

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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OJ COMMERCE, LLC,

Complainant,

**DOCKET NO. 21-11**

v.

HAMBURG SÜDAMERIKANISCHE  
DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO KG

and

HAMBURG SUD NORTH AMERICA, INC.,

Respondents.  
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**COMPLAINANT'S EXCEPTIONS TO THE INITIAL DECISION**

Complainant OJ Commerce, LLC ("OJC," "OJ Commerce," or "Complainant"), by and through its undersigned counsel, hereby files its Exceptions to the Initial Decision, entered on June 7, 2023.

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## INTRODUCTION

The Administrative Law Judge correctly concluded that Hamburg<sup>1</sup> “willfully and knowingly” violated the Shipping Act by retaliating against and refusing to deal with OJ Commerce, LLC (“OJC”) during the COVID-19 pandemic – when demand for international shipping and consumer home goods skyrocketed – simply because OJC threatened to file a complaint with this Commission. As a result, OJC’s ability to meet the unprecedented consumer demand for home goods in what should have been its most profitable year ever was eviscerated by Hamburg’s illegal conduct. Meanwhile, Hamburg reaped unprecedented revenue of \$61.8 billion in 2021 and \$81.5 billion in 2022 (or \$29.71 million and \$39.18 million *per hour*, respectively)<sup>2</sup> by manipulating the captive shipping market with its space availability.

Although the ALJ correctly held Hamburg liable in this case, the ALJ erred in determining OJC’s reparations for fiscal year 2021-22. Specifically, the ALJ came to the erroneous conclusion OJC had failed to show that “Hamburg would have agreed to a higher volume than the previous year,”<sup>3</sup> and then compounded that error by computing the amount of OJC’s damages for 2021-22 based solely upon the minimum container volume from the prior year’s 2020-21 service contract. In doing so, the ALJ mistakenly disregarded the clear evidence that: (1) Hamburg knew OJC

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<sup>1</sup> Like the ALJ, the term “Hamburg” is used herein to refer to *both* Respondents Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft A/S & CO. KG (“HSDG”) and Hamburg Sud North America, Inc. (“HSNA”). I.D. at 1. In November 2021, HSDG merged into Maersk A/S. *Id.* at 5, ¶4. In January 2022, HSNA merged into Maersk Agencies USA, Inc., the United States subsidiary and general agent of Maersk A/S. *Id.* at 6, ¶8.

<sup>2</sup> Calculated per Hamburg’s publicly reported revenue for 2021 and 2022 (40 hours per week \* 52 weeks = 2,080 hours per year; annual revenue / 2080 hours = \$29.71 million per hour in 2021 and \$39.18 million per hour in 2022). See <https://www.maersk.com/news/articles/2022/02/09/apmm-reports-record-earnings-for-2021-and-guides-for-a-strong-2022> (\$61.8 billion revenue in 2021) and <https://www.maersk.com/news/articles/2023/02/08/apmm-reports-strong-results-for-2022> (\$81.5 billion revenue in 2022) (last accessed on June 29, 2023).

<sup>3</sup> I.D. at 54

“plan[ned] to move between 4200 to 4700 FFE in 2021”<sup>4</sup> to meet the unprecedented demand for its products due to the pandemic; (2) before Hamburg’s illegal conduct, it had been soliciting OJC to consolidate *all* its shipping business with Hamburg;<sup>5</sup> and (3) Hamburg had more than sufficient capacity to meet OJC’s increased shipping volume in 2021-22, given “Hamburg entered into service contracts with other shippers for a *significantly higher amount of space than OJC was requesting*”<sup>6</sup> after it willfully retaliated against and refused to deal with OJC.

Throughout the latter half of 2020 and the initial months of 2021, Hamburg repeatedly solicited increased business from OJC with a range of enticing offers. This included the prospect of OJC becoming a “priority customer” with access to more containers, dedicated space protection, and committed personnel to enhance the service quality of OJC’s shipments.<sup>7</sup> Hamburg’s commitment of such resources to entice OJC to consolidate all its shipping with Hamburg makes no sense *unless* Hamburg intended to accommodate OJC’s shipping needs. Furthermore, during the parties’ countless negotiations over several weeks, the focus was consistently on OJC’s request for up to 4,700 FFE for 2021-22, not a mere 200 FFE.<sup>8</sup>

Tellingly, during the 2020-21 contract term, Hamburg frequently advised OJC that Hamburg could not accommodate OJC’s request for 15 to 30 more containers per week above its contractual allotment.<sup>9</sup> But during the time Hamburg was soliciting all OJC’s shipping business for 2021-22, the record is devoid of a single communication, whether internally or externally,

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<sup>4</sup> CX 219; *see also* CX 471 ¶21; Weiss Decl., Ex. 100; RX1024, 228:25 – 229:9; RX1024, 227:9-23; I.D. at 12-13, ¶46 (citing CX 203).

<sup>5</sup> I.D. at 60.

<sup>6</sup> I.D. at 19, ¶76 (citing CX 469 at ¶ 16; CX 283-284; *see also* CX 285-286); *see also* CX 469 ¶ 16; CX 283-284 (showing list of contracts entered into after April 29, 2021).

<sup>7</sup> I.D. at 60.

<sup>8</sup> CX 203; CX 468 ¶¶10-11; SCX 481.

<sup>9</sup> I.D. at 9, ¶25; CX 206, 175:8 - 176:18.

where Hamburg even hinted at any alleged unwillingness or inability to fulfill OJC’s shipping needs for 2021-22. That is ultimately why “OJC did not renew its service contracts with other carriers it had been using in 2020-21 and focused on consolidating all of its imports with Hamburg.”<sup>10</sup>

On the flip side, Hamburg proactively proposed a short-term contract for 2021-22 with a *minimum* quantity commitment (MQC) of 400 FFE. This proposal was intended not only to illustrate Hamburg’s dedication to mitigating any container deficits from 2020-21, but also to entice OJC with the prospect of further capacity. It would be entirely nonsensical for Hamburg to dangle such a carrot without any intention or capability to meet OJC’s repeated requests for up to 4,700 FFE for 2021-22. Yet that is the takeaway from the ALJ’s decision to limit OJC’s damages for 2021-22 to a mere 200 FFE. In other words, by disregarding the ample evidence that it was more likely than not that Hamburg would have agreed to a higher volume of 4,700 FFE for 2021-22 and computing OJC’s damages accordingly, the ALJ erred.

The ALJ’s error was further compounded by the misapplication of longstanding United States Supreme Court and FMC precedent that “where a wrongdoer has by its own action prevented the precise computation of damages, . . . *the wrongdoer must bear the risk of the uncertainty and that damages can be shown by just and reasonable estimates based on relevant data[,]*”<sup>11</sup> because “[a]ny other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim.”<sup>12</sup> This is a classic case of why the Supreme Court’s precedent, *Bigelow v. RKO Radio Pictures*, exists in the first place. Hamburg made the “executive decision” to

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<sup>10</sup> I.D. at 10, ¶29.

<sup>11</sup> *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, Dkt. No. 88-15, 25 S.R.R. 1213, 1990 WL 427466, at \*23 (FMC Oct. 19, 1990) (citing *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65 (1946)) (emphases added).

