

**BEFORE THE
FEDERAL MARITIME COMMISSION**

BALTIC AUTO SHIPPING, INC.)	
)	
)	
COMPLAINANT,)	
)	
v.)	
)	DOCKET NO. 14-16
)	
)	
MICHAEL HITRINOV a/k/a)	
MICHAEL KHITRINOV,)	
EMPIRE UNITED LINES CO., INC.,)	
)	
)	
RESPONDENTS.)	
)	

**MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION FOR PRODUCTION
OF COMPLAINANT'S EXHIBIT "H" IN ITS NATIVE FORMAT - MICROSOFT EX-
CEL**

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MEMORANDUM IN SUPPORT OF MOTION FOR PRODUCTION OF “COMPLAINANT’S ‘EXHIBIT “H”’ IN ITS NATIVE FORMAT – MICROSOFT EXCEL

The Respondents, Michael Hitrinov and Empire United Lines Co., Inc., by and through their attorneys, The Law Office of Doyle & Doyle, hereby file this Memorandum in Support of Respondents’ Motion for an Order compelling the Complainant to Produce Exhibit “H” of Complainant’s Audit in Microsoft Excel Format – its “Native Format” – as required by the Federal Rules, so that Respondents’ may be able to perform searches of the shipments identified in such Exhibit.

BACKGROUND

Complainant brought this proceeding, in part, on the basis of an audit of “shipping related documents”. The Complainant alleged that the audit “revealed that EUL charged Complainant for shipments in excess of the amounts set forth in EUL’s tariff” (Amended Verified Complaint, ¶ 13).

Respondents requested a copy of the audit, and Complainant supplied it, but not in its “native format” – Microsoft Excel. Exhibit “H” lists more than 2,000 shipments that form the basis of the Complainant’s audit. It can only be reliably searched if it is produced in its native format.

Respondent’s requested that the Exhibit “H” be provided in Microsoft Excel format at a discovery conference held with ALJ Guthridge on March 12, 2015. By his Honor’s Order of March 13, 2015 ALJ Guthridge instructed that “Complainant will endeavor to produce in Microsoft Excel format Attachment H to the audit previously produced in PDF format.”

On March 15, 2015 counsel for Complainant supplied Exhibit “H”, but not in Microsoft Excel format stating:

“ ... I do not know how long it will take for my client to find the excel file for Exhibit “H” of the audit, so I am attaching a searchable PDF file. I ran the text recognition on Adobe Acrobat Pro specifically for Exhibit “H”, but I make no guarantee as to

Adobe's [sic] Acrobat's accuracy." (emphasis added)

Counsel for the Respondents waited for the Excel spreadsheet, but when it was not produced, followed up with requests of March 25, 2015 and April 1, 2015:

"With respect to the Exhibit H of the audit that you provided, and in view of your inability to "guarantee" the accuracy of the ".pdf", we continue to demand production of the original Excel spreadsheet file to insure accuracy of searching results.

"It is not your obligation, but rather your client's obligation to produce the file in its native format as required by the Federal Rules. Please obtain the file from your client in the native format required." (March 25, 2015)

Receiving no response, Counsel for Respondents repeated the request:

"Please obtain and forward Baltic's "Exhibit H" in its native form as required by the Federal Rules. Thank you." (April 1, 2015)

As Complainant has still not provided the spreadsheet in its native format, Respondents have no alternative but to seek an Order compelling such disclosure.

LEGAL BASIS FOR THE MOTION

Rule 34 of the Federal Rules of Civil Procedure provide in pertinent part, that with respect to electronically stored information:

"A party must produce documents as they are kept in the usual course of business ... a party must produce [electronically stored information] in a form ... in which it is ordinarily maintained ..."

F.R.Cv.Pro. 34 (b) (E) (i), (ii), "Producing Documents, Electronically Stored Information ..."

The reason for requiring the electronically stored information (“ESI”) to be produced in the form in which it is “kept in the usual course of business” and “in which it is normally maintained” (i.e., “native format”), is for the protection of the reliability, accuracy and legitimacy of the information contained in such information:

“The form [in which the ESI disclosure is made] may have important implications for how easily, if at all, the information can be electronically searched, whether relevant information is obscured or sensitive information is revealed, and how the information can be used in later stages of litigation.”

“... ESI may be produced in “native format”, that is, the form in which the information was created and is used in the normal course of operations.”

Managing Discovery of Electronic Information: A Pocket Guide for Judges; Federal Judicial Center; 2nd ed., 2012

(http://www2.fjc.gov/sites/default/files/2012/eldscpkt2D_eB.pdf),

p. 2 (hereafter “*Managing Discovery*”)

As this issue has arisen, courts have insisted on the “native format” production. *Hagenbuch v. Sistemi Elettronici Industriali S.R.L.*, 2006 WL 665005 (N.D. Ill. Mar. 8, 2006) (holding that production of ESI as TIFF images was insufficient and ordering production of ESI in original format); *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640 (D. Kan. 2005) (holding that the production of spreadsheets in static format was insufficient because the mathematical formulas, text exceeding cell size, and metadata were eliminated, and that defendant should have preserved and produced the spreadsheets in native format or taken other measures to preserve and produce the nonapparent information.)

Rule 34 requires the responding party to:

“produce ESI either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.”

“The Advisory Committee note is clear that production of ESI in a form that removes or significantly degrades the recipient’s ability to search the information electronically generally does not fulfill the ‘reasonably usable’ requirement.”

Managing Discovery, p. 23.

ARGUMENT

As there are more than 2,000 shipments identified in Complainant's Exhibit "H", and as Exhibit "H" forms a great portion of the Complainant's Shipping Act violations claims, it is absolutely necessary for the Respondents to be able to test the quality of the audit. In order to make such an assessment the Exhibit must be searched and the shipments researched. The only procedure which will guarantee the reliability and accuracy of the Exhibit is to search the spreadsheet as it was originally developed – in its native format.

Counsel for Complainant has already refused to "guarantee" the "accuracy" of the material produced.

It would be a waste of time and energy to work with such an unstable and unreliable document.

As the audit is an apparently essential piece of this litigation, it should be produced in its native format.

Further, it should be of little difficulty for the Complainant to produce the spreadsheet in its native format, as it would be resident on its office computer, and could be forwarded to Respondents with a matter of a few keystrokes.

CONCLUSION

The Complainant should be ordered to produce Exhibit "H" of the audit in its native format so that there will be no questions as to its reliability or accuracy, and to facilitate the Respondents' efforts to search and verify the quality of the audit, all as required by the Federal Rules of Civil Procedure and applicable case law.

Respectfully submitted,

By:



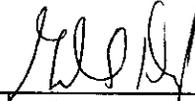
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Dated in Short Hills, NJ this day of 2nd day of April 2015.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION FOR PRODUCTION OF "COMPLAINANT'S 'EXHIBIT "H'" IN ITS NATIVE FORMAT – MICROSOFT EXCEL upon Complainant's counsel, Marcus A. Nussbaum, Esq., with the address of P.O. Box 245599, Brooklyn, NY 11224 by first class mail, postage prepaid, and by email (marcus.nussbaum@gmail.com); and that the original and five (5) copies are being filed with the Secretary of the Federal Maritime Commission.



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Dated in Short Hills, NJ. this 2nd day of April, 2015.