

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

OJ COMMERCE, LLC,	)	
	)	
<i>Complainant,</i>	)	
	)	
v.	)	
	)	
HAMBURG SÜDAMERIKANISCHE	)	
DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S	)	
& CO. KG	)	
	)	<b>DOCKET NO. 21-11</b>
and	)	
	)	
HAMBURG SUD NORTH AMERICA, INC.	)	
	)	
<i>Respondents.</i>	)	
	)	

**RESPONDENTS' OPPOSITION TO COMPLAINANT'S  
MOTION FOR LEAVE TO FILE VERIFIED AMENDED COMPLAINT**

Respondents Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft A/S & Co. KG (“HSDG”) and Hamburg Sud North America, Inc. (“HSNA”) hereby submit this opposition to Complainant’s Motion For Leave To File Verified Amended Complaint (“Motion”).

For the reasons set forth below, the Motion should be denied.

**I. The Applicable Legal Standard For Leave To Amend**

While the standard for granting leave to amend a complaint under Rule 66 of the Commission’s Rules of Practice and Procedure 66 (46 C.F.R. §502.66) and its counterpart in Rule 15 of the Federal Rules of Civil Procedure is fairly liberal, the granting of leave is not automatic. *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993). Here, the Motion fails to meet the standard.

Factors which the courts consider in evaluating motions for leave to amend include “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment.” *Id.*

As explained below, the Motion was filed with undue delay, and would unduly prejudice Respondents.

## **II. The Motion Is Unduly Delayed**

It is well-established that a motion to amend may be denied as dilatory or unduly delayed where a plaintiff was aware of the facts giving rise to the cause of action before filing the complaint that she now wishes to amend. See, e.g., *LaPrade v. Abramson*, 2006 U.S. Dist. LEXIS 86431, \*11 (D.D.C. Nov. 29, 2006).

In *Yager v. Carey*, 910 F. Supp. 704, 731-32 (D.D.C. 1995), the court denied leave to amend because plaintiff had been aware of a claim at the time the original complaint was filed but had not included it. See also, *Rojas v. Westco Framers LLC*, 2015 U.S. Dist. LEXIS 143179 (D. Col. 2015) (“Other common reasons for finding undue delay include...when a moving party knows or should have known of the facts in the proposed amendment but did not include them in the original complaint...”), citing *Minter v. Prime Equip. Co.*, 451 F.3d 1206 (10<sup>th</sup> Cir. 2006); *Pallottino v. City of Rio Rancho*, 31 F.3d 1023 (10<sup>th</sup> Cir. 1994). Failure to include facts or claims known at the time of an original filing is more likely to result in a denial of leave to amend when the plaintiff offers no explanation for the omission or delay. *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365–66 (10<sup>th</sup> Cir. 1993).

Here, Complainant knew or should have known of the facts/claims it seeks to add to the complaint at the time the complaint was originally filed. Complainant’s Motion offers no explanation for why those facts/claims were not included in the original complaint.

In addition, a motion to amend may be considered unduly delayed if, among other reasons, the moving party has made the complaint a “moving target,” is trying to “salvage a lost case by untimely suggesting new theories of recovery,” or is trying to present more theories to avoid dismissal. *Minter, supra.*, at 1206. Here, the Motion was filed on February 2, 2022, more than two months after the complaint was filed on November 23, 2021, more than six weeks after the complaint was served (December 13, 2021), and two weeks after Respondents’ dispositive motion was filed. The amended complaint seeks to add new Shipping Act claims and to address deficiencies in the original complaint identified in Respondents’ motion to dismiss. The effect is to turn the complaint into a moving target for Respondents.

In light of the foregoing, denial of the Motion is appropriate.

### **III. The Motion Has And Will Prejudice Respondents**

The Motion itself has prejudiced Respondents, and granting the Motion would exacerbate that prejudice.

Prior to the filing of the Motion, the Presiding Officer had before her a motion to dismiss a substantial portion of the original complaint. The Complainant now simultaneously seeks leave to amend the complaint and opposes the motion to dismiss. In so doing, Complainant argues that leave to amend should be granted because the amended complaint would remedy deficiencies identified in Respondents’ motion to dismiss and argues that the motion to dismiss should be denied because the amended complaint would remedy those same deficiencies. Complainants should not be permitted to get away with this legal circularity.

Numerous courts have recognized that much of the value of summary judgment procedure in the cases for which it is appropriate would be dissipated if a party were free to rely on one theory in an attempt to defeat a motion for summary judgment and then, should that theory prove unsound, come back along thereafter and fight on the basis of some other theory. See, e.g.,

*Freeman v. Continental Gin Co.*, 381 F.2d 459, 469–70 (5th Cir.1967); *Humphreys v. Roche Biomedical Labs., Inc.*, 990 F.2d 1078, 1082 (8th Cir.1993); *Lussier v. Dugger*, 904 F.2d 661, 667 (11th Cir.1990); *FDIC v. Meyer*, 781 F.2d 1260, 1268 (7th Cir.1986).

Here, Complainant appears to be adding new legal theories (retaliation, discrimination against ports), reconfiguring others (failure to adhere to filed agreement), and substituting allegedly verified facts (HSNA is no longer a marine terminal operator, it is now an ocean transportation intermediary) in an attempt to overcome legal deficiencies identified in Respondents' motion to dismiss.

If the Motion is granted, either before or after a ruling on Respondents' motion to dismiss, Respondents will be forced to file another dispositive motion, even if Respondents' original motion to dismiss is granted in whole or in part.<sup>1</sup> Thus, Respondents will be faced with preparing and filing another such motion, when all issues could and should have been addressed from the outset. This is unduly prejudicial to Respondents.

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<sup>1</sup> Respondents will not address the merits of the proposed amended complaint here, other than to say that many (if not all) such arguments appear to be susceptible to dismissal for various reasons.

**III. Conclusion**

For the foregoing reasons, the Motion should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Wayne R. Rohde". The signature is written in a cursive, slightly slanted style.

Wayne R. Rohde  
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Dated: February 7, 2022

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 7<sup>th</sup> day of February, 2022, the foregoing Respondents' Opposition to Complainant's Motion for Leave to File Verified Amended Complaint was served via electronic mail on:

Shlomo Y. Hecht  
[sam@hechtlawpa.com](mailto:sam@hechtlawpa.com)

and

Aaron Davis, Esq.  
[davis@valhallalegal.com](mailto:davis@valhallalegal.com)

A handwritten signature in black ink, appearing to read "Wayne R. Rohde", is written above a horizontal line.

Wayne R. Rohde