<sup>12</sup> *Bigelow*, 327 U.S. at 264.

willfully retaliate against and refuse to deal with OJC right at the time that they were finalizing the few remaining details for their renewal contract for 2021-22. And Hamburg executed this decision despite internal risk management warnings that “[t]his is a very bad case for us which we will likely lose.”<sup>13</sup> To be sure, the renewal contract was slated to include a large increase in container volume since OJC was consolidating all its shipping business with Hamburg, as well as the unprecedented consumer demand for home goods as the world sheltered at home during the pandemic. As an online retailer of home goods, OJC was well poised to reap unprecedented profits given it had grown “nearly 400% in sales compared to the initial year’s forecast and the trend is estimated to continue.”<sup>14</sup> But instead of expanding their relationship, Hamburg crippled OJC’s business at the worst possible time, as OJC was unable to obtain another service contract for **any** of its containers for 2021-22 and, consequently, was forced into the expensive, limited spot market where the carriers price-gouged shippers like OJC by raising their prices to their highest levels ever.

What was a once-in-a-lifetime profit event for Hamburg would have been the same for OJC **but for** Hamburg’s willful Shipping Act violations. Indeed, the *only* way Hamburg’s wrongs can be fully remedied is if this Commission adheres to the binding precedent of *Bigelow*, which prohibits wrongdoers from *benefiting* from their wrongdoing at their victims’ expense. Yet the ALJ’s Initial Decision does just that. Rather than rely upon the relevant data in the record to conclude that OJC’s projected container volume of up to 4,700 FFE in 2021-22 was a reasonable estimate given the unprecedented circumstances, the ALJ instead penalized OJC for not showing with *certainty* whether “Hamburg would have agreed to a 2021-22 contract of that volume”<sup>15</sup> or

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<sup>13</sup> I.D. at 8 (emphasis added.).

<sup>14</sup> I.D. at 9, ¶25.

<sup>15</sup> I.D. at 54

whether “the route to Kentucky would have been included in a 2021-22 contract[.]”<sup>16</sup>

Although “this lack of information was caused by Hamburg’s retaliation and refusal to deal”<sup>17</sup> – and compounded by its discovery violations – the ALJ erroneously construed the resulting evidentiary uncertainty against OJC, not Hamburg, in concluding that a volume of up to 4,700 FFE for 2021-22 “has not been demonstrated with reasonable certainty.”<sup>18</sup> Instead, the ALJ erroneously concluded that “the most reasonable estimate” of Hamburg’s shipping capacity for OJC in 2021-22 was merely 200 FFE and awarded damages accordingly.<sup>19</sup>

This outcome sends a chilling message to the international shipping community. The ALJ’s Initial Decision effectively condones Hamburg *benefiting* from retaliating against and refusing to deal with OJC at the height of the pandemic—as opposed to paying full reparations for its willful Shipping Act violations.<sup>20</sup> As the Supreme Court cautioned, such a result is not only unjust, but also “an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.”<sup>21</sup> Worse yet, “it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.”<sup>22</sup> That cannot – and must not – be the takeaway here. Accordingly, as shown below, OJC respectfully requests that this Commission modify the ALJ’s erroneous damages determination for 2021-22, recompute OJC’s damages based upon a container volume of 4,700 FFE, and award

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<sup>16</sup> I.D. at 54.

<sup>17</sup> I.D. at 55.

<sup>18</sup> I.D. at 52.

<sup>19</sup> I.D. at 54.

<sup>20</sup> The FMC itself has vowed to “take prompt and decisive action” on retaliation complaints and to interpret the anti-retaliation provision broadly to address new shipping practices and forms of retaliation. CX 60; Statement, Dkt. 21-15 at 1.

<sup>21</sup> *Bigelow*, 327 U.S. at 264.

<sup>22</sup> *Id.*



reparations accordingly.<sup>23</sup>

### **STANDARD OF REVIEW**

When the Commission reviews an Initial Decision, it has “all the powers which it would have in making the initial decision.”<sup>24</sup> The Commission therefore reviews the ALJ’s Initial Decision *de novo*.<sup>25</sup>

### **EXCEPTIONS AND RELATED ARGUMENTS**

#### **I. Limiting OJC’s reparations for 2021-22 to just 200 FFE defied the law, clear evidence of record, and simple logic.**

The ALJ correctly concluded that Hamburg “willfully and knowingly” violated the Shipping Act on April 29, 2021, when it made the “executive decision” to retaliate against and refuse to deal with OJC because it had threatened to complain to this Commission. Indeed, the primary exception OJC takes with the Initial Decision concerns the ALJ’s mistaken determination to limit OJC’s lost profits for 2021-22 to merely 200 FFE – the MQC of the prior year’s 2020-21 service contract – despite substantial competent evidence that Hamburg could have undoubtedly shipped up to 4,700 FFE for OJC in 2021-22.<sup>26</sup> This mistake was based upon the ALJ’s erroneous conclusions that: “a 2021-22 container volume assumption of either 4,200 or 4,700 has not been

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<sup>23</sup> OJC’s requested reparations are a mere drop in the ocean for Hamburg, equivalent to less than six (6) working hours of the company’s massive revenue it generated in 2022 from its price gouging during the pandemic. *See*: <https://investor.maersk.com/static-files/000db719-39c7-46d4-a63d-52c7f9b3f6aa#> (last accessed on June 29, 2023) (Calculated by comparing OJC’s requested damages, **including doubling**, to Hamburg’s publicly-reported revenue of \$81.5 Billion for 2022 (40 hrs/week \* 52 weeks/year = 2,080 working hours/year; \$81.5 Billion / 2080 hours/year = \$39.18 Million per hour):

<sup>24</sup> 46 C.F.R. § 502.227(a)(6).

<sup>25</sup> *Id.*; *see also ONE Network Express Pte., Ltd. – Possible Violations of 46 U.S.C. § 41102(C)*, Dkt. No. 21-17, 2022 WL 16570734, at \*2 (FMC Oct. 27, 2022).

<sup>26</sup> Specifically, the ALJ mistakenly computed OJC’s damages “by multiplying 200 FFE times the average profit per container of \$22,892.48, which equals a total 2021-22 injury of \$4,578,496.” I.D. at 57. The correct multiplier should have been 4,700 FFE.

demonstrated with reasonable certainty[;]”<sup>27</sup> “[t]he record does not allow a determination as to whether 400 FFE or more were available in the 2021-22 contract year[;]”<sup>28</sup> and, “although it is possible the parties would have contracted for 400 FFEs or more, the most reasonable estimate, backed by solid evidence and reasonable certainty, is 200 FFE.”<sup>29</sup>

As shown below, these conclusions were erroneous because: (A) the evidence was more than sufficient to reasonably infer that Hamburg had the capacity to ship upwards of 4,700 FFE for OJC in 2021-22; (B) even if the evidence was not sufficient (it was), any uncertainty regarding the amount of OJC’s damages for 2021-22 should have been construed *against Hamburg*, not OJC, because Hamburg’s conduct prevented the precise computation of OJC’s damages; (C) even if Hamburg did not have capacity to ship to Kentucky in 2021-22 (it did), it was still more likely than not that Hamburg could have shipped up to 1,410 FFE to California for OJC in 2021-22 based on Hamburg’s own admissions; (D) even if only OJC’s prior year’s total container volume were considered, it was still more likely than not that 542 FFE – the undisputed total number of containers OJC shipped with all carriers in 2020-21 – was a reasonably certain estimate of OJC’s container volume for 2021-22; (E) limiting OJC to a mere 200 FFE for 2021-22 – just because that was the MQC for the prior year and in complete disregard of Hamburg’s promise to make OJC a “priority customer” – is not logical; and (F) Hamburg’s discovery violations directly impeded the determination of its space availability in 2021-22, and therefore prejudiced OJC to Hamburg’s benefit. Accordingly, for the reasons below, OJC respectfully requests that the FMC review the Initial Decision *de novo* and correctly conclude that OJC is entitled to damages for 2021-22 based on 4,700 FFE, not the bare minimum of 200 FFE.

