UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

№ 20-CV-1118 (FB) (RER)

YANG MING MARINE TRANSPORT CORP.,

Plaintiff,

VS

JAC SHIPPING, INC., JENSEN LEE, AND JOHN DOES 1-10,

Defendants.

REPORT & RECOMMENDATION

January 7, 2021

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to the Honorable Fredrick Block,
Senior United States District Judge

RAMON E. REYES, JR., U.S.M.J.:

Your Honor has referred to me for a report and recommendation plaintiff Yang Ming Marine Transport Corp.'s ("Plaintiff" or "Yang Ming") motion for default judgment. (Dkt. Nos. 8–11, 13; Order dated July 9, 2020). For the reasons discussed herein, I respectfully recommend that Yang Ming's motion be denied and that Yang Ming be ordered to show cause in writing within fourteen days why the Complaint should not be dismissed for lack of subject matter jurisdiction.

BACKGROUND

Yang Ming, an ocean carrier, seeks to recover $52,947.30 in compensation it paid to JAC Shipping, Inc. ("JAC"), a licensed freight forwarder, for shipments made by Gleemonsky Enterprises (USA) Inc. ("Gleemonsky") and JSL Logistics Corp. ("JSL"). (Dkt. No. 1 ("Compl") ¶ 19). Yang Ming claims that JAC had a beneficial interest in Gleemonsky's and JSL's shipments because defendant Jansen Lee, JAC's chief executive officer, is also Gleemonsky's and JSL's chief executive officer. (*Id.* ¶ 3). Yang Ming contends that such an interest violates 46 C.F.R. §

515.42(i),[1] (*Id.* ¶¶ 2, 16–9), which prohibits a licensed freight forwarder such as JAC from receiving "compensation from a common carrier with respect to any shipment in which the forwarder has a beneficial interest or with respect to any shipment in which any holding company, subsidiary, affiliate, officer, director, agent, or executive of such forwarder has a beneficial interest," 46 C.F.R. § 515.42(i). Yang Ming contends that the Court has subject matter jurisdiction over this claim pursuant to 28 U.S.C. § 1331 — "federal question jurisdiction."[2] (Compl. ¶ 8). Plaintiff also contends that JAC's conduct in collecting such fees while maintaining an interest in the cargo is deceptive in violation of New York General Business Law ("GBL") § 349, over which this Court should exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367. (*Id*. ¶¶ 8, 20–25).

DISCUSSION

I. Legal Standards

Federal Rule of Civil Procedure 55 establishes a two-step process to obtain a default judgment. First, "[w]hen a party against whom judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." FED. R. CIV. P. 55(a). Second, after a default has been entered and the defendant fails to appear or move to set aside the default under Rule 55(c), on a plaintiff's motion the Court may enter a default judgment. FED. R. CIV. P. 55(b)(2).

The Second Circuit has often stated the "preference for resolving disputes on the merits," making default judgments "generally disfavored." *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 95–96 (2d Cir. 1993). "Accordingly, plaintiff is not entitled to a default judgment as a matter of right simply because a party is in default." *Finkel v. Universal Elec. Corp.*, 970 F. Supp. 2d 108, 118 (E.D.N.Y. 2013) (citing *Erwin DeMarino Trucking Co. v. Jackson*, 838 F. Supp. 160, 162 (S.D.N.Y. 1993)). Although on default a court "deems all the well-pleaded allegations in the pleadings to be admitted," *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 108 (2d Cir. 1997), the court still has the "responsibility to ensure that the factual allegations, accepted as true, provide a proper basis for liability and relief," *Rolls-Royce PLC v. Rolls-Royce USA, Inc.*, 688 F. Supp. 2d 150, 153 (E.D.N.Y. 2010) (citing *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981)). In other words, "after default . . . it remains for the court to consider whether the unchallenged facts constitute *a legitimate cause of action*, since a party in default does not admit conclusions of law." *Id.* (citations omitted) (emphasis added).

