

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

20230930-DK-BUTTERFLY-1, INC., *Complainant*

v.

MSC MEDITERRANEAN SHIPPING CO. SA, *Respondent*.

DOCKET NO. 23-12

Served: December 4, 2023

ORDER OF: Linda S. Harris CROVELLA, *Administrative Law Judge*.

INITIAL ORDER

On November 28, 2023, the Commission issued a Notice of Filing of Complaint and Assignment (“Notice”) for this proceeding. The response to the complaint is due 25 days after date of service of the complaint and failure to respond may result in a default decision. 46 C.F.R. § 502.62(b). In addition, Commission regulations require the parties to confer to establish a schedule and to consider mediation.

The Commission’s Notice requires the initial decision in this case to be issued within one year. Pursuant to Rule 141, discovery must be completed within 150 days of the service of a respondent’s answer and the parties are required to meet and confer: (a) to establish a schedule for the completion of discovery, including initial disclosures and discovery related to experts; (b) to resolve, to the fullest extent possible, disputes relating to discovery matters; and (c) to expedite, limit, or eliminate discovery by use of admissions, stipulations, and other techniques. 46 C.F.R. § 502.141.

The parties must submit a joint status report with proposed schedule, as outlined below, within fifteen days of the service of the answer. In the joint status report, the parties must submit a joint proposed schedule that completes discovery within 150 days of service of the answer and allows issuance of the initial decision within one year.

Within fifteen days of the service of a respondent’s answer, the parties “must participate in a preliminary conference with the Commission’s Office of Consumer Affairs and Dispute Resolution Services (CADRS) as to whether this matter may be resolved through mediation. The preliminary conference may be conducted either in person or via telephone, video conference, or other forum.” 46 C.F.R. § 502.64. This proceeding will not be stayed during the dispute resolution process. In the joint status report, the parties must state whether each party has contacted CADRS and whether the parties have agreed to engage in mediation. The parties are directed *not* to state the parties’ positions on whether to agree to mediation or their settlement positions.

Pursuant to the Howard Coble Coast Guard and Maritime Transportation Act of 2014, 46 U.S.C. § 41305(e), and Commission Docket No. 15-06, under certain circumstances, attorney fees may be awarded to the prevailing party in a complaint proceeding. It is therefore in the best interest of all parties to proceed expeditiously.

By Commission order, certain requirements in 46 C.F.R. part 502 related to the paper filing of documents, ink signatures, and service by mail of complaints are currently waived. Order (May 12, 2020), Docket No. 20-07, www2.fmc.gov/readingroom/docs/20-07/20-07_order.pdf; *see also* Temporary Adjustments in FMC Operations (Mar. 19, 2020), www.fmc.gov/temporary-adjustments-in-fmc-operations/. Filings by email are preferred.

In addition, the parties must abide by the following additional instructions:

ADDITIONAL INSTRUCTIONS

Filing

1. Information regarding where to find the Commission's rules of practice and procedure (46 C.F.R. § 502), Commission decisions, and other information helpful for parties may be found in the reading room section of the Commission's website, www2.fmc.gov/readingroom. Parties are strongly urged to familiarize themselves with the Commission's rules of practice and procedure. Filings may be rejected for failure to comply with the rules.
2. Parties are encouraged to file documents with the Office of the Secretary via email. These emails must include the opposing party and courtesy copies (cc) to the presiding judge at judges@fmc.gov. A party is obligated to notify the Commission of any change of its service address.
3. All filings and all attachments must have page numbers or they may be rejected.
4. *Attachments*. When documents are attached to a filing, as far as practicable, the exhibits should be in one PDF document. The PDF should have unique, sequential page numbers (bates numbers). Each separate exhibit should be clearly identified, for example by a cover sheet or bookmark. A table of contents should indicate what the exhibit is and the page where it starts.
5. *Case citations*. The Commission recently switched to Westlaw. Citations to opinions on Lexis should include a parallel citation to Westlaw, if possible. Citations to Commission decisions may be made to official reporters including F.M.C., F.M.C.2d, Pike & Fischer Shipping Regulation Reports (S.R.R.), Westlaw, or Commission slip opinions. Every citation to a Commission case should include the case name, docket number, level (FMC or ALJ) and exact date of service (month/day/year). Selected FMC cases, including F.M.C. from 1919-1987 and F.M.C.2d from 2018 to present are available at www.fmc.gov/activity-logs. If a document from another source is cited, the decision or ruling must be transmitted via e-mail to judges@fmc.gov.

