

Issued: August 10, 2023

**FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.**

DOCKET NO. 23-08

**MEDITERRANEAN SHIPPING COMPANY, S.A.—POSSIBLE VIOLATIONS OF THE
SHIPPING ACT, 46 U.S.C. §§ 41102(c), 40501 and 41104(a)(2)(A)**

ORDER OF INVESTIGATION AND HEARING

The Federal Maritime Commission (FMC or Commission) deems it appropriate and in the public interest that a proceeding be, and hereby is, instituted pursuant to 46 U.S.C. § 41302 of the Shipping Act of 1984, as amended, 46 U.S.C. chs. 401-413, (Shipping Act) against Respondent Mediterranean Shipping Company, S.A. (MSC), a vessel-operating common carrier (VOCC), for possible violations of 46 U.S.C. §§ 41102(c), 40501, and 41104(a)(2)(A).

Based on information provided to it, the Commission's Bureau of Enforcement, Investigations, and Compliance (BEIC) makes the following allegations:

**STATEMENT OF FACTS
CONSTITUTING BASIS OF VIOLATIONS**

1. Mediterranean Shipping Company, S.A. (MSC or Respondent) is a VOCC, FMC Org. No. 001699.
2. Upon information and belief, MSC is privately owned and organized under the laws of Switzerland with its principal place of business at 12-14, Chemin Rieu, Geneva, Switzerland 1208.
3. MSC's agent in the United States is Mediterranean Shipping Company (USA), Inc. with

a principal place of business at 420 5th Avenue, 8th floor, New York, NY 10018-2702.

4. Upon information and belief, MSC is one of the world's top container shipping lines with the largest imported TEUs from January 2022 to 2023.¹
5. MSC is a member of the 2M Alliance with a fleet size of 730 vessels.
6. MSC publishes its tariffs with Descartes Systems Group Inc. at <https://rates.descartes.com>.

Merchant Clause

7. MSC defines and applies in its Bill of Lading and its Sea Waybill the term “merchant.” Merchant “includes the Shipper, Consignee, holder of this Sea Waybill, the receiver of the Goods and any Person owning, entitled to or claiming the possession of the Goods or of this Sea Waybill or anyone acting on behalf of this Person.”²
8. MSC defines and applies in its Bill of Lading and its Sea Waybill the term “person.” Person “includes an individual, corporation, company, or any other legal entity.”³
9. MSC states in its Bill of Lading and its Sea Waybill “Demurrage, per diem and detention charges will be levied and payable by the Merchant [at the end of the free time allowed at the Port of Discharge or the Place of Delivery] thereafter in accordance with the Tariff.”⁴
10. MSC's bill of lading or sea waybill hereinafter is referred to as “bill of lading.”

¹ <https://www.datamyne.com/> (recorded data from Datamyne—a publicly available database—rank MSC as the number one carrier with a total of 18% of market share and 5.1 million of TEUs imported from January 20, 2022 to January 20, 2023) (last visited May 19, 2023).

² MSC Bill of Lading and MSC Sea Waybill Terms and Conditions, <https://www.msc.com/en/carrier-terms> (last visited May 16, 2023).

³ MSC Bill of Lading and MSC Sea Waybill Terms and Conditions, <https://www.msc.com/en/carrier-terms> (last visited May 16, 2023).

⁴ MSC Bill of Lading and MSC Sea Waybill Terms and Conditions, <https://www.msc.com/en/carrier-terms> (last visited May 16, 2023).

11. MSC relies on its definition of merchant (merchant clause) to (1) invoice third parties for money when they are not in privity of contract, (2) invoice third parties who have no beneficial cargo interest being shipped, and/or (3) invoice third parties who have not consented to the bill of lading or seaway bill terms and/or conditions for a specific shipment.
12. Upon information and belief, MSC has a policy that when a container arrives at destination, the “notify party” listed on its bill of lading is a merchant as defined in its bill of lading.
13. Upon information and belief, MSC has a policy that when a container arrives at destination, the notify party is billed detention and demurrage or per diem charges per its bill of lading terms.
14. Upon information and belief, MSC has a policy to collect detention or demurrage or per diem charges from third parties named as a notify party on its bill of lading.
15. Upon information and belief, MSC has a policy that if the consignee, rather than the notify party, is to pay detention and demurrage or per diem charges, the consignee must first confirm in writing with MSC that they accept the invoices.
16. Upon information and belief, MSC has a policy that until a consignee accepts in writing the detention and demurrage or per diem charges, MSC will not remove the charges from the notify party’s account.

