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BEFORE THE
FEDERAL MARITIME COMMISSION

OFFICE OF THE SECRETARY
FEDERAL MARITIME COMMISSION

Docket No. 11-12

KAWASAKI KISEN KAISHA, LTD.;
NIPPON YUSEN KAISHA;
UNITED ARAB SHIPPING COMPANY (S.A.G.); and
YANG MING MARINE TRANSPORT CORPORATION,

COMPLAINANTS

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

RESPONDENT

**RESPONSE TO "K" LINE'S MOTION FOR
IMPLEMENTATION OF ALJ'S RULINGS BY ORDER OF DISMISSAL**

The Port Authority of New York and New Jersey (“Port Authority”), by its undersigned attorneys, hereby submits its Response to “K” Line’s Motion for Implementation of ALJ’s Rulings By Order of Dismissal, dated October 8, 2013 (“Mot. for Dismissal”).

PRELIMINARY STATEMENT

Nearly seven weeks ago, Your Honor ruled that Complainants’ willful and persistent discovery failures left them only three options: (1) “immediately provide the required discovery and proceed to a determination on the merits,” (2) “file a motion to withdraw the Complaint,” or (3) “if [Complainants] refuse to provide discovery . . . have the case dismissed for discovery violations.” Order on Motions for Final Judgment and to Amend Complaint, dated Sept. 5, 2013 (“Order on Mot. for Final J.”), at 5. Since then, none of the four remaining Complainants have provided *any* of the required discovery. Instead, on September 20, three Complainants chose option two and moved to withdraw from the proceeding. “K” Line, however, has neither provided discovery nor moved to withdraw. Rather, “K” Line moves to dismiss this case “on the merits,” expressly “so that ‘K’ Line may seek review” by the full Commission *before* discovery reveals additional facts that would be fatal to its claims. Mot. for Dismissal at 1.

As Your Honor already has explained multiple times, dismissal on the merits is not an option, because “[t]he proceeding is not ripe for decision until discovery is completed and a decision can be rendered on a full and complete record.” Order on Mot. for Final J. at 3. Moreover, such a dismissal would have the further effect of presenting this case to the full Commission on the same inadequate record that renders a decision on the merits inappropriate here. See Order Denying Petition for Leave to Appeal and Motion to Stay, dated July 24, 2013 (“Order Denying Pet. for Leave to Appeal”), at 3 (“Sending the proceeding to the Commission without an adequate factual record would delay the proceeding and add additional expense to the

parties.”). Nothing has changed since Your Honor’s previous rulings that would support a determination on the merits; Complainants have not provided a shred of discovery. And the Port Authority has never sought judgment on the merits precisely because it is entitled first to develop all of the relevant facts, in order to present its best case on the merits to Your Honor and, if there is an appeal, to the Commission. Though “K” Line apparently believes it would be “pure foolishness” to debate Complainants’ allegations “in a factual context,” Mot. for Dismissal at 9, a well-developed factual record is exactly what Your Honor has repeatedly held is required. *See* Order Denying Complainants’ Motion for Summary Judgment, dated June 20, 2013 (“Order Denying Mot. for Summary J.”), at 5 (“The question of whether the cargo facility charge violates the Shipping Act requires an analysis of disputed material facts.”); Order Denying Pet. for Leave to Appeal at 3 (“Once discovery has been completed, the parties will be in a better position to fully brief the issues and the decision will be based on a thorough understanding of the material facts.”); Order on Mot. for Final J. at 3 (“Resolution of actual disputes requires a factual basis on which to make the decision.”).

At bottom, “K” Line’s Motion for Dismissal is yet another entry in Complainants’ unending series of improper motions seeking reconsideration of Your Honor’s June 20, 2013 ruling that the Complaint is not ripe for decision without further development of disputed material facts through discovery. As we discuss below, there is no basis even to entertain another motion for reconsideration here because “K” Line does not identify any newly-discovered evidence or any intervening change in the controlling law. And even if Your Honor were inclined to reconsider a sound decision reached four months ago and reaffirmed on two subsequent occasions, “K” Line’s position is just as meritless now as it was before. Nothing in the Motion for Dismissal obviates the need for previously-ordered discovery; indeed, “K” Line’s

brief asserts *additional* disputed “facts” that would require even more discovery prior to any decision on the merits.

Though the Port Authority agrees with “K” Line that dismissal of this proceeding is now entirely appropriate, it differs completely as to the grounds and basis for such dismissal. This proceeding should not be dismissed based upon any ruling on the merits, as that would only invite “K” Line to seek review before the Commission on the record made inadequate by its (and the other Complainants’) refusal to cooperate in discovery. Rather, it should be dismissed as a sanction for “K” Line’s flagrant disregard of numerous orders and refusal to participate in discovery, despite Your Honor’s repeated warnings that those actions would result in such a dismissal. Provided dismissal is based solely on that ground, the Port Authority has no objection to “K” Line’s request for dismissal.

