

**BEFORE THE
FEDERAL MARITIME COMMISSION**

.....
Docket No. CC-001
.....

MEDITERRANEAN SHIPPING COMPANY - INVESTIGATION FOR COMPLIANCE WITH
§§ 41104(a) AND 41102 OF DEMURRAGE OR DETENTION CHARGES UNDER THE
CHARGE COMPLAINT PROCEDURES OF 46 U.S.C. § 41310
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**MEDITERRANEAN SHIPPING COMPANY S.A.
PETITION TO DISMISS
THE CHARGE COMPLAINT AND THE ORDER TO SHOW CAUSE**

Pursuant to 46 C.F.R. §502.69, Respondent Mediterranean Shipping Company S.A. (“MSC” or “Respondent”) hereby petitions for an order dismissing with prejudice the Charge Complaint No. 001¹ and the related Order Directing MSC to Show Cause dated February 3, 2023 (“Order”) in their entirety. (“Petition”). A Memorandum of Law and the Declaration of Wook Chung are submitted herewith in support of MSC’s Petition.

Respondent reserves all rights and defenses it might have in opposition to the Order. Respondent further respectfully requests that since this Petition is dispositive of the Order, the deadline to respond to the Order, currently set for February 28, 2023, be extended to after 10 days from the Commission’s decision on the Petition pursuant to 46 C.F.R. § 502.62(b)(1) and 46 C.F.R. § 502.63.²

¹ Originally SOFi Paper Products LLC’s Charge Complaint 2022004.

² The Charge Complaint Proceeding is a novel one, and Respondent is aware that there is no specific provision for extension. However, the provisions for extension of time, as the one requested by Respondent, are provided in similar procedural postures under 46 C.F.R. § 502.62(b)(1) and 46 C.F.R. § 502.63 and should be applicable by analogy, in light of same, or similar case precedents in other FMC matters.

MEMORANDUM OF LAW IN SUPPORT OF PETITION TO DISMISS

MSC petitions to dismiss the Charge Complaint and the Order on the ground that MSC refunded in full the amount that was subject to claimant's, SOFi Paper Products LLC ("SOFi"), Charging Complaint. MSC, via its attorneys, couriered the check for the full refund to the Claimant's mailing address. The check has been acknowledged by FedEx as having been delivered to the address set forth by Claimant with the Secretary of State of Florida as its "mailing address".

STATEMENT OF MATERIAL FACTS

1. On or about August 11, 2022, MSC (USA) Inc. received a Charging Complaint number 2022004 ("Claim") filed by SOFi involving Bill of Lading MEDUI0745188 dated July 14, 2022. (Chung Declaration ¶ 4).
2. MSC retained Montgomery McCracken Walker Rhoads LLP at its attorneys ("MSC Attorneys") to contact the Claimant, review the Claim, and try to amicably resolve the Claim, if deemed appropriate. (Chung Declaration ¶ 5).
3. Between September of 2022 and October of 2022, Mr. Leeds, President of SOFi ("Leeds") and Wook Chung, one of the MSC Attorneys ("Chung"), exchanged several emails and telephone communications to discuss the amicable resolution of the Claim that involved the refund of a surcharge SOFi paid to its freight forwarder. (Chung Declaration ¶ 6).
4. On or about October 6, 2022, with the authority from MSC, Chung sent an email to Leeds offering a \$350.00 refund in full settlement of the Claim. (Chung Declaration ¶ 7; Exhibit A to Chung Declaration).
5. On or about October 7, 2022, Leeds replied via an email to Chung stating that "*we would settle for the full amount of \$1,000.*" (Chung Declaration ¶ 8; Exhibit A to Chung Declaration).

