

Before the
FEDERAL MARITIME COMMISSION

Washington, D.C. 20573

Docket No. 23-12

20230930-DK-BUTTERFLY-1, INC. v.

MSC MEDITERRANEAN SHIPPING COMPANY SA

**COMPLAINANT'S MEMORANDUM IN OPPOSITION TO
RESPONDENT'S PARTIAL MOTION TO DISMISS**

Complainant 20230930-DK-Butterfly-1, Inc., formerly known as Bed Bath & Beyond Inc. (“BBBY” or “Complainant”), by and through its undersigned counsel, respectfully submits this Memorandum in Opposition to Respondent MSC Mediterranean Shipping Company SA’s (“Respondent”) Partial Motion to Dismiss dated January 5, 2024 (the “Motion”), and states as follows in support of such opposition.

ARGUMENT

I. Respondent’s Motion Must Be Denied Because Its Sole Legal Argument Regarding the Scope of Illegal Retaliation Is Contrary to Law and the Commission’s Guidance, as Discussed in *OJ Commerce*.

Respondent states that the only issue raised in the Motion is “whether Complainant makes sufficient factual allegations, which, if taken as true, establish a plausible claim for relief” as it relates to Complainant’s claim in Count V of its Verified Complaint for retaliation in violation of 46 U.S.C. Section 41102(d) (formerly codified at 46 U.S.C. Section 41104(a)(3)). (Motion. at 6.) However, Respondent fails to satisfy its burden under the applicable legal standard, based on Rule 12(b)(6) of the Federal Rules of Civil Procedure, because it fails to identify any legal authority that entitles it to relief.

Respondent cannot dispute that the plain language 46 U.S.C. Section 41102(d) (formerly codified at 46 U.S.C. Section 41104(a)(3)) prohibits a carrier such as MSC from refusing or threatening to refuse cargo space accommodations or engaging in other discriminatory methods *in retaliation* where the shipper “has patronized another carrier, or has filed a complaint, *or for any other reason.*” (Motion at 6 (emphasis added).) The sole legal basis for Respondent’s Motion is the incorrect contention that Section 41102(d)’s reference to “any other reason” can stem “only [from] conduct which brings allegations of unlawful activity to the attention of the [Federal Maritime] Commission via some recognized Commission procedure”, a limitation which appears nowhere in the statute. (Motion at 7.) Respondent argues that, for this reason, Complainant’s

allegations that it brought complaints *to the Respondent* cannot form the basis for a retaliation claim. Respondent is simply wrong.

Respondent's Motion fails to distinguish, or even cite, the recent decision in *OJ Commerce*, which is directly on point. In the *OJ Commerce* decision, the Commission's Chief Administrative Law Judge analyzed § 41104(a)(3) in analogous circumstances and held that “any other reason” may [] also apply to threats” *to the carrier* to bring legal action. *OJ Commerce, LLC, Complainant v. Hamburg Südamerikanische Dampfschiffahrts-gesellschaft A/S & Co. KG and Hamburg Sud North America, Inc., Respondents*, Docket No. 21-11, 2023 WL 3969857, at *39 (ALJ June 7, 2023). The *OJ Commerce* decision recognized that a threat *made to the carrier* to pursue legal action is “closely related to the listed violations” in Section 41102(d) and thus triggers the anti-retaliation provision. *Id.* at *38.

The *OJ Commerce* decision was correctly decided based on clear guidance from the full Commission that applies equally here. In her analysis, Chief Judge Wirth analyzed in detail the December 28, 2021 Statement of the Commission on Retaliation (Docket No. 21-15, 3 F.M.C.2d 201, 207, 2021 WL 9204128 (FMC Dec. 28, 2021)) (the “Retaliation Statement”) relied on by the Respondent in support of the present Motion, reasoning that “[i]deally, parties should be able to discuss what they think could be Shipping Act violations as soon as possible”, and holding that “[t]hese conversations may be limited if ‘threats’ to file a complaint are not included in the anti-retaliation provisions [i]ncluding ‘threats’ to file a complaint as an ‘any other reason’ is consistent with the Commission’s statement that this section should be read broadly.” *Id.* (emphasis added). Respondent's argument that retaliation can only occur in response to complaints to or other communications with the Commission is obviously in direct contrast to the *OJ Commerce* decision and cannot stand.

Furthermore, Respondent misinterprets the Commission's Retaliation Statement. In support of its Motion, the Respondent cites the Retaliation Statement:

[The Commission] interprets 'any other reason' to mean that protected activity under 46 U.S.C. § 41104(a)(3) *includes* other ways that shippers may bring allegations of unlawful activity to the Commission, such as participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or using CADRS' dispute resolution procedures.

