

Not Reported in F.Supp., 1998 WL 231132 (D.Kan.)  
 (Cite as: 1998 WL 231132 (D.Kan.))

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United States District Court, D. Kansas.  
**SITHON MARITIME COMPANY**, Plaintiff,

v.

**Holiday MANSION**, et al., Defendants.  
**No. CIV.A. 96-2262-EEO.**

May 8, 1998.

**Lee M. Smithyman, Smithyman & Zakoura, Chtd.**, Overland Park, **Michael G Chalos, Richard M Ziccardi, George J Tsimis**, Chalos & Brown, New York, NY, for **Sithon Maritime** Company, plaintiffs.

**Norman R. Kelly**, Norton, Wasserman, Jones & Kelly, Salina, **Anthony F. Rupp, Andrew M. DeMarea**, Shughart, Thomson & Kilroy, **Heather Suzanne Woodson**, Stinson, Mag & Fizzell, P.C., Overland Park, **John C. Aisenbrey**, Stinson, Mag & Fizzell, P.C., Kansas City, MO, **Alex B Marconi, Patrick X Fowler**, Snell & Wilmer L.L.P., Phoenix, AZ, for **Holiday Mansion**, a Division of Mohawk, Inc., Mercury Marine, a Division of Brunswick Corporation, defendants.

#### MEMORANDUM AND ORDER

**RUSHFELT**, Magistrate J.

\*1 Before the court is Plaintiff-**Sithon Maritime** Company's Second Motion to Compel the Production of Certain Documents by Defendant-Mercury Marine (doc. 159). Pursuant to **Fed.R.Civ.P. 26, 34, and 37(a)** and D.Kan. Rules 37.1 and 37.2, plaintiff seeks an order to compel defendant Mercury Marine (Mercury) to produce forthwith the list of pre-production engines described upon deposition by Brian Walker, an engineer at Mercury. It further seeks an order to compel Mercury to identify and produce all documents withheld from previous requests for discovery on grounds that a Confidentiality Agreement had not yet been signed by plaintiff. Upon production, it also wants Mercury to identify the requests for production which asks for

the produced documents. In addition it seeks its costs and attorney fees incurred in making the present motion and other appropriate sanctions. Mercury opposes the motion. It requests its costs and attorney fees incurred in responding.

Plaintiff has withdrawn the motion to the extent it seeks to compel a list of pre-production engines. The court thus deems the motion moot to that extent. Plaintiff urges the court to impose sanctions, nevertheless, including the payment of its costs and attorney fees incurred in moving to compel the production of the pre-product engine listing. It contends Mercury provided the information after the motion was served. Mercury maintains that it had produced the listing in May 1997. It suggests that plaintiff improperly sought to have it locate a document previously produced.

Mercury had indeed produced the pre-product engine listing before Mr. Walker identified it upon deposition. (Aff. of Brian Frederick Walker, at ¶ 3, attached to Mercury Marine's Resp. to Pl.'s Second Mot. to Compel, doc. 164.) Plaintiff does not dispute the previous production. It argues only that the identification by Mercury was untimely in that it came three months after an oral request for it at the deposition of Mr. Walker. Plaintiff cites no authority for requiring a party to identify or locate previously produced documents in the absence of a formal request for such identification or for a second production. The court otherwise finds no rule of law which supports such a requirement. Accordingly, it declines to sanction Mercury for its alleged untimely identification of the listing. It overrules the motion to that extent.

The court next addresses the motion to compel the identification and production of documents withheld from previous requests for discovery. Plaintiff contends that Mercury asserted on the record at a deposition on July 22, 1997, that it had withheld proprietary information from discovery. In response to the motion Mercury admits that it would not produce its dealer list without a proper order to protect its confidentiality. It suggests that no such order yet exists. It states that it will produce its dealer

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information once the court enters an appropriate confidentiality order notwithstanding its contention that the information is irrelevant and was not included within the scope of any request for production or interrogatory submitted by plaintiff. Plaintiff suggests that Mercury should have produced the confidential documents in response to its Second Request for Production of Documents (Second Request) and its letter requests of June 3 and 5, 1997. It further suggests that the court direct parties claiming confidentiality to produce a log or listing of all information withheld on that ground.

\*2 After reviewing the memoranda and their supporting exhibits, the only information which the court finds to have been withheld for lack of a protective order is the "client list" of defendant Mercury. Defense counsel refers to it in the course of the deposition of Brian Walker. (Pl.'s Mem. in Supp. of Second Mot. to Compel, Attach. B, doc. 160.) The court finds no reason to indulge a presumption from such identification that defendant has also withheld other information which it should have disclosed. Consequently, the court declines to order defendant to provide a list of other information which plaintiff supposes to have been withheld. Plaintiff has not pointed to any other concession by defendant to show it has withheld other information that was subject to disclosure or discovery. In an earlier ruling the court has declined to order discovery that is the subject only of informal requests and promises in correspondence and not of formal requests under the Federal Rules of Civil Procedure. Upon the present motion plaintiff again proposes that defendant be ordered to produce information, whether it is the subject of a formal request for production under [Rule 34](#) or merely of its informal requests in correspondence. The court declines to do so, for the reasons stated in its previous ruling. Plaintiff has failed to show that defendant has withheld any specific information which is the subject of any formal request. In violation of [D.Kan. Rule 37.1](#), plaintiff has not attached to its motion any specific request for documents which shows that any information it now requests is indeed the subject of a formal request. Nor has it shown that the information constituted initial disclosures under [Fed.R.Civ.P. 26\(a\)\(1\)](#). In its response to the motion defendant argues that the requested information was not the subject of any request under [Rule 34](#).

For the foregoing reasons, with one exception the court overrules the motion to require defendant Mercury to produce all documents and information withheld for lack of a confidentiality agreement. The parties have not shown that defendant has improperly withheld any documents, except for its "client list." The memoranda of the parties do not clearly indicate whether or not that list is within the scope of either initial disclosures or the formal requests for production which plaintiff served upon defendant Mercury. Nor has defendant substantiated its argument that the client list is irrelevant.

Given its conceded willingness to do so, subject to an order to protect confidentiality, the court will order defendant Mercury to produce its client list to plaintiff. On October 28, 1997, the court entered an Agreed Confidentiality and Protective Order (doc. 166). All parties agreed to it. It applied only to documents subpoenaed from a non-party, Marine Corporation of America. The court finds the applicable provisions of that order adequate to protect the need for confidentiality of the client list. Consequently, those provisions will apply to the client list with the understanding that defendant Mercury is the producing party.

\*3 For the foregoing reasons, the court deems moot in part, sustains in part, and overrules in part Plaintiff-Sithon Maritime Company's Second Motion to Compel the Production of Certain Documents by Defendant-Mercury Marine (doc. 159). It deems the motion moot to the extent it has been withdrawn by plaintiff as set forth herein. Within fifteen days of the date of this order defendant Mercury shall produce its client list for inspection and copying by plaintiff and the co-defendant. Such production shall take place at the offices of counsel for defendant Mercury in Overland Park, Kansas, or at such other place as the parties may agree. The motion is otherwise overruled. Each party shall be responsible for its own costs and expenses incurred on the motion and subsequent briefing. In accordance with [Fed.R.Civ.P. 37\(a\)\(4\)\(C\)](#), furthermore, the court makes the protective order entered October 28, 1997 (doc. 166), applicable to the production of the client list of defendant Mercury, as set forth herein.

IT IS SO ORDERED.

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D.Kan.,1998.  
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