BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 25-29

MAC Industries Inc DBA MAC Container Line

v.

COSCO Shipping Lines Co., Ltd. and COSCO Shipping Lines (North America), Inc.

RESPONDENTS' MOTION TO DISMISS

Respondent COSCO Shipping Lines Co., Ltd. ("COSCO") and putative Respondent COSCO Shipping Lines (North America), Inc. ("CSLNA"), jointly referred to as "Respondents," by their undersigned attorneys, move to dismiss the Complaint filed by MAC Industries Inc DBA MAC Container Line ("Complainant" or "MAC"). This is a dispositive motion subject to 46 C.F.R. §§ 502.69(g) and 502.70.

The Complaint is a confusing amalgamation of bits and bobs, which does not comply with the FMC's requirements, such as the mandate to set forth "[a] clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the acts or practices alleged to be in violation of the law, and a statement showing that the complainant is entitled to relief." 46 C.F.R. § 502.62(a)(3)(iii). It is more in the nature of an outline of a possible complaint. Although the Presiding Officer could well dismiss the Complaint (or order it amended) on that basis, we do not press that here, given that it must be dismissed for the reasons stated below. Instead, we have done our best to make sense of the senseless and respond to what we think the Complaint is trying to convey.

As detailed in the memorandum of law below, the grounds for this Motion are:

1) The Complaint fails to state a claim for any of the purported violations set forth therein.

2) The Complaint raises contract law disputes, rather than colorable Shipping Act claims, which must be dismissed pursuant to 46 U.S.C. § 40502(f).

3) The Commission lacks both personal and subject matter jurisdiction over CSLNA, as it is not a regulated entity.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. STANDARDS FOR MOTIONS TO DISMISS

Although the FMC Rules do not expressly provide for a motion to dismiss, it is well established that litigants before the FMC may bring such motions pursuant to the Federal Rules of Civil Procedure, as made applicable to FMC proceedings by 46 C.F.R. § 502.12. See, e.g., *YSN Imports Inc. v. Oberlander*, FMC Dkt. 21-02, 2021 WL 2935838 at *2-3 (ALJ Order, July 7, 2021); *Carlstar Group LLC v. UTI United States, Inc.*, FMC Dkt. 17-08, 2018 WL 1062398 at *9 (ALJ Order, February 23, 2018). As the Presiding Officer explained in *YSN Imports*, "the Commission looks to Federal Rule of Civil Procedure 12(b)(1) when considering dismissals based on lack of subject matter jurisdiction, and to Rule 12(b)(6) when considering dismissals based on failure to state a claim." *YSN Imports*, 2021 WL 1062398, at *3 (citing *MAVL Capital v. Marine Transport Logistics*, FMC Dkt. 16-16, 2020 WL 6445041 at *6 (FMC 2020)).

The standards for consideration of a motion to dismiss differ depending on whether the dismissal is sought for failure to state a claim pursuant to Rule 12(b)(6), or for lack of personal or subject matter jurisdiction pursuant to Rule 12(b)(1).

A. <u>Failure to State a Claim Under Rule 12(b)(6)</u>

For a motion to dismiss for failure to state a claim, "the facts alleged are taken as true and all reasonable inferences are drawn in the complainant's favor." *MAVL Capital*, FMC Dkt. 16-16, 2020 WL 6445041 at *4 (October 9, 2020) (citing *Maher Terminals, LLC v. The Port Authority of New York and New Jersey* FMC Dkt. 12-02, 2015 WL 435475 (FMC 2015)); *see also YSN Imports, supra,* 2021 WL 1062398 at *2. This does not mean, however, that the Presiding Officer is required to credit everything said in the Complaint. Rather, as the Presiding Officer has explained:

> "To survive motions 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 plaintiff pleads factual content that 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). . . . *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics*, 32 S.R.R. 126, 136, 2011 FMC LEXIS 12 at *31-32 (FMC 2011). A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555)." *YSN Imports*, 2021 WL 1062398 at *2 (emphasis added).

