Before the

FEDERAL MARITIME COMMISSION

Docket No. 24-13

ACCESS ONE TRANSPORT

v.

COSCO SHIPPING LINES CO., LTD.

RESPONDENT'S MOTION FOR PARTIAL DISMISSAL

Pursuant to 46 C.F.R. § 502.69, Respondent COSCO Shipping Lines, Inc. ("Respondent" or "COSCO"), by and through its undersigned attorneys, hereby moves to dismiss with prejudice the complaint ("Complaint") of Complainant Access One Transport ("Access One" or "Complainant") insofar as the Complaint asserts claims under to 46 U.S.C. §§ 41104(a)(3) and (a)(8). The bases for this motion, elaborated below, are:

1. Complainant fails to state a claim for which relief may be granted with respect to alleged violations of 46 U.S.C. § 41104 (a)(3) as in effect for most of the relevant period because that statutory provision applied only to retaliation and only to retaliation regarding against shippers. The Complaint does not allege either retaliation or that Access One is a shipper.

2. Complainant fails to state a claim for which relief may be granted with respect to alleged violations of 46 U.S.C. § 41104 (a)(3) as in effect since June 16, 2022 because the Complainant is not a shipper and the Complaint alleges no retaliation.
3. Complainant fails to state a claim for which relief may be granted with respect to alleged violations of 46 U.S.C. § 41104(a)8) for any part of the relevant period, because that section applies only to service pursuant to a tariff and COSCO did not provide service to Access One at all, much less pursuant to a tariff, and Access One does not allege to the contrary.

I. MOTION TO DISMISS STANDARD

While the Commission's Rules of Practice and Procedure (the "Rules") do not explicitly provide for motions to dismiss, it is well established that the Commission can consider such motions pursuant to Commission Rule 12 (46 C.F.R. §502.12) and Federal Rules of Civil Procedure, Rule 12(b)(1). See, e.g. *MAVL Capital v. Marine Transport Logistics*, 2 F.M.C. 2d 198, 202 (FMC 2020)(the "Commission looks to Federal Rule of Civil Procedure . . . 12(b)(6) when considering dismissals based on failure to state a claim").

Under Fed. R. Civ. P. 12(b)(6), "the facts alleged [in the Complaint] are taken as true and all reasonable inferences are drawn in the complainant's favor." *Id*., citing *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 34 S.R.R. 35, 54 (FMC 2015). To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (citing *Twombly*,

550 U.S. at 556). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

II. COMPLAINANT FAILS TO STATE A CLAIM UNDER 46 U.S.C. § 41104(a)(3)

The Complaint alleges that COSCO violated 46 U.S.C. § 41104(a)(3). Allegations 8, 36.a. It does not, however, say whether it is referring to that section before or after it was amended by the Ocean Shipping Reform Act of 2022 ("OSRA") went into effect on June 16, 2022. As we now show, it doesn't matter, as the Complaint fails in either event.

Complainant alleges that the violations it asserts occurred between April 2021 and August 2022. Precedent at the FMC states that, where a statutory section has been revised during the course of the activities under challenges, the law to be applied is that in effect on the date that the underlying conduct occurred, not that in effect on the date the Complaint was filed. *See Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC – Possible Violations of 46 U.S.C. § 41102(c),* 4 F.M.C. 2d 53, 94 (ALJ 2022) and cases cited therein. Accordingly, the applicable statutory version for COSCO conduct is the: (i) current (post-OSRA22) version for activities since June 16, 2022; and (ii) the pre-OSRA22 version for activities before June 16, 2022. Because the substantial majority of the time period alleged by Complainant is pre-OSRA22 (about 15 of 17 months), we begin with that version of 46 U.S.C. § 41104(a)(3).

Pre-OSRA22 46 U.S.C. § 41104(a)(3) (retaliation against a shipper)[1]

Before being amended by OSRA22, 46 U.S.C. § 41104(a)(3) made it unlawful for a common carrier, either alone or in conjunction with another person, directly or indirectly, to:

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[1] It is possible that Complainant cited 46 U.S.C. § 41104(a)(3) by error, as it seems wholly irrelevant to the factual allegations made in the Complaint. Should Complainant identify any other Shipping Act provisions in its response to this Motion, we will address them in the reply.

> “Retaliate ***against a shipper*** by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason.”

