

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

OJ COMMERCE, LLC, *Complainant*

v.

HAMBURG SÜDAMERIKANISCHE DAMPFSCHEFFFAHRTS-
GESELLSCHAFT A/S & CO. KG AND HAMBURG SUD NORTH
AMERICA, INC., *Respondents*.

DOCKET NO. 21-11

Served: September 30, 2022

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

**ORDER ON RESPONDENTS' MOTION TO COMPEL AND
COMPLAINANT'S MOTIONS FOR EXTENSION OF TIME AND FOR CLARIFICATION**

I. Introduction and Procedural Background

On September 1, 2022, Complainant OJ Commerce, LLC ("OJC") filed a motion for expedited relief concerning extension of time for limited discovery ("Extension Motion"). Also on September 1, 2022, Respondents Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft A/S & Co. KG ("HSDG") and Hamburg Sud North America, Inc. ("HSNA"), collectively "Hamburg," filed a notice of intent to oppose ("Notice") and Complainant filed a response to the notice ("Notice Opposition"). On September 7, 2022, Respondents filed an opposition to the extension motion ("Extension Opposition").

Also on September 1, 2022, Respondents filed a motion to compel responses to discovery requests ("Compel Motion"). On September 8, 2022, Complainant filed an opposition to Respondents' motion to compel ("Compel Opposition").

On September 22, 2022, Complainant filed a motion requesting clarification of an August 31, 2022, order ("Clarification Motion"). On September 26, 2022, Complainant filed an opposition to the motion for clarification ("Clarification Opposition").

Additional background is found in previous orders, including the August 31, 2022, order on Respondents' motions to partially dismiss and for a protective order and Complainant's motion for expedited relief. The notice of intent to oppose and opposition to the notice were both unnecessary and an inefficient use of the parties' and the court's time. For the reasons set forth below, both Respondents' motion to compel and OJC's motion for clarification are denied. Complainant's motion for an extension of time for limited discovery is granted in part and denied in part. Each motion is addressed separately.

II. Respondents' Motion to Compel

A. Arguments of the Parties

Respondents seek to compel OJC to provide documents relevant to OJC's damages claims including service contracts with other ocean common carriers, NVOCC service arrangements, volumes shipped with other OCCs, and volumes shipped under NVOCC service arrangements and negotiated rate agreements. Compel Motion at 2-5. In addition, Respondents seek to compel OJC to provide documents showing total volumes imported or shipped since 2018, as relevant to OJC's damages calculation. Compel Motion at 6. Thirdly, Respondents seek to compel sales and profit data, including audited financial statements; quarterly and annual profit and loss statements; and unaudited monthly internal financial reports. Compel Motion at 6-8.

Complainant contends that OJC has already provided documents to Respondents or informed them that the documents do not exist; Respondents have failed to produce documents; and Respondents should be sanctioned by precluding them from challenging OJC's claimed damages, and a hearing set to resolve all outstanding discovery disputes. Compel Opposition at 2-17.

B. Standard

The Commission's Rules permit discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense." 46 C.F.R. § 502.141(e)(1).

On motion or on its own, the presiding officer may limit the frequency or extent of discovery otherwise allowed by these rules if the presiding officer determines that:

(A) The discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(B) The party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(C) The burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the proceeding, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

46 C.F.R. § 502.141(e)(2)(ii). The Commission's Rules also permit the presiding officer to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." 46 C.F.R. § 502.141(j). Further, the Commission's Rules governing the production of documents or electronically stored information provides that parties "must produce the documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request" and "need not produce the same electronically stored information in more than one form." 46 C.F.R. § 502.146(b)(2)(v)(A, C).

C. Discussion

1. First Requests for Production 1-4

Respondents' first requests for production 1-4 seek: (1) All service contracts, including amendments, with ocean common carriers other than HSDG; (2) All NVOCC Service Arrangements and/or Negotiated Rate Agreements, including amendments, with any non-vessel operating common carrier; (3) Documents relating to and sufficient to show the volumes shipped under each service contract with an ocean common carrier other than HSDG; and (4) Documents relating to and sufficient to show the volumes shipped under each NVOCC Service Arrangement and each Negotiated Rate Agreement with any non-vessel operating common carrier. Compel Motion at 3-4.