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<sup>27</sup> I.D. at 52.

<sup>28</sup> I.D. at 39.

<sup>29</sup> I.D. at 54.

**A. The record evidence more than sufficed to reasonably infer that Hamburg had the capacity to ship upwards of 4,700 FFE for OJC in 2021-22.**

“The basic objective of the law of damages in such cases as the instant one is to make a person who has suffered injury whole.”<sup>30</sup> To that end, the Shipping Act requires that the “Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation” of the Act.<sup>31</sup> “Actual damages means ‘compensation for the actual loss or injuries sustained by reason of the wrongdoing’ which complainants must show to a reasonable degree of certainty.”<sup>32</sup> “That does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained.”<sup>33</sup> The Supreme Court has affirmed that lost profits from being “unjustly and illegally denied shipping space” is a loss that “is real and it is certainly compensable under the Shipping Act.”<sup>34</sup>

Here, there is ample evidence from which the ALJ should have reasonably inferred that Hamburg would have shipped up to 4,700 FFE for OJC in 2021-22, but for Hamburg’s willful violations of the Shipping Act. As an initial matter, there is *not one contemporaneous email in the record* – not a single communication out of the dozens sent before Hamburg’s illegal conduct – that Hamburg lacked the space to fulfill OJC’s requested container increase for 2021-22. This is in stark contrast to 2020, when Hamburg frequently advised OJC that Hamburg could not accommodate OJC’s request for 15 to 30 more containers per week.<sup>35</sup>

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<sup>30</sup> *Adair v. Penn- Nordic Lines, Inc.*, Dkt. No. 1695(F), 26 S.R.R. 11, 1991 WL 383091, at \*24 (ALJ Sept. 24, 1991), admin. final Oct. 24, 1991.

<sup>31</sup> 46 U.S.C. § 41305(b).

<sup>32</sup> *MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, Dkt. No. 16-16, 2022 WL 2209421, at \*3 (FMC June 10, 2022) (quoting *California Shipping*, 1990 WL 427466, at \*23).

<sup>33</sup> *Id.*

<sup>34</sup> *Consolo v. FMC*, 383 U.S. 607, 626 (1966) (holding it was error on the part of the Court of Appeals to reverse the Commission’s award of reparations).

<sup>35</sup> I.D. at 9, ¶25; CX 206, 175:8 - 176:18.

Unlike 2020-21, the record is devoid of any such communications for the 2021-22 contract season because Hamburg had been courting OJC throughout 2021 to secure *all* its shipping business for 2021-22—**an established fact that makes no sense *unless* Hamburg anticipated being able to fulfill all OJC’s shipping needs.** As the ALJ correctly found:

OJC believed, based on communications with Hamburg, that Hamburg would make OJC a *priority customer*, providing benefits such as supplying more containers, dedicated space protection, and committed personnel to ensure better service for OJC’s shipments, in return for OJC consolidating all of its imports with Hamburg. CX 467; RX 1024. In other circumstances, this may have resulted in better rates and a stronger long-term relationship between OJC and Hamburg.<sup>36</sup>

In reliance on Hamburg’s promises, “OJC did not renew its service contracts with other carriers it had been using in 2020-21 and focused on consolidating all of its imports with Hamburg.”<sup>37</sup> Had Hamburg genuinely lacked the capacity or intention to accommodate OJC’s request for increased volume in 2021-22, Hamburg would not have coaxed OJC to forgo its business with other carriers and instead focus on consolidating all its business with Hamburg.<sup>38</sup> Hamburg simply would not have invested the time and effort to pursue all of OJC’s shipping business if Hamburg did not have the capacity or intention to accommodate OJC’s request for increased volume in the first place. After all, why pursue “priority customers” if you lack the capacity to do so?

As the ALJ further acknowledged, “[r]egarding whether space was available, the evidence shows that *after* April 29, 2021, Hamburg entered into service contracts with other shippers *for a significantly higher amount of space than OJC was requesting.*”<sup>39</sup> This finding was based upon internal documents showing that Hamburg had, in fact, subsequently entered into service contracts

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<sup>36</sup> I.D. at 60 (emphasis added).

<sup>37</sup> I.D. at 10.

<sup>38</sup> I.D. at 10, ¶29.

<sup>39</sup> I.D. at 39 (emphasis added).

with other customers (for the same trade lanes requested by OJC) to ship nearly triple the container volume repeatedly requested by OJC.<sup>40</sup> And that volume of containers did not include spot rate volume that Hamburg also had available, nor how Hamburg manipulated space using blank sailings. The ALJ therefore should have concluded that it was more likely than not that Hamburg would have finalized a contract with OJC for upwards of 4,700 FFE in 2021-22, just like Hamburg ended up doing with other customers, *but for* its illegal conduct.

Assuming, *arguendo*, this evidence was not sufficient to reach this conclusion (it clearly was), there is more compelling evidence in the record relevant to this issue. This includes:

- At the very time Hamburg made the “executive decision” to retaliate, Hamburg was literally hours from offering OJC a bridge service contract, in addition to the 4,700 FFE contract, for 400 FFE to cover the deficit from the 2020-21 contract and to “show our interest to participate [in] more of their volume,” since OJC “has been constant in [its] volumes and is willing to commit to *much more* of the current MQC.”<sup>41</sup>
- Hamburg agreed to enter into a service contract with OJC for up to 4,700 FFE shortly before it willfully committed its Shipping Act violations, with the only pending question being “an exact minimum quantity commitment (MQC)” that OJC wanted.”<sup>42</sup>
- As the ALJ found, “OJC also frequently sought more container space from Hamburg in 2020-21; and OJC’s projection of, and request for, a volume of 4,200 to 4,700 FFE in 2021-22 shows that its desire for more containers was only intensifying. The consistent theme is that OJC was trying to ship as much as it could and was attempting to secure the container space to keep up with its projected demand.”<sup>43</sup>
- Hamburg’s internal emails stating: (i) “[t]he customer [OJC] requests any additional space that we can accommodate beyond the MQC and assures that its volume is constantly peaking [and] their

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<sup>40</sup> See CX 469 ¶ 16; CX 283-284 (showing list of contracts entered into after April 29, 2021 for nearly triple the containers OJC was requesting).

<sup>41</sup> I.D. at 14, ¶57 (quoting CX 215 (emphasis added)).

<sup>42</sup> CX 468 ¶11; SCX 481 (emphasis added).