BACKGROUND

On August 5, 2011, Complainants initiated this proceeding by filing a Complaint together with eighty (80) document requests, which sought broad-ranging discovery into the Port Authority’s operations going back several years. *See* Declaration of Jared R. Friedmann, dated July 18, 2013 (“July 18 Declaration”), ¶ 4. The Port Authority produced over 80,000 pages in response to these requests. *Id.* But the Port Authority’s efforts to obtain reciprocal discovery into the core issues in this litigation have been met at every turn by all of the Complainants’ (and now “K” Line’s) stonewalling of discovery.

As Complainants' tactics already have been detailed in several submissions concerning discovery disputes,¹ the Port Authority will not burden the Presiding Officer by reciting them all.

We simply note a few of the more salient facts:

- Your Honor has issued two separate orders directing Complainants to provide targeted discovery.²
- Despite having had *over two full years* to provide discovery, Complainants and their affiliates have refused to provide complete responses to the Port Authority's two sets of document requests and two sets of interrogatories; reneged on promises to produce documents and to supplement interrogatory responses; refused to appear at the Port Authority's duly noticed depositions; and repeatedly ignored discovery deadlines.³
- "K" Line's discovery responses have been the most egregiously deficient of all the Complainants'. For instance, "K" Line has failed to supplement its interrogatory responses to provide even the names of employees with relevant knowledge, as directed by Your Honor's October 11, 2012 Order on Motions to Compel and to Reply.⁴
- On July 24, 2013, Your Honor warned Complainants that their "[f]ailure to produce discovery or to meet deadlines may result in sanctions, including dismissal."⁵
- On September 5, 2013, Your Honor again stated that "if [Complainants] refuse to provide discovery," the case will be "dismissed for discovery violations."⁶
- Since these warnings, "K" Line has not provided any of the discovery ordered by Your Honor, and the August 15, 2013 deadline for the completion of all fact discovery has long passed.⁷

¹ See e.g., Letter dated Dec. 20, 2012, responding to Complainants' request to stay discovery; Motion to Compel Production of Contracts, dated Jan. 3, 2013; Opposition to Omnibus Motion to Quash, dated Jan. 3, 2013; Opposition to Complainants' Motion for Protective Order, dated Jan. 11, 2013.

² See Order on Motions to Compel and to Reply, dated October 11, 2012 ("First Discovery Order"); Order on Discovery Motions, dated June 20, 2013 ("Second Discovery Order").

³ See, e.g., Rule 56(d) Declaration of Jared R. Friedmann, dated February 1, 2013 ("February 1 Declaration"), ¶¶ 9-19.

⁴ See Letter from Jared R. Friedmann to Matthew J. Thomas, dated February 25, 2013 ("February 25 Discovery Letter"), at 3-4 (attached as part of Exhibit A to July 18 Declaration).

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Save for a small production of documents by Hanjin on January 10, 2013, the Port Authority has not received responses to *any* of its discovery requests from *any* of the Complainants since December 7, 2012—the day after Complainants filed their Motion for Judgment that Respondent’s Cargo Facility Charge Violates 46 U.S.C. § 41102(c) (“Summary Judgment Motion”). Indeed, for almost a year, Complainants have thwarted the proceeding they themselves had commenced by flagrantly ignoring one discovery deadline after the next, choosing instead to submit a series of meritless, repetitive motions.

Specifically, after filing their Summary Judgment Motion, “K” Line failed to satisfy any of its remaining discovery obligations by the dates set forth in the then-effective Third Revised Scheduling Order.⁸ On June 20, 2013, Your Honor denied Complainants’ Summary Judgment Motion and required the parties to produce all documents by July 8, 2013 and complete all fact discovery by August 15, 2013. *See* Order Denying Mot. for Summary J.; Second Discovery Order; Scheduling Order. But on July 8, 2013, instead of completing their document production, Complainants sought to circumvent Your Honor’s authority by submitting a baseless interlocutory petition for leave to appeal to the Commission. Moreover, Complainants strongly insinuated that they would *never* provide the compelled discovery in this matter. *See* Petition for Review of Administrative Law Judge’s Order, dated July 8, 2013, at 5 (characterizing Complainants’ case as being in “its final form” and disavowing the need to provide discovery). Three days later, in response to the Port Authority’s inquiry regarding the status of discovery—

⁷ *See* Fourth Revised Scheduling Order, dated June 20, 2013 (“Scheduling Order”).

