FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

PHILLIP MARCIANO LLC, *Complainant* v. US CARGO SERVICES INC., *Respondent.*	**DOCKET NO. 25-11**

Served: December 16, 2025

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION GRANTING MOTION TO DISMISS[1]

I. Introduction

On July 22, 2025, Respondent US Cargo Services Inc. ("US Cargo"), acting pro se, filed a motion to dismiss as well as its answer to the verified complaint ("Motion") along with an exhibit. On July 25, 2025, Complainant Phillip Marciano LLC ("Phillip Marciano") filed its opposition to the motion to dismiss ("Opposition") with two exhibits. Respondent did not file a reply.

On August 26, 2025, the parties were ordered to file additional information. Order Requiring Additional Information at 4-5. On September 18, 2025, Complainant filed its additional information with two exhibits ("Complainant's Brief"). On September 22, 2025, Respondent filed its additional information ("Respondent's Response"). No replies were filed when due on October 6, 2025. The parties were emailed on November 14, 2025, to confirm that no additional filings had been made and requiring any response by November 18, 2025. On November 18, 2025, Complainant filed a reply brief with two exhibits ("Complainant's Reply"). No additional filings were received and the motion is now ready for a decision.

The complaint alleges failure to deliver cargo identified in three bills of lading in violation of the Shipping Act, sections 41102(c) and (d) and 46 C.F.R. § 545.5. The motion requests that the complaint be dismissed in its entirety for failure to state a Shipping Act violation, reparations be denied, Respondent awarded costs and expenses due to a "frivolous and misdirected claim in bad faith," and other relief as appropriate. Motion at 4. There is not a material dispute of facts. Rather, the parties disagree about whether Respondent is required to follow the instructions of the shipper.

[1] This decision will become the order of the Commission in the absence of review by the Commission. Any party may file exceptions to the dismissal within twenty-two days of the date of service. 46 C.F.R. § 502.227.

For the reasons below, the motion to dismiss is granted and the proceeding is dismissed without prejudice. This decision discusses the relevant law, factual basis, arguments and analysis, and issues an order.

II. Relevant Law

Although the Commission's Rules of Practice and Procedure ("Rules") do not explicitly provide for motions to dismiss, Rule 12 of the Commission's Rules 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. "In evaluating whether a complaint before the Commission states a cognizable claim under the Shipping Act, the Commission has relied on Federal Rule of Civil Procedure 12(b)(6) and the federal caselaw interpreting it." *Cornell v. Princess Cruise Lines, Ltd.*, Docket No. 13-02, 2014 WL 5316340, at *6 (FMC Aug. 28, 2014).

Federal Rule of Civil Procedure 12(b) permits a party to raise, by motion, failure to state a claim. FED. R. CIV. P. 12(b)(6); *see also Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, Docket No. 09-01, 2011 WL 7144008, at *11 (FMC Aug. 1, 2011). "On a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), courts will dismiss a claim if the plaintiff's complaint fails to plead 'enough facts to state a claim for relief that is plausible on its face.'" *Cornell*, Docket No. 13-02, 2014 WL 5316340, at *6 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Under this standard, "the facts alleged are taken as true and all reasonable inferences are drawn in the complainant's favor." *MAVL Capital v. Marine Transport Logistics, Inc.*, Docket No. 16-16, 2020 WL 13512925, at *5 (FMC Oct. 29, 2020). "When evaluating a motion to dismiss for failure to state a claim, the Commission considers the facts alleged in the complaint, documents attached to the complaint, documents incorporated by reference in, or integral to, the complaint, and matters subject to official notice." *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, Docket No. 12-02, 2015 WL 9426189, at *1 n.1 (FMC Dec. 18, 2015).

"A claim 'has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Mitsui O.S.K. Lines Ltd.*, 2011 WL 7144008, at *12 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009)). The complaint's factual allegations must be enough to raise a right to relief above the speculative level and must nudge claims across the line from conceivable to plausible. *Cornell*, 2014 WL 5316340, at *6. "Mere labels and conclusions or a "formulaic recitation of the elements of a cause of action" will not suffice, nor will "naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Cornell,* 2014 WL 5316340, at *6 (citing *Iqbal*, 446 U.S. at 678). The focus at this stage is not with whether a complainant can prevail on its claim, but whether it has adequately pled the claim. *Negron v. USAA Casualty Ins. Co.*, 2014 WL 4411676, at *2 (M.D. Tenn. 2014).