6. On or about November 14, 2022, the FMC's regional officer in charge of the Claim sent a notice to MSC stating that "*this case has been forwarded to the Commission's Office of Enforcement to pursue further action.*" The same notice also stated that "*... parties are encouraged to continue efforts to settle disputes privately and may request that the FMC discontinue the charge complaint process at any time, by providing proof of refund, cancellation of the disputed invoice, or some other documentation of the settlement agreement to the Office of Enforcement.*" (Chung Declaration ¶ 9).
7. After discussing the circumstances of the Claim with MSC, on or about November 18, 2022, Chung sent an email to Leeds accepting that MSC would "settle for the full amount of \$1000" according to Claimant's counteroffer that Claimant never withdrew. (Chung Declaration ¶ 10; Exhibit B to Chung Declaration). MSC took steps to perform the necessary paperwork to pay out the refund.
8. On or about November 22, 2022, after MSC had already agreed to Claimant's settlement offer by agreeing to make a full refund, Leeds replied to Chung stating that "*given our company time spent on this and time without the money, I feel it is appropriate to settle for an additional \$500.*" (Chung Declaration ¶ 11; Exhibit B to Chung Declaration). The email did not have an invoice for the \$500 attached, nor did it clarify how the \$500 was calculated besides stating that the new and additional claim was for "*time without the money*".
9. On or about November 23, 2022, and November 28, 2022, MSC Attorneys notified the FMC's regional officer in charge of the Claim that an offer of full refund had been made – *based on Claimant's own settlement demands*. The notice also specified that the Claimant was now seeking additional monies. MSC sought assistance of the FMC's regional office

- to resolve the Claim amicably. (Chung Declaration ¶ 12; Exhibit C to Chung Declaration).
10. On or about November 29, 2022, the FMC officer replied that he was forwarding [MSC's] emails to the Office of Enforcement at BOE@fmc.com because the "case is currently pending there." (Chung Declaration ¶ 13; Exhibit D to Chung Declaration).
 11. On or about February 3, 2023, FMC served the Order on MSC. (Chung Declaration ¶ 14)
 12. On or about February 13, 2023, MSC, through its counsel, mailed the check for the full refund of \$1,000 to the SOFi's mailing address listed with the Florida Secretary of State, and copies were sent to two other addresses also listed on the Secretary of State's website. (Chung Declaration ¶ 15; Exhibit E to Chung Declaration).
 13. The original check addressed to the formal "mailing address" of SOFI, as listed by the Secretary of State of Florida, was confirmed received by the Claimant as per FedEx's delivery record. (Chung Declaration ¶ 16; Exhibit F to Chung Declaration).

LAW

A. The Commission's Rule 12 Standard

46 C.F.R. § 502.12 states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules, to the extent that application of the Federal Rules is consistent with sound administrative practice. As the Commission's Rules do not address motions to dismiss for lack of subject matter jurisdiction or failure to state a claim, Federal Rules 12(b)(1) and 12(b)(6) apply in such cases. *See, e.g., The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, Docket No. 06-02, 2007 WL 2468431 (F.M.C. Aug. 2, 2007).

B. Formation of a Settlement Contract

Disputes involving settlement agreements are governed by contract principles. *See Tiburzi v. Dep't of Justice*, 269 F.3d 1346, 1351 (Fed.Cir.2001) (“It is ‘axiomatic that a settlement agreement is a contract.’”) (Internal citations and quotation marks omitted).

“The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.” *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003) quoting the Restatement (Second) of Contracts § 22(1) (1979).

“A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.” *First Com. Corp. v. United States*, 335 F.3d 1373, 1381 (Fed. Cir. 2003) quoting the Restatement (Second) of Contracts § 59 (1979).

In particular, in the context of a settlement agreement, “where a party's response to an offered settlement agreement makes ‘edits’ or changes to the offer proposed by the other party, the responding party has ‘essentially made a counter-offer.’” *Great Lakes Commc'n Corp. v. AT&T Corp.*, 124 F. Supp. 3d 824, 849 (N.D. Iowa 2015). *See also Etablissement Asamar Ltd. v. Lone Eagle Shipping Ltd.*, 882 F. Supp. 1409, 1411 (S.D.N.Y. 1995).

An offer that does not specify a time for acceptance is to be considered to be open open for a reasonable time unless sooner revoked. *See Etablissement Asamar Ltd.*, 882 F. Supp. at 1411 (S.D.N.Y. 1995).

MSC unconditionally accepted Claimant’s offer to settle for the full amount of \$1000 in this case.

C. Dismissal for Mootness

Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies.” *Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C.Cir.2008) (quotation marks omitted). A case is moot when “the challenged conduct ceases such that there is no reasonable expectation that the wrong will be repeated” in circumstances where “it becomes impossible for the court to grant any effectual relief whatever to the prevailing party.” *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000).