6. Any marking systems should be clearly identified on the first page. For example: “Confidential information marked with red box.”

Discovery

7. Rules regarding discovery require initial disclosures within seven days of filing of the answer, limit the number of interrogatories and depositions, and impose time limits to complete discovery. 46 C.F.R. §§ 502.141-502.150. Parties may agree to additional limitations, however, requests to extend established deadlines will be reviewed for good cause even if parties agree to the extension.
8. The parties are reminded of their obligation to ensure preservation of all relevant evidence, including electronically stored information. *Zhi Chen v. District of Columbia*, 839 F. Supp. 2d 7, 12 (D.D.C. 2011); *The Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).
9. Discovery materials must not be filed with the Commission until used in the proceeding, for example, as exhibits to a motion. 46 C.F.R. § 502.2(k).
10. Compliance with the date set for completion of discovery requires that the parties serve discovery requests sufficiently in advance of the discovery cutoff so that all responses and objections are due on or before that date.
11. The parties must provide each other with an electronic copy, in a word processing format, of all discovery requests served and all responses to discovery with the exception of documents produced. Answers, responses, and objections to interrogatories and requests for admissions or for production of documents must identify and quote each interrogatory or request in full immediately preceding the answer, response, or objection thereto.
12. A motion to compel should only be filed after good faith efforts between the parties to resolve the dispute. The motion to compel should be filed as soon as practicable. The motion must set forth verbatim the interrogatory or request, the response that the moving party argues is insufficient, a summary of the moving party’s attempts to secure a sufficient response, and the moving party’s argument as to why the response is insufficient. The moving party must provide an electronic copy in a word processing format of the motion to compel to the opposing party and judges@fmc.gov with the PDF copy of the motion sent to the opposing party, judges@fmc.gov, and secretary@fmc.gov.

The non-moving party must use the electronic copy of the motion to compel and add any counter-summary of the attempts to secure a sufficient response, then its argument on why the response is sufficient, below the moving party’s summary and argument for each response claimed to be insufficient. The non-moving party must provide to the moving party and to the Presiding Officer an electronic copy in a word processing format of the motion to compel to which it has added its counter-summaries and arguments as well as filing the PDF version with the Secretary, with courtesy copies to opposing party and judges@fmc.gov.

13. A party withholding documents because of an asserted privilege must serve a privilege log that complies with the requirements of Federal Rule of Civil Procedure 26(b)(5)(A).

Motions

14. Rules regarding motions impose time limits, page limits, address replies, and require the parties to confer prior to filing non-dispositive motions. 46 C.F.R. §§ 502.67-502.71.
15. Any request for action by the Commission or presiding officer must be made by motion, not by letter or email request or as part of a joint status report. Each page of the motion should be sequentially numbered.
16. A party moving for summary decision must include in a separate document a statement of material facts as to which there is no genuine dispute. This document must set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine dispute. Each paragraph must be limited as nearly as practicable to a single factual proposition. Each factual proposition must be followed by an exact citation to evidence that the party contends will establish the fact or demonstrate that it is uncontroverted; *i.e.*, a page number in the Appendix.¹ *See* 46 C.F.R. § 502.70(a). The party filing Proposed Findings of Fact must provide an electronic copy of the Proposed Findings of Fact in a word-processing format to all parties *and to the Office of Administrative Law Judges*.
17. A party opposing a motion for summary decision must file a responding statement either admitting or disputing each of the facts in the movant's statement. This document must set forth verbatim each material fact to which it responds, then admit or deny the fact. All material facts in the movant's statement that are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation demonstrating the existence of a genuine issue as to the fact. Each proposed finding of fact that the responding party denies must be followed by an exact citation to evidence that the responding party contends will rebut the evidence the proposing party claims supports the fact. An opposing party may also include in the responding statement additional facts that the party contends are material. Each such fact must be stated in separately numbered paragraphs with a citation to the motion record (page in the appendix) establishing the fact or demonstrating that it is controverted. Each paragraph must be limited as nearly as practicable to a single factual proposition. The party filing a Response to Proposed Findings of Fact must provide an electronic copy of the Response in a word-processing format to all parties *and to the Office of Administrative Law Judges*.
18. Each party must prepare and submit with its motion or reply an appendix containing the documentary evidence on which it relies for its claims regarding material facts. The pages of the appendix must be numbered sequentially. If the evidence relied upon has

¹ Parties must designate specific facts and provide the court with their location in the record. *Orr v. Bank of Am.*, 285 F.3d 764, 775 (9th Cir. 2002). "General references [to evidence] without page . . . numbers are not sufficiently specific." *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003).

previously been provided either by the party or the opposing party, that evidence should be cited rather than providing a differently numbered copy of the same evidence.