"Nor does a complaint suffice if it 'tenders 'naked allegation[s]' devoid of 'further factual enhancement.'" *Iqbal* at 677 (quoting *Twombly*), *accord, Phillip Marciano LLC v. US Cargo Services Inc.*, FMC Dkt. 25-11, 2025 WL 3732714, *1 (ALJ Initial Decision Granting Motion to Dismiss, Admin. Final January 16, 2025).

B. <u>Failure to Demonstrate Subject Matter Jurisdiction Under Rule 12(b)(1)</u>

Well-pleaded allegations in the Complaint are not necessarily presumed true if the motion to dismiss is based on lack of jurisdiction. In jurisdictional disputes, the respondent may make either: (a) a facial attack on jurisdiction, in which case well-pleaded allegations are assumed true; or (b) a factual attack, in which allegations in the complaint must be supported by evidence:

> "With regard to motions to dismiss a complaint for lack of subject matter jurisdiction under Rule 12(b)(1), such motions may assert either a factual attack or a facial attack to jurisdiction. A factual attack challenges "the existence of subject matter jurisdiction in fact, ***irrespective of the pleadings***, and matters outside the pleadings, such as testimony and affidavits, are considered." . . . In a facial attack, on the other hand, the court examines whether the complaint has sufficiently alleged subject matter jurisdiction. . . . *Sinaltrainal v. Coca-Cola Company*, 578 F.3d 1252, 1260 (11th Cir. 2009)." *Carlstar Group LLC,* FMC Dkt. 17-08, 2018 WL 1062398 at *2 (February 23, 2018) (emphasis added).

See also Barsan DNB Exports v. Global Lojistiks Ve Gumruk Musaviriligi, FMC Dkt. 11-07, 2011 WL 7144017, at *3 (ALJ Order July 7, 2011)) As the above quote makes clear, a facial attack on jurisdiction challenges the sufficiency of the allegations in the complaint while a factual attack challenges "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Id.* Further, "[t]he party asserting federal subject matter jurisdiction bears the burden of proving its existence." *Dukart v. Ocean Star International Inc.*, FMC Dkt. 20-03, 2020 WL 13512914 at *5 (ALJ Order July 10, 2020).

II. THE COMPLAINT FAILS TO STATE A CLAIM AS TO WHICH RELIEF MAY BE GRANTED

As discussed above, a complaint must be dismissed under Rule 12(b)(6) unless it states a claim for relief that is plausible on its face. The Complaint fails to state such a plausible claim for relief under any of the Shipping Act provisions that it asserts COSCO and CSLNA violated.

A. The Complaint Fails to State a Claim Under 46 U.S.C. § 41102(c)

To state a claim for reparations under 46 U.S.C. § 41102(c), a complainant must allege each of the essential elements. As the Commission's Rules state, "46 U.S.C. § 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations":

- The respondent is an ocean common carrier;
- The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
- The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
- The practice or regulation is unjust or unreasonable; and
- The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4.

It is Complainant's burden to allege and prove each and every element of a 46 U.S.C. § 41102(c) claim. 5 U.S.C. § 556(d); 46 C.F.R. § 502.203; *DSW Int'l Inc. v. Commonwealth Shipping, Inc.,* FMC Dkt. 1898(F), 32 S.R.R. 763, 2012 WL 11914710 (FMC July 23, 2012); *Santa Fe Discount Cruise Parking, Inc. v. Board of Trustees of the Galveston Wharves*, FMC Dkt. 14-06, 3 F.M.C 2d 59, 67 (FMC, Sept. 10, 2021). Although the scrambled allegations of the Complaint may arguably be pieced together to address four of the five elements, it is undeniable that the Complaint does not address the requirement that the claimed acts or omissions "are occurring on a normal, customary, and continuous basis." Indeed, none of the words "normal," "customary," and "continuous" appears anywhere in the Complaint. This is not surprising, as the entire complaint concerns a single shipment.

