

BEFORE THE  
FEDERAL MARITIME COMMISSION

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DOCKET NO. 23-05

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RAHAL INTERNATIONAL, INC.,  
Complainant,

v.

HAPAG-LLOYD AG,  
HAPAG-LLOYD (AMERICA) LLC, and  
HAPAG-LLOYD USA, LLC  
Respondents.

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**MEMORANDUM OF LAW BY RAHAL INTERNATIONAL, INC.  
IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT  
BY HAPAG-LLOYD USA, LLC**

**PRELIMINARY STATEMENT**

Complainant Rahal International, Inc. (“Rahal”) respectfully submits this memorandum of law in opposition to the motion for summary judgment by Respondent Hapag-Lloyd USA, LLC (“HLUSA”). *See* Respondents’ Motion For Summary Judgment (Aug. 22, 2023), FMC Docs. 18-19. Although HLUSA asserts that it “played no role whatsoever in the events that are the basis of the Complaint,” the affidavit (by David Zimmermann) upon which HLUSA relies makes no such express statement. Indeed, the Zimmermann Affidavit makes a mere five factual allegations, four of which pertain to HLUSA’s corporate relations, and none of which support HLUSA’s sweeping assertions in support of its motion. Accordingly, HLUSA has failed to establish its *prima facie* entitlement to summary judgment and its motion should be denied.

## LEGAL ARGUMENT

As an initial matter, summary judgment is disfavored where discovery is incomplete. *See Smith v. OSF Healthcare Sys.*, 933 F.3d 859, 866 (7th Cir. 2019); *Jones v. Blanas*, 393 F.3d 918, 930 (9th Cir. 2004); *Cable Sci. Corp. v. Rochdale Vill., Inc.*, 920 F.2d 147, 152 (2d Cir. 1990) (“It is worth observing, however, that summary judgment is generally disfavored when the party opposing the motion has not obtained discovery.”).

If the timing of HLUSA’s motion is insufficient to warrant denial, then the paltriness of the assertions in its supporting affidavit compels it. The Zimmermann Affidavit makes only *one* factual assertion (apart from HLUSA’s corporate affiliations). That singular assertion is that HLUSA “did not call the port of New York/New Jersey during 2022 and did not transport cargo to the Port of New York/New Jersey for Rahal International in 2022.” Notwithstanding that HLUSA has provided the Commission with the one singular assertion, it sweepingly argues in its motion that “HLUSA was not engaged in any of the conduct which is the basis of the Complaint.” Curiously, the affiant did not include a sworn statement coextensive with — and thus substantiating of — HLUSA’s sweeping assertion. HLUSA’s assertion should be rejected.

Similarly, HLUSA asserts that “HLUSA played no role whatsoever in the events that are the basis of the Complaint.” Again, the affiant makes no attempt to substantiate — let alone do so under oath — the complete refutation of HLUSA’s involvement in relevant events. Again, therefore, HLUSA’s assertion should be rejected and its motion denied.

The omissions from HLUSA’s affidavit are more telling than its affirmative statements. For example, Rahal has alleged that the Respondents, including HLUSA, “assessed excessive charges against Rahal” in violation of the Shipping Act of 1984, Pub.

L. No. 98-237, 98 Stat. 67 (1984), as amended by the Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, 136 Stat. 1272, 46 U.S.C.S. §§ 40101 to 46108 (LexisNexis 2023) (collectively the “Shipping Act”). *See* Compl. ¶¶ 28-29 (June 22, 2023), FMC Doc. 1. HLUSA does not address the allegation and offers no substantiation that it was not part of the excessive charges assessed against Rahal.

Additionally, Rahal has alleged that the Respondents, including HLUSA, “invoiced Rahal” for detention and demurrage charges that failed to comply with the Shipping Act. *See* Compl. ¶¶ 30-31 (June 22, 2023), FMC Doc. 1. The Zimmermann Affidavit simply does not address whether and to what extent HLUSA was involved in invoicing Rahal.

As a final example, Rahal has alleged that the Respondents, including HLUSA, failed to establish reasonable practices for the return of empty containers, and to provide adequate facilities at and about the Port of New York and New Jersey for its customers to return empty containers. *See* Compl. ¶ 43 (June 22, 2023), FMC Doc. 1. Once again, the Zimmermann Affidavit is silent as to HLUSA’s role regarding establishing reasonable practices for the return of empty containers at the port.

Thus, HLUSA has failed to establish its entitlement to summary judgment. To the extent that the Commission determines that HLUSA has established its *prima facie* entitlement to summary judgment, then Rahal submits that it should be permitted to conduct discovery into the foregoing allegations. Those allegations stand unrefuted by HLUSA’s evidence in support of its motion and Rahal has had no opportunity to conduct

discovery into those matter. At a minimum, therefore, HLUSA's motion should be denied with leave to renew at the conclusion of discovery.<sup>1</sup>

**CONCLUSION**

In light of the foregoing, Rahal respectfully requests that HLUSA's motion for summary judgment be denied and Rahal granted such other and further relief as the Court deems just and proper.

Dated: September 6, 2023  
New York, NY

Respectfully submitted,

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<sup>1</sup> To the extent HLUSA seeks to supplement the Zimmermann Affidavit on reply to cure its deficiencies, such should be rejected. "Where new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the movant an opportunity to respond." *Black v. TIC Inv. Corp.*, 900 F.2d 112, 116 (7th Cir. 1990).

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**CERTIFICATE OF SERVICE**

I, William M. Fennell, certify that, on September 6, 2023, a true and correct copy of the Memorandum Of Law By Rahal International, Inc. In Opposition To The Motion For Summary Judgment By Hapag-Lloyd USA, LLC, to which this certification is annexed, was filed via electronic mail with the Secretary of the Federal Maritime Commission, and a copy was served via electronic mail on the following counsel:

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