V. Alexander & Co., Inc. (V. Alexander)

17. V. Alexander is a licensed and bonded Ocean Freight Forwarder, FMC Org. No. 005312.
18. V. Alexander provides customs services and is a trade consultant.
19. MSC’s bills of lading, listed in Attachment A, under the heading of V. Alexander, dated

between about December 5, 2017, and about October 12, 2018, list V. Alexander as the notify party.

20. Upon information and belief, V. Alexander provided customs clearance services for the containers listed in Attachment A.
21. MSC issued to V. Alexander eight (8) rail detention invoices dated between about January 12, 2018, and about December 6, 2018, totaling \$3,195.00. A list of these invoices and their corresponding bills of lading and container number are included in Attachment A.
22. From March 2021 through July 2021, MSC billed and attempted to collect from V. Alexander detention and demurrage or per diem on the containers listed in Attachment A.
23. Upon information and belief, MSC did not obtain consent from V. Alexander before binding them to the terms of its bill of lading for any of the containers listed in Attachment A.
24. V. Alexander was neither the shipper nor consignee on bills of lading for any of the containers listed in Attachment A.
25. Upon information and belief, MSC was not in privity of contract with V. Alexander for any of the containers listed in Attachment A.
26. Upon information and belief, MSC had knowledge that V. Alexander did not have a beneficial cargo interest in the merchandise shipped inside the containers listed in Attachment A.
27. Upon information and belief, MSC refused to remove detention and demurrage or per diem charges from V. Alexander's account for any of the containers listed in Attachment A, unless the consignee first accepted the charges in writing.
28. Upon information and belief, MSC had knowledge that V. Alexander was not contracted

to fill any role in moving cargo or organizing container movement (pickup or delivery) for any of the containers listed in Attachment A.

John S. Connor, Inc. (J. Connor)

29. J. Connor is a licensed, tariffed, and bonded non-vessel operating common carrier and ocean freight forwarder, FMC Org. No. 00674.
30. Upon information and belief, J. Connor provides customs brokerage and compliance services.
31. MSC bills of lading listed in Attachment A, under the heading of J. Connor, dated between on or about September 7, 2020, and on or about October 14, 2020, list J. Connor as the notify party.
32. J. Connor was neither the shipper nor consignee on these bills of lading.
33. MSC issued to J. Connor five (5) rail detention invoices dated between about October 2, 2020, and about November 12, 2020, totaling \$2,310.00. A list of these invoices and their corresponding bills of lading and container number are included as Attachment A.
34. Upon information and belief, MSC was not in privity of contract with J. Connor for any of the containers listed in Attachment A.
35. Upon information and belief, J. Connor provided customs clearance services for the containers listed in Attachment A.
36. Upon information and belief, MSC had no indication that J. Connor had a beneficial cargo interest in the merchandise shipped inside the containers listed in Attachment A.
37. Upon information and belief, MSC did not receive any indication from J. Connor that it accepted responsibility for the payment of rail detention for any of the containers listed in Attachment A.

38. Upon information and belief, MSC did not obtain consent from J. Connor before binding them to the terms of its bill of lading for any of the containers listed in Attachment A.
39. Upon information and belief, MSC had knowledge that J. Connor was not contracted to fill any role in moving cargo or organizing container movement (pickup or delivery) for any of the containers listed in Attachment A.

Welke Customs Brokers USA, Inc. (Welke USA)

40. Welke Customs Brokers USA, Inc. (Welke USA) is a licensed customs brokerage firm.
41. Welke USA provides customs clearance, consulting, and cargo insurance services.
42. MSC bills of lading, listed in Attachment A, under the heading Welke USA, dated between approximately February 3, 2020, and April 1, 2020, list Welke Customs Brokers USA Inc. as the notify party.
43. Welke USA was neither the shipper nor consignee on these bills of lading.
44. Upon information and belief, MSC was not in privity of contract with Welke USA for any of the containers listed in Attachment A.
45. Upon information and belief, Welke USA provided customs clearance services for the containers listed in Attachment A.
46. Upon information and belief, MSC had no indication that Welke USA had a beneficial cargo interest in the merchandise shipped inside the containers listed in Attachment A.
47. Upon information and belief, MSC did not obtain consent from Welke USA binding them to the terms of its bill of lading for any of the container listed in Attachment A.
48. Upon information and belief, MSC opened an account in the name of Welke USA without its consent.
49. Upon information and belief, MSC posted truck detention charges to Welke USA and

MSC demanded payment from Welke USA.

