

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



COMMISSIONERS: JOSEPH J. SIMONS, CHAIRMAN  
MAUREEN K. OHLHAUSEN  
NOAH JOSHUA PHILLIPS  
ROHIT CHOPRA  
REBECCA KELLY SLAUGHTER

**In the Matter of**

**Wilh. Wilhelmsen Holding ASA**  
a public company,

**Wilhelmsen Maritime Services AS,**  
a private company,

**Resolute Fund II, L.P.**  
a private company,

**Drew Marine Intermediate II B.V.**  
a private company,

**And**

**Drew Marine Group, Inc.,**  
a corporation.

**Docket No. 9380**

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENTS’ MOTION FOR LEAVE  
TO FILE A REPLY IN SUPPORT OF RESPONDENTS’ MOTION TO STAY  
ADMINISTRATIVE HEARING**

Respondents Wilhelm Wilhelmsen and Wilhelmsen Maritime Services AS (together, “Wilhelmsen”) and Resolute Fund II, L.P., Drew Marine Intermediate II B.V., and Drew Marine Group, Inc. (together, “Drew Marine”) have moved for leave to file a reply brief in support of their May 15, 2018 motion to stay the administrative hearing in this matter. It is abundantly

clear under Commission Rule 3.22(d) that Respondents have no basis to submit a reply to their original motion. Respondents' motion for leave to file a reply should therefore be denied.

If Respondents' motion for leave to file a reply is granted, Complainants move for leave to file a reply of their own due to Respondents' misrepresentations in their prior motions to the Commission. In their May 15, 2018 and May 30, 2018 motions to the Commission, Respondents' state that the decision on the preliminary injunction hearing will be determinative, and that they would abandon the transaction if the District Court grants the preliminary injunction. However, in Respondents' opposition brief to the District Court, Respondents state that they reserve their right to pursue appeals of the District Court's decision. The possibility that respondents will not abandon the transaction if they lose the preliminary injunction hearing is an additional reason why the Commission should deny Respondents' May 15, 2018 Motion for Continuance of Administrative Hearing.

## ARGUMENT

### **I. Rule 3.22(d) Does Not Permit Respondents to File a Reply to Their Original Motion**

Respondents correctly identify Rule 3.22(d) as the controlling rule in their May 30, 2018 Motion for Leave to File a Reply in Support of Respondents' Motion to Stay Administrative Hearing. Rule 3.22(d) states that:

The moving party shall have no right to reply, except for dispositive motions or as otherwise permitted by the Administrative Law Judge or the Commission. Reply and surreply briefs to motions other than dispositive motions shall be permitted only in circumstances where the parties wish to draw the Administrative Law Judge's or the Commission's attention to recent important developments or controlling authority that could not have been raised earlier in the party's principal brief.

Rule 3.22(d) is clear that Respondents have no right to reply, except when “recent important developments” have occurred “that could not have been raised earlier in the party’s principal brief.”

Respondents first argue that Complaint Counsel failed to cite to a declaration from Wilhelmsen Ships Service President Bjoerge Grimholt. Respondents included Mr. Grimholt’s entire declaration as an Exhibit in their May 15, 2018 motion to stay the administrative proceedings. Thus, the Commission is already well-aware of the Grimholt Declaration, and it is not even a “development” let alone important or recent. To grant Respondents’ request here would circumvent the express commands of Rule 3.22(d) and render the rule a nullity.

The Respondents also claim that Complaint Counsel presented a “selective rendition of the facts” for cases cited in its response. Specifically, Respondents argue that Complaint Counsel did not highlight the fact that administrative stays have been granted in the cases cited when there was a commitment to abandon the transaction if enjoined by a federal preliminary injunction. This qualifies as neither an important recent development nor controlling authority that could not have been raised earlier. Complaint Counsel is not aware of any obligation to structure its response in the manner dictated by Respondents. Notwithstanding that fact, the two cases that Complaint counsel cited in its May 25, 2018 opposition motion are over two years old, and certainly do not qualify as “recent important developments . . . that could not have been raised earlier” in Respondents’ May 15, 2018 motion.<sup>1</sup> Under Respondents’ theory, they could wait for Complaint Counsel’s briefing, claim surprise about caselaw that they could have uncovered with

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<sup>1</sup> See Advocate Health Care Network, Docket No. 9369, Order Denying Motion to Stay the Administrative Hearing (March 18, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160318advocatehealthcareorder.pdf>; The Penn State Hershey Medical Center, Docket No. 9368, Order Denying Motion to Stay the Administrative Hearing (March 21, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160321pinnacleorder.pdf>.

minimal effort, and request leave for a sur-reply. To read Rule 3.22(d) in that manner would be absurd. As a result, Respondents' motion for leave to file a reply should be denied.

## **II. Respondents Presented an Incomplete Account of the Circumstances in Which They Would Abandon the Proposed Transaction**

In their May 30, 2018 motion, Respondents provide an incomplete statement as to their position on abandoning the transaction should they lose the preliminary injunction motion. In both their May 15 and May 30 motions to the Commission, Respondents stated that they would abandon the transaction if they lose the preliminary injunction hearing at the District Court.<sup>2</sup> However, in their May 16, 2018 Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, Respondents expressly stated that they reserve the right to appeal the District Court's decision.<sup>3</sup> Thus, there is still a distinct possibility that this litigation will continue even if the District Court issues a preliminary injunction, and this is an additional reason why the Commission should deny Respondents' May 15, 2018 motion to stay the administrative hearing.

## **CONCLUSION**

Respondents have failed to provide any basis to justify a reply to their May 15, 2018 Motion for Continuance of Administrative Hearing. Thus, Respondents' motion to file a reply should be denied. However, if the Commission grants Respondents' motion to file a reply, Complaint Counsel respectfully requests that the Commission also allow Complainants to

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<sup>2</sup> See Respondents' Expedited Motion for Continuance of Admin. Hr'g at 1 (May 15, 2018) ("If the District Court grants the preliminary injunction, Respondents do not intend to proceed with the transaction."); Respondents' Motion for Leave to File a Reply in Support of Respondents' Motion to Stay Administrative Hearing (May 30, 2018) ("Wilhelmsen Maritime Services AS will abandon the transaction without further litigating the administrative proceeding, if the District Court grants a preliminary injunction.").

<sup>3</sup> Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction (May 16, 2018) at 1 ("Accompanying that motion is a sworn statement from the President of WSS indicating that Defendants will not pursue the merger if a preliminary injunction is granted. In other words, despite the FTC's motion merely seeking "preliminary" injunctive relief, this Court's decision will in reality be final (saving only any potential appeals).").

provide a reply to explain Respondents' misrepresentation of the circumstances in which they would abandon the proposed transaction, and respond to any additional arguments they raise in their reply.

Dated: June 4, 2018

Respectfully Submitted

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 4, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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Administrative Law Judge  
Federal Trade Commission  
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I also certify that I delivered via electronic mail a copy of the foregoing document to:

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Dated: June 4, 2018

By: /s/ Thomas J. Dillickrath  
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*Counsel Supporting the Complaint*

**CERTIFICATE FOR ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

June 4, 2018

By: /s/ Thomas J. Dillickrath