In addition to the requirements of Rule 55, Plaintiff must follow the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York (the "Local Rules"). *See Contino v. United States*, 535 F.3d 124, 126 (2d Cir. 2008) (citation omitted) ("Local rules have the force of law, as long as they do not conflict with a rule prescribed by the Supreme Court, Congress, or the Constitution."); *Miss Jones, LLC v. Viera*, No. 18-CV-1398 (NGG) (SJB), 2019 WL 926670, at *4 (E.D.N.Y. Feb. 5, 2019) ("[A] motion for default judgment will

[1] In the "First Claim for Relief" as against JAC, Yang Ming incorrectly refers to a purported violation of "46 C.F.R. § 515.42*(h)(2)(i)*." (Compl. at ¶¶ 16-17) (emphasis added). There is no such subsection within 46 C.F.R. § 515.42. Rather, the subsection to which Yang Ming likely intended to refer is § 515.42(i).

[2] Yang Ming asserts no other basis for subject matter jurisdiction over its claim that defendants violated 46 C.F.R. § 515.42(i).

not be granted unless the party making that motion adheres to certain local and individual rules." (quoting *Bhagwat v. Queens Carpet Mall, Inc.*, No. 14 CV 5474 (ENV) (PK), 2015 WL 13738456, at *1 (E.D.N.Y. Nov. 24, 2015))), *R & R adopted by* 2019 WL 955279 (Feb. 26, 2019).

Local Civil Rule 55.2(b) provides that a party seeking default judgment "shall append to the application (1) the Clerk's certificate of default, (2) a copy of the claim to which no response has been made, and (3) a proposed form of default judgment." Loc. Civ. R. 55.2(b). Further, Local Civil Rule 7.1 provides that, except for letter-motions, "all motions shall include . . . [a] memorandum of law, setting forth the cases and other authorities relied upon in support of the motion[.]" Loc. Civ. R. 7.1(a)(2).

II. Plaintiff's motion fails to comply with Local Rules 55.2 and 7.1

Plaintiff's motion fails to comply with the Local Rules in two ways, one more significant than the other.

First, Plaintiff did not attach to its motion the certificate of default or the complaint in violation of Local Rule 55.2(b). (*See* Dkt Nos. 8–11, 13); Loc. Civ. R. 55.2(b). This alone could be reason enough to deny Plaintiff's motion, although the Court would have discretion to overlook the violation. *See Guangzhou Yongjia Garment Manufacturing Co. Ltd. v. Zoomers Inc.*, No. 19-CV-2759 (NGG) (LB), 2020 WL 5578936, * 5 (E.D.N.Y. Aug. 28, 2020) (collecting cases) (recommending denial of default judgment in part due to failure to comply with Local Rule 55.2(b)), *R & R adopted by* 2020 WL 5577706 (Sept. 17, 2020). *Compare Century Sur. Co. v. Atweek, Inc.*, No. 16-CV-335 (ENV) (PK), 2018 WL 10466835, at *1 (E.D.N.Y. Jan. 9, 2018) ("A motion for default judgment will not be granted unless the party making the motion adheres to all of the applicable procedural rules. One such rule, Local Civil Rule 55.2(b) provides that certain items must be appended to a default judgment motion . . . . The fact that some of these items may be found electronically, scattered on the docket, does not absolve movants of their obligation to collect and append copies to their moving papers."), *and Apex Mar. Co. v. Furniture, Inc.*, No. 11-CV-5365 (ENV) (RER), 2012 WL 1901266, at *1 (E.D.N.Y. May 18, 2012) (denying motion for default judgment for failure to submit copy of Clerk's certificate of default), *and Evseroff v. I.R.S.*, 190 F.R.D. 307, 308 (E.D.N.Y. 1999) (same), *with Gustavia Home, LLC v. Vaz*, No. 17-CV-5307 (ILG) (RER), 2019 WL 3752772, at *4 (E.D.N.Y. Aug. 8, 2019) ("the Second Circuit has made it clear that the court has broad discretion to excuse noncompliance with Local Rules." (quotation omitted)), *aff'd*, 824 F. App'x 83 (2d Cir. 2020).