<sup>43</sup> I.D. at 56 (emphasis added).

projection is growing”; and (ii) “[a]ccording to the customer, online furniture purchases in the USA increased by more than 200% due to Covid-19 measures and OJ Commerce grew nearly 400% in sales compared to the initial year’s forecast and the trend is estimated to continue.”<sup>44</sup>

- In 2020 alone, OJC shipped 542 FFE through Hamburg and its competing carriers.<sup>45</sup>

In sum, and despite any uncertainty created by Hamburg’s illegal conduct, there is more than sufficient evidence from which the ALJ should have reasonably inferred that Hamburg would have shipped up to 4,700 FFE for OJC in 2021-22, but for its illegal conduct. This is undoubtedly true when any lingering uncertainty over Hamburg’s “container volume” or the “routes” for the new contract is correctly construed against Hamburg, as discussed below. The ALJ therefore erred in concluding that “the most reasonable estimate” of Hamburg’s shipping volume for 2021-22 was 200 FFE, because OJC purportedly failed to establish Hamburg’s shipping capacity with “reasonable certainty.”<sup>46</sup>

**B. Any uncertainty regarding OJC’s damages for 2021-22 should have been construed against Hamburg – not OJC – because Hamburg’s conduct prevented the precise computation of OJC’s damages.**

To the extent a “precise computation” of OJC’s damages for 2021-22 was uncertain in the ALJ’s view, that uncertainty must be held against Hamburg, not OJC. Indeed, the ALJ properly concluded that “[t]he [alleged] lack of a meeting of the minds [for a 2021-22 contract], therefore, was directly related to Hamburg’s decision to disengage from negotiations,”<sup>47</sup> not anything OJC

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<sup>44</sup> I.D. at 9, ¶ 25 (citing RX 622 and RX 638, respectively) (emphasis added); see also RX 799-800 (“customer is looking for an increase in their allocation since last year their business grew by 20% this trend seems to continue this year due to the increase in online shopping as consequence of the pandemic”); CX 410; I.D. at 10, ¶ 30.

<sup>45</sup> See, e.g., Hamburg Brief, p. 34 (“542 FFEs that OJC shipped in 2020-21” and “OJC’s 542 FFE volume in 2020-21”).

<sup>46</sup> I.D. at 54.

<sup>47</sup> I.D. at 31.

had done. “[W]here a wrongdoer has by its own action prevented the precise computation of damages, the [Supreme] Court has stated that the wrongdoer must bear the risk of the uncertainty and that damages can be shown by just and reasonable estimates based on relevant data.”<sup>48</sup> Stated differently, “when precise evidence measuring financial injury is unavailable because of the nature of the violation, the Commission will rely on reasonable estimations, as do the courts, so that the wrongdoer does not benefit from its misconduct.”<sup>49</sup> As the Supreme Court cautioned in *Bigelow*, “[a]ny other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim.”<sup>50</sup> Yet that is effectively the result of the ALJ’s decision to compute OJC’s damages for 2021-22 based solely upon the minimum container volume of 200 FFE from the prior year’s 2020-21 service contract.

The ALJ found that the uncertainty over OJC’s damages was clearly caused by Hamburg’s willful retaliation against and refusal to deal with OJC at the worst possible time, because it was so late in the contract season that OJC could not obtain another service contract from any other carrier to meet the unprecedented demand for its products as consumers sheltered at home during the pandemic.<sup>51</sup> So, while Hamburg benefited greatly from its illegal conduct by reaping unprecedented revenue of \$61.8 billion in 2021 and \$81.5 billion in 2022 – or \$29.71 million and \$39.18 million *per hour*, respectively<sup>52</sup> – OJC’s business was crippled in what should have been its most profitable year ever.

***i. The ALJ erred by construing any alleged “uncertainty” over Hamburg’s “container volume” for 2021-22 against OJC, not Hamburg.***

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<sup>48</sup> *California Shipping*, 1990 WL 427466, at \*23 (citing *Bigelow*, 327 U.S. at 264-65).

<sup>49</sup> *Adair*, 1991 WL 383091, at \*23.

<sup>50</sup> *Bigelow*, 327 U.S. at 264

<sup>51</sup> I.D. at 63.

<sup>52</sup> *See supra* at n.2.

Long before Hamburg’s malicious decision to retaliate against and refuse to deal with OJC, Ms. Casanova, an account executive at Hamburg, testified that Mr. Weiss of OJC had been repeatedly asking for Hamburg to ship anywhere from 15 to 30 more containers per week for OJC throughout the 2020-21 term – outside the service contract season – given the unprecedented demand for its products during the pandemic.<sup>53</sup> In response to Hamburg’s months-long efforts to secure all OJC’s shipping business for 2021-22, OJC repeatedly informed Hamburg that it was seeking a volume of up to 4,700 FFE for that following contract year.<sup>54</sup> This increased volume request was calculated using OJC’s internal projections that estimated the sales of each product and concluded that 4,598 FFE would be required for 2021-22, which OJC communicated to Hamburg during the parties’ renewal negotiations in March/April 2021.<sup>55</sup> OJC’s increased volume need was also corroborated in an internal email of Hamburg on April 27, 2021, which stated that OJC “plans to move between 4,200 to 4,700 FFE in 2021.”<sup>56</sup> In fact, Hamburg verbally *agreed* to enter into a service contract with OJC for up to 4,700 FFE shortly before its illegal conduct, with the only pending question being “an **exact** minimum quantity commitment (MQC)” that OJC wanted.<sup>57</sup>

In reliance thereon, as the ALJ found, “OJC did not renew its service contracts with other

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<sup>53</sup> I.D. at 9 (“Q: Did Jacob Weiss [of OJC] ask you to increase to a lot more than 10 TEUs per week? A. Yes. He did request to have more space per week. . . . A. He was usually saying to me I remember, if I remember correctly, you can give me 15, 20, 30, like, whatever more you can provide to us, we will – we can provide with shipments. . . . A. Okay. And you indicated later today in your testimony that Mr. Weiss frequently came to you on a – repeatedly on – he repeatedly came to you seeking more and more space. I think you said at some point, it was like 15, 30, whatever you can give me he wanted. Is that right? A. Yes. That is correct.”).

<sup>54</sup> I.D. at 56 (emphasis added).

<sup>55</sup> CX 219; CX 471 ¶21; Weiss Decl., Ex. 100; RX1024, 228:25 – 229:9; RX1024, 227:9-23; I.D. at 12-13, ¶46 (citing CX 203).

<sup>56</sup> CX 203.

<sup>57</sup> CX 468 ¶11; SCX 481 (emphasis added).



carriers it had been using in 2020-21 and focused on consolidating all of its imports with Hamburg.”<sup>58</sup> But when Hamburg subsequently refused to provide OJC with any containers for March and April 2021 (despite the MQC under the existing contract for 2020-21), and also improperly charged OJC invalid demurrage fees, OJC sent a demand letter on April 28, 2021, threatening legal action before the FMC.<sup>59</sup> But Hamburg could not have cared less. Instead of curing its violations, the very next day, on April 29, 2021, Hamburg made the “executive decision” to retaliate against OJC and to “not engage in any renewal discussion with customer in light of potential litigation[.]”<sup>60</sup> The ALJ correctly determined these were “knowing and willful” violations of the Shipping Act.