⁸ This inaction forced the Port Authority to propose that all dates in the Third Revised Scheduling Order be suspended until after Your Honor ruled on the then-pending discovery motions, so as to avoid the closing of fact discovery before the Port Authority had an opportunity to take depositions and discover information necessary to defend this case. *See* Unopposed Motion to Extend Schedule, dated February 15, 2013 (summarizing Complainants’ discovery violations during this time period).

which was not automatically stayed by Complainants' petition—Complainants moved to stay discovery. *See* July 18 Declaration ¶ 13. On July 24, 2013, Your Honor denied both the petition and the motion to stay, warning that “Complainants may not refuse to participate in the proceeding that they brought.” Order Denying Pet. for Leave to Appeal at 4.

In response to Your Honor's directive to “proceed expeditiously” with discovery or risk dismissal, *see id.* at 4, one Complainant, Hanjin, moved to withdraw from this matter, explicitly admitting that its reason for doing so was to avoid discovery. *See* Hanjin Shipping Co. Ltd.'s Motion to Withdraw, dated July 26, 2013, at 3. The other Complainants' response, however, was to file a premature and meritless “Motion for Final Judgment” on August 8, 2013, repackaging the same arguments from their failed Summary Judgment Motion and petition for leave to appeal, in another attempted end-run around the Presiding Officer's jurisdiction. Although fact discovery again was not automatically stayed by this filing, Complainants still refused to provide any of the outstanding discovery. Your Honor properly denied the Motion for Final Judgment, stating that this “duplicative request, previously denied in two orders, will not be permitted.” Order on Mot. for Final J. at 3. Your Honor then warned again that if Complainants did not “immediately provide the required discovery,” they must either withdraw their Complaint or “have the case dismissed for discovery violations.” *Id.* at 5.

Three of the four remaining Complainants then chose to withdraw from the proceeding rather than provide the discovery that would likely damage their case. *See* Motion of Nippon Yusen Kaisha, United Arab Shipping Company (S.A.G.), and Yang Ming Marine Transport Corporation to Withdraw, dated September 20, 2013.⁹ Four days later, the only remaining Complainant, “K” Line, indicated its intention *not* to withdraw. *See* Status Report of Kawasaki

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Kisen Kaisha Ltd., dated September 24, 2013. Nonetheless, “K” Line still has not “immediately provide[d] the required discovery,” a prerequisite to keep this case alive. Order on Mot. for Final J. at 5. Instead, “K” Line has now oddly moved to dismiss its own complaint in a transparent *third* attempt to circumvent Your Honor’s authority and put its case to the full Commission *before* the Port Authority can take discovery to which it is entitled and assemble the record necessary to make its defense.¹⁰

ARGUMENT

I. Dismissal for Failure to Prosecute is the Appropriate Consequence of Complainants’ Willful and Continuing Failure to Provide Ordered Discovery

Despite an outstanding order compelling discovery followed by multiple warnings that failure to provide the discovery would result in the sanction of dismissal, “K” Line has obstinately persisted in its refusal to participate in discovery and, indeed, has evidenced its intention of *never* complying with Your Honor’ orders. Dismissal is now entirely proper and

¹⁰ On October 21, 2013, just two days before this response brief was due, “K” Line filed a 23-page “Status Report”—not pursuant to any scheduling order—which amounts to an untimely attempt to supplement its motion by having Your Honor revisit discovery disputes long since resolved through motions to compel. *See* First Discovery Order; Second Discovery Order. As such, “K” Line’s “Status Report” changes nothing and should be accorded no weight here. The remainder of the filing consists of selective and thoroughly deficient unsworn “responses” to certain discovery requests. These so-called “responses” are not responses at all, but rather are simply unsworn submissions by counsel in the nature of additional, untimely legal arguments on long-since resolved discovery disputes. And those arguments, which incorrectly presume that a party has the unilateral right to make relevance determinations, are thoroughly meritless. To this day, neither “K” Line nor its affiliates (whose outstanding discovery is not even addressed in the status report) have produced a single witness for depositions or produced a single document since December 2012, in violation of multiple orders. We further note that although “K” Line makes much of the fact that it has now “abandoned” certain claims, Complainants already had abandoned their discrimination claims well before Your Honor issued the June 2013 Second Discovery Order. In short, nothing has changed since Your Honor’s previous rulings to support a different result here. “K” Line continues to flout the discovery orders and has once again made clear its intention never to comply with them.

should be based upon “K” Line’s long-standing refusal to meet its discovery obligations in a proceeding that “K” Line itself chose to file.

FMC Rule 210(b)(3) authorizes the Presiding Officer to impose sanctions on a party that violates a discovery compulsion order, including authorizing an order “dismissing the action or proceeding.” 46 C.F.R. § 502.210(b)(3); *see also Universal Logistic Forwarding Co., Ltd.*, No. 00-10, 2001 WL 247927, at *1 (F.M.C. February 6, 2001) (“A presiding judge may issue sanctions against parties that refuse to answer discovery requests and violate orders to answer. The Commission’s rules specifically provide for sanctions in such cases.”).