Respondents assert that these requests are reasonably calculated to lead to the discovery of admissible evidence with respect to OJC's damage claims; inability to ship with other carriers allegedly resulted in OJC forgoing shipments; evidence of past performance with other ocean carriers is relevant to assess the reasonableness of OJC's assumptions regarding future cargo volumes; OJC's performance under past contracts is relevant to mitigation of damages; and the content of OJC's service contracts may be relevant to testimony given by OJC's CEO. Compel Motion at 4-5.

Complainant contends that Respondent was provided with spreadsheets that contain comprehensive data on the 737 containers shipped by OJC from June 1, 2020, through the present, and that OJC's CEO testified that "he could not get extra space from other carriers during the time Respondents were failing to meet their contractual requirements." Compel Opposition at 10.

It appears that Complainant did not provide full copies of the service contracts and agreements but rather provided a detailed spreadsheet with data on the containers shipped by OJC. Respondents may argue in their brief that the underlying documents were not provided and therefore that the spreadsheet is less probative. However, at this point in the proceeding, production of that information will not be required. Respondents have not identified specific problems with the detailed information provided in the spreadsheet. Moreover, these types of service contracts and agreements, some with Respondents' competitors, are highly sensitive and it is not clear that information beyond the data provided by Complainant is relevant. Also, given changing market conditions, it is not clear that past performance would be relevant to the timeframe at issue. Accordingly, the motion to compel responses to Respondents' first requests for production 1-4 is denied.

2. First Requests for Production 9

First requests for production 9 seeks documents "relating to and sufficient to show total volumes imported and/or shipped by You by year since 2018." Compel Motion at 6.

Respondents assert that "OJC's damages calculations are based in large part on projected cargo volumes that it alleges would have been shipped under a 2021-22 service contract. Respondents are entitled to information about OJC's shipping history to evaluate the reliability of those projections and the damages claims the projections allegedly support." Compel Motion

at 6. Respondents further assert that information about OJC's "total import volumes would be compared with the information about OJC's ocean shipments to determine if OJC may have used alternative means of transport (e.g., air cargo) to move cargo" and whether the "alternative means of transport might have been a way for OJC to mitigate the damages it claims to have suffered." Compel Motion at 6.

Complainant contends that Respondents have "no legitimate basis for OJC's shipping volumes from before June 1, 2020, as what was shipped by OJC in 2018 or 2019 has nothing to do with what OJC did and could have shipped during the 2021 and 2022" and that deposition testimony established that OJC has not used any alternative means of transport to move cargo. Compel Opposition at 11-12.

Given the changing market conditions, it is not clear that past performance would be relevant to the timeframe at issue. Moreover, Complainant has already provided testimony that alternate means of transportation were not used. Accordingly, the motion to compel responses to Respondents' first requests for production 9 is denied.

3. First Requests for Production 10, Second RFP 20 and 21

First requests for production 10 and second requests for production 20 and 21 seek Complainant's audited financial statements for the period January 1, 2018, to the present; quarterly and annual profit and loss statements from 2018 until present; and unaudited monthly internal financial reports for all months during calendar years 2019, 2020, 2021, and 2022. Compel Motion at 6-7.

Respondents argue that OJC has provided a spreadsheet supporting its alleged damages but that OJC has not provided any of the documentation upon which the spreadsheet is based, and that lost sales or profits should be reflected in financial statements or some sort of financial reports. Compel Motion at 8.

Complainant asserts that OJC is a private company which does not generate or possess any audited financials; overall company financials would not be relevant as the only line of business at issue is the import of house-brand products; OJC specifically generated the sales history of the house-brand products for Respondents; and OJC does not generate quarterly or annual profit and loss statements. Compel Opposition at 15-17.

Respondents may argue in their brief that the underlying documents used to create the spreadsheet were not provided and therefore that the spreadsheet is less probative. However, at this point in the proceeding, production of that information will not be required. Respondents have not identified specific problems with the detailed information provided in this spreadsheet. In addition, Complainant's arguments are persuasive that certain financial reports are not available or would not be probative because other product lines are included. Accordingly, the motion to compel responses to Respondents' first requests for production 9 is denied.

III. Complainant's Motions

A. Motion for Expedited Relief Concerning Extension of Time for Discovery

Complainant seeks to extend the discovery deadline by 28 days until October 14, 2022, for OJC to conduct limited discovery related to pricing, damages, and other information withheld from it; extension of the deadline for OJC's damages report until September 16, 2022; and extension of the briefing deadlines by 28 days. Extension Motion at 1-3.