However, in computing OJC’s damages for 2021-22, the ALJ erred by finding that “OJC’s request for damages based on up to 4,700 FFEs is overly speculative.”<sup>61</sup> The ALJ deemed OJC’s damages request speculative because “it was not clear whether or not Hamburg could handle a higher volume.”<sup>62</sup> Yet the very reason OJC could not provide *further certainty* regarding whether Hamburg could have handled a volume of up to 4,700 FFE was because Hamburg had cut off OJC right at the time that they were finalizing the few remaining details for their new contract for 2021-22, which would have enabled OJC to meet the unprecedented consumer demand for home goods due to the pandemic. Even Hamburg’s internal documents show, “[a]ccording to the customer, online furniture purchases in the USA increased by more than 200% due to Covid-19 measures and OJ Commerce grew nearly 400% in sales compared to the initial year’s forecast and the trend

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<sup>58</sup> I.D. at 10.

<sup>59</sup> I.D. at 13, ¶52.

<sup>60</sup> I.D. 33.

<sup>61</sup> I.D. at 54.

<sup>62</sup> I.D. at 54.

is estimated to continue.”<sup>63</sup> OJC’s projections for upwards of 4,700 FFE for 2021-22 were not only reasonably certain based upon its past performance and the unprecedented consumer demand for its products, but also consistent with Hamburg’s months-long pursuit of all OJC’s shipping business.

While the ALJ may have preferred evidence of a signed service contract for 4,700 FFE, no such contract exists *because of* Hamburg’s illegal conduct. Nor is such a contract a legal prerequisite for an award of lost profits damages. Likewise, while the ALJ may have preferred even more evidence that Hamburg had the capacity to ship 4,700 FFE during 2021-22, no more evidence exists *because of* Hamburg’s illegal conduct (although, again, there is indisputable evidence that Hamburg entered into contracts with other customers for almost triple the FFEs OJC was requesting shortly after willfully retaliating and terminating its relationship with OJC).<sup>64</sup>

Adding to the alleged lack of “reasonable certainty” over Hamburg’s shipping capacity, Hamburg stonewalled highly relevant testimony on this topic by, as discussed in Section F below, refusing to comply with the ALJ’s discovery order to produce witnesses to testify about Hamburg’s pricing and space-related issues, which thwarted OJC’s good-faith efforts to obtain more certainty on these issues.<sup>65</sup> So, while there may have been some lingering questions about whether Hamburg had the capacity to fulfill OJC’s request for an increased volume in 2021-22, OJC’s inability to provide even more evidence to answer those very questions was the direct result of Hamburg’s misconduct—both before and during this proceeding. Yet instead of acknowledging that such

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<sup>63</sup> I.D. at 9.

<sup>64</sup> I.D. at 19, ¶ 76 (“After April 29, 2021, Hamburg entered into service contracts with other shippers for a significantly higher amount of space than OJC was requesting.”) (citing CX 469 at ¶ 16; CX 283-284; *see also* CX 285-286); *see also* CX 469 ¶ 16; CX 283-284 (showing list of contracts entered into after April 29, 2021 for nearly triple the containers OJC was requesting).

<sup>65</sup> CX312.

evidentiary uncertainty was caused by Hamburg and therefore construing such uncertainty against Hamburg, as required by *Bigelow* and its progeny, the ALJ erroneously construed such uncertainty against OJC.

Equally problematic, in concluding that “[t]he evidence does not support a finding that Hamburg would have agreed to a 2021-22 contract of that volume [of 4,700 FFE],” the ALJ relied heavily upon testimony from Mr. Pump – the very Hamburg executive who willfully decided to violate the Shipping Act – that Hamburg’s “biggest challenge in 2021 was capacity.”<sup>66</sup> The ALJ did so even though that exact excuse had previously been rejected by the ALJ as pretextual.<sup>67</sup> As further alleged support, the ALJ also cited a trivial email from Ms. Casanova, which merely inquired whether it would be possible to increase the MQC for OJC to 400 FFE for 2021-22.<sup>68</sup> Although Ms. Casanova never received a response to her email *because of* Hamburg’s decision to retaliate against and refuse to deal with OJC, it would have been answered with a resounding “YES!” but for Hamburg’s illegal conduct, given the undisputed evidence that Hamburg had more than enough space available at that time.<sup>69</sup>

Aside from the dubious sufficiency of Mr. Pump’s self-serving testimony and Ms.

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<sup>66</sup> I.D. at 39.

<sup>67</sup> The substance of Mr. Pump’s testimony about Hamburg’s “capacity” was shown to be a pretext, as the reasons Hamburg gave to OJC for not providing a new contract, *i.e.*, “due to the lack of space and equipment in Asia and the shortage of truck power in the US” and “due to the space situation in Asia more than truck power and chassis availability in the US” were shown to be false by Hamburg’s own internal documents. I.D. at 40 (citing SCX 481, RX 811); *see also* I.D. at 19, ¶76; CX 469 at ¶ 16; CX 283-284; *see also* CX 285-286, HSDG’s Resp. to OJC RFA 1-4. As the ALJ found, “that Hamburg did not communicate to OJC that the contract negotiations were terminated due to a concern about potential litigation suggests that Hamburg knew the real reason was not appropriate.” I.D. at 40.

<sup>68</sup> I.D. at 40.

<sup>69</sup> I.D. at 19, ¶76; I.D. at 39 (emphasis added) (citing CX 469 at ¶ 16; CX 283-284; *see also* CX 285-286, HSDG’s Resp. to OJC RFA 1-4) (Hamburg admitting that it entered into service contracts after it retaliated against OJC).

Casanova’s trivial email to support the ALJ’s conclusion, they are also completely beside the point. It does not matter whether Hamburg’s biggest challenge in 2021 was capacity, or whether Ms. Casanova herself was unsure if Hamburg could accommodate a larger MQC for 2021, because the ALJ correctly found that “[a]fter [the date of its retaliation], Hamburg entered into service contracts with other shippers *for a significantly higher amount of space than OJC was requesting.*”<sup>70</sup> Therefore, it is reasonably certain that Hamburg would have been able to ship upwards of 4,700 FFE for OJC during that same time, for example, by allocating its space in favor of its new “priority customer” as promised. And, again, to the extent there was any evidentiary uncertainty on any issue related to OJC’s damages, the Supreme Court required such uncertainty to be construed *against* Hamburg, not to its benefit.<sup>71</sup>

**ii. The ALJ erred by construing any alleged “uncertainty” over Hamburg’s “routes” for 2021-22 against OJC, not Hamburg.**

Next, the ALJ erred by concluding that “it is not reasonably certain that the route to Kentucky would have been included in the 2021-22 contract between the parties” because the Kentucky route was “not part of the 2020-21 contract.”<sup>72</sup> The ALJ thus refused to compute OJC’s damages based upon its requested container volume of up to 4,700 FFE, because OJC had *initially* requested 70% of those containers shipped to Kentucky.<sup>73</sup> But that is a moot point, because the evidence shows Hamburg knew that if shipments to Kentucky were an issue, OJC could ship all its containers through California, where OJC had a warehouse to accommodate all the additional

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<sup>70</sup> I.D. at 19, ¶ 76 (emphasis added) (citing CX 469 at ¶ 16; CX 283-284; *see also* CX 285-286); *see also* CX 469 ¶ 16; CX 283-284 (showing list of contracts entered into after April 29, 2021 for nearly triple the containers OJC was requesting).

<sup>71</sup> *California Shipping*, 1990 WL 427466, at \*23 (citing *Bigelow*, 327 U.S. at 264-65).