Likewise, the Federal Rules provide that “[i]f a party . . . fails to obey an order to provide or permit discovery,” a court may “dismiss[] the action or proceeding in whole or in part.” Fed. R. Civ. P. 37(b)(2)(a)(v); *see also Albert v. Starbucks Coffee Co. Inc.*, 213 F. App’x 1, 1-2 (D.D.C. 2007) (“Under Rule 37, the district court has broad discretion to impose sanctions for discovery violations.”) (citation omitted); *Chira v. Lockheed Aircraft Corp.*, 85 F.R.D. 93, 98-100 (S.D.N.Y. 1980) (dismissing case for failure to prosecute based on repeated discovery failures); *Curtis-Joseph v. Richardson*, 417 F. App’x 570, 572-573 (7th Cir. 2011) (same).

The sanction of dismissal is particularly appropriate where, as here, a party has been given ample opportunity to ameliorate its deficient discovery efforts, including having been warned that it faced such consequences if it did not comply. *See Neal v. Director, District of Columbia Department of Corrections* No. Civ. A. 93-2420, 1995 WL 517248, at *7 (D.D.C. 1995) (noting that sanctions were appropriate where defendants were granted numerous extensions, and were “forewarned of the consequences of their failure to comply with the discovery request, but nonetheless failed to reply responsively”); *Lee v. Max Int’l, LLC*, 638 F.3d 1318, 1320-21 (10th Cir. 2011) (affirming district court’s sanction of dismissal where plaintiffs

were warned regarding the possibility of dismissal under Rule 37 for failure to comply with discovery orders, but continued to “repeatedly flout[]” the court’s orders). Indeed, “[i]f harsh measures were not taken in such cases, [litigants] would feel freer than . . . Rule 37 contemplates they should feel to flout . . . discovery orders.” *U.S. v. Sumitomo Marine & Fire Ins. Co., Ltd.*, 617 F.2d 1365, 1370 (9th Cir. 1980) (citations omitted).

In the instant proceeding, “K” Line has had multiple chances to provide discovery, has repeatedly failed to do so, and has shown no intention of *ever* doing so. Quite the opposite, Complainants’ actions have forced Your Honor to revise the scheduling order *four times*. Despite these generous extensions, “K” Line is in violation of the current Scheduling Order and has not provided *any* discovery since December of last year.¹¹ “K” Line’s discovery violations include failure to: (i) provide the information that “K” Line agreed to produce in the parties’ September 14, 2012 Joint Status Report (a representation on which the Port Authority relied in agreeing to table certain discovery disputes); (ii) supplement its interrogatory responses or provide metadata as directed by Your Honor’s First Discovery Order of October 11, 2012; (iii) produce the documents required by Your Honor’s Second Discovery Order of June 20, 2013; or (iv) appear for a single deposition noticed by the Port Authority, despite the fact that the deadline for completing all such discovery passed months ago.

“K” Line’s flagrant and repeated disregard for its discovery obligations and Your Honor’s orders should not be tolerated. Its abuse of this forum has wasted the resources of not one but *two* public agencies (the FMC and the Port Authority) and has further prejudiced the Port Authority by preventing it from fairly defending itself against the allegations in the Complaint.

¹¹ The Port Authority completed its own production of documents and interrogatory responses in January 2012, some 21 months ago.

Accordingly, Your Honor should dismiss the case “for discovery violations” under FMC Rule 210(b)(3). Order on Mot. for Final J. at 5.

II. There Is No Basis For Further Reconsideration of Your Honor’s Ruling That This Case Is Not Ripe For Decision Without Discovery of the Relevant Facts

By oddly seeking dismissal of its own case “on the merits,” “K” Line is playing a procedural game, attempting to present its case to the full Commission on the merits based upon the same inadequate record that led to the denial of successive motions for judgment. “K” Line’s motion is, in substance, an impermissible attempt to manipulate the Commission’s processes to suit its own tactical preferences. It is also an improper attempt to reargue a baseless position Your Honor has rejected multiple times: that the reasonableness of the CFC under 46 U.S.C. § 41102(c) can be fairly evaluated in a vacuum, without an evaluation of the extent of the CFC-funded services and benefits received by “K” Line, its affiliates, and other parties. Indeed, while “K” Line maintains that the CFC is “per se” unreasonable, *see* Mot. for Dismissal at 2-3, 6-8, Your Honor has made it abundantly clear that “[d]etermination of whether the [CFC] violates the Shipping Act requires a comparative analysis of the benefits received by Complainants, including the services provided to the Complainants, and a determination of the reasonableness of the fee imposed.” Order on Mot. for Final J. at 3 (quoting Order Denying Mot. for Summary J. at 5).