(Retaliation Statement at 7) (emphasis added). The Retaliation Statement does *not* say that the list of retaliatory actions that it provides is exhaustive or exclusive: this alone defeats Respondent's motion. To the extent that the Retaliation Statement in any way limits the scope of the "any other reason" provision, the Retaliation Statement states only that such "other reasons" should be "activities of the same class" as patronizing other carriers or bringing complaints. Retaliation Statement at 9. This class already includes informal actions unrelated to the FMC, such as patronizing other carriers, which is ample evidence that Respondent's proposed reading of the Retaliation Statement would be inappropriately restrictive. *OJ Commerce* goes one step further, making clear that complaints directly to carriers about improper conduct fall within the "same class" of conduct protected by the retaliation statute. Moreover, the illustrative list of actions mentioned in the Retaliation Statement includes actions, such as efforts toward alternative dispute resolution, and commenting on rulemaking, that fall far short of filing an actual complaint before the Commission. The *OJ Commerce* decision relied on the broad reading endorsed by the Commission, finding that "the Commission[] state[d] that this section should be read broadly". *OJ Commerce*, 2023 WL 3969857, at *39. Thus, Respondent's attempts to read the Retaliation Statement as a *prohibition* against retaliation claims is a tortured, unsupported reading of that Statement.

In addition to being contrary to Commission guidance and a plain reading of the statute, Respondent's Motion fails as a matter of public policy. At bottom, Respondent argues that carriers are permitted to retaliate at will against customers for raising complaints until, like a referee blowing a whistle, the customer actually files a formal complaint. If adopted, Respondent's proposal would create perverse incentives for all participants in the maritime economy. For carriers, Respondent's proposal would create a legal incentive to retaliate *hard and fast* against any customer who dares to raise any complaint about the carrier's performance or compliance with the Shipping Act. For customers, Respondent's proposal would utterly eliminate any incentive to pursue resolution of complaints through informal means or alternative dispute resolution, instead forcing customers to file complaints before even engaging with the carrier to discuss accommodations. Such a scheme would encourage wasteful, unnecessary filings—and would be directly contrary both to Section 41102(d)'s clear prohibition of retaliation for “any other reason”, and to the Commission's specific guidance that retaliatory conduct in response to efforts to seek alternative dispute resolution procedures is prohibited by Section 41102(d).

II. The Verified Complaint Adequately Alleged Retaliation Under Section 41102(d).

On a motion to dismiss, the Presiding Officer must take the allegations in the Verified Complaint as true and draw all factual inferences in favor of Complainant. *See, e.g., Rendezvous International v. Chief Cargo Services, Inc., Kaiser Apparel, Inc., Edco Logistics, Inc., Oriental Logistics, Inc., and Razor Enterprise*, Docket No. 10-07, 2010 WL 8367625, at *5 (ALJ Sept. 17, 2010). The only question is whether, drawing all such inferences in the Complainant's favor, Complainant has alleged sufficient facts to state a plausible claim for relief. *Id.*

As Respondent recognizes (*see* Motion at 7), the Verified Complaint alleges that Respondent retaliated against Complainant in reaction to Complainant's complaints to Respondent regarding Respondent's improper and illegal practices of artificially limiting supply and falsely

claiming no space was available while allocating such space to shippers willing to pay more under premium rates. (Verified Complaint ¶ 62.) In making these complaints, Complainant engaged in the kind of dialogue encouraged in *OJ Commerce* to discuss possible violations of the Shipping Act as soon as possible, and the Complainant has stated a plausible retaliation claim at the pleadings phase. Respondent does not dispute that Complainant actually made complaints, that such complaints were made in an effort to resolve potential claims, or that Complainant alleges that Respondent subsequently retaliated against Complainant. Accordingly, drawing all factual inferences in Complainant's favor, Complainant has adequately alleged facts sufficient to state a claim for retaliation under Section 41102(d).

CONCLUSION

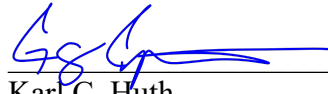
As the movant, Respondent “bears the burden of proving the [Complainant] has failed to articulate a claim upon which relief could be granted.” *Harris v. Citimortgage, Inc.*, 878 F. Supp. 2d 154, 158 (D.D.C. 2012). Because the Respondent raises only a single legal argument in favor of dismissing Complainant's retaliation claim—that “only conduct which brings allegations of unlawful activity to the attention of the Commission via some recognized Commission procedure can constitute ‘for any other reason’”—and because that single legal argument is contradicted by the plain language of the statute, the Commission's Retaliation Statement, and the recent *OJ Commerce* decision, Respondent has not satisfied its burden on this motion to dismiss and the Motion must be denied.

For the reasons stated above, Complainant respectfully requests that the Presiding Officer deny Respondent's Partial Motion to Dismiss.

Dated: January 19, 2024

Respectfully submitted,

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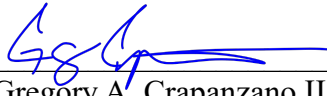
Certificate of Service

I hereby certify that I have this day served the foregoing document upon Respondent MSC Mediterranean Shipping Company SA by emailing copies of those documents to their counsel of record listed below:

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