BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 24-11

OL USA LLC

COMPLAINANT,

v.

MAERSK A/S,

RESPONDENT.

OL USA LLC'S OPPOSITION TO MAERSK A/S's MOTION TO DISMISS FOR LOST REVENUES AND DEMURRAGE/DETENTION

I. PRELIMINARY STATEMENT

Maersk A/S's ("Maersk") Motion to Dismiss fails to articulate a valid ground for dismissal and seeks improper relief. More specifically, the Motion should be denied because it improperly seeks to "dismiss" damages, relies on extrinsic evidence to support its arguments for dismissal, and seeks improper relief by requesting the Federal Maritime Commission ("FMC") prevent OL USA LLC ("OL USA") from using certain discovery.

Maersk spends most of its Motion discussing discovery efforts to date and seeking an order that would bar OL USA from using documents and information produced after June 17, 2024. A motion to dismiss is not the proper vehicle for this requested relief. Moreover, the FMC's July 26, 2024 Order moots Maersk's request. The FMC expressly allowed OL USA to supplement certain document requests and interrogatories by August 1, 2024 which OL USA did. Thus, per the FMC's July 26 Order, OL USA may rely on these materials.

Second, Maersk's argument for dismissal of OL USA's damages is improper because damages are not independent claims that can be dismissed. Furthermore, in its pursuit of dismissal

Maersk relies on materials outside the Complaint. Because the Commission's Rules of Practice and Procedures ("Rules") do not explicitly provide for motions to dismiss, in accordance with Rule 12, the Federal Rules of Civil Procedure apply to Maersk's Motion to Dismiss. It is well settled that a motion to dismiss asks whether a complainant has adequately *pled* the claim, not whether it can *prevail* on its claim. When considering a motion to dismiss, courts are limited to the well-pled allegations in the complaint and any exhibits attached thereto. Maersk argues that OL USA cannot prove damages and relies on outdated discovery responses in doing so. The salient question is not whether OL USA can prove its damages—which it can—but whether OL USA has sufficiently pled a claim for damages. The answer is yes. Accordingly, Maersk's Motion to Dismiss should be denied.

II. FACTUAL BACKGROUND

In November and December 2021, certain shipping containers were mistakenly delivered by a motor carrier to and accepted by a Maersk operated and controlled terminal of the Port of Savannah in Savannah, Georgia: (1) HPCU4154798; (2) HPCU4154761; (3) HPCU4154822; (4) HPCU4154777; and (5) HPCU4154756 (the "Shipping Containers"). Verified Complaint ("Complaint") ¶ 12. Maersk knew at the time of acceptance that it was neither the owner nor lessee of the Shipping Containers. *Id.* at ¶ 15. OL USA sent multiple communications to Maersk alerting Maersk of the error, but Maersk ignored these communications and made no effort to return the Shipping Containers. *Id.* at ¶¶ 16-18. Instead, Maersk used the Shipping Containers for its own exports. *Id.* at ¶ 23. After repeated demands and significant efforts by OL USA, it finally regained possession of its the Shipping Containers. *Id.* ¶ 26.[1]

[1] The Fifth Container was returned during the pendency of this action.

On March 29, 2023, OL USA sent Maersk a demand requesting return of the Shipping Containers still under Maersk's possession at that time, among other things. *Id.* at ¶ 35. Maersk responded on April 14, 2023 claiming that its wrongful possession and use of the Shipping Containers was permitted pursuant to Maersk's tariffs. *Id.* at ¶ 36. (However, Maersk's tariff is a contract to which OL USA is not a party. Thus, OL USA was not bound by Maersk's rules.) But, even if OL USA was willing to utilize Maersk's imposed methods for obtaining its property, when OL USA searched for these tariffs, it was unable to find them. *Id.* at ¶¶ 38-39.

On February 9, 2024, OL USA filed its Complaint against Maersk. On June 14, 2024, the FMC served its first Order on Motion to Compel and Amended Scheduling Order. On July 18, 2024, Maersk filed its Motion to Dismiss. On July 26, 2024, the FMC served its Second Order on Motion to Compel, which gave OL USA until August 1, 2024 to supplement its discovery responses and document productions. On August 1, 2024, OL USA served supplemental written discovery responses and produced a supplemental production of documents. Now, OL USA files its Opposition to Maersk's Motion to Dismiss.

Although the FMC should not consider extrinsic evidence when deciding a motion to dismiss, Maersk's belabored arguments that OL USA has failed to explain its lost profits damages warrants inclusion of its supplemental interrogatory responses on the same.