Second, and more significantly, Plaintiff did not include a memorandum of law as required by Local Rule 7.1(a)(2). (*See* Dkt Nos. 8–11, 13); Loc. Civ. R. 55.2(b). In light of the substantial question as to whether the Court has federal question jurisdiction over Plaintiff's claims, Point III *infra*, this failure is sufficient in and of itself to warrant denial of the motion for default judgment. *E.g.*, *Pompey v. 23 Morgan II, LLC*, No. 16-CV-2065 (ARR) (PK), 2017 WL 1102772, at *3 (E.D.N.Y. Feb. 13, 2017) (citing *Cardoza v. Mango King Farmers Market Corp.*, No. 14-CV-3314 (SJ) (RER), 2015 WL 5561033, at *2 n.4 (E.D.N.Y. Sept. 1, 2015), *R & R adopted* (Sept. 21, 2015)) ("The absence of a memorandum of law that comports with the requirements of Rule 7.1 could alone form a basis for denying Plaintiff's motion [for default judgment]."), *R & R adopted* (Mar. 23, 2017); *Lanzafame v. Dana Restoration, Inc.*, 09-CV-0873 (ENV) (JO), 2010 WL

6267657, at *7 (E.D.N.Y. Aug. 12, 2010) ("failure to comply with the local rule requiring [plaintiff] to submit a memorandum of law . . . would be reason enough for the court to deny [his] motion in its entirety."), *R & R adopted by* 2011 WL 1100111 (Mar. 22, 2011); *see also Woo Hee Cho v. Oquendo,* No. 16-CV-4811 (MKB), 2018 WL 9945701, *1 n.2 (E.D.N.Y. Aug. 25, 2018) (denying motion for default judgment for failure to file memorandum of law in compliance with Local Rule 7.1(a)(2)).

III. The Court Lacks Subject Matter Jurisdiction Over Plaintiff's Purported Shipping Act Claim

The Court must be satisfied that subject matter jurisdiction exists before considering the claims presented, even in the context of a motion for default judgment. *Centra Developers Ltd. v. Jewish Press Inc.*, No. 16-CV-6737 (WFK) (LB), 2018 WL 1788148, at *5 (E.D.N.Y. Feb. 20, 2018) (citations omitted) ("Prior to entering a default judgment, the Court must ascertain that subject matter jurisdiction exists over plaintiff's claims."), *R & R adopted by* 2018 WL 1445574 (Mar. 23, 2018); *see also Wynn v. AC Rochester*, 273 F.3d 153, 157 (2d Cir. 2001) (per curiam) (citations omitted); *Lyndonville Sav. Bank & Tr. Co. v. Lussier*, 211 F.3d 697, 700 (2d Cir. 2000) ("It is axiomatic that federal courts . . . may not decide cases over which they lack subject matter jurisdiction.").

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "They possess only that power authorized by Constitution and statute." *Id.* (citations omitted); *see* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). "[T]he party invoking federal jurisdiction bears the burden of establishing that jurisdiction exists." *Bey v. New York*, No. 12-CV-2171 (WFK), 2012 WL 1899379, at *2 (E.D.N.Y. May 4, 2012) (quoting *Conyers v. Rossides*, 558 F.3d 137, 143 (2d Cir. 2009)).

"Whether federal courts have federal question jurisdiction over an action is typically governed by the 'well-pleaded complaint' rule, pursuant to which federal question jurisdiction exists only if 'plaintiff's statement of his own cause of action shows that it is based' on federal law." *Romano v. Kazacos*, 609 F.3d 512, 518 (2d Cir. 2010) (quoting *Vaden v. Discovery Bank*, 556 U.S. 49, 60 (2009)); *see also Whitehurst v. 1199SEIU United Healthcare Workers E.*, 928 F.3d 201, 206 (2d Cir. 2019) ("[F]ederal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." (citation omitted)). Jurisdiction pursuant to § 1331 is properly invoked when a plaintiff "pleads a colorable claim 'arising under' the Constitution or laws of the United States." *Belmont v. JetBlue Airways Corp.*, 401 F. Supp. 3d 348, 353 (E.D.N.Y. 2019) (citation omitted); *see also New York v. Shinnecock Indian Nation*, 686 F.3d 133, 138 (2d Cir. 2012) ("A cause of action raises an issue of federal law only when 'a right or immunity created by the Constitution or laws of the United States . . . [is an] essential [element] of the . . . cause of action." (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936))). To properly invoke federal question jurisdiction the claim must attempt to enforce a "private right of action" that "depend[s] necessarily on a substantial question of federal law." *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 807–09 (1986).

Here, Plaintiff's own statement of its cause of action shows that it is based on a *federal regulation*, 46 C.F.R. § 515.42, as establishing federal question jurisdiction.