> [O]n a motion to dismiss, a court may consider 'documents attached to the complaint as an exhibit or incorporated in it by reference,…matters of which judicial notice may be taken, or…documents either in plaintiffs' possession or

> which plaintiffs had knowledge and relied on in bringing suit.' Because this standard has been misinterpreted on occasion, we reiterate here that a plaintiff's *reliance* on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough.

Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC Docket No. 14-04, 2014 WL 5824274 at *6 (ALJ Nov. 6, 2014) (admin. final Dec. 8, 2014) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002)) (emphasis and ellipses in original, footnote omitted); *see also Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991).

The complaint first alleges a violation of section 41102(c) regarding unreasonable practices. Section 41102(c) states: "A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). The Commission has identified five factors required to establish a violation of this section.

> 46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:
>
> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
>
> (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
>
> (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
>
> (d) The practice or regulation is unjust or unreasonable; and
>
> (e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4. The complaint also alleges a violation of 46 C.F.R. § 545.5. "The purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and § 545.4(d) in the context of demurrage and detention." 46 C.F.R. § 545.5(a).

The complaint also includes an allegation of a violation of section 41102(d) regarding retaliation. This section states:

> A common carrier, marine terminal operator, or ocean transportation intermediary, acting alone or in conjunction with any other person, directly or indirectly, may not-
>
> (1) retaliate against a shipper, an agent of a shipper, an ocean transportation intermediary, or a motor carrier by refusing, or threatening to refuse, an otherwise-available cargo space accommodation; or

(2) resort to any other unfair or unjustly discriminatory action for-

(A) the reason that a shipper, an agent of a shipper, an ocean transportation intermediary, or motor carrier has-

(i) patronized another carrier; or

(ii) filed a complaint against the common carrier, marine terminal operator, or ocean transportation intermediary; or

(B) any other reason.

46 U.S.C. § 41102(c).

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including common carriers.

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country[.]

46 U.S.C. § 40102(7); *see also* 46 C.F.R. § 515.2(e).

The Shipping Act also provides that the term "ocean transportation intermediary" means "an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(20). The term non-vessel-operating common carrier is defined as a common carrier that "(A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(17). The term ocean freight forwarder is defined as "a person that - (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(19).

III. Factual Basis

Because this is a motion to dismiss, the facts in the complaint are accepted as true. The complaint alleges a violation of 46 U.S.C. § 41102(c) and (d) and 46 C.F.R. § 545.5 with regard to withholding delivery of Complainant's goods transported via three bills of lading. Complaint at 2-3. According to the complaint, Complainant Phillip Marciano "engaged D & T Apparels Inc. ('D&T') as a shipping broker" and in turn, "D&T engaged Respondent to arrange for the U.S. Customs clearance and as carrier for delivery of the Cargo to Complainant." Complaint at 3; *see also* Brief, Exhibit 2 (Phillip Marciano's District Court Amended Complaint) ("D&T is a textile/apparel manufacturer that also offers various logistic, shipping, freight and import services."). Tausif Hassan is identified as the "principal/representative" of D&T with whom

Phillip Marciano worked closely. Compliant at 3. D&T and Tausif Hassan are not parties to this proceeding although in a related federal court case, Phillip Marciano is suing D&T and Deal Zone Co. Inc., as well as Respondent US Cargo.

The complaint further alleges that "[a]t the direction of Hassan, however, upon the Cargo's clearance at customs, Respondent failed and/or refused to deliver the Cargo to Complainant as consignee, in breach of the obligations set forth in the Bills of Lading" and that while "Complainant attempted to resolve this matter in good faith with both Respondent and Hassan directly, Respondent refused to communicate with Complainant, advising that because they were engaged by Hassan, Respondent would only speak or take directions from him." Complaint at 4; *see also* Complaint at 5 (Respondent refused "to complete delivery in accordance with the subject Bills of Lading (at Hassan's direction) until there is payment of some unrelated past due balance.").

The complaint states that:

> Each of the imported shipments is subject to its own Bill of Lading in which Complainant is either consignee or owns the goods being imported as follows: (i) Nonnegotiable bill of lading, No. MCLNYC250031A covering the shipment of 970 Cartons of Boy's Shorts from Bangladesh to New York; (ii) a bill of lading, No. OSSPL/US/24-25/1949 covering the shipment of 451 Cartons comprised of Men's Polo Shirts and T-Shirts from India to New York; and (iii) a bill of lading, No. COSU6408922450 covering the shipment of 1,501 Cartons of Readymade Garments from India to New York.

Complaint at 3.