- Supplemental Response to Interrogatory No. 7: OL USA incorporates its previous objections as though fully restated herein. Subject to and without waiving its general and specific objections, OL USA states that it does not have specific losses because OL USA did not book shipments for the Shipping Containers while they were in Maersk's possession. Rather, OL USA estimates that it could have made approximately $128,680.00 in profits had Maersk not in-gated the Shipping Containers in Savannah so that OL USA could have used the Shipping Containers for its own purpose. Maersk retained the Shipping Containers at a time when carriers were giving discounts and guaranteed space for shippers and ocean transportation intermediaries who had their own boxes. OL USA was not able to take advantage of these discounts because Maersk was using OL USA's Shipping Containers during this time period. *See* OL-

USA000331, OL-USA000333, and OL-USA000335 for calculations of OL USA's lost profits claims and back up documentation for profit margin.

- Supplemental Response to Interrogatory No. 8:[2] Lost profits it could have made if Maersk had timely returned the Shipping Containers. This can be calculated by multiplying the number of trips inbound, the number of containers, and the extra margin. This calculation was done based on a 45 day turn time using a closed loop environment/ shuttle service of containers moving only between Shanghai and Los Angeles. The margin is calculated using actual performance reports from the relevant time period. The spreadsheet and performance reports are being produced herewith. *See* OL-USA000331, OL-USA000333, and OL-USA000335.

III. LAW AND ARGUMENT

A. OL USA Has Produced Relevant Documents And Information Regarding Damages.

Maersk's lengthy recitation of discovery to date is both unnecessary and outdated. Frankly, the Court should simply ignore pages 2 through 9 of Maersk's Motion to Dismiss because those arguments are irrelevant to a motion to dismiss. On July 26, 2024, the FMC ordered OL USA to produce any additional responsive documents and supplement responses to Interrogatory No. 7 and No. 8 by August 1, 2024. OL USA complied with this Order, thus resolving Maersk's complaint that OL USA's discovery responses were deficient.[3] Furthermore, the FMC's Order impliedly permits OL USA to rely on the additional discovery. To interpret the Order any other way would be illogical. There would be no reason to compel OL USA to produce discovery that could not be relied upon in this case. Moreover, a motion to dismiss is not the proper vehicle for the relief Maersk seeks. A motion to dismiss tests the sufficiency of the complaint and should not be used as a Trojan horse to seek a discovery sanction. Thus, the FMC should deny Maersk's request that OL USA be foreclosed from using discovery not produced on or before June 17, 2024.

[2] OL USA only included the portion of this response that discussed lost profits, as that is the salient part of this interrogatory response.

[3] Maersk takes issue with OL USA's representation that its damages are supported by testimonial evidence. OL USA reminds Maersk that testimony *is* evidence and OL USA can support its claim for damages via deposition testimony and affidavits.

B. Motion To Dismiss Standard.

Although the Commission's Rules do not explicitly provide for motions to dismiss, Commission Rule 12 states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules, to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. The Commission looks to Federal Rule of Civil Procedure Rule 12(b)(6) when considering dismissals based on failure to state a claim. *See MAVL Capital v. Marine Transport Logistics*, 2020 FMC LEXIS 216 at *6 (FMC 2020).

"The purpose of Rule 12(b)(6) is to test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits*." Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 155 (2d Cir. 2006). "Under Fed. R. Civ. P. 12 (b)(6), the facts alleged are taken as true and all reasonable inferences are drawn in the complainant's favor." *MAVL Capital v. Marine Transport Logistics*, 2020 FMC LEXIS 216 at *6 (FMC 2020) (*citing Maher II*, 34 S.R.R. at 54, 2015 FMC LEXIS 43 at *36).

A court should not dismiss a complaint where the complainant has stated "enough facts to state a claim to relief that is plausible on its face," or, in other words, where the complaint "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *McKevitt v. Mueller*, 689 F.Supp.2d 661, 665 (S.D.N.Y 2010) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)); *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics*, 32 S.R.R. 126, 136, 2011 FMC LEXIS 12, *25-26 (same).

C. OL USA Plausibly States That It Is Entitled To Recover Damages For Maersk's Violation Of The Shipping Act.

To begin, damages are not considered an independent cause of action and therefore cannot be "dismissed" via a motion to dismiss. *See, e.g., Denton v. McKee*, 332 F.Supp.2d 659, 667

(S.D.N.Y. 2004) (finding "any discussion of damages, compensatory, punitive or otherwise, to be premature at this time" and denying motion to dismiss to the extent it seeks to preclude certain categories of damages); *Somnia, Inc. v. Change Healthcare Tech. Enabled Servs.*, LLC, No. 19-CV-08983 (PMH), 2021 WL 639529, at *3, n.5 (S.D.N.Y. Feb. 16, 2021) (internal citation omitted) (declining to consider argument regarding damages "at this juncture because 'a motion to dismiss is addressed to a 'claim'—not to a form of damages.'"). Thus, Maersk's request that the FMC dismiss certain portions of OL USA's request for damages does not make sense. The substance of Maersk's argument fare no better.

a. OL USA has sufficiently pled lost profits.

