

BEFORE THE
FEDERAL MARITIME COMMISSION

FMC DOCKET NO. 16-12

PRO TRANSPORT, INC.,
PRO TRANSPORT JACKSONVILLE, INC.,
PRO TRANSPORT SAVANNAH, INC., and
PRO TRANSPORT CHARLESTON, INC.

Complainants,

vs.

SEABOARD MARTINE OF FLORIDA, INC., and
SEABOARD MARINE LTD.

Respondents.

RESPONDENTS' MOTION FOR A STAY

Pursuant to Rule 71 of the Federal Maritime Commission's Rules of Practice and Procedure, 46 C.F.R. §502.71, Respondents Seaboard Martine of Florida, Inc. and Seaboard Marine Ltd. (collectively "Seaboard") by and through their undersigned counsel, respectfully move for the entry of an order indefinitely staying proceedings in the above captioned case. In support thereof, Seaboard respectfully represents as follows:

Background

1. On April 17, 2016, PRO TRANSPORT filed a complaint in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County Florida under the caption and docket number *Pro Transport, Inc., Pro Transport Jacksonville, Inc., Pro Transport Savannah, Inc., and Pro Transport Charleston, Inc. v. Seaboard Marine Ltd., Inc.*, Case No. 16-9612-CA-01

(hereafter referred to as “State court case”). A copy of the aforementioned complaint was attached to Seaboard’s June 3, 2016 motion.

2. On May 12, 2016, PRO TRANSPORT filed a complaint before the Federal Maritime Commission, under the caption and docket number, *Pro Transport, Inc., Pro Transport Jacksonville, Inc., Pro Transport Savannah, Inc., and Pro Transport Charleston, Inc. v. Seaboard Marine Florida, Inc. and Seaboard Marine Ltd., Inc.*, Docket No. 16-12.

3. On May 18, 2016, Judge Ely entered an Order mandating that the Parties to the State court case were to complete mediation within 45 days of the date of the Order.

4. On June 3, 2016, Seaboard filed an unopposed motion to stay the proceedings in this case to allow for mediation of the previously filed State court case. That motion was granted on June 3, 2016, and Seaboard was granted until July 13, 2016 to answer or otherwise respond to the Complaint.

5. In anticipation of the June 30 mediation in the State court case, counsel for Seaboard sent a letter to counsel for Complainants on June 21, 2016, informing Complainants of a counterclaim that Seaboard would be asserting against Complainants based on the unauthorized movement of Seaboard’s empty containers by Complainants.

6. Following receipt of the letter regarding Seaboard’s counterclaim, counsel for Complainants cancelled the June 30, 2016 mediation, which did not take place.¹

7. Complainants’ FMC complaint is based on the same conduct as the State court case, with some additional allegations added in an effort to give a garden variety commercial dispute the appearance of a Shipping Act issue.

¹ The undersigned counsel for Seaboard spoke with counsel for Complainants via telephone on July 12, 2016, and the parties agreed that it would be premature to engage in alternative dispute resolution under the auspices of the FMC’s Office of Consumer Affairs and Dispute Resolution Services at this time.

8. For the reasons that follow, Respondents maintain that a stay of Complainants' FMC complaint is warranted in the interest of judicial and administrative economy.²

MOTION FOR A STAY

A. Standards for a motion for a stay.

9. It has been recognized that the Commission may grant a request to stay a proceeding because "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *General Motors LLC v Nippon Yusen Kabushiki Kaisha, et al.*, 34 S.R.R. 7, 8 (ALJ 2016)(quoting *Landis v North American Co.*, 299 U.S. 248, 254 (1936)). The factors to be considered in evaluating a motion to stay are "which court first assumed jurisdiction, the inconvenience of the federal forum, the desirability of avoiding piece-meal litigation, whether state or federal law provides the rule of decision on the merits, the adequacy of the state court to protect the parties' rights, and whether one of the actions has a vexatious or reactive nature." *Id.*, citing *Profile Manufacturing, Inc. v. Ronald Kress*, 1994 US App LEXIS 6048 at *7 (Fed. Cir. 1994).