Documents attached to a complaint may be considered in a motion to dismiss. The documents attached to the complaint were integral to the complaint and are considered. The complaint attaches documents that show:

(i) Bill of lading, No. MCLNYC250031, for container number WHLU5653755. Although the bill of lading states "non-negotiable" on the top right, on the top left it says "Not Negotiable unless consigned To Order." The Consignee is listed as "TO ORDER" and Phillip Marciano LLC is listed as the notify party. The shipped on board date is March 10, 2025. There is an "ALSO NOTIFY PARTY" listed as A2Z Global Commodities Inc. The US Cargo Services seal appears and a stamp says that Maple Consolidations Ltd. signed as agents of US Cargo Services. Complaint, Exhibit 1 at 1.

(ii) A Multimodal Transport Document, No. OSSPL/US/24-25/1949, for container HLBU2932467, listing Phillip Marciano LLC as the consignee and notify party but not listing US Cargo or the date. The document also says that it is "SUBJECT TO REALISATION OF PAYMENT." Complaint, Exhibit 1 at 2.

(iii) A document from Union Logistics Inc. regarding Master Bill of Lading No. COSU6408922450, house bill of lading No. OSSPL/US/24-25/1921 for container TIIU5917424 / 22151132 loading on February 24, 2025. The document does not list US Cargo. The document states: "Freight will be released within 24-72 hours after receipt of the TOTAL amount and the

properly endorsed Original Bill of Lading or express release bill of lading is received." Complaint, Exhibit 1 at 3.

Phillip Marciano contends in its Brief that it has identified another bill of lading for two containers that US Cargo should have delivered to it. Complainant's Reply at 2, Exhibit 1. This document is Bill of Lading, No. MCLNYC250048, for container numbers WHSU6511792 and WHSU8105508. Although the bill of lading states "ORIGINAL" on the top right, on the top left it says "Not Negotiable unless consigned To Order." The Consignee is listed as "TO THE ORDER OF: Pubali Bank PLC" and Phillip Marciano LLC is listed as the notify party. The shipped on board date is May 2, 2025. There is an "ALSO NOTIFY PARTY" listed as A2Z Global Commodities Inc. The US Cargo Services seal appears and a stamp says that Maple Consolidations Ltd. signed as agents of US Cargo Services. Complainant's Reply, Sub-Exhibit 5 to Exhibit 2.

While it is certainly possible that additional bills of lading and documents would be identified during discovery if this case were to proceed, there is no reason to believe that they would alter what is on the face of the documents submitted with the complaint and relied upon in filing the complaint. Moreover, the description of the bill of lading as non-negotiable is a legal conclusion, not a fact that must be accepted as true.

IV. Arguments and analysis

The parties primarily focus on the unreasonable practices claim and the failure by US Cargo to deliver cargo to Phillip Marciano. Therefore, the unreasonable practices allegations of violations of 46 U.S.C § 41102(c) and 46 C.F.R. § 545.5 are addressed prior to discussing the retaliation allegations of a violation of 46 U.S.C § 41102(d).

A. Unreasonable Practices

1. Party's Arguments

In its motion, US Cargo states that it is a licensed non-vessel operating common carrier ("NVOCC") and that it "acted solely as a delivery agent at destination, not as carrier or issuer." Motion at 1. US Cargo argues that it "had no contractual or commercial relationship with the Complainant. The respondents' dealings were with Deal Zone NY (Tausif Hassan), who provided a signed letter acknowledging responsibility for the shipment and confirming the container was in their custody." *Id.* at 2. US Cargo also argues that:

> Complainant's agent D&T Apparels, through Tausif Hassan, directed all delivery matters. If any delay or withholding occurred, it was in the direction of the controlling party or their nominated agent. Respondent cannot be held liable for refusing release without proper delivery instructions or proof of ownership. The allegations in the Verified Complaint amount to a commercial dispute between Complainant and its broker/agent (D&T Apparels), not a regulatory violation by Respondent.

Motion at 3.

In opposition, Phillip Marciano contends that Tausif Hassan, "the shipping broker who hired Respondent as freight forwarder to complete shipment of Complainant's goods, wholly undermine Respondent's attenuated position because he admits that he uses Respondent as his exclusive shipping broker and that he intentionally chose to not deliver Complainant's goods as retribution." Opposition at 1. Phillip Marciano argues that the complaint "more than adequately pleads wrongdoing against Respondent as the carrier and/or forwarder involved with the subject Bills of Lading" and that "Respondent was supposed to complete delivery of the subject cargo to Complainant and refused to do so at Hassan's direction based upon an unrelated balance that Hassan purports Complainant owes." Opposition at 3.