(Compl. ¶¶ 1, 8). Section 515.42, titled "Forwarder and carrier compensation; fees", regulates the compensation of freight forwarders and requires that they complete certain certifications in order to receive payment for their services. 46 C.F.R. § 515.42; *see also* Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries, 64 Fed. Reg. 11156-01, 1999 WL 114087 (Mar. 8, 1999) (codified at 46 C.F.R. pt. 510, 515, 583). A federal regulation by itself, however, cannot establish federal question jurisdiction. *Sofia v. Esposito*, No. 17 Civ. 1829 (KPF), 2019 WL 6529432, at *6 (S.D.N.Y. Dec. 4, 2019) ("[P]rivate rights of action to enforce federal law must be created by Congress." (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001))); *see also Abrahams v. MTA Long Island Bus*, 644 F.3d 110, 117–18 (2d Cir. 2011) ("Language in a regulation may invoke a private right of action that Congress *through statutory text created*, but it may not create a right that Congress has not." (emphasis added) (quoting *Sandoval*, 532 U.S. at 291)). A plaintiff must do more.[3] Indeed, a plaintiff must cite to statutory authority that created the private right of action. *See id.*

Therefore, to determine whether a private right of action, and hence federal question jurisdiction exists in this context, one must look to the statute under which § 515.42 was promulgated — the Shipping Act of 1984, 46 U.S.C. §§ 40101, *et. seq*. (the "Shipping Act" or "Act"). *See* Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries, 64 Fed. Reg. 11156; *see also Taylor ex rel. Wazyluk v. Hous. Auth. of New Haven*, 645 F.3d 152, 153 (2d Cir. 2011) ("[A] right of action can extend no further than the personal right conferred by the plain language of the statute." (quotations and citations omitted)); *Abrahams*, 644 F.3d at 118 (citing *Sandoval* for the proposition that if "the regulation applies—but does not expand—the statute," then the statute's private right of action extends to its regulations); *Sofia*, 2019 WL 6529432, at *6.

Yang Ming does not cite to any particular provision of the Shipping Act to establish federal question jurisdiction. Indeed, Yang Ming does not cite to any provision of the Shipping Act at all.[4] Regardless, there is a substantial body of case law in this Circuit and others that establishes that the Shipping Act does not provide a private right of action, and therefore cannot provide a basis for federal question jurisdiction. *See MAVL Cap., Inc. v. Marine Transp. Logistics, Inc.*, 130 F. Supp. 3d 726, 730–31 (E.D.N.Y. 2015) (dismissing Shipping Act claims for lack of federal question jurisdiction); *Mediterranean Shipping Co. USA Inc. v. AA Cargo Inc.*, 46 F. Supp. 3d 294, 301 (S.D.N.Y. 2014) (collecting cases) ("[T]the

[3] Regardless, there should be no question that § 515.42 on its own does not provide for federal question jurisdiction, even if it could. I have carefully reviewed the regulation itself, and those other regulations found in Part 515, "Licensing, Registration, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries", and can say with certainty that there is nothing therein that even implies that the Federal Maritime Commission, which promulgated the regulations, intended to extend a private right of action that Congress explicitly or implicitly created in the authorizing legislation — the Shipping Act of 1984, 46 U.S.C. §§ 40101, *et. seq*. In addition, there are no reported cases in which any federal court has determined that § 515.42 creates federal question jurisdiction.

[4] Although not cited by Yang Ming, the Shipping Act does prohibit "[a]n ocean freight forwarder [from] receiv[ing] compensation from a common carrier for a shipment in which the ocean freight forwarder has a direct or indirect beneficial interest", 46 U.S.C. § 40904(c), the very act complained of here. As discussed below, however, it is at the very least highly doubtful that this provision provides for a private right of action.