In promulgating 46 C.F.R. Part 545.4, the Commission emphasized that that the requirement of a "normal, customary, and continuous basis" is not to be taken lightly or to be given a cursory pass. As the Commission explained in the preamble to the Proposed Rule: "In simple summary, discrete or occasional actions by regulated entities not reflecting a *practice* or *regulation* would not constitute a violation of § 41102(c)." 83 Fed. Reg. 45367 (Sept. 7, 2018) (Proposed Rule) (italics in original). The Commission elaborated on this point in the Preamble to the Final Rule:

> "Section 41102(c) was never intended to be a method of resolving every dispute that arises in the receiving, handling, storing or delivering of cargo. In drafting the 1916 Act, and through its revisions and reenactment in 1984, Congress chose the word "practice" and the phrase, "establish, observe, and enforce just and reasonable regulations and practices," to describe actions or omissions engaged in on a normal, customary, and continuous basis. . . . To find a violation of § 41102(c), the Commission consistently required that the unreasonable regulation or practice was the ***normal, customary, often repeated, systematic, uniform, habitual, and continuous manner in which the regulated common carrier was conducting business***. 83 Fed. Reg. 64478, 64480 (Dec. 17, 2018) (footnotes omitted, emphasis added).

As relevant here, the Commission has repeatedly held that allegations relating to one, two, four, or even ***six*** shipments are insufficient to constitute a normal, customary, and continuous practice. *Investigation of Certain Practices of Stockton Elevators*, 8 F.M.C. 178, 201 (FMC 1964) (six similar actions not a "practice"); *European Trade Specialists v. Prudential-Grace Lines*, 19 S.R.R. 59, 63 (FMC 1979) (unless respondent's "normal practice was not to notify the shipper, such adverse action cannot be found to violate the section as a matter of law"); *A.N. Deringer, Inc. v. Marlin Marine Services, Inc.,* 25 S.R.R. 1273, 1276 (FMC 1990) (an isolated error does not amount to failure to establish, observe, and enforce just and reasonable regulations and practices); *Kamara v. Honesty Shipping Service*, 29 S.R.R. 321, 322 n.8 (ALJ July 26, 2001) (complainant must demonstrate regulations and practices, as opposed to identifying what might be an isolated error).[1]

Commission cases adjudicated since 46 C.F.R. Part 545.4 was promulgated confirm that the standard for showing a practice is rigorous. *See, e.g., Hangzhou Qianwang Dress Co. v. RDD*

[1] This same interpretation of "practice" is followed in the federal courts. *See, e.g., Baltimore & Ohio Railroad Company v. United States*, 277 U.S. 291 (1923); *Wells Lamont Corp. v. Bowles*, 149 F.2d 364, 366 (Em. Ct. App. 1945) ("a practice is a custom or usage, a customary usage, something habitually and uniformly performed"); *Whitam v. Chicago, R.I. & P. Ry. Co*., 66 F. Supp. 1014, 1017 (N.D. Tex. 1946) (a "practice" typically must involve not only repetition, but also application to multiple customers); *McClure v. Blackshere*, 231 F. Supp. 678, 682 (D. Md. 1964); *J.C. Francesconi v. Baltimore & O. R. Co*., 274 F. 687, 690-91 (S.D.N.Y. 1921).

Freight International Inc., 1 F.M.C.2d 478 (2019) *aff'd* 2 F.M.C. 2d 168 (FMC 2020) (explaining that, under 46 C.F.R. 545.4, a claimant must show that "the unreasonable regulation or practice was the normal, customary, ***often repeated***, systematic, ***uniform, habitual, and continuous manner*** in which the regulated common carrier was conducting business") (emphasis added) (citations omitted). There, the Presiding Officer held, and the Commission affirmed on appeal, that ***three*** instances of conduct over two months were insufficient to establish § 41102(c)'s "practice" requirement. 2 F.M.C.2d at 173.