Further, Phillip Marciano addresses the letter from Tausif Hassan and mentions a case it brought against US Cargo, D&T Apparels, and Deal Zone in the United States District Court for the District of New Jersey, stating:

> Most notably, Hassan confesses to the wrongdoing leading to both this Complaint and the District Court Action, stating that delivery was deliberately withheld to Plaintiff because of a claimed outstanding balance: "we decided not to deliver this cargo to original client [Plaintiff] because of our long-standing dues with them for around half a million."

Opposition at 4. Phillip Marciano requests discovery to understand the relationship between US Cargo and Tausif Hassan and to determine where the goods are currently located.

Regardless of the veracity of the Tausif Hassan letter, the parties seem to agree that when US Cargo refused to release the cargo, it was acting at the direction of Tausif Hassan. The parties were asked to provide additional information regarding the unreasonable practices claim. Specifically, both parties were ordered "to address whether the complaint plausibly alleges the five elements which are required for a section 41102(c) claim." Each element is discussed below.

2. Elements

a. Regulated Entity

The complaint indicates that US Cargo is a common carrier with a principle place of business in the United States that is subject to regulation by the Commission. Complaint at 1-2. For these shipments, the complaint alleges that US Cargo was "engaged/designated to receive the subject Cargo (defined herein), aid in U.S. customs clearance, and coordinate and complete delivery to Complainant/consignee at the final destination listed on the subject Bills of Lading." Complaint at 2.

In its motion, US Cargo states that it is a licensed NVOCC but that in the shipment at issue, "Respondent acted solely as a delivery agent at destination, not as carrier or issuer." Motion at 1. Moreover, US Cargo discusses the three bills of lading identified in the complaint and argues:

> 9. Of these, only Bill of Lading MCLNYC250031A lists US Cargo Services Inc. in any capacity, and only as a delivery agent at destination, not the carrier or issuer.

> 10. The remaining two Bills of Lading — OSSPL/US/24-25/1949 and COSU6408922450 were not issued by Respondent. Instead, OSSPL/US/24-25/1949 was issued by OAK Shipping Services, represented by Union Logistics Inc. - COSU6408922450 is a House B/L issued by Union Logistics Inc, again handled by a separate NVOCC or freight forwarder unrelated to Respondent.
>
> 11. US Cargo Services Inc. is not listed as a carrier, agent, consignee, or notify party on these two bills of lading and had no contractual or operational role in the shipment, clearance, or delivery of the cargo described therein.

Motion at 3.

In its brief, Phillip Marciano contends that: "Respondent admits that it is a non-vessel operating common carrier which is considered an "ocean transportation intermediary" pursuant to 46 U.S.C. 40102(20). Thus, the first element is satisfied (respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary)." Complainant's Brief at 2; Complainant's Reply at 2. In its reply, Phillip Marciano asserts that "Respondent is attempting to maintain its tenuous position that it was not involved with the Subject Shipments." Complainant's Reply at 1-2.

The parties do not disagree that US Cargo was an NVOCC and that the role of US Cargo on these shipments was as destination or at most consignee, although US Cargo disputes whether it was involved at all with two of the shipments. Motion at 3. However, US Cargo does not appear to misrepresent or mislead, as Phillip Marciano suggests. Complainant's Reply at 2. Rather, US Cargo is arguing that its involvement was limited to acting as consignee or delivery agent for the shipments which it handled.

Given the allegations in the complaint regarding cargo imported into the United States, US Cargo could not be a freight forwarder because, by definition, ocean freight forwarders ("OFFs") handle shipments leaving the United States. 46 U.S.C. § 40102(19); *see also Logfret, Inc. v. Kirsha, B.V., Leendert Johanness Bergwerff, and Linda Sieval*, Docket No. 18-10, 2019 WL 4689188, at *11 (ALJ Sept. 17, 2019) (admin. final Oct. 21, 2019) ("Because the shipments were entering the United States, Respondents could not be ocean freight forwarders, as OFFs, by definition, handle shipments leaving the United States.").

The question, then is whether the complaint plausibly alleges that US Cargo was operating as an NVOCC for any of these particular shipments. The Commission has clearly stated that not all activities of regulated entities are subject to the jurisdiction of the Commission.

> But the fact that Marine Transport is licensed as a regulated entity does not mean that everything it does is subject to § 41102(c). *See Auction Block Co. v. City of Homer (Auction Block I)*, 33 S.R.R. 589, 2014 FMC LEXIS 16 (FMC 2014), *aff'd sub nom. Auction Block Co. v. Fed. Mar. Comm'n (Auction Block II)*, 606 Fed. Appx. 347 (9th Cir. 2015); *see also Petchem*, 28 F.M.C at 290 (publishing a tariff rate does not guarantee the Commission's jurisdiction). There must also be a link between the respondents' regulated status and the conduct that allegedly violates the Shipping Act. *See Auction Block II*, 606 Fed. Appx. at 347-48. That is, the

> inquiry is whether a respondent was acting as regulated entity with respect to the conduct at issue.