10. In *SSA Terminals, LLC, et al. v. The City of Oakland, acting by and through its Board of Port Commissioners*, 32 S.R.R. 107 (ALJ 2010), the ALJ noted that "[m]otions to stay are generally evaluated under the factors established in *Virginia Petroleum Jobbers Ass 'n v FPC*, 259 F.2d 921, 925 (D C. Cir.1958)." *Id.* at *3. The Presiding Officer listed the factors as:

² As required, Respondents have conferred with counsel for Complainants in respect of whether Complainants will consent to the relief sought in this motion for a stay; Complainants have declined to consent.

(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal, (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Ibid., (quoting *Wisconsin Gas Co v FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985) (citing *Virginia Petroleum Jobbers Ass 'n, supra*, 259 F.2d at 925). In *SSA Terminals, supra*, the Presiding Officer granted the requested stay over the opposition of the non-moving party.

11. Application of the *Profile Manufacturing and Virginia Petroleum Jobbers* factors, as adopted by the Presiding Officer in *General Motors LLC* and *SSA Terminals*, and as supplemented by additional factors also judicially recognized — that is, the stage of the litigation, whether the non-moving party will be unduly prejudiced or tactically disadvantaged by a stay; and whether a stay will simplify issues, see *Board of Trustees of the Ohio Laborers' Fringe Benefit Programs v. O.C.I. Construction, Inc.*, No. 2 10-cv-550, 2011 WL 902246 at *3 (S.D. Ohio March 14, 2011), *Washington Mutual Bank v. Law Office of Robert Jay Gumenick*, 561 F. Supp. 2d 410 (S.D.N.Y. 2008); *Auto-Owners Ins. Co. v Summit Park Townhouse Ass'n*, No. 14-cv-3417, 2015 WL 1740818 (D. Col. April 14, 2015), *Woodman's Food Market, Inc. v. Clorox Co.*, No. 14-cv-734, 2015 WL 4858396 (W.D Wis. Aug. 13, 2015) -- support the grant of a stay. Respondents address each of those factors below.

B. An application of the standards for a motion for a stay justify the entry of a stay.

12. *The first-filed status of the State court case.* As noted above, Complainants filed the State court case almost a month before filing the complaint in this proceeding. Dispositive motions have been filed by both parties in the State court case, and are currently pending before the court. Accordingly, this factor favors the entry of a stay. See *Signal International, LLC v*

LeTourneau, Inc., No H-07-2915, 2008 WL 239655 (S.D Tex. Jan. 29, 2008) (staying action in favor of earlier filed case).

13. *The convenience of the forum.* No party to this proceeding is a citizen of or maintains its principal place of business in the District of Columbia. In contrast, Complainants and Respondents are located in or do business in Miami-Dade County. This factor too supports a stay.

14. *The desirability of avoiding piecemeal litigation.* Duplicative litigation will result if the parties are required to litigate the same issues before the Commission and the State court. The factual allegations asserted in Complainants' FMC complaint are mirror-images of the allegations asserted in the class action complaint, with the addition of some speculative and/or attenuated allegations of harm for the apparent purpose of converting a relatively straightforward commercial dispute into a Shipping Act case. This factor also supports a stay. *See In re Groupon Derivative Litigation*, 882 F.Supp.2d 1043 (N.D 111. 2012) (staying action in part to avoid piecemeal litigation and attendant burdens on court and parties).

15. *The law providing the rule of decision.* In the State court case, Complainants seek payment of allegedly past due and unpaid invoices. In the complaint in this case, the gravamen is the same: non-payment. The remaining allegations, which are absent from the State court case, are largely speculative and/or attenuated, and appear to have been included solely in an attempt to bring the dispute within the scope of the FMC's jurisdiction. However, Complainants' alleged monetary damages, as well as Seaboard's counterclaim, which constitute the bulk if not the entirety of the substantive dispute, are not Shipping Act issues and should be resolved by reference to State law. Thus, the law providing the rule of decision favors a stay.