Shipping Act does not provide for a private cause of action in federal district court; rather, alleged violations of the Shipping Act must be addressed with the Federal Maritime Commission."); *Va. Int'l. Terminals v. Va. Elec. & Power Co.*, 21 F. Supp. 3d 599, 605–06 (E.D. Va. 2014) ("Shipping Acts do not provide the federal courts with original subject matter jurisdiction."); *Port Auth. of N.Y & N.J. v. Maher Terminals, LLC*, No. 08 Civ. 2334 (DRD), 2008 WL 2354945, at *3 (D.N.J. June 3, 2008) ("[N]o provision of the Shipping Act of 1984 provides a federal cause of action for violations of the Act."); *Gov't of Guam v. Am. President Lines, Ltd.*, 809 F. Supp. 150, 152–55 (D.D.C. 1993) (finding that the Shipping Act does not create private right of action to challenge carrier rates directly in federal district court), *aff'd*, 28 F.3d 142, 149 (D.C. Cir. 1994); *see also D.L. Piazza Co. v. W. Coast Line, Inc.*, 210 F.2d 947, 948 (2d Cir.) (explaining that "the Federal Maritime Board has exclusive primary jurisdiction over" matters "under the Shipping Act"), *cert. denied*, 348 U.S. 839 (1954); *GlobeRunners Inc. v. Env't Packaging Techs. Holdings, Inc.*, No. 18 Civ. 4939 (JGK) (BCM), 2020 WL 1865536 (S.D.N.Y. Mar. 6, 2020) (noting in dicta that the Shipping Act does not provide a private right of action), *R & R adopted by* 2020 WL 1862565 (S.D.N.Y. Apr. 14, 2020); *but see, e.g.*, *Hong Kong Islands Line Am. S.A. v. Distrib. Servs., Ltd.,* 795 F. Supp. 983, 990 (C.D. Cal. 1991) (concluding that a private right of action, and hence federal question jurisdiction, exists under the Shipping Act (citing *Sea–Land Serv., Inc. v. Murray & Sons' Co.*, 824 F.2d 740, 742 (9th Cir. 1987))). I am persuaded by the reasoning of those courts which found that there is no private right of action under the Shipping Act, and therefore no federal question jurisdiction.

The Act, which establishes a uniform federal framework for regulating ocean shipping entities,[5] seeks to promote economically sound, evenhanded, and efficient ocean commerce that responds to international shipping practices. 46 U.S.C. § 40101.[6] The Act provides for, among other things, a comprehensive system of licensing, contracting, contractual performance, pricing ("tariffs") and compensation, and prohibited practices in the ocean shipping realm. *E.g.*, *Id.* §§ 40301–303, 40501–503, 40701, 40901–904, 41102–106.

Critically, however, the Shipping Act empowers the Federal Maritime Commission ("FMC"), an independent federal agency, to enforce violations of its provisions in the first instance. *See Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 773 (2002) (Breyer, J., dissenting) (describing FMC as an independent federal agency). The Act empowers the FMC to receive and investigate complaints of violations or do so on its own volition. §§ 41301–302. In

[5] The regulated entities include common carriers, marine terminal operators, non-vessel-operating common carriers, ocean common carriers, and ocean transportation intermediaries, among others. *See* 46 U.S.C. § 40102.

[6] "The purposes of this part are to—
(1) establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;
(2) provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices;
(3) encourage the development of an economically sound and efficient liner fleet of vessels of the United States capable of meeting national security needs; and
(4) promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace."
46 U.S.C. § 40101.

resolving such disputes, the FMC may award damages and attorney's fees, assess monetary civil penalties payable to the United States, and enter injunctions. §§ 41107–109, 41305, 41307.

Quite notably, while the Shipping Act contemplates that district courts will play the limited role of enforcing FMC orders,[7] plaintiffs cannot avail themselves of any remedy in federal court unless they first lodge a complaint with the FMC. *See Troy Container Line, Ltd. v. Housewares, Inc.*, 312 F. Supp. 2d 482, 483 (S.D.N.Y. 2004) (*sua sponte* dismissing breach of contract action for lack of jurisdiction because "the Shipping Act does not confer jurisdiction on the district courts in actions to collect [shipping payments, although it] . . . grants the district courts jurisdiction to enforce orders of the FMC," and thus, "if plaintiff is determined to litigate this case in a federal court, it first will have to obtain a reparation order from the FMC"); *In re M/V Rickmers Genoa Litig.*, 622 F. Supp. 2d 56, 69 (S.D.N.Y. 2009) ("[T]he Shipping Act was not meant to affect maritime parties' rights and liabilities for purposes of civil litigation. Plaintiffs may not sue under the Shipping Act unless and until they have lodged a complaint with the FMC and an investigation has been concluded."), *aff'd sub nom. Chem One, Ltd. v. M/V Rickmers Genoa*, 502 Fed. Appx. 66 (2d Cir. 2012) (summary order); *F.W. Myers & Co., Inc. v. World Projects Int'l*, 903 F. Supp. 353, 355–56 (N.D.N.Y. 1995) (finding no jurisdiction under the Shipping Act until after resolution of an FMC complaint).