Crocus Investments, LLC v. Marine Transport Logistics, Inc., Docket No. 15-04, 2019 WL 4734299, at *7 (FMC July 16, 2019).

To conclude that an entity operated as an NVOCC for a shipment, the entity must meet the Shipping Act's definition of common carrier; that is, it must hold itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation, assume responsibility for the transportation from the port or point of receipt to the port or point of destination, and use for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102(7); *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd*., 29 S.R.R. 119, 162 (FMC 2001).

The complaint makes a bare allegation that US Cargo was an NVOCC and the parties agree that US Cargo was licensed as an NVOCC. Thus, the complaint plausibly alleges that US Cargo held out to provide transportation by water of cargo between the United Staes and a foreign country and that a vessel operating on the high seas was used. *See Logfret,* 2019 WL 4689188, at *12-16. However, the complaint does not plausibly allege that US Cargo assumed responsibility for the transportation from the port or point of receipt to the port or point of destination. *See Common Carriers by Water -- Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 6 F.M.B. 245, 250, 1 S.R.R. 292 (FMC 1961). Specifically, the complaint alleges that for these shipments, at most, US Cargo was a delivery agent or consignee, responsible to receive the cargo, aid in U.S. customs clearance, and coordinate and complete delivery. Complaint at 2. This does not amount to a plausible allegation that US Cargo assumed responsibility for the cargo throughout its journey. And merely acting as a consignee or delivery agent, without more, is not enough to make an entity an NVOCC.

Phillip Marciano summarizes its argument, stating:

> Respondent also concedes that: (i) it received and was in possession of Complainant's goods; (ii) it released Complainant's goods at Hassan's direction; and (iii) it has a relationship with Hassan. Despite these admissions which implicate US Cargo (as Complainant has alleged since it's the filing of its Complaint), Respondent argues that because it did not have a contractual/commercial relationship directly with Complainant and only with Hassan whom Respondent claims was acting on the parties' behalf, Respondent cannot be held liable. That is unavailing.

Complainant's Reply at 2. Indeed, Phillip Marciano contends that a proposed settlement payment was to be made directly to US Cargo, which was named a partial beneficiary. Complainant's Reply at 5.

As explained above, receiving goods, releasing goods at the shipper's instructions, having a relationship, or even accepting payment do not necessarily mean that an entity was acting as an NVOCC or a regulated entity for a particular shipment. It is not the contractual relationship that

is the key finding, it is whether or not US Cargo acted as an NVOCC and assumed responsibility for these shipments from receipt to destination. Because US Cargo was merely the consignee or delivery agent, it did not assume responsibility and does not meet the Shipping Act's requirements. Accordingly, this element is not plausibly alleged.

b. Normal, Customary, Continuous Basis

The complaint identifies three bills of lading or other shipping documents and Complainant's Brief identifies one other bill of lading with two shipments. Complainant's Brief at 2-3; *see also* Complainant's Reply at 6 (subject shipments and two additional containers). Phillip Marciano asserts that these shipments plus the Hassan letter can be coupled to plausibly allege that Respondent's conduct occurred on a normal, customary, and continuous basis (at least in regard to Complainant's goods, which Complainant impliedly asserts is enough to satisfy this element). Complainant's Brief at 2-3.

The complaint, brief, and reply argue that there are four shipments with a total of five containers involved. There are not allegations that US Cargo failed to deliver shipments to other shippers, but rather, the issue seems limited to the shipments where Hassan directed US Cargo not to deliver the cargo.

The Commission addressed the reverse scenario, where an NVOCC delivered cargo to the consignee without obtaining permission from the shipper or original bills of lading for three shipments. The Commission quoted the portion of the Administrative Law Judge decision which stated:

> The evidence shows that Hangzhou Qianwang entered into a contract with RDD Freight calling for RDD Freight to transport cargo to an identified consignee in three separate shipments and that RDD Freight unjustly and unreasonably delivered the cargo to that consignee without obtaining the original bills of lading for the cargo or Hangzhou Qianwang's permission to do so. As such, the evidence solely demonstrates unjust and unreasonable actions by RDD Freight with regard to the delivery of the cargo in these three shipments, not unjust and unreasonable acts on other occasions involving different transportation agreements, shippers, or consignees. Thus, the evidence of unjust and unreasonable acts by RDD does not rise to a level constituting a "regulation and practice" as described by the Commission.