Likewise, in *Crocus Investments, LLC v. Marine Transport Logistics, Inc*., the Presiding Officer again explained that the "normal, customary, and continuous" requirement of § 41102(c) requires a showing that the carrier's unreasonable conduct was representative of the "course of conduct between these parties," *i.e.,* the "normal and customary arrangement." FMC Dkt. 15-04, 2 FMC 2d 213 (ALJ 2020), *aff'd* 3 FMC 2d 110 (FMC 2021). In that case, the Presiding Officer concluded that two similar actions by Marine Transport Logistics, LLC were not enough to make out a practice. The Commission affirmed, holding that:

> Commission precedent has made clear that a single shipment or isolated act or omission does not show a pattern or practice. *Hangzhou Qianwang Dress Co., Ltd. v. RDD Freight International Inc.*, FMC Dkt. 17-02, 2018 WL 741226 (F.M.C. 2018). An "occasional transaction" or isolated act is not a "practice." *Stockton Elevators*, 8 F.M.C. at 201. Two or three incidents over a short time period are not enough to show that the conduct in question is an entity's normal and customary practice. *Hangzhou*, 2018 WL 741226 at 192 (releasing three shipments to the same consignee without an original bill of lading over a 2-month period insufficient to show that was respondent's normal practice or that it was customary or continuous). ***Even six instances of "unreasonable conduct" carried out over a period of several months involving the same entities have been ruled insufficient to prove that conduct was "uniform or continuous***" under § 41102 (or its predecessor, section 17 of the Shipping Act). *Stockton Elevator,* 8 F.M.C. at 200-201 (charges to the same customer inconsistent with tariff rates on six occasions amounted to a "single transaction")" *Crocus Investments, LLC*, 3 F.M.C. 2d at 117-18 (emphasis added).

See 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) (allegations regarding four shipments were insufficient to meet the requirement of the "normal, customary, and continuous").

Most recently, in *Marciano, supra*, a rather similar case involving claims of improper delivery, the Presiding Officer concluded that allegations regarding four shipments covering five containers were insufficient to make out a practice:

> ”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:
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>> 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.
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> *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:
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>> 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.
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> *Id*. at *5; *see also Marie Carew v. Maersk Line A/S*, FMC Dkt. 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)."

Accordingly, the Presiding Officer dismissed the claim, concluding that "it is not plausibly alleged

that the conduct identified here meets the normal, customary, and continuous element." *Id.* at *10.

The instant Complaint addresses only ***one*** shipment. Under *Marciano* and the other cases cited above, this cannot possibly be deemed "uniform or continuous," and thus "does not show a pattern or practice." The claim must therefore be dismissed.

B. <u>The Complaint Fails to State a Claim Under 46 U.S.C. §41104(a)(10)</u>

As the Commission has said about refusal to deal claims:

> "The Act does not guarantee the right to enter into a contract, much less a contract with any specific terms; such a right has not existed either before or since the passage of the OSRA [1998]. All that is required is that common carriers . . . refrain from ' shutting out ' any person for reasons having no relation to legitimate transportation-related factors." *New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans*, 29 S.R.R. 345, 351 (ALJ 2001), aff'd 29 S.R.R. 1066, 1070 (FMC 2002), aff'd *New Orleans Stevedoring Co. v. Fed. Mar. Comm'n*, 80 F. App'x 681 (D.C. Cir. 2003) (emphasis added).

The elements of a claim under 46 U.S.C. § 41104(a)(10) have been elucidated by the FMC in its Rules (46 C.F.R. § 542.l(c)). A complainant must allege, and prove, that:

(1) The respondent is an ocean common carrier as defined in 46 U.S.C. § 40102;

(2) The respondent refuses or refused to deal or negotiate with respect to vessel space accommodations; and

(3) The ocean common carrier's conduct is unreasonable.

The Complaint does not contain sufficient factual allegations to meet either Element 2 or Element 3. All that MAC alleges is that COSCO refused to accept bookings. There is absolutely no discussion about any circumstances regarding the communications/negotiations (or lack thereof) between Complainant and COSCO. Such bald-faced assertions have been held inadequate to state a claim in multiple cases.