<sup>72</sup> I.D. at 54.

<sup>73</sup> I.D. at 54.

space.<sup>74</sup> Hamburg knew that OJC could be flexible with where its shipments were sent because 100% of its containers were sent to California during the first service contract.<sup>75</sup> This is a point unaddressed in the Initial Decision.

But even when evaluating the Kentucky route on its own merits, it should not have precluded OJC from being made whole for its 2021-22 damages. Indeed, the ALJ found that “Hamburg internally communicated possible interest in this route at points; Hamburg handled some shipments for OJC from Brazil to the United States on a case-by-case basis; and Hamburg acknowledged actually shipping some quantity of containers from Brazil to Kentucky, even in 2021 and 2022.”<sup>76</sup> Furthermore, OJC was able to ship to Kentucky with Hamburg using a third-party reseller, United Shippers Association, during the same time period Hamburg claimed that it could not ship to Kentucky, further evidencing that this criticism is just another post hoc pretext.<sup>77</sup>

Moreover, during the negotiations for the initial 2020-21 contract, OJC originally proposed a minimum volume of “1266x40hc per year” (approximately 2500TEU) that included a Kentucky route.<sup>78</sup> According to Hamburg, however, OJC had to sign a contract with a different carrier because Hamburg “rejected it initially.”<sup>79</sup> At that time, Hamburg admittedly regretted its decision to reject OJC’s 2020-21 volume based on the Kentucky route, formulated possible solutions, and bemoaned that “[e]specially for this kind of volume, I would have love[d] to take a look [at solutions] before we declined 2500TEU.”<sup>80</sup> Hamburg also informed OJC that Hamburg wanted to

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<sup>74</sup> CX 475 ¶ 35.

<sup>75</sup> CX 119-135; CX 475 ¶ 35.

<sup>76</sup> I.D. at 54 (citing CX 242; CPFF No. 87; RRPFF No. 87; CX 287; *see also* RPPF No. 25; CRPPF No. 25).

<sup>77</sup> SCX509-512, ¶¶ 3, 8.

<sup>78</sup> CX 242-243; I.D. at 21, ¶92.

<sup>79</sup> CX 242-243.

<sup>80</sup> CX 242-243.

ship to Kentucky in 2021-22 to make up for its failure to previously secure OJC's Kentucky business for the year prior.<sup>81</sup> Furthermore, Hamburg's top executive confirmed that shipments to Kentucky would make OJC "more attractive" than if it only imported to California.<sup>82</sup> Hamburg also confirmed internally that OJC's warehouse was very close to the railyards needed for the movement of containers, so Hamburg could handle that lane.<sup>83</sup>

Given all this evidence, the ALJ should have concluded that it was more likely than not that the new contract for 2021-22 would have included a Kentucky route, or that the cargo would have all been shipped to California, but for Hamburg's illegal conduct. And insofar as the ALJ had any uncertainty about whether Hamburg would have so agreed, such uncertainty should have been construed against Hamburg, not OJC.<sup>84</sup>

**C. Even if Hamburg did not have capacity to ship to Kentucky in 2021-22 (it clearly did), it was still more likely than not that Hamburg could have shipped up to 1,410 FFE to California for OJC in 2021-22 based on Hamburg's own admissions.**

The ALJ found that "OJC initially requested that seventy percent [70%] of [the 4,200 to 4,700] containers be shipped to Kentucky," but nevertheless concluded "it is not reasonably certain that the route to Kentucky would have been included in a 2021-22 contract between the parties."<sup>85</sup> Even if that conclusion were correct (it is not, as shown above), that still leaves OJC shipping 30% of the 4,200 to 4,700 containers – that is, 1,260 to 1,410 containers – to California, a route that was undisputedly a part of the parties' 2020-21 contract.<sup>86</sup>

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<sup>81</sup> I.D. at 10 (citing RX 799-800 ("we would to revisit another route to PLD Louisville KY, similar volume to CA. Unfortunately, last year, this business was turned down due to lack [of] space to this destination point."), ¶ 30; CX 410; CX 468 ¶ 13; *see also* CX 203, 214-215).

<sup>82</sup> CX 92-93, 137:13 - 139:20, 142:3-21.

<sup>83</sup> CX 203; CX 410, 125:25 - 127:25.

<sup>84</sup> *California Shipping*, 1990 WL 427466, at \*23 ("the wrongdoer must bear the risk of the uncertainty" caused "by its own action").

<sup>85</sup> I.D. at 54.

<sup>86</sup> I.D. at 54.

The FMC need look no further than Hamburg’s own admissions to conclude that these projections for 2021-22 were reliable. As the ALJ found, “[t]hroughout the [prior year’s] 2020-21 service contract, OJC repeatedly asked for more space per week.”<sup>87</sup> Hamburg likewise admitted that OJC had “repeatedly” requested weekly increases of “15, 20, 30, [or] whatever more [containers] you can provide to us.”<sup>88</sup> This equates to OJC shipping between 720 to 1,440 FFE in 2020-21, which is consistent with the 30% of the 4,200 to 4,700 FFE – the 1,260 to 1,410 FFE – that OJC planned to ship to California alone in 2021-22. In other words, Hamburg’s own admissions show that it was more likely than not that OJC’s projected volume of 1,260 to 1,410 FFE to California was a “just and reasonable estimate” of OJC’s volume for 2021-22.<sup>89</sup> Accordingly, even if the FMC were to reject the overwhelming evidence that Hamburg could have undoubtedly shipped up to 4,700 FFE for OJC – just like it did for other customers after retaliating against OJC – the FMC should still conclude that Hamburg could have shipped 1,260 to 1,410 FFE for OJC in 2021-22 and award damages accordingly.

**D. Even if only OJC’s prior year’s container volume were considered, it was still more likely than not that 542 FFE – the undisputed total number of containers OJC shipped with all carriers in 2020-21 – was a reasonably certain container volume for 2021-22.**

The ALJ found that “[i]t is reasonably certain that OJC would have shipped *at least* that same 200 FFE in 2021-22, *given OJC’s actual performance in 2020-21 . . .*”<sup>90</sup> Yet OJC’s actual

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<sup>87</sup> I.D. at 9, ¶25.

<sup>88</sup> I.D. at 9, ¶25 (citing CX 206-208).

<sup>89</sup> See *California Shipping*, 1990 WL 427466, at \*23.

<sup>90</sup> I.D. at 53 (emphasis added) (citing *e.g.*, CX 212; CX 217; CX 206-208; RX 622; RX 638; RX 823; CX 475; CX 203; CX 475; RX 1024; Opposition at 1 (“In 2020 and 2021, consumers spent more time at home due to the pandemic, resulting in increased spending on consumer goods. Increased demand for consumer goods led to increased imports from Asia, where many goods are manufactured.”); see also I.D. at 53 (“Moreover, the evidence supports a finding that until April 29, 2021, Hamburg was interested in contracting with OJC for 2021-22 *for at least the same contract volume, 200 FFE, if not more.*” (emphasis added))).

performance in 2020-21 included shipping a total of 542 FFE with all carriers,<sup>91</sup> not merely the 200 FFE with Hamburg.<sup>92</sup> Accordingly, even using the ALJ's flawed methodology of focusing solely on a limited rearview mirror for determining volume, given that OJC was in the process of consolidating all its shipping for 2021-22 with Hamburg,<sup>93</sup> the ALJ should have computed OJC's damages for 2021-22 based upon a volume of 542 FFE, not 200 FFE.