D. FMC Rules on Disputed Charges

FMC’s policies and procedures, as well as its Charging Complaint guidelines and related interim procedures (including “Frequently Asked Questions” on FMC’s website), have always expressly endorsed and encouraged the ocean carriers to make refund or agree to waive such a claimed amount as way to resolve such claims.

Under the rules of Ocean Shipping Reform Act of 2022 (“OSRA 2022”) and the guidelines of Federal Maritime Commission (“FMC”), the common carrier can voluntarily elect to refund any payment to the shipper or complaining party while the matter is being investigated or at any stage prior to the Commission’s decision.

Guidance on Charge Complaint Interim Procedure

FREQUENTLY ASKED QUESTIONS

Q: Can the common carrier settle/voluntarily refund or withdraw the disputed fee or charge?

*A: Yes. The common carrier can voluntarily elect to refund (or waive) any payment to the shipper or complaining party while the matter is being investigated **or at any stage prior to the Commission’s decision**.*

The common carrier’s issuance of a refund or waiver of the charge in dispute will result in the closure of the complaint and no additional Charge Complaint action will be taken. (emphasis supplied).

(Reference: <https://www.fmc.gov/osra-2022-implementation/charge-complaint-interim-procedure/>).

ARGUMENT

1. A VALID SETTLEMENT WAS REACHED BETWEEN THE PARTIES

MSC respectfully submits that this case involves a full refund, and not a “settlement” which contemplates an amount less than 100%. To the extent that the FMC may perceive this case as a “settlement” between the parties, MSC takes the position that MSC and SOFi entered into a valid settlement agreement as of November 18, 2022, when Chung sent SOFi an email unconditionally accepting SOFi’s \$1,000 settlement offer.

The parties’ exchanges that led to the formation of the settlement agreement can be summarized as follows. MSC presented an initial settlement offer for \$350 on October 6, 2022. SOFi rejected that offer on October 7, 2022 and stated that SOFi would “settle for the full amount of \$1000”. That email constituted a counteroffer as it contained a conditioned assent by SOFi to settling with MSC. The condition in this case was MSC accepting a different material term of the settlement: a payment increase from \$350 to \$1,000. MSC then unconditionally accepted SOFi’s counteroffer on November 18, 2022 when Chung emailed back SOFi accepting to settle for the full \$1,000 amount. SOFi’s October 6, 2022 offer did not contain a term for its acceptance, nor was ever revoked by SOFi prior to MSC’s unconditional acceptance. When an offer doesn’t specify a timeframe for its acceptance it will remain open for a reasonable time unless revoked. *Etablissement Asamar Ltd.*, 882 F. Supp. at 1411 (S.D.N.Y. 1995). Courts have held that a two-month delay between offer and acceptance constitutes a reasonable time to communicate an acceptance. MSC accepted SOFi’s offer 42 days after the offer was made which is fully within the reasonable term. As such, the settlement between MSC and SOFi was perfected on November 18 and the dispute should be considered resolved from that date.

Had MSC refused to pay the \$1000 after accepting Claimant's demand to settle for \$1000, under the horn-book law cited above, Claimant would have been entitled to sue on the settlement agreement and to recover from MSC the unpaid amount. There is no reason under the law why the Claimant is not equally bound by the agreement. SOFi's sudden attack of "buyer's remorse" after being told by MSC that it would provide a full refund, and its new demand for \$1500 in hopes that it could recover even more money than it claimed, is not a legal defense to an agreed settlement - and should not be condoned by the FMC if the FMC seeks to pursue its public policy of amicable settlements between the parties.

2. THE FMC SHOULD APPROVE THIS SETTLEMENT

The Commission has long recognized that the law strongly favors settlements. *A.P. Moller-Maersk Line Possible Violations of Sections 10(b)(1), 10(b)(2), and 10(b)(4) of the Shipping Act of 1984*, 1999 WL 462920, at *1. This has led the Commission to develop "a strong and consistent policy of encouraging settlements and engaging in every presumption which favors a finding that they are fair, correct, and valid". *HUAL AS v. Puerto Rico Ports Authority*, 2003 WL 22113978, at *3 (internal citations omitted). *See also World Chance Logistics (Hong Kong), Ltd. and Yu, Chi Shing, A.k.a. Johnny Yu - Possible Violations of Section 10 of the Shipping Act of 1984*, 2010 WL 2175399, at *3 and *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002)). Rather than substituting its judgment to the parties, the Commission undertakes a relatively limited role when it comes to scrutinizing settlements. *See P.R. Shipping Ass'n v. P.R. Ports Auth.*, 27 S.R.R. 645, 647 (ALJ 1996). In fact, "[i]f a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of

settlements, the settlement will probably pass muster and receive approval. *HUAL AS v. Puerto Rico Ports Authority*, 2003 WL 22113978, at *3.