Hangzhou Qianwang Dress Co., Ltd. v. RDD Freight Int'l Inc., Docket No 17-02, 2020 WL 5406762, at *4 (FMC Sept. 1, 2020). The Commission concluded that:

> The ALJ correctly found that the conduct here did not satisfy the "normal, customary, and continuous" element of § 41102(c). Complainant demonstrated that over the course of two months, Respondent released three of Complainant's shipments to the same consignee without obtaining the original bill of lading or Complainant's consent. The conduct occurred over two months (September and October 2016), with respect to three shipments, under one contract, and involved one shipper and one consignee.

Id. at *5; *see also Marie Carew v. Maersk Line A/S*, Docket No. 20-17, 2021 WL 5195751, at *9 (ALJ Nov. 22, 2021) (admin. final Dec. 3, 2021) (normal, customary, and continuous element not met for four containers).

It is noted that Phillip Marciano has identified additional containers and it is presumed that it might identify even more containers in discovery. However, it is not plausibly alleged that the conduct identified here meets the normal, customary, and continuous element as it appears to be an unusual situation where the shipper instructed that delivery not be made to this particular consignee over a limited period of time. Accordingly, the complaint does not plausibly allege this element.

c. Receiving, Handling, Storing, or Delivering Property

The complaint alleges a failure to deliver containers. Thus, the complaint alleges conduct that involved receiving, handling, storing, or delivering containers. Therefore, this element is plausibly alleged.

d. Reasonableness

The Commission has consistently held that it is a Shipping Act violation for an NVOCC to release containers without the permission of the shipper. It is not unusual for payment for goods to occur after the goods have been shipped but before they are delivered. A negotiable bill of lading states that the goods are to be delivered "to order.'" *See* 49 U.S.C. § 80103. Thus, permission to deliver is often demonstrated by the consignee providing an original bill of lading. For example, in this case the one bill of lading attached to the complaint states "non-negotiable" on the top right, on the top left it says "Not Negotiable unless consigned To Order," the Consignee is listed as "TO ORDER" and Phillip Marciano LLC is listed as the notify party. Complaint, Exhibit 1 at 1.

The *Chief Cargo* case illustrates why US Cargo could not release the cargo against the instructions of the shipper. *Bimsha Int'l v. Chief Cargo Services, Inc and Kaiser Apparel, Inc.*, Docket No. 10-08, 2011 WL 7144011 (FMC Dec. 14, 2011) ("*Chief Cargo/ALJ*"); *aff'd* 2013 WL 9808692 (FMC Sept. 4, 2013); *aff'd sub nom Chief Cargo Services, Inc. v. FMC*, 586 Fed. Appx. 730 (2nd Cir 2014). In *Chief Cargo/ALJ*, on three separate shipments, NVOCC Chief Cargo released cargo to Rich Kid Jeans, which was the purchaser, listed on the bills of lading as the notify party, without requiring presentation of an original bill of lading. *Id.* at *14-15. Bimsha alleged that it had only received partial payment. *Id.* at *15. The initial decision described the question as: "When Chief Cargo released cargo to Rich Kids Jeans, the 'notify party,' without requiring presentation of an original bill of lading, did it fail to fulfill an NVOCC obligation and engage in an unjust and unreasonable practice in violation of section 10(d)(1)?" *Id.* at *21 (Section 41102(c) was previously Section 10(d)(1)). The decision concluded that this constituted an unreasonable practice and a Shipping Act violation. *Id.* at *25. Both the Commission and the Second Circuit affirmed the decision.

The *Chief Cargo* decision was issued prior to 46 C.F.R. § 545.4 being adopted. While the analysis of the normal, customary, and continuous element has evolved, the analysis regarding reasonableness has not changed. The *Hangzhou Qianwang* Remand Initial Decision stated that

"the evidence supports a finding that Respondent failed to establish, observe, and enforce just and reasonable regulations and practices when it released Hangzhou Qianwang's cargo to the consignee without obtaining the original bills of lading from the consignee, the fourth required element under the interpretive rule." *Hangzhou Qianwang Dress Co., Ltd. v. RDD Freight International Inc.*, 2019 WL 6124914, at *14 (ALJ Nov. 7, 2019), *aff'd* 2020 WL 5406762.