Yang Ming has not established how, in light of the statutory scheme, as interpreted by case law, it has a private right of action under the Shipping Act for the particular violation it alleges occurred. I thus feel constrained to find that there is no express or implied private right of action found anywhere within the Shipping Act to permit Yang Ming to sue in federal district court in the first instance under 46 C.F.R. § 515.42(i) or 46 U.S.C. § 40904(c). Accordingly, I respectfully recommend that Yang Ming's motion for default judgment be denied and that it be ordered to show cause in writing why this action should not be dismissed for lack of subject matter jurisdiction.

IV. The Court Should not Exercise Supplemental Jurisdiction over Plaintiff's GBL § 349 Claim

In addition to its purported Shipping Act claim, Yang Ming asserts a claim for alleged deceptive practices under section 349 of GBL. (Compl. ¶¶ 20–25). Plaintiff contends the Court has supplemental jurisdiction over that claim pursuant to 28 U.S.C. § 1367. (*Id.* ¶ 8). I respectfully recommend that default judgment on this claim be denied. Even were the Court to exercise subject matter jurisdiction over Plaintiff's Shipping Act claim, and it should not, default judgment on Plaintiff's claim under GBL should be rejected.

Section 349 makes deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in New York unlawful, and permits a private cause of action by an individual injured by such deceptive acts or practices. N.Y. GEN. BUS. LAW § 349(a), (h). To establish liability, a plaintiff must show:

[7] *See* 46 U.S.C. § 41107(b) (district courts may entertain actions *in rem* to enforce liens created by civil penalties imposed by the FMC); *Id.* § 41109(g) (district courts may enforce civil penalties imposed by the FMC); *Id.* § 42104(e) (district courts may enforce orders and subpoenas issued by the FMC); *Id.* § 41309(a) (district courts may enforce an FMC order for the payment of reparations).

"first that the challenged act or practice was *consumer-oriented*; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." *Lonner v. Simon Prop. Grp., Inc.*, 866 N.Y.S.2d 239, 247 (N.Y. App. Div. 2008) (emphasis added) (citation omitted).

Section 349 was intended to protect consumers—in other words, "those who purchase goods and services for personal, family or household use." *Sheth v. N.Y. Life Ins. Co.*, 709 N.Y.S.2d 74, 75 (N.Y. App. Div 2000). Although to establish that a practice was "consumer-oriented" a plaintiff need not allege that defendant engaged in the complained-of conduct repeatedly, the plaintiff must show "that the acts or practices have a broader impact on consumers at large." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (1995). Accordingly, private contract disputes or other disputes unique to the parties do not constitute "consumer-oriented" activity, precluding liability pursuant to section 349. *Id.* (citing *Genesco Ent. v. Koch*, 593 F. Supp. 743, 752 (S.D.N.Y. 1984)). "In other words, the deceptive act or practice may not be limited to just the parties." *Teller v. Bill Hayes, Ltd.*, 630 N.Y.S.2d 769, 772 (N.Y. App. Div. 1995); *see Int'l Sport Divers Ass'n, Inc. v. Marine Midland Bank, N.A.*, 25 F. Supp. 2d 101, 114 (E.D.N.Y. 1998) (collecting cases) ("The plaintiff must . . . plead and prove injury to the public generally, not just to himself.").

Here, Yang Ming complains of actions that are limited to it and defendants. There are no allegations that any conduct was directed at the consuming public at large. Accordingly, the Complaint fails to state a claim upon which relief can be granted and therefore default judgment should not be granted.

CONCLUSION

For the foregoing reasons, I respectfully recommend that Plaintiff's motion for default judgment be denied and that Plaintiff be ordered to show cause in writing within fourteen (14) days why the Complaint should not be dismissed for lack of subject matter jurisdiction.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b)(2); *see also* FED. R. CIV. P. 6 (providing the method for computing time). Failure to file objections within the specified time waives the right to appeal the District Court's order. *See, e.g.*, *Caidor v. Onondaga Cnty.*, 517 F.3d 601, 604 (2d Cir. 2008) (explaining that "failure to object timely to a . . . report [and recommendation] operates as a waiver of any further judicial review of the magistrate [judge's] decision").

RESPECTFULLY RECOMMENDED

/s/ Ramon E. Reyes, Jr.
RAMON E. REYES, JR.
United States Magistrate Judge
Dated: January 7, 2021
Brooklyn, NY