Thus, as a procedural matter, there is no basis whatsoever even to *entertain* “K” Line’s arguments here. First, no precedent supports “K” Line’s anomalous effort to obtain an appealable judgment by requesting an *adverse* determination on the merits. (Even more puzzling, “K” Line simultaneously reargues the merits in its own favor.) Second, “K” Line cites no new evidence, no change in relevant precedent, nor any manifest injustice that would justify reconsideration of Your Honor’s prior rulings that this case is not ripe for decision on the merits.

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PRELIMINARY STATEMENT

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As Your Honor already has explained multiple times, dismissal on the merits is not an option, because “[t]he proceeding is not ripe for decision until discovery is completed and a decision can be rendered on a full and complete record.” Order on Mot. for Final J. at 3. Moreover, such a dismissal would have the further effect of presenting this case to the full Commission on the same inadequate record that renders a decision on the merits inappropriate here. *See* Order Denying Petition for Leave to Appeal and Motion to Stay, dated July 24, 2013 (“Order Denying Pet. for Leave to Appeal”), at 3 (“Sending the proceeding to the Commission without an adequate factual record would delay the proceeding and add additional expense to the

parties.”). Nothing has changed since Your Honor’s previous rulings that would support a determination on the merits; Complainants have not provided a shred of discovery. And the Port Authority has never sought judgment on the merits precisely because it is entitled first to develop all of the relevant facts, in order to present its best case on the merits to Your Honor and, if there is an appeal, to the Commission. Though “K” Line apparently believes it would be “pure foolishness” to debate Complainants’ allegations “in a factual context,” Mot. for Dismissal at 9, a well-developed factual record is exactly what Your Honor has repeatedly held is required. *See* Order Denying Complainants’ Motion for Summary Judgment, dated June 20, 2013 (“Order Denying Mot. for Summary J.”), at 5 (“The question of whether the cargo facility charge violates the Shipping Act requires an analysis of disputed material facts.”); Order Denying Pet. for Leave to Appeal at 3 (“Once discovery has been completed, the parties will be in a better position to fully brief the issues and the decision will be based on a thorough understanding of the material facts.”); Order on Mot. for Final J. at 3 (“Resolution of actual disputes requires a factual basis on which to make the decision.”).

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brief asserts *additional* disputed “facts” that would require even more discovery prior to any decision on the merits.

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BACKGROUND

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We simply note a few of the more salient facts:

- Your Honor has issued two separate orders directing Complainants to provide targeted discovery.²
- Despite having had *over two full years* to provide discovery, Complainants and their affiliates have refused to provide complete responses to the Port Authority's two sets of document requests and two sets of interrogatories; reneged on promises to produce documents and to supplement interrogatory responses; refused to appear at the Port Authority's duly noticed depositions; and repeatedly ignored discovery deadlines.³
- "K" Line's discovery responses have been the most egregiously deficient of all the Complainants'. For instance, "K" Line has failed to supplement its interrogatory responses to provide even the names of employees with relevant knowledge, as directed by Your Honor's October 11, 2012 Order on Motions to Compel and to Reply.⁴
- On July 24, 2013, Your Honor warned Complainants that their "[f]ailure to produce discovery or to meet deadlines may result in sanctions, including dismissal."⁵
- On September 5, 2013, Your Honor again stated that "if [Complainants] refuse to provide discovery," the case will be "dismissed for discovery violations."⁶
- Since these warnings, "K" Line has not provided any of the discovery ordered by Your Honor, and the August 15, 2013 deadline for the completion of all fact discovery has long passed.⁷

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Specifically, after filing their Summary Judgment Motion, “K” Line failed to satisfy any of its remaining discovery obligations by the dates set forth in the then-effective Third Revised Scheduling Order.⁸ On June 20, 2013, Your Honor denied Complainants’ Summary Judgment Motion and required the parties to produce all documents by July 8, 2013 and complete all fact discovery by August 15, 2013. *See* Order Denying Mot. for Summary J.; Second Discovery Order; Scheduling Order. But on July 8, 2013, instead of completing their document production, Complainants sought to circumvent Your Honor’s authority by submitting a baseless interlocutory petition for leave to appeal to the Commission. Moreover, Complainants strongly insinuated that they would *never* provide the compelled discovery in this matter. *See* Petition for Review of Administrative Law Judge’s Order, dated July 8, 2013, at 5 (characterizing Complainants’ case as being in “its final form” and disavowing the need to provide discovery). Three days later, in response to the Port Authority’s inquiry regarding the status of discovery—

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⁸ This inaction forced the Port Authority to propose that all dates in the Third Revised Scheduling Order be suspended until after Your Honor ruled on the then-pending discovery motions, so as to avoid the closing of fact discovery before the Port Authority had an opportunity to take depositions and discover information necessary to defend this case. *See* Unopposed Motion to Extend Schedule, dated February 15, 2013 (summarizing Complainants’ discovery violations during this time period).