Failing that, at the very least, the ALJ should have computed OJC's damages for 2021-22 based upon a volume of 400 FFE, because that was the initial MQC of the bridge contract drafted by Hamburg. On April 29, 2021, the day Hamburg made the "executive decision" to willfully retaliate against OJC by refusing to deal, Hamburg conceded internally that it had failed to satisfy OJC's MQC for 2020-21 because it had illegally denied OJC space.<sup>94</sup> Nevertheless, Ms. Casanova confirmed that she had spoken to Mr. Weiss and "he does not want to end the relationship with us and just look for the fair that we promised," and that "[h]e is open to any solution that can offset this deficit."<sup>95</sup> Ms. Casanova also recommended, "since we are working to renew the contract," that Hamburg should initially increase the MQC from 200 FFE to 400 FFE to cover the deficit and show its commitment to consolidating all of OJC's shipping volume with Hamburg, as the ALJ found had been the plan for months.<sup>96</sup> Ms. Casanova further suggested using a total of 400 FFE

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<sup>91</sup> See, e.g., Hamburg Brief, p. 34 ("542 FFEs that OJC shipped in 2020-21" and "OJC's 542 FFE volume in 2020-21").

<sup>92</sup> OJC's actual shipments in 2020-21 do not take into consideration the other factors that push OJC's container demand higher for 2021-22, including "OJC's constant requests for even higher volumes throughout 2020-21," "OJC's internal projection of and request for a significantly higher 2021-22 volume," "and the increased demand for consumer goods that even Hamburg recognized." I.D. at 53; see also CX434-436 (graphs on the exponential revenue increase for Hamburg during 2020-22).

<sup>93</sup> I.D. at 60 (citing CX 467; RX 1024); see also p. 12 *supra*.

<sup>94</sup> CX 215.

<sup>95</sup> CX 215.

<sup>96</sup> CX 215; I.D. at 60 (citing CX 467; RX 1024); see also p. 12 *supra*.



to “show our interest to participate [in] more of their volume,” since OJC “has been constant in [its] volumes and is willing to commit to *much more* of the current MQC.”<sup>97</sup> To that end, Ms. Casanova created a new service contract, “NOAC10000728 Effective June 1, 2021, until May 31, 2022,” which contained “the same lanes, rates, and conditions of the current contract AECC0000291 and an increased MQC 400 FFE.”<sup>98</sup>

Although a new contract was never signed, as the ALJ found, “the terms were not reached because an ‘executive decision’ was made that Hamburg would ‘not engage in any renewal discussion with customer in light of potential litigation.’”<sup>99</sup> The ALJ thus concluded that “[t]he [alleged] lack of a meeting of the minds, therefore, was directly related to Hamburg’s decision to disengage from negotiations.”<sup>100</sup> Under such circumstances, the law prohibits “enabl[ing] the wrongdoer to profit by his wrongdoing at the expense of his victim.”<sup>101</sup> Yet that is the very result of the ALJ’s erroneous decision to compute OJC’s damages for 2020-21 based upon the prior year’s MQC of 200 FEE. Indeed, given all the relevant data in the record, the ALJ should have computed OJC’s damages for 2021-22, at a bare minimum, based upon a volume of 400 FFE, because that was the initial volume of the renewal contract drafted by Hamburg.

**E. Limiting OJC to a mere 200 FFE for 2021-22 – just because that was the container volume for the prior year and in complete disregard of Hamburg’s promise to make OJC a “priority customer” – is not logical.**

In the face of all the above, the only “evidence” cited by the ALJ (*i.e.*, Mr. Pump’s self-serving testimony and Ms. Casanova’s trivial email) that supposedly called into question whether Hamburg could accommodate OJC’s request to ship up to 4,700 FFE in 2021-22 is disproven and

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<sup>97</sup> I.D. at 14, ¶57 (quoting CX 215 (emphasis added)).

<sup>98</sup> CX 214; I.D. at 14-15, ¶¶54-55, 57.

<sup>99</sup> I.D. at 31.

<sup>100</sup> I.D. at 31.

<sup>101</sup> *Bigelow*, 327 U.S. at 264.

vastly outweighed by the evidence showing Hamburg had plenty of space available to accommodate OJC’s request and would have done so, but for its illegal conduct.

Nevertheless, the ALJ declined to compute OJC’s damages for 2021-22 according to a container volume of 4,700 FFE, based upon her assertion that “*the last position communicated internally at Hamburg, before disengaging from negotiations*, was that the Kentucky route would not be included in a 2021-2 contract,” even though that email merely stated, “maintain focus on local destination only.”<sup>102</sup> Indeed, although the ALJ correctly found that [i] Hamburg promised to make OJC a “priority customer” when it brought all its shipping business to Hamburg,<sup>103</sup> [ii] “OJC has demonstrated that it constantly for months communicated to Hamburg its plans to move between 4,200 to 4,700 FFE in 2021, and [iii] Hamburg had begun to discuss this volume and its associated routes internally[,]” the ALJ incorrectly determined that the “*negotiations had not advanced to the point where this increase in volume can be reasonably assumed to have been contracted for in 2021-22.*”<sup>104</sup> The ALJ thus erroneously concluded that “OJC’s calculation of actual injury predicated on volumes of either 4,200 to 4,700 is not supported by the record.”<sup>105</sup>

Therein lies the illogical outcome on reparations in this case. It is an injustice against OJC – and other wronged shippers in the future – to focus only on “the last position” of the Shipping Act violator when determining reparations to the exclusion of all other substantial evidence. As it stands, Hamburg has *benefited greatly* from retaliating and refusing to deal when it did, *i.e.*, before every detail of the 2021-22 contract was finalized in a signed agreement, an outcome that cannot stand.

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<sup>102</sup> I.D. at 54 (emphasis added) (citing CX 217).

<sup>103</sup> I.D. at 60.

<sup>104</sup> I.D. at 52 (emphasis added).

<sup>105</sup> I.D. at 52-3.

This point is further driven home by the following hypothetical: If the parties had *not* had a service contract for 2020-21, but were negotiating their first contract ever for 2021-22, and then Hamburg retaliated against and unreasonably refused to deal with OJC, what would be the reasonable measure of OJC's reparations in volume? It couldn't be the parties' past contract volume because no such contract existed. If the ALJ's reasoning from the Initial Decision is followed, OJC would not be entitled to *any* reparations because they would be based on future estimates, not the parties' actual contract volume from the past, and therefore "overly speculative."

Indeed, in this case, the ALJ penalized OJC by computing its damages for 2021-22 based upon the prior, absolute certainty of the 200 FFE in the 2020-21 contract with Hamburg. **But, again, that is not the standard when the wrongdoer's conduct created the uncertainty by making it impossible to precisely compute its victim's damages.**<sup>106</sup> Plus, the ALJ's finding illogically disregards Hamburg's months-long efforts to entice OJC to become a "priority customer" by bringing all its shipping business to Hamburg, which would make no sense if Hamburg did not intend to agree to greatly increase OJC's space allocation. OJC should logically and legally have its reparations based on the "just and reasonable estimates based on relevant data" for 2021-22, which OJC has amply shown above.<sup>107</sup> Accordingly, an upward adjustment of OJC's reparations based upon a volume of 4,700 FFE would properly comply with the policy of the wrongdoer not benefiting from its misconduct and bearing the risk of any uncertainty it created, as well as the "basic objective" of making OJC whole, which the 200 FFE-basis for reparations fails to do.