Phillip Marciano argues that "Respondent's refusal to complete delivery in accordance with the Bills of Lading, seemingly done at the behest of Tausif Hassan for no legitimate or legal reason, is undoubtedly unjust and unreasonable." Complainant's Brief at 3. In its reply, Phillip Marciano argues:

> Respondent's brief is undermined by: (1) its admission that it is an NVOCC which confirms that its actions are subject to the Shipping Act; (2) its admission that it does work closely with Hassan and his entities; (3) its admission that it was engaged to receive and forward Complainant's goods at port; (4) it did receive such goods and then claimed to have released the goods to Hassan at Hassan's direction; (5) its failure to deliver to the goods to Complainant; and (6) the representations made by Hassan in his Letter, Text Messages and Email which collectively establish Respondent involvement and a claimed amount of money owed to it.

Complainant's Reply at 6; *see also* Complainant's Reply at 2.

While Phillip Marciano is correct that Section 41102(c) does not require an existing contractual or commercial relationship between the Complainant and Respondent, this does not mean that an NVOCC is free to ignore the instructions from its shipper. Despite being given multiple opportunities to explain its legal theory, Phillip Marciano has not identified any plausible reason that it believes US Cargo should have released goods to it without the shipper's consent. That Hassan may have owed US Cargo money only confirms that Hassan hired US Cargo and does not suggest anything unreasonable. Indeed, Phillip Marciano has been clear that US Cargo was acting as instructed by Hassan and Hassan has submitted a letter explaining that it instructed US Cargo not to release the cargo to Phillip Marciano.

The complaint describes the cargo as "purchased and owned by Complainant." The purchase or ownership of goods is not controlled by the bill of lading as implied by the complaint ("Respondnet's refusal to complete delivery in accordance with the subject Bills of Lading" and "Respondent's conscience refusal to complete delivery in accordance with the subject Bills of Lading (at Hassan's direction)." Complaint at 5. Rather, the bills of lading provided suggest that delivery was to be made at the direction or order of the shipper and Phillip Marciano is only listed as the notify party. Phillip Marciano's claim of ownership of the goods is a legal conclusion not supported by the facts alleged.

Taking the allegations in the complaint as true does not plausibly allege that US Cargo acted unreasonably. Accordingly, this element is not met.

e. Proximate Cause

In order to prove a claim for reparations, a party must show that it is entitled to receive reparations by showing that it sustained actual loss or injury and that the violation of law was the proximate cause of that loss or injury with "reasonable certainty." *Adair v. Penn-Nordic Lines, Inc.*, Docket No. 1695(F), 26 S.R.R. 11, 25, 1991 WL 383091, at *23 (ALJ Sept. 18, 1991); *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, Docket No. 88-15, 25 S.R.R. 1213, 1230 1990 WL 427466 (FMC Oct. 19, 1990).

Here, the complaint alleges that Hassan directed US Cargo not to deliver this cargo because Hassan believed that Phillip Marciano owed him money for prior shipments. Thus, the allegations in the complaint suggest that it is Phillip Marciano's dispute with Hassan that caused the loss, not the actions of US Cargo. Accordingly, this element is also not plausibly alleged.

Accordingly, the complaint does not plausibly allege that US Cargo acted as an NVOCC for these shipments; US Cargo engaged in these practices on a normal, customary, and continuous basis; the practices were unreasonable; or that US Cargo was the proximate cause of loss. Therefore, the motion to dismiss the unreasonable practices claim is granted.

B. Retaliation

Regarding retaliation, the only allegation in the complaint states:

> Respondent's refusal to complete delivery in accordance with the subject Bills of Lading is a clear violation of 46 U.S.C. 41102(d) which states: "Retaliation and other discriminatory actions. A common carrier ... acting alone or in conjunction with any other person, directly or indirectly, may not ... resort to any other unfair or unjustly discriminatory action for ... any other reason."

Complaint at 5.

Section 41102(d) states that a common carrier may not retaliate against a shipper "because the shipper has patronized another carrier, or has filed a complaint, or for any other reason." 46 U.S.C. § 41102(d)(2). The Commission issued the Statement on Retaliation to clarify that it will interpret the anti-retaliation provision "broadly to effectuate Congress's intent that shippers feel free to air their grievances to the Commission, and to address new shipping practices and new forms of retaliation." Statement of the Commission on Retaliation, Docket No. 21-15, 3 F.M.C.2d 201, 2021 WL 9204128 (FMC Dec. 28, 2021) ("Statement on Retaliation"). The Commission has indicated that "protected activity includes not only filing a complaint with the Commission but also participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or using CADRS' dispute resolution procedures." Statement on Retaliation, 3 F.M.C.2d at 201. The Commission concluded the policy statement with an example, stating:

> A complainant must show that a carrier engaged in prohibited conduct (refusing cargo space accommodations or other unfair or unjustly discriminatory methods), with respect to a protected entity (shipper), because the protected entity engaged

in protected activity (patronizing other carriers, filing a complaint, or other activities of the same class).