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Kisen Kaisha Ltd., dated September 24, 2013. Nonetheless, “K” Line still has not “immediately provide[d] the required discovery,” a prerequisite to keep this case alive. Order on Mot. for Final J. at 5. Instead, “K” Line has now oddly moved to dismiss its own complaint in a transparent *third* attempt to circumvent Your Honor’s authority and put its case to the full Commission *before* the Port Authority can take discovery to which it is entitled and assemble the record necessary to make its defense.¹⁰

ARGUMENT

I. Dismissal for Failure to Prosecute is the Appropriate Consequence of Complainants’ Willful and Continuing Failure to Provide Ordered Discovery

Despite an outstanding order compelling discovery followed by multiple warnings that failure to provide the discovery would result in the sanction of dismissal, “K” Line has obstinately persisted in its refusal to participate in discovery and, indeed, has evidenced its intention of *never* complying with Your Honor’ orders. Dismissal is now entirely proper and

¹⁰ On October 21, 2013, just two days before this response brief was due, “K” Line filed a 23-page “Status Report”—not pursuant to any scheduling order—which amounts to an untimely attempt to supplement its motion by having Your Honor revisit discovery disputes long since resolved through motions to compel. *See* First Discovery Order; Second Discovery Order. As such, “K” Line’s “Status Report” changes nothing and should be accorded no weight here. The remainder of the filing consists of selective and thoroughly deficient unsworn “responses” to certain discovery requests. These so-called “responses” are not responses at all, but rather are simply unsworn submissions by counsel in the nature of additional, untimely legal arguments on long-since resolved discovery disputes. And those arguments, which incorrectly presume that a party has the unilateral right to make relevance determinations, are thoroughly meritless. To this day, neither “K” Line nor its affiliates (whose outstanding discovery is not even addressed in the status report) have produced a single witness for depositions or produced a single document since December 2012, in violation of multiple orders. We further note that although “K” Line makes much of the fact that it has now “abandoned” certain claims, Complainants already had abandoned their discrimination claims well before Your Honor issued the June 2013 Second Discovery Order. In short, nothing has changed since Your Honor’s previous rulings to support a different result here. “K” Line continues to flout the discovery orders and has once again made clear its intention never to comply with them.

should be based upon “K” Line’s long-standing refusal to meet its discovery obligations in a proceeding that “K” Line itself chose to file.

FMC Rule 210(b)(3) authorizes the Presiding Officer to impose sanctions on a party that violates a discovery compulsion order, including authorizing an order “dismissing the action or proceeding.” 46 C.F.R. § 502.210(b)(3); *see also Universal Logistic Forwarding Co., Ltd.*, No. 00-10, 2001 WL 247927, at *1 (F.M.C. February 6, 2001) (“A presiding judge may issue sanctions against parties that refuse to answer discovery requests and violate orders to answer. The Commission’s rules specifically provide for sanctions in such cases.”).

Likewise, the Federal Rules provide that “[i]f a party . . . fails to obey an order to provide or permit discovery,” a court may “dismiss[] the action or proceeding in whole or in part.” Fed. R. Civ. P. 37(b)(2)(a)(v); *see also Albert v. Starbucks Coffee Co. Inc.*, 213 F. App’x 1, 1-2 (D.D.C. 2007) (“Under Rule 37, the district court has broad discretion to impose sanctions for discovery violations.”) (citation omitted); *Chira v. Lockheed Aircraft Corp.*, 85 F.R.D. 93, 98-100 (S.D.N.Y. 1980) (dismissing case for failure to prosecute based on repeated discovery failures); *Curtis-Joseph v. Richardson*, 417 F. App’x 570, 572-573 (7th Cir. 2011) (same).

The sanction of dismissal is particularly appropriate where, as here, a party has been given ample opportunity to ameliorate its deficient discovery efforts, including having been warned that it faced such consequences if it did not comply. *See Neal v. Director, District of Columbia Department of Corrections* No. Civ. A. 93-2420, 1995 WL 517248, at *7 (D.D.C. 1995) (noting that sanctions were appropriate where defendants were granted numerous extensions, and were “forewarned of the consequences of their failure to comply with the discovery request, but nonetheless failed to reply responsively”); *Lee v. Max Int’l, LLC*, 638 F.3d 1318, 1320-21 (10th Cir. 2011) (affirming district court’s sanction of dismissal where plaintiffs

were warned regarding the possibility of dismissal under Rule 37 for failure to comply with discovery orders, but continued to “repeatedly flout[]” the court’s orders). Indeed, “[i]f harsh measures were not taken in such cases, [litigants] would feel freer than . . . Rule 37 contemplates they should feel to flout . . . discovery orders.” *U.S. v. Sumitomo Marine & Fire Ins. Co., Ltd.*, 617 F.2d 1365, 1370 (9th Cir. 1980) (citations omitted).