When it comes to this specific dispute, the initial notice of Charging Complaint 2022004 (dated August 11, 2022) from the FMC to MSC also stated that -

“Please note, parties are encouraged to privately settle disputes and may request that the Commission discontinue the charge complaint process at any time with the consent of both parties, and by providing to the assigned Area Representative, proof of refund, cancellation of the disputed invoice, or some other documentation indicating a settlement agreement.”

And even in the final notice sent by the FMC regional officer to MSC (dated November 14, 2022), updating MSC that the subject case has been forwarded to Office to Enforcement, the FMC continued to encourage the ocean carrier to make the refund as a way to resolve the claim.

“Please note, parties are encouraged to continue efforts to settle disputes privately and may request that the FMC discontinue the charge complaint process at any time, by providing proof of refund, cancellation of the disputed invoice, or some other documentation of the settlement agreement to the Office of Enforcement.”

Such a guidance and encouragement for the Respondent to offer the full refund or waiver of the charges that are being claimed as the disputed amounts are consistent with the FMC Commission’s longstanding policy of encouraging settlements and applies presumptions favoring a finding that the terms are fair, correct and valid.

Given the settlement achieved between the parties and the long-standing policy of the FMC of approving settlements and consequently terminating the corresponding action pending, MSC respectfully requests that the Commission dismiss the Order.

3. CLAIMANT HAS RECEIVED A FULL REFUND

When MSC made the full refund of the charges as demanded by the Claimant,³ MSC satisfied that demand by the Claimant in compliance with the requirements and guidelines set by the FMC to settle a disputed fee or charge. As the FAQ section of the FMC's website explains, the action by the carrier can be voluntary and there is no requirement that the complaining party accept the refund. Claimant's last minute additional request of \$500 on top of the full refund is unjustified, irrelevant and, most importantly, insufficient to maintain in existence a justiciable controversy. Claimants has never indicated that its actual claim for congestion charges exceeded \$1,000.

MSC's refund payment to SOFi of the entire amount of the charges previously claimed incurred by SOFi, prior to any decision by the FMC, constitutes a full satisfaction of SOFi's rights under 46 U.S.C. § 41310 *et seq.* and no further demand can be made by SOFi to MSC pursuant to the facts of this case.

It is black letter law that, in absence of a justiciable controversy, a dispute should be dismissed for lack of subject matter jurisdiction and mootness. Notwithstanding the fact that the Order has ignored that MSC had already presented an offer of full refund to SOFi, the fact remains that MSC delivered a check for the full refund of \$1,000 to the Claimant at its office. Therefore, there is no congestion charge dispute left to be examined by the FMC. It is submitted that from the moment MSC's full refund check to SOFi was acknowledged as received by the Claimant through FedEx, the Order and the furtherance of these proceedings were rendered moot.

³ It should be noted that sending the funds to the Claimant was complicated and delayed by the fact that the Claimant's address was not included in any of the documents provided to MSC, and consequently we had to go through the Secretary of State's office of Florida to get an address.

Once the Respondent offered and tendered a refund check for the full amount of the Claim to Claimant, the intended purpose of the Charge Complaint has been satisfied. Therefore, since MSC did deliver a refund check in the amount of \$1,000 to Claimant, and that delivery was confirmed, there is no longer a case or controversy under the Charge Complaint for the original claim of congestion surcharge. Claimant has never provided an invoice to show that its claim exceeded \$1000. The original claim by SOFi is moot as is clearly provided under the FMC own guidelines. (See Section D. FMC Rules on Disputed Charges *Supra*). At best, what remains is a new claim for \$500, unsupported by invoices or documents, and raised only on November 22, 2022 (almost 4 months after the original charge complaint was filed) in an effort to recover for “loss of use of money”. Claimant has never argued that is overpayment due to congestion charges were more than \$1000.