In *Samsung Electronics America, Inc. v. Orient Overseas Container Line Limited*, FMC Dkt. No. 24-17, 2024 WL 5714589, at *12 (ALJ Order Partially Granting Motion to Dismiss, November 18, 2024) for example, Judge Chintella dismissed complainants claims under 46 U.S.C. § 41104(a)(10), explaining:

> SEA's complaint fails to allege any facts supporting the second or third elements of the claim, that OOCL unreasonably refused to deal or negotiate with respect to vessel space accommodations. SEA argues that Complaint ¶¶ 68 and 73 provide sufficient factual material to establish these elements. Opp'n to Mot. to Dismiss, p. 18. But the allegations in ¶ 68 are the classic "labels, conclusions, or a recitation of the elements" that do not satisfy the *Iqbal-Twombly* pleading standard:
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> > 68. In response to Complainant's efforts to address OOCL's shipping and charging practices, resolve disputes, and dispute invoices, OOCL threatened to retaliate, and in fact did retaliate, against Complainant and SEA Containers with respect to delivery of cargo and refusing available cargo space accommodation.
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> Compl., ¶ 68; *Maher Terminals*, 2015 WL 9426189, at *12. And ¶ 73 has nothing to do with vessel-space accommodation, but specifically relates to the detention and demurrage practices in Section V of the Complaint:
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> > 73. In response to Complainant's efforts to: (a) address OOCL's shipping and charging practices with respect to inland services under through bills of lading and demurrage and detention charges and practices, (b) resolve disputes, and (c) dispute invoices, OOCL refused to meaningfully engage in good faith discussions or change its underlying practices, specifically including the practices and actions described in Section V above.
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> Compl., ¶ 73."

Accordingly, Judge Chintella concluded:

> "Without any factual material describing OOCL's vessel-space accommodation practices, or any specific attempts at negotiations or communications that occurred, any specific non-transportation factors that played a role in those discussions, or unreasonable rates that OOCL quoted, or any other non-conclusory allegations, there is not enough factual material to carry SEA's claim into the realm of

> plausibility, and so Count III must be dismissed." 2024 WL 4893409, at *12 (Order Partially Granting Motion to Dismiss) (Nov. 18, 2024).

Similarly, in a like case involving COSCO, Judge Crovella dismissed another claim of refusal to deal in almost identical terms, concluding: "SEA does not allege facts to support a claim that COSCO unreasonably refused to deal or negotiate regarding vessel space accommodations and Count III is dismissed." FMC Dkt. No. 24-16, *Samsung Electronics America, Inc., v. Cosco Shipping Lines Co., Ltd.,* 2025 WL 1126006 at *13 (Order on Motion to Dismiss, April 11, 2025).

Here, the Complaint alleges even less than SEA alleged in the two cases discussed immediately above. *A fortiori*, it must be dismissed.

C. <u>The Complaint Fails to State a Claim Under 46 U.S.C. § 41104(a)(3)</u>

The two *SEA* cases discussed immediately above also demonstrate why Complainant's claim under 46 U.S.C. § 41104(a)(3) must also fail. As Judge Chintella explained :

> "Having established that SEA is a protected entity under the Shipping Act's retaliation provision, SEA must also allege sufficient facts to show that it engaged in protected activity ("filed a complaint" or "any other reason") and that, because of this protected activity, OOCL refused or threated to refuse available cargo-space accommodation (or engaged in "any other unfair or unjustly discriminatory action"). The Commission has explained that the "for any other reason" language includes other ways a shipper might bring unlawful activity to the Commission's attention:
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>> Section 41104(a)(3) contains two types of shipper activity that are specifically protected: patronizing another carrier and filing a complaint. Filing a complaint refers to filing a sworn complaint alleging a violation under 46 U.S.C. § 41301(a). The statute also, however, protects shippers from being retaliated against "for any other reason." The Commission interprets "any other reason" to mean that protected activity under § 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. This interpretation is consistent with congressional intent as set forth in the Alexander Report and with the important role shippers serve in assisting the Commission with its

> mission. Further, providing information to Commission investigators and enforcement attorneys, seeking assistance from CADRS, and commenting on Commission rules and notices fall within same class of conduct as filing a complaint."

Id., 3 F.M.C.2d at 207, 2021 WL 9204128, at *5.