In the instant proceeding, “K” Line has had multiple chances to provide discovery, has repeatedly failed to do so, and has shown no intention of *ever* doing so. Quite the opposite, Complainants’ actions have forced Your Honor to revise the scheduling order *four times*. Despite these generous extensions, “K” Line is in violation of the current Scheduling Order and has not provided *any* discovery since December of last year.¹¹ “K” Line’s discovery violations include failure to: (i) provide the information that “K” Line agreed to produce in the parties’ September 14, 2012 Joint Status Report (a representation on which the Port Authority relied in agreeing to table certain discovery disputes); (ii) supplement its interrogatory responses or provide metadata as directed by Your Honor’s First Discovery Order of October 11, 2012; (iii) produce the documents required by Your Honor’s Second Discovery Order of June 20, 2013; or (iv) appear for a single deposition noticed by the Port Authority, despite the fact that the deadline for completing all such discovery passed months ago.

“K” Line’s flagrant and repeated disregard for its discovery obligations and Your Honor’s orders should not be tolerated. Its abuse of this forum has wasted the resources of not one but *two* public agencies (the FMC and the Port Authority) and has further prejudiced the Port Authority by preventing it from fairly defending itself against the allegations in the Complaint.

¹¹ The Port Authority completed its own production of documents and interrogatory responses in January 2012, some 21 months ago.

Accordingly, Your Honor should dismiss the case “for discovery violations” under FMC Rule 210(b)(3). Order on Mot. for Final J. at 5.

II. There Is No Basis For Further Reconsideration of Your Honor’s Ruling That This Case Is Not Ripe For Decision Without Discovery of the Relevant Facts

By oddly seeking dismissal of its own case “on the merits,” “K” Line is playing a procedural game, attempting to present its case to the full Commission on the merits based upon the same inadequate record that led to the denial of successive motions for judgment. “K” Line’s motion is, in substance, an impermissible attempt to manipulate the Commission’s processes to suit its own tactical preferences. It is also an improper attempt to reargue a baseless position Your Honor has rejected multiple times: that the reasonableness of the CFC under 46 U.S.C. § 41102(c) can be fairly evaluated in a vacuum, without an evaluation of the extent of the CFC-funded services and benefits received by “K” Line, its affiliates, and other parties. Indeed, while “K” Line maintains that the CFC is “per se” unreasonable, *see* Mot. for Dismissal at 2-3, 6-8, Your Honor has made it abundantly clear that “[d]etermination of whether the [CFC] violates the Shipping Act requires a comparative analysis of the benefits received by Complainants, including the services provided to the Complainants, and a determination of the reasonableness of the fee imposed.” Order on Mot. for Final J. at 3 (quoting Order Denying Mot. for Summary J. at 5).

Thus, as a procedural matter, there is no basis whatsoever even to *entertain* “K” Line’s arguments here. First, no precedent supports “K” Line’s anomalous effort to obtain an appealable judgment by requesting an *adverse* determination on the merits. (Even more puzzling, “K” Line simultaneously reargues the merits in its own favor.) Second, “K” Line cites no new evidence, no change in relevant precedent, nor any manifest injustice that would justify reconsideration of Your Honor’s prior rulings that this case is not ripe for decision on the merits.

As discussed at length in the Port Authority's prior briefing, those rulings govern here as law of the case. *See* Opposition to Motion for Final Judgment, dated Aug. 23, 2013, at 7. Accordingly, "K" Line's motion should be summarily rejected as "merely a reargument and resubmission of evidence which the Commission has already concluded is inadequate." *Id.* at 8 (quoting *Singer Prods. Co. v. Delta Steamship Lines, Inc.*, 24 F.M.C. 1139, 1139 (June 24, 1982)). Like Complainants' earlier Motion for Final Judgment, "K" Line's Motion for Dismissal is a "duplicative request, previously denied," and should not be considered. Order on Mot. for Final J. at 3.

Even if Your Honor were to consider "K" Line's repackaged arguments—and there is no reason to do so—they would fail for the same reason as before: many of the so-called "facts" that "K" Line characterizes as obvious or "beyond cavil," Mot. for Dismissal at 2, actually are hotly disputed by the Port Authority. For example, while "K" Line again contends that the Port Authority "impos[es] the CFC . . . with no correlation to use," Mot. for Dismissal at 9, the Port Authority has offered evidence that the CFC is correlated as closely as practicable to use of the port services and infrastructure that are funded by the charge. *See* Opposition to Complainants' Motion for Judgment, dated Feb. 1, 2013, at 4-6, 8-9. Incredibly, while "K" Line chides the Port Authority for supposedly failing to "offer[] any correlation of 'benefits' from the three categories of facilities/services" funded by the CFC, Mot. for Dismissal at 7, "K" Line continues to stonewall the very discovery that would reveal the services and benefits received by all relevant entities, including "K" Line and its affiliate companies.¹² "K" Line also asserts that *other* types of port users, such as "inland roadway truck or railway carriers," benefit extensively from CFC-

