S E R V E D
October 21, 2015
FEDERAL MARITIME COMMISSION

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DOCKET NO. 15-08

GENERAL MOTORS LLC

v.

**NIPPON YUSEN KABUSHIKI KAISA;
WALLENIUS WILHELMSEN LOGISTICS AS; and
EUKOR CAR CARRIERS INC.**

ORDER TO FILE SUPPLEMENTAL MEMORANDUM REGARDING JOINT MOTION TO STAY PROCEEDINGS

On September 3, 2015, a Notice of Filing of Complaint and Assignment was issued, indicating that Complainant General Motors LLC filed a complaint against the Respondents, Nippon Yusen Kabushiki Kaisa, Wallenius Wilhemsen Logistics AS, and Eukor Car Carriers Inc. General Motors alleges that the Respondents violated the Shipping Act of 1984 ("Shipping Act"), including 46 U.S.C. §§ 40302(a), 41102(b)(1), 41102(c), 41103(a)(1) and (2), 41104(10), 41105(1) and (6), and 46 C.F.R. § 535.401, *et seq.*, in connection with General Motors's purchase of vehicle carrier services from the Respondents. The Commission's Notice requires that the Initial Decision in this proceeding be issued by September 6, 2016.

Respondents entered a special appearance for the limited purpose of requesting a stay of proceedings and to contest the sufficiency of service of process. On September 21, 2015, the Complainant and the specially appearing Respondents filed a joint motion to stay this proceeding pending resolution of a complaint filed by Complainant against Respondents which was transferred into multi-district antitrust litigation in the United States District Court for the District of New Jersey. As explained below, additional information is required before ruling on the joint motion and the parties will be required to file a joint supplemental memorandum.

The Commission may grant a request to stay a proceeding, however, the party seeking a stay has the burden to demonstrate the need for the stay. The test for evaluating a motion to stay was established by Justice Cardozo, who wrote that "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." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). The Commission has stated that:

> Rule 201(i), on its face, grants a presiding officer complete discretion in deciding motions pertaining to discovery. Thus, the question of whether to grant a motion for stay of discovery is discretionary, and requires only a balancing of various competing interests. In this regard, the movant must first "make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else."

Exclusive Tug Arrangements in Port Canaveral, Florida, 2002 FMC LEXIS 29, *5 (FMC 2002) (citing 46 C.F.R. § 502.201(i) and quoting *Landis v. North American Co.*, 299 U.S. at 254-255); *see also Carolina Marine Handling, Inc v. South Carolina State Ports Authority*, 2000 FMC LEXIS 1, at *16 (ALJ 2000). In *Exclusive Tug Arrangements*, the Commission denied a motion to stay discovery pending a Commission decision in a companion case, concerned that for another party, "the costs of participating in this proceeding are considerable and increase each time a deadline is extended." *Exclusive Tug Arrangements*, 2002 FMC LEXIS 29, at *9.

The parties *sub judice* state that "GM filed its complaint before this Commission as a protective action to preserve all applicable statute of limitations and other deadlines and to obtain relief." Motion at 2. The parties maintain that a stay is warranted in the interest of judicial economy and "allows the parties to concentrate on resolving the first-filed matter in the U.S. District Court." Motion at 3.

The Supreme Court addressed the factors to consider when staying a federal proceeding pending the outcome of a related state court matter. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 14-18 (1983). These factors include "which court first assumed jurisdiction, the inconvenience of the federal forum, the desirability of avoiding piecemeal 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 vexations or reactive nature." *Profile Manufacturing, Inc. v. Ronald Kress*, 1994 U.S. App. LEXIS 6048, at *7 (Fed. Cir. 1994). The parties should address whether these, or other factors, should be considered by the Commission in determining whether or not to stay this proceeding due to the parallel federal court proceeding.

It appears that the multi-district litigation to which the parties referred in their joint motion, MDL No. 2471, was dismissed by Judge Salas on August 28, 2015, in a decision finding that Clayton Act claims for damages and injunctive relief are barred by the Shipping Act and that the state law claims are conflict preempted by the Shipping Act. *In re Vehicle Carrier Services Antitrust Litigation*, 2015 U.S. Dist. LEXIS 114691 (D.N.J. 2015). The status of the parallel proceeding is certainly relevant to the analysis of the motion to stay and should be addressed by the parties.

The parties are directed to file a joint supplemental memorandum fully addressing all factors to be considered in deciding the motion to stay, including whether any parties or the public interest will be harmed by a stay and the Commission's interest in resolving controversies efficiently. In addition, the parties should discuss the current status of the federal court litigation.

For the reasons set forth above, **IT IS HEREBY ORDERED**, that the parties submit a joint supplemental memorandum by November 12, 2015, addressing the issues discussed above.

Erin M. Wirth

Erin M. Wirth
Administrative Law Judge