The Complaint here does not allege that Complainant engaged in any "protected activity." It does not assert that Complainant brought the matter addressed therein to the attention of the Commission (until it filed the Complaint) or that it even threatened to do so. Instead, it specifically alleges that the purported retaliation was in response to Complainant's questioning of an invoice, which is not a "protected activity." Accordingly, as in the *SEA* cases cited above, the Complaint must be dismissed for failure to state a claim.

As discussed above, the Presiding Officer dismissed a similar complaint in *Marciano*. She there explained:

> "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."

Phillip Marciano, FMC Dkt. 25-11, 2025 WL 3732714 at *13.

Insofar as relevant, the instant Complaint is on all fours with the complaint dismissed by the Presiding Officer in *Marciano* and accordingly must be dismissed for the same reasons.

D. The Complaint Fails to State a Claim Under 46 U.S.C. § 41104(a)(2)

46 U.S.C. § 41104(a)(2) states that a common carrier may not "provide service in the liner trade that is—(A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title, unless excepted or exempted under section 40103 or 40501(a)(2) of this title."

As the Complaint admits, the relationship between COSCO and Complainant was governed by a Service Contract. Apart from a brief reference to "service contract violations," the Complaint nowhere alleges that COSCO assessed rates or charges, or imposed classifications, rules, or practices other than those specified in the Service Contract. Accordingly, the Complaint fails to state a claim under 46 U.S.C. § 41104(a)(2).

III. THE FMC LACKS JURISDICTION OVER COMPLAINANT'S 46 U.S.C. § 41102(a)(2) CLAIM

Complainant bases its claim that COSCO violated 46 U.S.C. § 41102(a)(2) on the ground that COSCO committed unspecified "service contract violations." But the Shipping Act specifically denies the Commission jurisdiction to address such service contract claims.

46 U.S.C. § 40502(f) provides that: "Unless the parties agree otherwise, the ***exclusive remedy*** for a breach of a service contract is an action in an appropriate court." (Emphasis added). The parties here have not agreed, and the Complaint nowhere alleges, that alleged breaches of the Service Contract may be raised before the FMC. Accordingly, Complainant's claim under 46 U.S.C. § 41102(a)(2) must be dismissed for lack of jurisdiction.

The Commission has held that, for 46 U.S.C. § 40502(f) "to have meaning, it must have been intended to preclude the filing of some complaints of Shipping Act violations, and not just

breach of contract claims, as such claims would not be actionable before the Commission in any event." *Cargo One, Inc. v. Cosco Container Lines Co. Ltd*, FMC Dkt. 99-24, 2000 WL 1648961, at *14 (FMC Oct. 31, 2000). Claims "premised on the obligation to meet one's contract commitments" are thus "outside its jurisdiction," even if they also might be phrased as Shipping Act claims.

> "We find that as a general matter, allegations essentially comprising contract law claims should be dismissed unless the party alleging the violation successfully rebuts the presumption that the claim is no more than a simple contract breach claim. In contrast, where the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support such a claim, that the matter is appropriately before the agency." *Id.* (footnote omitted).

More specifically, the Commission in *Cargo One* expressly recognized that claims under 46 U.S.C. § 41104(a)(2) are essentially breach of contract claims and therefore ***may not*** be adjudicated by the Commission absent special circumstances:

> "[W]e find that the alleged violations of sections 10(b)(1) and (3) are substantially contract law claims. Sections 10(b)(1) and (3) are premised on the obligation to meet one's contract commitments, and are therefore essentially breach of contract actions which section 8(c) renders not properly before the Commission in the absence of evidence offered by complainant (as the party bearing the burden of proof) that some ***extraordinary aspects*** of the allegation distinguish it substantially from a breach claim." *Id.* at *15 (footnote omitted, emphases added).[2]

The Complaint does not allege any unusual, much less "extraordinary" circumstances" that would pull the Complaint regarding 46 U.S.C. § 41102(a)(2) out from the realm of judicial jurisdiction and into the kingdom of the FMC. Accordingly, even if the Complaint plausibly stated a claim under 46 U.S.C. § 41102(a)(2), which it does not, the Commission would not have jurisdiction over that claim, so the Complaint would need to be dismissed in any event.

