

certainly by mid-week of the week of April 20, 2015 (the week immediately preceding the “due date” for Complainant’s response to Respondents’ Motion) that it would not be able to meet the briefing schedule? Complainant waited until the business afternoon preceding the due date to make its motion, leaving no time for the Respondent to understand the grounds for the request, or the request itself. Having failed to act with due regard to the briefing Schedule established by the Commission, the Complainant should not be awarded the relief it seeks because of its abuse of the scheduling procedure.

By the nature of Complainant’s apparent request of the subpoenaed non-party (see Exhibit C of Complainant’s Motion, Nussbaum email of 4/14/2015; 12:08 PM), it is seeking much ephemeral material that is not likely to have been kept in the ordinary course of business – especially after three-and-a-half years. Necessarily, this situation is of the Complainant’s own doing by its delay, and precisely the reason why Statutes of Limitations are enacted - so that parties exercise their rights in a timely way, with access to the necessary evidence.

Having failed to act promptly, and seeking stale correspondence of unexplained relevance, the Complainant should not be rewarded for its lack of diligence. The Complainant’s Second Motion should be denied and the Complaint dismissed.

2. The Complainant’s Motion should be denied for not explaining why the information it is trying to obtain by subpoena is at all relevant to either the Statute of Limitations defense or the Settlement and Release defense.

Complainant has failed to explain “why” the specific documentation it is seeking from the subpoenaed party is necessary for Complainant to make its response to Respondents’ Motion.

The correspondence sought appears to apply to shipments in 2011 which were the subject of the earlier federal lawsuit in New Jersey, as well as the Settlement Agreement and Release. There is no disagreement on this point.

What then is the relevance of the documentation that may have been sent in connection with the delivery dispute? Without an explanation, it appears that the Complainant is simply trying to “run out the clock” in an attempt to keep consideration of the Respondents’ Motion to dismiss the Complaint from ever being heard – because of “discovery problems”.

The Complainant has never explained why it needs the documentation from MSC. While certain latitude may be given the Complainant in such matters, in this case, in view of the failure to abide by the Scheduling Order, failure to confer with counsel to narrow the issues, and for its needless delay, the Complainant’s Second Motion should be denied and the Complaint dismissed.

3. The Complainant’s Motion should be denied because it failed to “attempt to discuss the anticipated motion with [opposing counsel] to determine whether there is any opposition to the relief sought, and, if there is opposition, to narrow the areas of disagreement” as required by the Commissions Rule of Practice No. 71 (46 CFR 502.71 (a) (“Rule 71”).

The Commission has established Rule 71 requiring the parties to confer on just these kinds of dispositive motions to expedite reaching agreement (where possible) and for narrowing the issues where there is no agreement between the parties, and for judicial economy (and to avoid having to make Response such as this).

Even in its “amended Second Motion”, Complainant has failed to satisfy its obligations under Rule 71.

It is not denied that the Complainant did not confer prior to making it motion.

In response to the Commission’s inquiry about conferring with opposing counsel, Complainant sent an email to counsel for the Respondents at 3:46 PM last Friday, on the business day before the Response to Respondents’ Motion was due. In requesting consent to the Second Mo-

tion, counsel for the Complainant's simply said that "MSC has not completed its disclosure". (See Exhibit 1, attached hereto.)

In reviewing the correspondence attached to Complainant's Second Motion it appears that this is a mis-statement. It would appear that the subpoenaed non-party may never be able to provide all of the documentation sought by Complainant – if such documentation ever existed. To say that "MSC has not completed its disclosure", does not fully explain the situation.

Further, counsel misrepresents that it "also attempted to reach counsel by phone and was unable to do so" (Second Motion, p. 3). While I was not in the office on Friday afternoon, the office was staffed. No phone call was received during business hours, and no messages were left at any time. (See Certification of Gerard S. Doyle, Jr., attached as Exhibit 2)

It should be noted that the Complainant submitted the "revised" Second Motion at 6:25 P.M., on Friday, April 24. This delay, affording Respondents no effective time to respond, was due solely to Complainant's disregard of the Commission's Rules and Scheduling Order, is abusive and manipulative.

