

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

OL USA LLC, *Complainant*

v.

MAERSK A/S, *Respondents*.

DOCKET NO. 24-11

Served: August 8, 2024

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

THIRD ORDER ON MOTION TO COMPEL AND DENIAL OF MOTION TO EXTEND

On July 26, 2024, Respondent, Maersk A/S (“Respondent”), filed a motion to compel Complainant’s depositions (“MTC Deps”). This is the third discovery motion filed by Respondent. A response by Complainant OL USA LLC (“Complainant”) to the MTC Deps was received on August 2, 2024.

The MTC Deps asserts that Complainant has failed to follow up on a request to reschedule the deposition of one of Complainant’s representatives. Respondent provided partial email chains establishing the June 28, 2024 service of the notice of deposition (Exhibit A); a July 9, 2024 email response by Complainant that the individual had a conflicting appointment but was available the week of July 22, 2024, and Respondent’s response that it was amenable to rescheduling (Exhibit B); Respondent’s July 16, 2024 email asking for a specific date to reschedule the individual’s deposition (Exhibit C); and a letter dated July 24, 2024 that again asks for a date to reschedule the individual’s deposition and adding that it also needs a date to reschedule another individual’s deposition for which there are no email exchanges but which was noticed to occur on July 24, 2024 (Exhibits D, A). MTC Dep 1-2, Exs. A-D.

The MTC Deps does not include a statement that Respondent conferred with Complainant prior to filing the motion as required by Commission Rule 502.71(a), nor does it state what Complainant’s position is regarding the motion:

Before filing a non-dispositive motion as defined in § 502.69(g) of this subpart, the parties must attempt to discuss the anticipated motion with each other in a good faith effort to determine whether there is any opposition to the relief sought and, if there is opposition, to narrow the areas of disagreement. *The moving party must state in the body of the motion what attempt was made or that the discussion occurred and whether the motion is opposed.*

46 C.F.R. § 502.71(a) (emphasis added). Respondent's good faith efforts to reschedule the deposition does not satisfy the requirement of making a good faith effort to confer with Complainant on the motion itself. Thus, Respondent has not met this requirement.

Complainant opposes the MTC Deps stating that Respondent's insistence on deposing witnesses in the order it provided in the Notice of Deposition has resulted in a delay of depositions solely because the first deponent was not available on the date Respondent provided. The second deponent, also referenced in Respondent's motion, was available on the date Respondent noticed, but because it was out of order, Respondent refused to depose the individual. Finally, Complainant asserts it provided dates for both individual's depositions on about August 1, 2024, and Respondent had not responded to those dates by the August 2, 2024, 5:00 pm filing of Complainant's opposition.

While the motion raises issues with Complainant's obligation to prosecute its claims and to follow my orders, which includes the Motion on Order to Compel and Amended Scheduling Order issued on June 14, 2024, Respondent has opted to file motions rather than directly communicate with Complainant causing further delay in the deposition schedule. In this regard, while Respondent asserts in the motion that it is entitled to depose witnesses in the order that it wishes, the Notice of Deposition and emails attached to the MTC Deps do not indicate that it was not willing to go ahead with the depositions for the remaining named deponents on the dates Respondent noticed. MTC Deps at 2, Exs. A-D. Respondent cites to no cases in support of its contention that it can demand the order of witnesses it deposes to the point of delaying all depositions because it failed to ascertain whether witnesses were available to meet said schedule. Filing the instant motion without conferring with Complainant and attempting to narrow the issues, and Respondent's refusal to continue with the depositions it noticed also without conferring with Complainant, has contributed to the delay in this proceeding.

Further, and without explanation, Respondent raises its July 18, 2024, MTD request that a stay be issued for all discovery until Complainant fully complies with all written discovery requests, which was the subject of Respondent's two previous discovery motions. Respondent filed the instant MTC Deps on the same day that the Second Order on Motion to Compel issued, prior to knowing what would be compelled and what would be denied, or by what date Complainant would be ordered to produce responses. MTC Deps at 2. The rush to file motions without conferring with each other is interfering with the progress of the case.

Due to the failure to confer regarding the scheduling of depositions and prior to filing the motion, the MTC Deps is **DENIED**. However, the parties are ordered below to confer on the scheduling of depositions.

A separate order will issue to fully address the arguments raised in the MTD because Respondent is entitled to and has not yet replied to Complainant's opposition to the MTD. 46 C.F.R. § 502.70(c). In that regard, Respondent most recently filed a motion for an extension of time to reply to Complainant's opposition, asserting that it did not receive the discovery responses addressed in the Second Order on Motion to Compel issued on July 26, 2024, and needs them to reply to the opposition. Once again, Respondent failed to confer with Complainant, instead opting to file a motion that shines a spotlight on the lack of communication between the parties. Respondent asserts that it did not receive the responses that Complainant

contends it served on Respondent after the Third Order on Motion to Compel issued, so it needs an additional seven days to file a reply to the opposition to the MTD. For the reasons stated below, good cause for an extension of time has not been presented, and Respondent's motion for an extension of time to reply is **DENIED**.

In the MTD, Respondent predominantly raises discovery issues rather than presenting arguments for failure to state a claim under Federal Rules of Civil Procedure 12(b)(6).¹ MTD at 2-9. A motion to dismiss under FRCP 12(b)(6), which the MTD appears to be, must show that a complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Mitsui O.S.K. Lines, Ltd. v Global Link Logistics, Inc.*, 2011 WL 71440008 at *12 (FMC 2011) (quoting in part, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Thus, the motion to dismiss and opposition to the motion to dismiss should address the sufficiency of the allegations in the complaint, not the status of discovery. The reply to the opposition, in turn, should address the arguments raised in the opposition that assert that Complainant has sufficiently pled the allegations in the complaint. Receipt of discovery regarding lost profits or damages claimed by Complainant does not present good cause to extend the time to reply to an opposition to Respondent's MTD. Further, filing a dispositive motion under 46 C.F.R. § 502.70, which allows a reply, in conjunction with a non-dispositive motion under 46 C.F.R. § 502.150, which does not, is not appropriate. See 46 C.F.R. § 502.69(g).

Accordingly, the parties are **ORDERED** to confer regarding deposition scheduling by August 13, 2024, with firm dates for the two individuals identified in Respondent's MTC Deps to be deposed.

Any further motion filed by either party that fails to state that the parties conferred prior to the filing of the motion or that fails to state the other party's position regarding the motion as required by 46 C.F.R. § 502.71(a), will be denied.

The parties are encouraged to speak to and cooperate with each other about any remaining discovery issues. No further discovery motions will be accepted, and any remaining discovery issues should be raised and argued in the parties' briefs. As stated in the March 20, 2024 Scheduling Order, motions do not automatically stay the proceeding, and a stay is not appropriate at this juncture. The parties are **ORDERED** to follow the schedule while awaiting the order on motion to dismiss. If the parties wish to amend the schedule, a motion to amend setting forth good cause to amend will be considered if the parties first confer.



Linda S. Harris Crovella
Administrative Law Judge

¹ The Commission's Rules do not explicitly provide for motions to dismiss, but in instances not covered by the Commission's Rules, the Federal Rules of Civil Procedure ("FRCP") "will be followed to the extent that they are consistent with sound administrative practice." 46 C.F.R. § 502.12 ("Rule 12").