Confidential Material

19. *Stipulation* – The parties may agree and stipulate between themselves regarding treatment of confidential documents and information obtained during discovery that is not filed with the Commission. The parties may, but are not required to, file a courtesy copy of the agreement with the Commission.
20. *Use in the proceeding* – If confidential information is filed in a memorandum or as an exhibit to a dispositive motion or as part of briefing on the merits, it must be accompanied by a motion justifying confidential treatment. This motion must identify each item for which protection is sought and show good cause by demonstrating that the information is a trade secret or other confidential research, development, or commercial information. 46 C.F.R. § 502.141(j)(1). The burden is on the party seeking to protect the information to show good cause for its protection.
21. *Depositions* – Parties may not mark entire depositions as confidential. Parties should ask questions that may require confidential responses together, typically at the end of the deposition. Alternatively, parties may mark as confidential selected statements in a deposition prior to filing the deposition as an exhibit. Requests for confidential treatment of entire depositions should not be made and may be summarily rejected.
22. *Filing* – Parties should file two versions of confidential filings marked on the cover page as the “confidential version” and the “public version.” 46 C.F.R. § 502.5. Parties may label all pages as “confidential” or “public” in the header or footer. Improperly marked filings may be rejected.
23. *Marking confidential material* – In the confidential version, the confidential information must be conspicuously and clearly marked on each page, for example by outlining, highlighting, boxes, or braces. The public version must clearly indicate any omissions, for example with blackout or braces. *Pagination and depiction of text on each page must be identical to that of the confidential version.* For example, the confidential filing may read: “On January 1, 2010, Complainant entered into a {25} year lease with respondent for a monthly rent of {\$1000}.” The public version would read: “On January 1, 2010, Complainant entered into a {█} year lease with Respondent for a monthly rent of {█}.” Only confidential numbers or words should be marked as confidential in the confidential version and thus redacted in the public version, not entire sentences. Improperly marked filings may be rejected.
24. *Exhibits* – Confidential information in exhibits should be marked as described above. If marking within the text is not feasible, the motion seeking confidential treatment must indicate why the material could not be so marked. If justified, individual pages may be replaced in the public version with a page indicating that confidential material was excluded. Entire exhibits should not be excluded, only those pages containing confidential material.

25. *Personal information* – Personally identifiable information such as social security numbers, birth dates, and financial account numbers must be redacted pursuant to Commission Rule 13. 46 C.F.R. § 502.13.
26. *Confidential Request Table* – It is recommended that a confidential request table be submitted, organizing requests for confidential treatment of exhibits by bates number. The table may include: (1) the bates range for confidential document requests, (2) the document’s description, (3) whether confidential treatment is being requested for the entirety of the bates range or only for certain material marked in both the confidential and public versions, and (4) the legal basis for the confidentiality request. If a particular bates range in an appendix does not include any confidential information, it does not need to be listed in the confidential materials list. If a supplemental appendix is later submitted, it is recommended that a new comprehensive confidential bates list be submitted, which includes the previous list and any additional bates ranges for which confidential material has been requested (resulting in one confidential list for Complainants and one confidential list for Respondents, encompassing all confidentiality requests).

Example: [Party Name] Appendix - Confidential Bates Table

<i>Bates Range</i>	<i>Description</i>	<i>Classification Requested for</i>	<i>Basis for Confidentiality Request</i>
CX 12-13	Depo. Transcript of [Name]	Material indicated	Current pricing data
RX 8-9	Agreement dated [dd/mm/yy]	Entire page range	Commercially sensitive rates and terms

Hearing

27. The answer must indicate whether an oral hearing is requested and the desired place for such a hearing. The presiding officer will determine whether an oral hearing is necessary. 46 C.F.R. § 502.62(a)(5), (b)(3).
28. The parties should review Commission Rules 502.75 and 502.209-502.210 with regard to settlement and prehearing procedures including the submission of prehearing statements.
29. The parties are expected to attempt to narrow the issues and to shorten the proceeding by stipulations. The parties may, by stipulation, agree upon any facts involved in the proceeding. 46 C.F.R. § 502.207. Stipulations should be signed by the parties and may be filed at any point in the proceedings.



Linda S. Harris Crovella
Administrative Law Judge