Statement on Retaliation, 3 F.M.C.2d at 209.

The complaint appears to focus on the subsections prohibiting resorting "to any other unfair or unjustly discriminatory action" for "any other reason." Complaint at 5; 46 U.S.C. § 41102(d)(2)(B). This allegation is not discussed in the motion or in the parties' filings.

There are no allegations in the complaint that the failure to deliver occurred because Phillip Marciano patronized other carriers, filed a complaint, or otherwise aired their grievance with the Commission. Moreover, there are no factual allegations identifying unfair or unjustly discriminatory action or mentioning another entity that was treated differently. Rather, Phillip Marciano asserts that delivery was withheld by US Cargo because its customer, the shipper, had a dispute with Phillip Marciano over other allegedly unpaid cargo. *See* Complaint at 5. As discussed above, US Cargo was required to follow the instructions of the shipper. Just as it is not plausibly alleged that US Cargo acted unreasonably, it is also not plausibly alleged that it engaged in retaliation.

Therefore, the facts alleged in the complaint do not plausibly allege a violation of the retaliation prohibitions in the Shipping Act by US Cargo. Moreover, the parties have not provided any documents indicating that there was an unfair or unjustly discriminatory action taken for some other reason that would support a claim of retaliation. Accordingly, the retaliation claim is not plausibly alleged and is dismissed.

C. Remaining Issues

Phillip Marciano seeks discovery to "(1) determine Respondent's relationship with Hassan who via letter dated July 7, 2025 claims to be in possession of the subject shipments; and (2) locate the subject shipments after they were released from the stateside port by Respondent." Complainant's Brief at 2. Phillip Marciano further states that it requires further discovery regarding the relationship between US Cargo and Hassan to "determine whether or not Respondent was able to ignore instructions provided by Hassan." Complainant's Brief at 4.

It is not clear why Respondent's relationship with Hassan would make a material difference, unless Phillip Marciano is claiming that the two entities are alter egos or Phillip Marciano is attempting to pierce the corporate veil. While Phillip Marciano clearly alleges that US Cargo was involved with the shipments and even that a proposed settlement would be paid to US Cargo, that is not a sufficient factual basis to make permitting discovery regarding their relationship anything more than a fishing expedition. Moreover, the complaint does not allege facts suggesting that US Cargo was the alter ego of Hassan and does not seek to pierce the corporate veil. Therefore, the request for discovery is hereby denied.

Dismissal of proceedings can be with or without prejudice. The Commission recently stated that "in *Maher Terminals,* the Commission endorsed a high standard for dismissals of claims with prejudice, particularly dismissals that relied on futility, and the Commission noted that federal courts generally permit a claimant to amend at least once 'where a more carefully drafted complaint might state a claim.'" *Samsung Electronics America, Inc., Complainant, v.*

Orient Overseas Container Line Limited and OOCL (Europe) Limited, Docket No. 24-17, 2025 WL 2207363, at *12 (FMC July 30, 2025) (citing *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, Docket No. 12-02, 2015 WL 9426189, at *39 (FMC Dec. 18, 2015)).

Here, it is not clear whether or not Complainant could amend the complaint to make a plausible claim. While it is not clear how Complainant would make a plausible claim given these facts, that option will not be foreclosed. Any amended complaint must be filed within 22 days of the date of this decision. Therefore, if the Complainant chooses to make a filing, it may file either a motion to amend the complaint or an appeal to the Commission – but should not file both an appeal and a motion to amend the complaint.

The motion also seeks costs. Commission Rule 254 states that "to recover attorney fees, the prevailing party must file a petition within 30 days after a decision becomes final." 46 C.F.R § 502.254(c). Therefore, any request for attorney's fees would be premature at this point and denied. Additionally, "[c]osts and expenses, however, are not awardable under the Shipping Act for claims adjudicated by the Commission." *Petra Pet, Inc. v. Panda Logistics Ltd.*, Docket No. 11-14, 2014 WL 5316364, at *2 (FMC April 17, 2014).

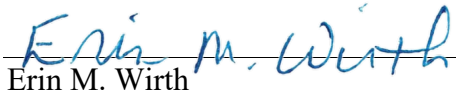
V. Order

Upon consideration of the record, the arguments of the parties, and the conclusions and findings set forth above, it is hereby

ORDERED that Respondent's motion to dismiss be **GRANTED**. The complaint is hereby **DISMISSED WITHOUT PREJUDICE**. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED**.



Erin M. Wirth
Chief Administrative Law Judge