4. THE ORDER TO SHOW CAUSE IS UNLAWFUL

On or about December 1, 2022, the FMC issued an announcement indicating that the new procedure for dealing with charge complaints would be for the FMC’s Bureau of Enforcement to “recommend that the Commission – the five Commissioners as a body – issue an ‘Order to Show Cause’ to the common carrier under 46 C.F.R. Section 502.91 to formally adjudicate the Charge Complaint.” This announcement was not a regulation and was adopted without notice and comment rulemaking therefore it is not legally binding. While the general public/industry should be allowed to rely on the guidelines issued by a government especially when there exists insufficient rules and regulations on any given subject matter, the government, in accordance with the principles of ‘due process’, is expected to base its enforcement actions on more concrete rules and procedures. “Agencies may impose legally binding requirements on the public only through regulations and on parties on a case-by-case basis through adjudications, and only after appropriate

process, except as authorized by law or as incorporated into a contract.” Executive Order 13891 of October 9, 2019 (Executive Order 13891 of October 9, 2019, Promoting the Rule of Law Through Improved Agency Guidance Documents.

Prior to the December 1 announcement, there were limited guidelines about the Charge Complaint. The only key guideline to the claimants concerned how to file the claim by including the invoices related to the “disputed charges”. The guidelines did not mention anything regarding the entitlement for a claimant to modify the amount of its claim. Certainly, the guidelines did not provide for a claimant who was offered a full refund to be allowed to present a new claim on the alleged grounds that it had “time spent on this and time without the money”. The key point is that the parties in this dispute were led by the FMC’s own guidelines which encourage the parties to a dispute to resolve it amicably. Specifically, the carrier is directed to seek a settlement by refunding (or waiving) the disputed charges. That is exactly what MSC has done.

Even, assuming arguendo, that the announced procedure of converting charge complaints into Orders to Show Cause is considered lawful, it is legally improper to apply the procedure announced on December 1 to a charge complaint filed in August, almost four months prior to the adoption of the new procedure.

An Order to Show Cause, by its nature, places the burden of proof on the respondent, in this case MSC. This is inconsistent with 46 U.S.C. §41310(b)(2), which shifts the burden of proof to demonstrate reasonableness only with respect to demurrage and detention charges. The congestion surcharge herein at issue is not a “detention” or “demurrage” charge within the meaning of 46 C.F.R. §545.5(b). By shifting the burden of proof to MSC in this proceeding the FMC is acting contrary to the statute.

Under 46 U.S.C. §41109(a), the Commission may assess a civil penalty only after giving notice and providing an opportunity for hearing. By issuing an Order to Show Cause and setting the deadline for a response in the manner it has, the Commission is denying MSC due process by denying MSC the ability to conduct discovery and thus denying an adequate opportunity for a hearing.

5. INTEGRITY OF THE CHARGING COMPLAINT PROCESS MUST BE PROTECTED.

The Charging Complaint process and procedure set out and guided by the FMC meant to provide stability and effectiveness to bring and resolve the claims brought under such process. The integrity of this process must be enforced in ways that will motivate the involved parties to trust the process and engage in the review and resolution process in good faith. In the event that the offer of full refund of the claimed amount is made, the FMC should consider the claims to have been resolved and closed without taking any further action(s).

If the FMC allows a claimant to demand an arbitrary or unjustified additional payment, based on a different claim, after being offered for the full amount (i.e., refund or waiver) of its congestion charge claim, the entire Charging Complaint process will be undermined. There will be no motivation for either party to settle, as a settlement payment does not bring the proceeding to an end.

Denying MSC's Petition to dismiss this case will set a bad precedent, discourage settlements, and put the integrity of Charging Complaint case in question.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons Respondent respectfully petitions that it be dismissed from the proceeding for lack of subject matter jurisdiction due to the claim being moot.

Dated: February 23, 2023

Respectfully submitted,

/s/Vincent M. DeOrchis

/s/Wook Chung

/s/Kaspar Kielland _____

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CERTIFICATE OF SERVICE

I certify that on the 24th day of February 2023, a true and correct copy of the foregoing Petition to Dismiss and Declaration of Wook Chung in Support of Petition to Dismiss were served by email on all counsel of record in accordance with 46 CFR Part 502.

/s/Kaspar Kielland
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