50. Upon information and belief, MSC insisted that the truck detention charges to Welke USA were valid and threatened legal action if the balance was not paid.
51. Upon information and belief, MSC received communications from Welke USA disputing its responsibility to pay any of the invoices associated with the containers listed in Attachment A.
52. Upon information and belief, MSC had knowledge that Welke USA was not contracted to fill any role in moving cargo or organizing container movement (pickup or delivery) for any of the containers listed in Attachment A.

Operating Reefer v. Non-Operating Reefer

53. Upon information and belief, MSC charged the same demurrage, detention, or per diem rate for both operating and non-operating reefers (NORs) in 2021 in its U.S. trades.
54. Upon information and belief, in 2021, MSC failed to publish in its tariff a demurrage, detention, or per diem rate for NORs in its U.S. trades.
55. Upon information and belief, MSC published in its tariff rates for demurrage, detention, or per diem for NORs in several non-U.S. markets.
56. The Commission requested and performed an audit of MSC's detention and demurrage charges in the year 2021.
57. The Commission received the requested data from MSC demonstrating the total number of shipments where demurrage or detention was charged for operating reefers.
58. Upon submitting the requested information, MSC, through its U.S. agent, stated in a letter to the Commission that operating reefers are assessed a different detention and demurrage rate than NORs.

59. Upon information and belief, expenses incurred in managing an operating reefer do not apply to a NOR.
60. Upon information and belief, on at least 925 occasions, MSC's customers disputed the operating reefer detention or demurrage, resulting in refunds totaling \$1,201,639.80.
61. Upon information and belief, in 2021, 1,704 NOR overcharges went undisputed, resulting in MSC retaining approximately \$857,944.57 in additional revenue.
62. Upon information and belief, in 2021, MSC took no action to correct the operating reefer vs. NOR detention or demurrage or per diem overcharges.
63. MSC did not publish applicable operating and non-operating demurrage, detention, or per diem rates and charges in its tariff in its U.S. trade lanes until March 9, 2023.

THE COMMISSION'S JURISDICTION AND REQUIREMENTS OF LAW

65. Under 46 U.S.C. § 41302(a), the Commission is empowered to investigate any conduct, fee, or charge that the Commission believes to be in violation of the Shipping Act.
66. MSC is a common carrier as defined in 46 U.S.C. § 40102(7). It holds itself out to the general public to provide transportation of cargo between the United States and foreign countries for compensation. MSC's conduct is under the jurisdiction of the Commission as a regulated entity.
67. MSC is an ocean common carrier as defined in 46 U.S.C § 40102(18).
68. According to 46 U.S.C. § 41102(c), a "common carrier . . . 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."
69. 46 U.S.C. § 40501(a)(1) and (b)(4) provide that "(a)(1) [i]n general.—[e]ach common

carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established.

. . . (b) . . . [a] tariff under subsection (a) shall . . . (4) state separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules that in any way change, affect, or determine any part or the total of the rates or charges.”

70. 46 U.S.C. § 41104(a)(2)(A) provides that “[a] common carrier . . . shall not—(2) 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. . . .”

71. MSC is obligated to observe and adhere to the Shipping Act and the statutes above and 46 U.S.C. § 41304 empowers the Commission to issue orders relating to a violation of the Shipping Act or a regulation related to the Shipping Act after an opportunity for a hearing.

72. The Commission is further empowered to assess civil penalties after notice and an opportunity for a hearing pursuant to 46 U.S.C. § 41109.

VIOLATIONS OF THE SHIPPING ACT

MERCHANT CLAUSE APPLICATION IN ALLEGED VIOLATION OF 46 U.S.C. § 41102(c)

73. 46 U.S.C. § 41102(c) provides that a common carrier “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.”

74. MSC’s bill of lading—and its definition of “merchant” contained within it—is a normally occurring and customary practice and regulation.