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[2] On remand of *Cargo One*, the ALJ recognized the Commission's determination that claims under 46 U.S.C. § 41102(a)(2), are not generally cognizable at the FMC, stating that "it seems clear that the Commission intended that the ALJ dismiss the complaint herein as to [46 U.S.C. 41104(a)(2)]." 29 S.R.R. 620, 621 (ALJ, Admin. Final 2002)

IV. THE COMMISSION LACKS JURISDICTION OVER CSLNA

CSLNA is not a common carrier, an OTI, or an MTO. Accordingly, the FMC lacks both personal and subject matter jurisdiction over CSLNA with respect to any disputes with Complainant.

A. Personal Jurisdiction.

The FMC's regulatory jurisdiction extends only to certain, specific types of entities (often referred to as "regulated entities") – those are "Vessel Operating Common Carriers," ("VOCC") "Marine Terminal Operators," "Non-Vessel-Operating Common Carriers,"("NVOCC") and "Ocean Freight Forwarders." The Complaint does not allege that CSLNA is any of those, and indeed, it is not.[3] Rather, as the Complaint explicitly recognizes, CSLNA is merely an agent of COSCO. Nothing in the Shipping Act authorizes the Commission to exercise regulatory authority over mere agents of regulated entities.[4]

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[3] To be a "common carrier" under the Shipping Act, an entity must:

(a) hold itself out to the general public to provide transportation of passengers or cargo between the United States and a foreign country;
(b) assume responsibility for the transportation from the port or point of receipt to the port or point of destination; and
(c) 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); *see* 46 C.F.R. § 520.2.

CSLNA does none of those things; rather, they are all done by COSCO. The Complaint does not allege otherwise.

[4] Both the FMC and the courts have recognized that an agent of a regulated entity is not itself a regulated entity unless it independently meets the statutory requirements for such an entity. Thus, in *Landstar Express Am., Inc. v. FMC,* 569 F.3d 493, 494 (D.C. Cir. 2009), for example, the U.S. Court of Appeals for the D.C. Circuit held that the Shipping Act does not allow an agent of a common carrier to be regulated as a common carrier unless such entity holds out in its own name to perform as a common carrier. Then-Judge Kavanaugh's opinion started with "the basic rule-of-law maxim that statutory text binds federal agencies" and concluded that "the Commission does

B. **Subject Matter Jurisdiction**.

Because CSLNA is not a regulated entity, the FMC also lacks subject matter jurisdiction. The provisions of the Shipping Act that the Complaint claims may have been violated are 46 U.S.C. §§ 41102(c), 41104(a)(2), 41104(a)(3) and 41104(a)(10). Those provisions apply by their terms only to a "common carrier, marine terminal operator, or ocean transportation intermediary." *Id*. Because CSLNA is not, and is not alleged to be, one of those regulated entities, CSLNA is not subject to those sections of the Shipping Act and hence the Commission lacks subject matter jurisdiction over the claims against CSLNA.

The Presiding Officer recognized the requirement to allege a plausible claim of regulated status in *Marciano, supra*, identifying that the complaint must show not only that the respondent is a regulated entity in general, but also that it acted as a regulated entity for the specific shipment(s) at issue:

> 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. *Marciano*, FMC Dkt. 25-11, 2025 WL 3732714 at *9.

The Complaint does not allege that CSLNA is a common carrier generally, much less for the specific shipment at issue. Accordingly, CSLNA must be dismissed.

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not possess statutory authority to require agents of Ocean Transportation Intermediaries who are not themselves Ocean Transportation Intermediaries to obtain licenses." *Id*. He further explained that "an agent of an NVOCC by definition is not a "common carrier," and thus not an "NVOCC" as described in the Act."

V. CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, Respondents respectfully request that the Commission dismiss the Complaint for failure to state a claim on which relief may be granted and/or for being outside the Commission's jurisdiction. This would require dismissal of the entire Complaint, both as to COSCO and as to CSLNA. Should the Presiding Officer not dismiss the entire Complaint, however, she must dismiss CSLNA for lack of jurisdiction.

Dated: January 23, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 23rd day of January, 2026, a true and correct copy of the foregoing document was served by email on the following:

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