS** AGL's Motion and concurrently **GRANTS** MOL leave to file an amended complaint.

II. BACKGROUND

On June 21, 2011, MOL filed its Complaint against Defendants AGL, Seamaster and Summit. Compl., Dkt. No. 1. The relevant allegations, taken from MOL's Complaint are as follows.

MOL is an ocean carrier and common carrier of goods for hire between the United States and foreign ports, including the Port of Oakland. *Id.* ¶¶ 2, 3. MOL transports cargo shipments on both a "port-to-port" and "door-to-door" basis. *Id.* ¶ 8. For "port-to-port" shipments, MOL's responsibility is only to transport the cargo from one port to another. *Id.* ¶ 8. For "door-to-door" shipments, in

1 addition to the ocean move from one port to another, MOL may assume responsibility to make
2 arrangements and pay for inland moves to the port of loading and/or from the port of discharge. *Id.*
3 “Through carriage” or “through transport” is ocean transportation that includes inland transportation
4 to and/or from a door location. *Id.*

5 Among MOL’s customers are Non Vessel Operating Common Carriers (“NVOCC”). *Id.* ¶ 9.
6 AGL, Seamaster, and Summit are NVOCCs and MOL’s customers that have booked and/or arranged
7 to be booked shipments with MOL for “door” pick-up of cargo to be carried to the United States from
8 Shenzhen, located in the Guangdong Province in south China. *Id.* ¶¶ 4-6, 10. MOL alleges that, as to
9 each shipment booked for door pick-up, it was required by its contracts with Seamaster and Summit
10 to pay the cost of trucking the shipments from the places of origin – thought to be a factory or
11 warehouse – to the ports of loading, and that AGL “was a regular consignee of many such
12 shipments.” *Id.*

13 MOL avers that “[o]n September 1, 2009, an employee of MOL’s agent in Hong Kong, MOL
14 (HK) Agency, entered into a written contract with Summit International Logistics Ltd. (“Summit
15 International”), whereby Summit International was to arrange for truck services in Shenzhen.”¹ *Id.* ¶
16 11. According to MOL, the written contract simply memorialized an arrangement that had already
17 been in place for years. *Id.* MOL alleges that, “[a]s a result of this arrangement, whenever Summit,
18 Seamaster and/or AGL represented to MOL that they had shipments that had to be picked up in
19 Shenzhen, MOL was billed and paid for Shenzhen truck services that were said to have been arranged
20 on MOL’s behalf.” *Id.*

21 At some point thereafter, while auditing shipments booked by or on behalf of Summit, AGL,
22 and Seamaster for carriage from Shenzhen to the U.S., MOL discovered that the contracts of carriage
23 entered into by Summit, Seamaster, and AGL with their cargo interests provided for the receipt of
24 cargo directly at the ports of loading in China. *Id.* ¶ 12. The customers of Summit, Seamaster, and/or
25 AGL therefore had to arrange and pay for all origin truck services and the shipments were delivered
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28 ¹ The contract was signed by Jerry Huang, who is a corporate officer of Seamaster. *Id.*

1 Pursuant to Rule 9(b), “[i]n alleging fraud or mistake, a party must state with particularity the
2 circumstances constituting fraud or mistake.” To satisfy this heightened pleading standard, a
3 complaint alleging fraud must state the time, place, and specific content of misrepresentations, as
4 well as the misrepresenting parties. *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 558 (9th Cir.
5 2010). In this way, “Rule 9(b) demands that the circumstances constituting the alleged fraud be
6 specific enough to give defendants notice of the particular misconduct . . . so that they can defend
7 against the charge and not just deny that they have done anything wrong.” *Kearns v. Ford Motor*
8 *Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (internal quotation marks omitted). Rule 9(b)’s
9 requirements apply not only to fraud claims, but also to claims that rely entirely on a fraudulent
10 course of conduct. *Id.* at 1125.

11 Likewise, “[w]here a plaintiff alleges a conspiracy to commit fraud, Rule 9(b) requires more
12 than conclusory allegations of the conspiracy.” *S. Union Co. v. Sw. Gas Corp.*, 165 F. Supp. 2d 1010,
13 1020 (D. Ariz. 2001); *see also Wanetick v. Mel’s of Modesto, Inc.*, 811 F. Supp. 1402, 1406 n. 3
14 (N.D. Cal. 1992). Allegations of conspiracy must be accompanied by “the who, what, when, where,
15 and how of the misconduct charged.” *See Vess v. Ciba—Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th
16 Cir. 2003) (internal citations and quotation marks omitted). This does not mean, however, that a
17 plaintiff alleging a fraudulent scheme by multiple defendants must plead each of these elements as to
18 each defendant. As the Ninth Circuit explained:

19 [T]here is no absolute requirement that where several defendants are sued in
20 connection with an alleged fraudulent scheme, the complaint must identify false
21 statements made by each and every defendant. “Participation by each conspirator in
22 every detail in the execution of the conspiracy is unnecessary to establish liability, for
23 each conspirator may be performing different tasks to bring about the desired result.”
24 *Beltz Travel Service, Inc. v. Int’l Air Transport Ass’n*, 620 F.2d 1360, 1367 (9th Cir.
25 1980). On the other hand, Rule 9(b) does not allow a complaint to merely lump
26 multiple defendants together but “require[s] plaintiffs to differentiate their allegations
27 when suing more than one defendant . . . and inform each defendant separately of the
28 allegations surrounding his alleged participation in the fraud.” *Haskin v. R.J.*
Reynolds Tobacco Co., 995 F. Supp. 1437, 1439 (M.D. Fla. 1998) (citation, quotation
omitted). In the context of a fraud suit involving multiple defendants, a plaintiff must,
at a minimum, “identif[y] the role of [each] defendant[] in the alleged fraudulent
scheme.” *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir. 1989).