¹² *See generally* Second Discovery Order (compelling specific categories of discovery relevant to determining the extent of services and benefits "received directly or indirectly" by Complainants).

funded projects without having to pay the charge. Mot. for Dismissal at 2-3, 6-8. But here again, “K” Line continues to hide some of the very information that would permit a fair assessment of that allegation.¹³ Notably, the chief precedent on which “K” Line now relies was decided only “[a]fter an evidentiary hearing,” in which the “substantial benefits” to non-paying users were “clearly supported by the evidence.” *Plaquemines*, 838 F.2d at 541, 548. Thus, if “K” Line now wishes to argue that the purported benefits to non-paying third parties are unreasonable, the Port Authority should be entitled to *additional* third-party discovery.

“K” Line also now contends—without any evidence at all—that operators of “roll on roll off” vessels do not use or benefit from the projects funded by the CFC. *See* Mot. for Dismissal at 2-3, 9. But this is yet another example of a disputed fact that “K” Line cannot simply peddle as gospel while denying access to pertinent discovery.¹⁴ In any event, “K” Line does not even *claim* to be exclusively, or even primarily, a “roll on roll off” vessel operator, and the Port Authority has consistently maintained that “K” Line’s business operations encompass much

¹³ *See* Second Discovery Order at 1-2 (compelling Complainants to produce certain contracts or agreements with rail and motor carriers). The discovery still being withheld by Complainants may show that rail and motor carriers *do* in fact pay the ocean carriers for some portion of the CFC. Or it may show that rail and motor carriers do not realize any genuine economic benefit from CFC-funded projects and services. (For example, a motor carrier that charges hourly rates for cargo transportation may not benefit from traffic improvements that shorten the time of the trip.) Or they may show that any benefit is “relatively small whereas the [Port Authority’s] administrative burden of collection is great.” *Plaquemines Port, Harbor, & Terminal Dist. v. Fed. Maritime Comm’n*, 838 F.2d 536, 548 n.11 (D.C. Cir. 1988) (cited by “K” Line).

¹⁴ Indeed, “K” Line elsewhere admits that even “roll on roll off” vessel operators *do* benefit from the CFC, which funds, at the very least, “infrastructure which their customers use, and some security for their customers’ cargoes on the dock, or perhaps protection of their vessels from hijacking.” Status Report of Only Remaining Complainant, dated Oct. 21, 2013, at 22. On top of that, the Port Authority has offered unrefuted evidence that the ExpressRail provides benefits to carriers in excess of the CFC’s cost even when their containers and/or cargo do not travel by rail (as is the case with “roll on roll off” transport). *See* Opposition to Complainants’ Motion for Judgment, dated Feb. 1, 2013, at 22-23; Supplemental Declaration of Frederick Flyer & Allan Champine, dated Jan. 31, 2013, at 5 & App’x C (explaining that the availability of ExpressRail has “moved port traffic from trucks to trains and, as a result, reduced congestion” on the port’s roadways, resulting in savings of “about \$21 to \$25 per container”).

more than operating vessels (whatever their variety). *See, e.g.*, Opposition to Motion for Final Judgment, dated Aug. 23, 2013, at 10-11.

Finally, “K” Line raises constitutional arguments that it freely admits are irrelevant here. While “K” Line posits that the CFC is an unconstitutional “tax,” Mot. for Dismissal at 3-6, there are no constitutional claims asserted in the Complaint, and as “K” Line acknowledges, the FMC is not the proper forum for constitutional claims. *See* Mot. for Dismissal at 10 (“recognizing that the Commission will not pass on [the CFC’s] constitutionality”). Presumably, “K” Line raises these constitutional questions in order to portray this proceeding as one of “great importance to the U.S. shipping community.”¹⁵ Mot. for Dismissal at 8. But even accepting “K” Line’s argument that this case involves “Major Policy Issues of National and International Importance,” *id.*, that would be all the more reason to decide the case *after* discovery, on an adequate factual record, as Your Honor has ordered.

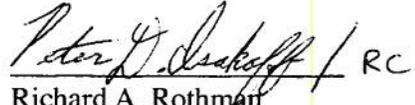
CONCLUSION

For the foregoing reasons, this proceeding should be dismissed due to Complainants’ discovery violations. Further, to avoid any confusion before the full Commission upon any appeal by “K” Line, the Port Authority respectfully requests that Your Honor’s order include an explicit directive that such dismissal is not “on the merits.”

¹⁵ Notably, however, eight of the nine Complainants have withdrawn voluntarily from this “important” litigation, rather than be bothered by discovery.

Dated: October 23, 2013

Respectfully submitted,

Handwritten signature of Peter D. Isakoff in black ink, with the initials "RC" written to the right of the signature.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2013, a copy of the foregoing document was served on the following by e-mail and Federal Express:

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