16. *The adequacy of the forum to protect the parties' rights.* As noted above, the

primary substantive claims in this case, particularly Seaboard's counterclaim, are not Shipping Act issues. Indeed, it is questionable whether the Commission could assert jurisdiction over the counterclaim. Accordingly, the State court is better-suited to protecting the rights of the parties, which weighs in favor of a stay.

17. *Whether one of the actions is vexatious or reactive.* Because the gravamen of the complaints in each the State court action and this proceeding is the same -- i.e., alleged non-payment -- and because many if not all of the additional allegations contained in the complaint in this proceeding are speculative and/or attenuated and were not included in the State court case, it can be reasonably inferred that these additional allegations were added solely for purposes of attempting to create a colorable argument with respect to Commission jurisdiction over the complaint. Accordingly, the complaint is largely if not entirely duplicative of the State court case and must be considered vexatious. This weighs in favor of a stay.

18. *Whether the parties or the public interest will be harmed by a stay.* The parties will benefit from a stay by avoiding costly and time-consuming duplicative litigation. The public interest likewise will benefit from a stay because the time and resources of the State court and the Commission will not be consumed by duplicative litigation. As the ALJ noted in *General Motors LLC, supra*, at 9, "Ultimately, only one of these cases will proceed; nothing is gained, and much is lost, by having the two cases proceed simultaneously... This factor weighs in favor of a stay."

19. *The Commission's interest in resolving controversies efficiently.* It is both inefficient and wasteful to consume the time and resources of the Commission in this action when all or a substantial part of it will be resolved in the State court case, whether on motion or after trial. A stay is in the best interests of the Commission's adjudicative goals.

20. *The stage of the litigation.* The parties already have filed dispositive motions in the State court case, whereas this proceeding has not yet reach that stage. This factor too favors a stay. *See Generac Power Systems, Inc. v Kohler Co.*, 807 F.Supp.2d 791 (E.D. WI 2011) (granting stay based in part on early stage of litigation being stayed).

21. *Whether the non-moving party will be unduly prejudiced or tactically disadvantaged by a stay.* Complainants, as the non-moving parties, will not be disadvantaged by the issuance of the stay. Complainants will continue to pursue their claims in the forum in which they first filed – the State court. A stay will not result in any prejudice to Complainants, either substantively or tactically.

22. *Whether a stay will simplify issues.* A stay will simplify issues, as a determination by the State court will resolve the competing claims of the parties in whole or in part, thereby simplifying what remains to be resolved by the FMC, if anything. *See Saipan Shipping Co, Inc. v Asiatic Intermodal Seabridge, S.A.*, 19 S.R.R. 900 (ALJ, 1979) (granting stay where decision in parallel proceeding was likely to either "eliminate the need for a determination of the issues in this proceeding" or have a "strong and direct bearing on the issues in this case") This factor too supports the issuance of a stay.

C. Conclusion

For the foregoing reasons, Respondents respectfully request that: (a) their motion for a stay of proceedings be granted pending a resolution of the State court case; (b) an appropriate order be entered staying this action, pending a further order from the Presiding Officer; (c) Respondents be allowed twenty-one days after this application is determined and, if granted, twenty-one days after the stay is lifted, to answer, move or otherwise respond to the Complaint; (d) the parties be commanded to file, every 90 days, a written status report

updating the Presiding Officer on the State court case, and (e) granting such other and further relief as the Presiding Officer may deem just and proper.

Respectfully submitted,



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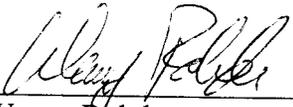
*Counsel for Seaboard Marine of Florida,
Inc., and Seaboard Marine Ltd.*

DATED: July 13, 2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of July, 2016, a true and correct copy of the foregoing pleading was served, via electronic mail and via first-class mail, postage prepaid on:

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