Swartz v. KPMG LLC, 476 F.3d 756, 764-65 (9th Cir. 2007).

1 Here, AGL asserts that the Complaint contains no allegations of misrepresentations or
2 omissions by AGL and fails to set forth any specific facts regarding the conspiracy or “arrangement”
3 in which AGL allegedly joined and participated. Mot. at 6. Rather, AGL argues that MOL merely
4 lumped all Defendants together and alleged in a conclusory manner that they conspired with each
5 other and acted as each other’s agents to commit the purported fraud. *Id.* AGL thus contends that the
6 allegations fail to state a claim that is plausible on its face and are wholly insufficient to state a claim
7 against AGL under Rule 9(b). *Id.*

8 MOL, however, maintains that it has alleged sufficient facts regarding AGL and its role in the
9 fraudulent scheme to satisfy Rule 9(b) and to defeat AGL’s 12(b)(6) challenge. Opp’n at 2-8. With
10 respect to MOL’s allegation that AGL participated in a fraudulently scheme to induce MOL to pay
11 for inland truck shipping that was not necessary or performed, MOL cites to paragraphs 7, 10, 11, 12,
12 and 13 of its Complaint. *Id.* at 5-6. Reviewing these paragraphs, the Court agrees with AGL that the
13 allegations fall short of Rule 9(b)’s pleading standard. Notably, while MOL cites generally to these
14 excerpts from its Complaint, it fails to pinpoint any averments in the paragraphs alleging how AGL
15 conspired with either of the other Defendants to overcharge MOL for inland shipping or how AGL
16 perpetuated the fraudulent scheme. Rather, as AGL correctly notes, MOL merely alleges that: (1)
17 AGL was a co-conspirator (Compl. ¶ 7); (2) AGL “was a regular consignee of many such shipments”
18 (Compl. ¶ 10); and (3) AGL “acted in concert and/or aided and abetted” the other Defendants “as part
19 of an overall scheme to defraud and deceive MOL,” (Compl. ¶ 13). Such conclusory statements are
20 insufficient under Rule 9(b).

21 AGL also contends that MOL has failed to allege the circumstances giving rise to the
22 fraudulent arrangement, *i.e.*, the “who, what, when; where, and how.” Based on the Court’s reading
23 of the Complaint, it is unclear whether MOL is alleging that AGL independently made fraudulent
24 misrepresentations or was only involved in perpetuating another Defendant’s fraudulent scheme. To
25 the extent that MOL is asserting that each Defendant, individually, made fraudulent statements
26 regarding the inland shipping costs, MOL must plead facts as to each of those elements for each
27 Defendant. However, as explained above, to the extent that MOL is asserting a fraudulent scheme in
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1 which all Defendants participated, MOL must specifically allege each Defendant's role in the
2 scheme, even if the Defendant did not make the initial fraudulent statement. *See Swartz*, 476 F.3d at
3 764-65; *see also See In re Equity Funding Corp. of Am. Secs. Litig.*, 416 F. Supp. 161, 181 (C.D. Cal.
4 1976). As it now stands, the only representation identified in the Complaint concerns the September
5 2009 contract executed by MOL's Hong Kong agent and Summit International.² *See* Compl. ¶ 11.
6 While MOL alleges that the contract "simply memorialized an arrangement that had already been in
7 place for years" (*Id.* ¶ 11), and argues in its Opposition that the "arrangement" that forms the basis of
8 its claims is broader than just the contract, MOL's Complaint is devoid of allegations concerning this
9 arrangement. Simply asserting that an arrangement existed because MOL discovered common
10 practices among the Defendants is insufficient to hold AGL liable on a conspiracy to defraud theory.
11 *See Twombly*, 550 U.S. at 565 & fn. 10 (allegations of defendants' parallel conduct alone did not
12 establish "plausible" claim of conspiracy).

13 Finally, the fact that MOL asserted claims for intentional and negligent misrepresentation do
14 not allow it to get around these pleading deficiencies. Because MOL has not alleged any specific
15 conduct by AGL or sufficient facts to support a conspiracy to defraud theory, there is no basis to
16 support either claim against AGL. Furthermore, to the extent that MOL's misrepresentation claims
17 are premised on fraudulent conduct, they are subject to Rule 9(b) and must be pled with particularity.
18 *See Vess*, 317 F.3d at 1103-04; *Stearns v. Select Comfort Retail Corp.*, 2009 WL 1635931, at * 12
19 (N.D. Cal. June 5, 2009).

20 In sum, the Court finds that MOL has failed to set forth sufficient allegations regarding the
21 fraudulent scheme that forms the basis of its claims against AGL and the other Defendants.
22 Dismissal pursuant to Rule 9(b) and 12(b)(6) is therefore appropriate. AGL requests that the Court
23 dismiss MOL's Complaint with prejudice. However, because MOL may remedy these pleading
24 deficiencies, the Court will grant MOL leave to file an amended complaint.

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26 ² MOL has not alleged how any of the Defendants, including AGL, are connected to Summit
27 International. Thus, it is unclear from the face of the Complaint how any of the Defendants can be
28 liable for representations made in the September 2009 contract.

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IV. CONCLUSION

For the reasons set forth above, the Court **GRANTS** AGL's Motion to Dismiss MOL's Complaint with leave to amend. MOL shall file its Amended Complaint no later than November 10, 2011.

IT IS SO ORDERED.

Dated: October 19, 2011



Maria-Elena James
Chief United States Magistrate Judge