75. MSC's merchant clause appears unreasonable, is overbroad, and is in violation of 46 U.S.C. § 41102(c) when applied to parties other than shippers, consignees, and persons with a beneficial cargo interest.
76. MSC's conduct of holding parties who have not consented to be bound by its bill of lading liable for charges and invoices via an overbroad definition of "merchant" is related to and connected with MSC's receiving, handling, storing, and delivering property and such practice occurs on a normal and customary basis.
77. MSC is alleged to have failed to establish, observe, and enforce just and reasonable regulations related to the definition of merchant in its bills of lading.

BILLING IN ALLEGED VIOLATION OF 46 U.S.C. § 41102(c)

78. In 2021, on at least 1,700 occasions, MSC appears to have billed NOR shipments the operating reefer detention and demurrage rate instead of the dry rate. A representative list of MSC bills of lading is included as Attachment B.
79. MSC's practice and regulation of billing NOR shipments the operating reefer detention rate instead of the dry rate is alleged to be a failure by MSC to establish, observe, and enforce just and reasonable practices.
80. MSC's misapplication of its operating reefer rates to NOR shipments is alleged to be a practice and regulation that occurred on a normal and customary basis.
81. MSC's misapplication of its operating reefer rates to NOR shipments is an alleged violation of 46 U.S.C. § 41102(c).

**FAILURE TO PUBLISH TARIFF RATES
IN ALLEGED VIOLATION OF 46 U.S.C. § 40501**

82. 46 U.S.C. § 40501 provides that common carriers must publish their tariffs for "public

inspection” and that those tariffs must “state separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules that in any way change, affect, or determine any part of the total of the rates or charges.” 46 U.S.C. § 40501(a)(1), (b)(4).

83. Prior to March 9, 2023, MSC did not publish separate detention and demurrage rates for NORs for public inspection, in contravention of 46 U.S.C. § 40501(a)(1), (b)(4).
84. By virtue of its status as an ocean common carrier, MSC is obligated to abide by the above statute and publish its tariffs and state each charge under its control and any rules that in any way change, affect or determine any part of the total of its rates or charges.
85. By allegedly withholding publication of the NOR rate for public inspection, MSC was operating in contravention of 46 U.S.C. § 40501(a)(1), (b)(4). *See* Attachment B.

**FAILURE TO PROVIDE SERVICES IN ACCORDANCE WITH
PUBLISHED RATES IN ALLEGED VIOLATION OF
46 U.S.C. § 41104(a)(2)(A)**

86. 46 U.S.C. § 41104(a)(2)(A) states that common carriers shall not provide service that is “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.”
87. MSC is obligated to abide by the above statute and must provide its services in accordance with the rates, charges, classifications, rules and practices published in its tariff.
88. Even if MSC is found to be in compliance with 46 U.S.C. § 40501(a)(1) by correctly publishing an operating reefer detention and demurrage rate that encompasses NORs, MSC would nonetheless appear to be in violation of 46 U.S.C. § 41104(a)(2)(A) by incorrectly charging the dry container rate instead of the published operating reefer rate. *See* Attachment B.

ORDER

NOW THEREFORE IT IS ORDERED That pursuant to 46 U.S.C. §§ 41302 and 41304 an investigation is hereby instituted to determine:

- (1) whether MSC violated 46 U.S.C. § 41102(c) by failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property by (a) holding parties who have not consented to be bound by its bill of lading or sea waybill liable for detention and demurrage or per diem charges, and (b) misapplying its operating reefer rates to NOR shipments;
- (2) whether MSC violated 46 U.S.C. § 40501 by failing to:
 - (a) publish in its tariff separate detention and demurrage rates for nonoperating reefers for public inspection;
 - (b) publish its tariffs and state each charge under its control and any rules that in any way change, affect or determine any part of the total of its rates or charges;
 - (c) publish the nonoperating reefer rate for public inspection;
- (3) whether MSC violated 46 U.S.C. § 41104(a)(2)(A) by providing transportation in the liner trade that was not in accordance with the rates, charges, classifications, rules, and practices contained in its published tariff;
- (4) whether, in the event violations of the Shipping Act and the Commission's regulations are found, civil penalties should be assessed against MSC and, if so, the amount of the penalties to be assessed; and

- (5) whether, in the event violations of the Shipping Act and the Commission's regulations are found, an appropriate cease and desist order should be issued as authorized by the Shipping Act at 46 U.S.C. § 41304.