Complainant, through its disregard of the letter and spirit of the Commission's Rules, and acting without respect to the Scheduling Order has caused its own crisis. It should not be rewarded for such behavior by being granted the relief it seeks. Rather, the Second Motion should be denied, and the Complaint dismissed.

4. The Motion should be denied because of the bad faith used by the Complainant's counsel in its treatment of a non-party which is subject to a Commission subpoena and threatening such party by a deliberate mis-statement of such party's obligations under the Commission's regulations.

Counsel for the Complainant was apparently unhappy that the subpoenaed non-party was not finding the three-and-a-half-year old documentation that counsel was seeking. Counsel for the Complainant berated the subpoenaed non-party by claiming that

“MSC’s response to the subpoena is deficient”, “MSC has failed to comply with the subpoena”, and then threatened the subpoenaed non-party with “monetary fines and/or other disciplinary action by the Commission” (see see Exhibit C of Complainant’s Motion, Nussbaum email of 4/14/2015; 12:08 PM).

Astoundingly, counsel for the Complainant advised (and arguably threatened) the non-party stating "Pursuant to 46 CFR 515.33, MSC is required to keep these documents for five years" (Id.)

This is a clear and perhaps purposeful mis-reading of the regulation.

As the Commission knows, the regulation cited by counsel for the Complainant applies to the duties of “licensed freight forwarders” – NOT vessel-operating common carriers such as the subpoenaed non-party. The Regulation reads in pertinent part:

“Each licensed freight forwarder shall maintain in an orderly and systematic manner, and keep current and correct, all records and books of account in connection with its forwarding business. The licensed freight forwarder must maintain the following records for a period of five years”

- a) *General financial data ...*
- b) *Types of services by shipment ...*
- c) *Receipts and disbursements by shipment ...*
- d) *Special contracts ...*

(46 CFR 515.33 (a) – (d))

What is to be made of this? Counsel for Complainant has threatened a subpoenaed non-party by deliberately citing a regulation that is not applicable to such party, and, in addition, seeking documentation not even covered by the regulation.

Counsel for Complainant seeks, *inter alia*, “telex releases, and correspondence from Empire regarding “hold” instructions, telex release instructions, and/or other written instructions sent to MSC from Empire, correspondence which contains instructions from Empire regarding

whether or not the telex releases should state "collect charges" or "freight prepaid" (see Exhibit C of Complainant's Motion, Nussbaum email of 4/14/2015; 12:08 PM).

None of this documentation is required to be maintained by any party under the Commission's jurisdiction. To mis-use the power of the Commission's subpoena power by threatening a non-party with a regulation that is not applicable to such non-party, and which does not even require the party who is to keep records to keep correspondence of the type subpoenaed is a willful misconduct and a gross abuse of the Commission's subpoena power.

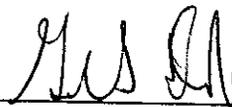
As noted above, Complainant knew for weeks that the subpoenaed non-party was having difficulty establishing whether the requested documentation existed, let alone finding it. Nevertheless, Complainant bided its time until the literal eve of the day required for its response to Respondents' motion, and threatened the non-party with Commission-levied "fines and/or other disciplinary action". Complainant has also failed to identify the need or relevance of the documents being demanded. This behavior is not worthy of practitioners before the Commission, and should not be rewarded by granting Complainant's Second Motion. The Motion should be denied, and the Complaint dismissed on the grounds that the Respondents' Motion has not been responded to, and for abuse of the Commission's procedures.

Conclusion

As Complainant has failed to file a Response to the Respondents' Motion as required, and as counsel for the Complainant has abused the Commission's Regulations with respect to motion practice, and for wrongfully threatening a subpoenaed non-party in abuse of the Commission's subpoena power, the Complainant's Second Motion should be denied, the Respondents' Motion to dismiss the Complaint granted, and attorneys' fees awarded to the Respondent.