46 U.S.C. § 41104(a)(3) (effective Dec. 4, 2018 to June 15, 2022) (emphasis added).

Any claim by Complainant pursuant to this provision is precluded by two insurmountable obstacles. First, Complainant does not (and cannot) allege that it was a shipper, as expressly required by the statute. Second, as recently held by Judge Crovella in *20230930-DK-Butterfly-1, Inc. v. MSC*, Docket No. 23-12 (Order Granting Respondent’s Partial Motion To Dismiss, March 25, 2024) (“*DK-Butterfly*”), the Complaint does not include sufficient allegations of “retaliation” to support a claim under that section. Although the first reason is obviously dispositive, without more, we briefly address why the second reason is dispositive as well.

In *DK-Butterfly*, the Presiding Officer reaffirmed FMC precedent that “the term “for any other reason” must be read *in pari materia* with the specifically referenced reasons of patronizing another carrier or filing a complaint. Accordingly, a claim of “retaliation” not relating to use of another carrier must include allegations that complainant brought its complaints to the attention of the FMC or at the very least threatened to do so. *Id*. at 5-6.[2]

The Complaint is entirely devoid of any allegation that COSCO retaliated against Access One at all, much less that it did so for a prohibited reason. Accordingly, the Complaint must be dismissed insofar as it asserts violations of 46 U.S.C. § 41104(a)(3) based on activities before June 16, 2022.

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[2] See also, e.g., *California Shipping Line, Inc. v. Yangming Marine Transport Corp*., 25 S.R.R. 1213 1225 (1990) (statue applies “solely to retaliatory acts of a carrier against a shipper”); *Consumer Electronics Shippers Ass’n v. Asia North America Eastbound Rate Agreement*, 26 S.R.R. 85, 91 (1991) (retaliation should not be interpreted so broadly as to read out of the statute the opening reference to retaliation, and if the statute “were applied to any act of discriminatory conduct, it could render the other provisions of the Act prohibiting discrimination superfluous”).

Post-OSRA22 46 U.S.C. § 41104(a)(3) (unreasonable refusal of space)

Section 41104(a)(3) of the Shipping Act currently (post-OSRA22) provides as follows:

> "(a) In General.—A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not . . .
>
> (3) unreasonably refuse cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods . . . ."

Access does not allege that it was refused available cargo space. Indeed, given that it identifies itself as a drayage provider, it would be surprising indeed if Access One had even requested, much less been denied cargo space. In any event, it does not allege so. Nor does Access One allege a "resort to any other unfair or unjustly discriminatory methods." As discussed below with respect to 46 U.S.C. 41104(a)(8), The Complaint does not allege that any other drayage provider received more favorable treatment.[3]

III. <u>COMPLAINANT FAILS TO STATE A CLAIM UNDER 46 U.S.C. § 41104(a)(8)</u>

Both before and after OSRA 2022, 46 U.S.C. § 41104(a)(8) (emphasis added) has said that carriers may not, "for service pursuant ***to a tariff,*** give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage." As with Complainant's purported claim under 46 U.S.C. § 41104(a)(3), this claim has (at least) two fatal flaws.

First, as highlighted in the quote above, claims under 46 U.S.C. § 41104(a)(8) are specifically limited to "service pursuant to a tariff." Access One does not, and could not, allege

[3] In any event, this phrase was intended by Congress to refer only to actions regarding cargo space. As one of the principal sponsors explained, the provision was intended to ensure "ocean carriers make a good-faith effort to negotiate vessel space and accommodate the cargo bookings for U.S. exports." Statement of Rep. Garamendi, H. 5466, Congressional Record (June 13, 2022).

that COSCO provided service to Access One. Nor has it alleged, and again could not allege, that any hypothetical service provided by COSCO to Access One was "pursuant to a tariff." Quite to the contrary, Access One itself avers that the relations between Access One and COSCO are governed by the Uniform Intermodal Interchange and Facilities Access Agreement ("UIIA"). See Allegations 12-13.

Second, Access One does not allege any facts supporting the claim that it was subject to any undue preference at all. In this respect, it does not allege that any similarly situated drayage provider received a better arrangement, much less identify such entity. This by itself warrants dismissal. But more fundamentally, Access One does not allege how it was disadvantaged. Quite to the contrary, it specifically acknowledges that Access One benefits from arrangements between COSCO and third parties (not drayage providers) that allow Access One to take advantage of longer free time.

IV. CONCLUSION

For the foregoing reason, the Complaint should be dismissed insofar as it relates to claims under 46 U.S.C. §§ 41104(a)(3) and (a)(8).

April 8, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2024, a true and correct copy of the foregoing *Respondent's Motion for Partial Dismiss* was served upon the Federal Maritime Commission and the following counsel of record:

Attorney for Complainant:

Stephen Uthoff, Esq.
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Respectfully submitted,

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