IT IS FURTHER ORDERED That Mediterranean Shipping Company, S.A. is designated as Respondent in this proceeding;

IT IS FURTHER ORDERED That the Commission's Bureau of Enforcement, Investigations, and Compliance is designated a party to this proceeding;

IT IS FURTHER ORDERED That within 25 days of being served with this Order, Respondent must file with the Commission and serve upon the Bureau of Enforcement, Investigations, and Compliance an Answer to the allegations in this Order, in accordance with the requirements of the Commission's regulations set forth in 46 C.F.R. § 502.63(c). Respondent's answer must be verified and admit or deny all allegations in this Order. Allegations not denied shall be deemed admitted.

IT IS FURTHER ORDERED That this matter be assigned for hearing before an Administrative Law Judge of the Commission's Office of Administrative Law Judges at a date and place to be determined by the Administrative Law Judge in compliance with Rule 61 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.61. This hearing shall include oral testimony and cross-examination in the discretion of the presiding Administrative Law Judge only after consideration has been given by the parties and the presiding Administrative Law Judge to the use of alternative forms of dispute resolution, and upon a proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matters in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record;

IT IS FURTHER ORDERED That failure of Respondent to timely file an answer to this Order may be deemed to constitute default and authorize the presiding officer, without further notice to Respondent, to find the facts to be as alleged and to enter a decision containing appropriate findings, conclusions, and an order;

IT IS FURTHER ORDERED That other persons having an interest in participating in this proceeding may file motions for leave to intervene in accordance with Rule 68 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.68;

IT IS FURTHER ORDERED That all further notices, orders, and/or decisions issued by or on behalf of the Commission in this proceeding, including notice of the time and place of hearing or prehearing conference, shall be served on the parties of record;

IT IS FURTHER ORDERED That all documents filed by any party of record in this proceeding shall be directed to the Secretary, Federal Maritime Commission, at Secretary@fmc.gov, in accordance with Rule 2 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.2, and shall be served on the parties of record; and

IT IS FURTHER ORDERED That in accordance with Rule 61 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.61, the initial decision of the Administrative Law Judge shall be issued by August 12, 2024 and the final decision of the Commission shall be issued by February 24, 2025.

By the Commission.

William Cody
Secretary

Attachment A

V. Alexander & Co., Inc. (V. Alexander)

Invoice No.	BOL No.	Charge
190000057911R	MSCUJX768383	\$660.00
190000058539R	MSCUJX768383	\$165.00
190000058338R	MSCUJX764689	\$1,215.00
190000060568R	MSCUJX802356	\$165.00
190000061236R	MSCUJX809211	\$165.00
190000067404R	MSCUJX963315	\$165.00
190000067405R	MSCUJX962887	\$165.00
190000071814R	MEDUJP120135	\$495.00

John S. Connor, Inc. (J. Connor)

Invoice No.	BOL No.	Charge
100000098316R	MEDUL8508615	\$330.00
100000098319R	MEDUL8510991	\$660.00
100000098317R	MEDUL8499021	\$330.00
100000098318R	MEDUL8510827	\$660.00
100000101476R	MEDUL8635335	\$330.00

Welke Customs Brokers USA, Inc. (Welke USA)

BOL No.	Charge
MEDUBA338947	\$675.00
MEDUBA354803	\$2,271.91
MEDUBA355438	\$2,87.50
MEDUBA361949	\$1,137.50
MEDUBA376731	\$225.00

ATTACHMENT B

Mediterranean Shipping Company, S.A.

Evidence of Violations of 46 U.S.C. §§ 41102(c), 40501(b)(4), and 41104(a)(2)(A)

No.	VPC Date	MSC Bill of Lading No.
1	07/25/2021	MEDUV3286725
2	07/25/2021	MEDUV3286691
3	07/25/2021	MEDUV3286949
4	08/17/2021	MEDUCP227613
5	09/04/2021	MEDUCV139869
6	08/12/2021	MEDUCB812625
7	08/21/2021	MEDUNF326098
8	09/14/2021	MEDUCV253041
9	09/04/2021	MEDUCV250229
10	07/27/2021	MEDUPH062812
11	06/23/2021	MEDUCE127161
12	07/05/2021	MEDUQ4868483
13	07/05/2021	MEDUQ4868491
14	07/28/2021	MEDUCB771680
15	07/15/2021	MEDUQ4941835
16	10/21/2021	MEDUCV807598
17	07/25/2021	MEDUV3286931
18	10/19/2021	MEDUCZ859694
19	10/13/2021	MEDUCZ544783
20	08/17/2021	MEDUQ5229800