Respectfully submitted,

By:



Gerard S. Doyle, Jr.
THE LAW OFFICE OF DOYLE & DOYLE
636 Morris Turnpike

Short Hills, NJ 07078
973-467-4433 (Telephone)
973-467-1199 (Facsimile)
gdoyle@doylelaw.net
Attorneys for Respondents
Michael Hitrinov, a/k/a
Michael Khitrinov, and
Empire United Lines, Co., Inc.

Dated in Short Hills, NJ twenty seventh day of April 2015.

ATTACHMENT 1

Gerry Doyle

From: Marcus A. Nussbaum [marcus.nussbaum@gmail.com]
Sent: Friday, April 24, 2015 3:46 PM
To: Gerry Doyle; David Gabel
Subject: Docket 14-16

Mr. Doyle,

As you may be aware, I just filed a motion seeking a second extension of the briefing schedule for the same reasons, to wit: that MSC has not completed its disclosure.

Do you agree to the dates in my motion for the revised briefing schedule? The revised dates allow for the period of time for you to put in your reply brief that you had previously asked for. Please let me know so that I can advise the Commission accordingly.

****** Please note that my mailing address has changed ******

Marcus A. Nussbaum, Esq.
P.O. Box 245599
Brooklyn, NY 11224
Tel: 888-426-4370
Fax: 347-572-0439
<http://www.nussbaumlawfirm.com/>

This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is confidential and may be subject to attorney client privilege. If the reader of this message is not the intended recipient, any dissemination, distribution or copying of this communication is prohibited. If you received this message in error, please delete and/or notify the sender by return e-mail. Although our company attempts to sweep e-mail and attachments for viruses, it does not guarantee that either are virus-free and accepts no liability for any damage sustained as a result of viruses. Thank you.

IRS Circular 230 Disclosure: To ensure compliance with U.S. Treasury regulations we inform you that any U.S. tax advice contained in this communication (including any attachments or enclosures) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing or recommending to another party any matters addressed herein.

ATTACHMENT 2

**BEFORE THE
FEDERAL MARITIME COMMISSION**

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

CERTIFICATION OF GERARD S. DOYLE, JR.

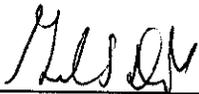
Gerard S. Doyle, Jr., pursuant to 28 U.S.C. 1746, making the following Certification under penalty of perjury, in lieu of oath or affidavit says:

1. I am an attorney at law, admitted to practice before the state and federal courts sitting in New York and New Jersey, and the Federal Maritime Commission.
2. I am also a partner in the Law office of Doyle & Doyle, attorneys for the Respondents herein.
3. I make this Certification in support of Respondents' opposition to Complainant's Second Motion for an extension of time to respond to Respondents' Motion to dismiss the Complaint on the grounds that the Complaint is barred by the Statue of Limitations, and is barred by the parties' Settlement Agreement and Release.
4. I was not in my office when the email attached to Respondents' Memorandum in Op-

position as Exhibit 1 was received (3:46 PM, April 24, 2015). However, my office was staffed at that time.

5. I have inquired of my staff as to whether any telephone calls were received from Mr. Nussbaum n April 24, 2015. The staff reported that no calls were received from Mr. Nussbaum.
6. I asked if any telephone messages had been left by Mr. Nussbaum. The staff reported that no telephone messages had been left by Mr. Nussbaum.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 27, 2015.



Gerard S. Doyle, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the RESPONDENTS' MEMORANDUM IN OPPOSITION TO COMPLAINANT'S SECOND MOTION FOR EXTENSION OF THE BRIEFING SCHEDULE FOR RESPONDENTS' MOTION FOR PARTIAL SUMMARY DECISION 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.



Gerard S. Doyle, Jr.
THE LAW OFFICE OF DOYLE & DOYLE
636 Morris Turnpike
Short Hills, NJ 07078
973-467-4433 (Telephone)
973-467-1199 (Facsimile)
gdoyle@doylelaw.net
Attorneys for Respondents
Michael Hitrinov, a/k/a
Michael Khitrinov, and
Empire United Lines, Co., Inc.

Dated in Short Hills, NJ. this twenty seventh day of April, 2015.