Respondents agree with OJC that the parties will not be able to complete discovery by September 16, 2022, and that an extension of time is necessary for both discovery and briefing, however, Respondents requests that "(i) either party may conduct additional depositions during this period; and (ii) this extension applies only to depositions, and does not permit the service of any further requests for production of documents, interrogatories, or requests for admissions." Extension Opposition at 2. Respondents also state that they oppose an extension of time for OJC to submit an expert report as the expert report provided by OJC on September 2, 2022, should have been submitted on August 5, 2022. Extension Opposition at 2.

It is not clear whether Complainant has received the discovery previously ordered or promised. If not, it should raise those issues in its brief. For example, in Exhibit A of Complainant's counterstatements and opposition to Respondents' motion to compel, Respondents agreed to provide spot rate information through May 31, 2022, and Respondents state that they "produced spot rate information through mid-2022." Clarification Opposition at 2. If Respondents failed to provide that information and there is an impact on the proceeding, that is an issue that can be argued in the briefs.

The expert report submitted by Complainant on September 2, 2022, was not filed timely. However, striking the report or not permitting Complainant to present a damages expert would be an extreme remedy. Rather, the discovery deadline will be extended briefly. In addition, any depositions previously agreed to between the parties should be scheduled during this limited period. At this late date in the proceeding, no additional requests for production of documents, interrogatories, or requests for admissions will be permitted. The parties should be prepared to brief the merits based on the information they have obtained through the extended discovery period. Any additional concerns about discovery may only be raised in the briefs on the merits.

The parties have previously received extensions of the schedule. Given the limited additional discovery permitted and the Commission deadline for this proceeding, a shorter extension is approved, and briefing deadlines are adjusted for holidays. No additional motions will be permitted. Any concerns from a party should be raised in their brief on the merits. The procedure for briefing outlined in the initial scheduling order remains in effect.

Accordingly, the motion for expedited relief concerning extension of time for discovery is granted in part and denied in part. The parties shall follow the revised schedule below and no additional motions or requests for extensions will be entertained.

October 14, 2022 Close of all discovery (fact and expert).
November 9, 2022 Complainant's brief, findings of fact, and appendix.
December 8, 2022 Respondents' brief, findings of fact, appendix, and response.
December 23, 2022 Complainant's reply brief

B. Motion for Clarification of the August 31, 2022, Order

Complainant's motion requests clarification of the timeframe limitation for OJC RFP 26; sanctioning Respondents by prohibiting them from challenging OJC's damages for failure to produce all responsive documents on service contract and spot market rate pricing; extension of the discovery period by at least 28 days; and extension of the initial briefing deadline by at least 28 days. Clarification Motion at 4.

Respondents contend that the clarification requested by OJC is unnecessary and the request for sanctions should be denied as Respondents have responded fully to RFP 26 as limited by the June 29, 2022, order on Respondents' motion to compel and revised schedule.

OJC's RFP 26 was previously addressed in an order which stated:

OJC RFP 26 requests documents showing pricing, including how prices are determined and why prices may vary between shippers. Respondents state that "prices vary among customers based on a number of factors, including the volume committed in a particular trade lane and in other trade lanes." Opposition at 9. This request will be narrowed to any policies, procedures, guidance, training, or instructions regarding pricing for shipping or determining prices charged for shipments under service contracts and on the spot market. Respondents will not be required to review or provide documents regarding pricing for individual shippers. So, for example, the negotiations with individual shippers would not be disclosed but an email with information about pricing on a specific route must be disclosed. Accordingly, OJC RFP 26 is compelled as limited.

Order on Respondents' Motion to Compel and Revised Schedule at 4 ("Order on Respondents' Motion to Compel").

The parties reached an agreement on the timeframe for the OJC RFP 26 request, and that agreement addresses the issue raised for clarification. In addition, the Order on Respondents' Motion to Compel significantly limited the documents that Respondents needed to provide in response to OJC RFP 26. If Complainant contends that information relevant to this narrow category of documents was not produced, they can so argue in their brief. However, given the degree to which prices vary based on other factors, it is not clear how relevant this information would be. The briefing schedule is addressed above. Accordingly, the motion seeking clarification is denied.


IV. Order

Upon consideration of the record herein, the arguments of the parties, and the conclusions and findings set forth above, it is hereby

ORDERED that Respondents' motion to compel be **DENIED**. It is

FURTHER ORDERED that OJC's motion seeking an extension of time for limited discovery be **GRANTED IN PART AND DENIED IN PART** as outlined above. It is

FURTHER ORDERED that Complainant's motion for clarification be **DENIED**.



Erin M. Wirth
Chief Administrative Law Judge