Maersk's argument for dismissal of OL USA's lost profits damages relies on OL USA's purported failure to produce responsive discovery. This argument is misguided for several reasons. First, it relies on improper extrinsic evidence. *See Nelson v. Stahl*, 173 F. Supp. 2d 153, 166 (S.D.N.Y. 2001) ("On a motion to dismiss, the Court does not take into account extrinsic evidence or resolve factual disputes."); *Palin v. New York Times Co.*, 940 F.3d 804, 807 (2d Cir. 2019) (holding that district court erred in relying on facts outside the pleadings to dismiss the complaint and reversing district court opinion). Notably, Maersk does not allege that OL USA failed to sufficiently plead its claim for lost profits[4] but rather, that it does not have the evidence to support the damages. This is *precisely* the type of argument that is disallowed at the motion to dismiss stage.

Second, OL USA, in compliance with the FMC's July 26 Order, supplemented its document production and interrogatory responses which provide explanation and backup for OL USA's lost

[4] OL USA seeks lost profit damages, not lost revenues. This distinction does not change the analysis of whether OL USA sufficiently pled damages.

profit damages.[5] OL USA's lost profits claim is based on the profits it could have made if Maersk had timely returned the Shipping Containers. This can be calculated by multiplying the number of trips inbound, the number of containers, and the extra margin. OL USA performed this calculation, which it produced in discovery, based on a 45 day turn time using a closed loop environment/ shuttle service of containers moving only between Shanghai and Los Angeles. The margin is calculated using actual performance reports from the relevant time period. Performing this calculation yields lost profits of $128,680.00. Moreover, as OL USA already represented, its lost profits damages will be supported by testimonial evidence presumably through the depositions Maersk plans to take. Thus, Maersk's argument that OL USA should not be able to seek lost profit damages due to alleged evidentiary deficiencies fails.

Finally, the case law Maersk cites is inapposite. None of it involves a motion to dismiss. Rather, Maersk supports its argument with cases where the court is deciding motions in *limine* and other procedurally distinguishable cases. This makes sense, considering Maersk's motion is more like a motion in *limine* or motion for discovery sanctions rather than a motion to dismiss.

b. OL USA has sufficiently pled detention/demurrage charges.

Maersk improperly relies on extrinsic evidence to argue that OL USA is not entitled to recover detention/demurrage charges from Maersk by citing to OL USA's interrogatory responses. Putting that aside, OL USA's use of Maersk's detention/demurrage tariff is a logical way to capture loss of use of the Shipping Containers which was caused by an inability to access Maersk's tariff.

All shipping containers have a usable value – that is precisely what Maersk is trying to capture with its own detention and demurrage charges to its customers. Maersk charges its customers detention and demurrage and justifies those charges on the basis that its shipping

[5] OL USA also produced an updated detention/demurrage spreadsheet reflecting the return of the Fifth Container.

containers have a use value and, when Maersk is deprived of the use of its shipping containers, it is deprived of that value. OL USA's position is no different.

Had OL USA had access to the tariff such that it could recover the Shipping Containers wrongfully held by Maersk, OL USA could have used those containers to its own economic benefit. Maersk deprived OL USA of the use of its Shipping Containers, and Maersk used those containers for its own benefit for various lengths of time. As the owner of the Shipping Containers, OL USA had a financial interest in keeping those conveyances in continuous operation for its *own* business, not to facilitate Maersk's business.

As such, OL USA has provided the FMC with a basis for its damages (loss of use), and a cognizable and plausible method to measure that loss (using Maersk's own assessment of the value of the Shipping Containers' use value) or, alternatively, the additional profits OL USA could have made on its documented shipments inbound from Shanghai to Los Angeles during the period of time Maersk was using the Shipping Containers. OL USA clearly states that it was damaged. Whether the finder of fact determines that Maersk's measure of its daily loss of use damage is ultimately the *correct or equitable* method to assess OL USA's loss of use is not a basis to dismiss this action. At this stage, all OL USA needs to survive a motion to dismiss is to assert an allegation of its damages, which it clearly does.

D. CONCLUSION

For the foregoing reasons, OL USA respectfully requests that the FMC deny Maersk's Motion to Dismiss in its entirety.

Dated: August 2, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Opposition to Maersk A/S's Motion to Dismiss* was filed on August 2, 2024.

Kelly E. Mulrane

One of the attorneys for OL USA LLC