**F. Hamburg's discovery violations directly impacted the determination of its space availability in 2021-22, and therefore prejudiced the victim to the wrongdoer's benefit.**

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<sup>106</sup> *California Shipping*, 1990 WL 427466, at \*23 (citing *Bigelow*, 327 U.S. at 264-65.

<sup>107</sup> *California Shipping*, 1990 WL 427466, at \*23.

Lastly, OJC also takes exception with the ALJ's finding that:

It is not necessary to determine whether or not discovery violations occurred as the evidence that the parties are disputing was not necessary to resolving the proceeding. Hamburg's spot market rates, blank sailings, and other issues raised by OJC were not necessary to a determination of damages and additional discovery would not have impacted the findings. **Therefore, because the evidence does not support finding that failure to provide discovery impacted the determination, OJC's request for sanctions is hereby DENIED.**<sup>108</sup>

As discussed above, the ALJ erred in finding that “[t]he *record does not allow a determination* as to whether 400 FFE or more were available in the 2021-22 contract year.”<sup>109</sup> Although OJC did present extensive evidence on this issue, OJC would have had even more evidence had Hamburg complied with its discovery obligations and the ALJ's orders. Specifically, OJC repeatedly asked for discovery about Hamburg's blank sailings, which relates to the amount of space it had available during 2020-22.<sup>110</sup> But Hamburg refused to answer, instead lodging meritless objections and playing musical chairs with its corporations to evade the questions.<sup>111</sup>

Similarly, OJC also filed an expedited motion to compel the depositions of Hamburg's CEO and CFO regarding “*reducing shipping space, drastically raising shipping prices, and otherwise manipulating the market* to record the highest profits in the company's history, several times over.”<sup>112</sup> The ALJ granted that motion and ordered Hamburg to produce management-level witnesses on pricing and space-related issues, and if Hamburg did not, then the depositions of its

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<sup>108</sup> I.D. at 64 (first emphasis added).

<sup>109</sup> I.D. at 39 (emphasis added).

<sup>110</sup> OJC Reply, pp. 29-31 (citing *e.g.*, RX457 and Hamburg Brief, p. 48, n.22.)

<sup>111</sup> OJC Reply, pp. 29-31 (citing *e.g.*, RX457 and Hamburg Brief, p. 48, n.22). OJC addressed Hamburg's refusals to answer this discovery in OJC's Final Briefing, as the ALJ ordered on September 30, 2022, that “[n]o additional motions will be permitted” and “[a]ny additional concerns about discovery may only be raised in the briefs on the merits.” CX317.

<sup>112</sup> See OJC's Motion for Expedited Relief, dated August 15, 2022, p. 11 (emphasis added).

CEO and CFO would be required.<sup>113</sup> Even then, Hamburg flouted the ALJ’s Order by refusing to disclose a potential witness for over three weeks past the ALJ’s deadline, and ultimately refused to produce any more witnesses for deposition.<sup>114</sup> Therefore, on multiple occasions, Hamburg wrongfully denied OJC access to highly relevant information about the space Hamburg had available at the relevant times, how Hamburg manipulated its space to reap unprecedented profits, and how much space Hamburg was exploiting on the spot market to the detriment of those, such as OJC, who had service contract commitments that were not met. Hamburg also violated the ALJ’s orders on at least three other occasions as well.<sup>115</sup> Consequently, Hamburg’s discovery misconduct hamstrung the “determination” of – and created uncertainty regarding – whether 4,700 FFE were “available in the 2021-22 contract year.”<sup>116</sup> Accordingly, Hamburg should be sanctioned with an adverse evidentiary determination of OJC’s damages for 2021-22 being conclusively established based upon a volume of 4,700 FFE.<sup>117</sup>

### CONCLUSION

The totality of the record evidence overwhelmingly shows that Hamburg wrongfully and willfully violated *both* the Shipping Act and the ALJ’s discovery orders for its own benefit by preventing the precise computation of OJC’s damages for 2021-22. It is of vital importance that a carrier should not – and ***must not*** – be permitted to benefit from its wrongdoing. The FMC itself has vowed that it will “take prompt and decisive action” on retaliation complaints.<sup>118</sup> Heading that

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<sup>113</sup> CX312.

<sup>114</sup> OJC Reply, pp. 26-27.

<sup>115</sup> OJC Reply, pp. 22-31 (detailing Hamburg’s two additional compel order violations and a damages report served months late in violation of the ALJ’s scheduling order).

<sup>116</sup> I.D. at 39.

<sup>117</sup> OJC Reply, pp. 26-29; 46 C.F.R. § 502.150(b); Fed. R. Civ. P. 37(b)(2)(A); *Shatsky v. Syrian Arab Republic*, 312 F.R.D. 219 (D.D.C. 2015); *Shepherd v. American Broadcasting Companies, Inc.*, 62 F.3d 1469, 1475 (D.C. Cir. 1995); *3E Mobile, LLC v. Global Cellular, Inc.*, 222 F. Supp. 3d 50, 53 (D.D.C. 2016).

<sup>118</sup> CX 60.

call, OJC brought these matters to the attention of the Commission who stated “it is absolutely illegal for ocean carriers to discriminate or retaliate against a shipper for filing a complaint or challenging a charge.”<sup>119</sup>

But that means little if a carrier can willfully retaliate against a shipper yet still benefit from its illegal conduct by creating uncertainty about its victim’s reparations. The ALJ’s slap on Hamburg’s wrist for its knowing Shipping Act violations provides carriers with a perverse “inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.”<sup>120</sup> Such a result sends the wrong message to Hamburg and indeed the entire shipping community, and sets a terrible precedent for future cases. The law is crystal clear that any uncertainty caused by Hamburg must be held against Hamburg and OJC must be made whole. Accordingly, OJC respectfully requests that the FMC review the Initial Decision *de novo* and correctly conclude that OJC is entitled to damages based on 4,700 FFE for 2021-22.

WHEREFORE, for all the foregoing reasons, OJC respectfully requests that the Commission:

- (i) affirm the ALJ’s conclusions that Hamburg “knowingly and willfully” retaliated against and refused to deal with OJC in violation of the Shipping Act;
- (ii) affirm the ALJ’s award of OJC’s reparations of \$343,387.20 for 2020-21;
- (iii) modify the ALJ’s award of OJC’s reparations of \$4,578,496.00 for 2021-22 based upon a container volume of 200 FFE, and instead award OJC reparations of \$107,594,656.00 based upon a container volume of 4,700 FFE;

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<sup>119</sup> <https://www.fmc.gov/fmc-probing-shipping-lines-anti-retaliation-compliance/> (last visited June 29, 2023).

<sup>120</sup> *Bigelow*, 327 U.S. at 264.

- (iv) double OJC’s reparations for 2020-21 and 2021-22 due to Hamburg’s willful violations of the Shipping Act, and award OJC total reparations of \$215,876,086.40, plus interest; and
- (v) grant such further relief as the Commission deems just and proper.

Dated: June 29, 2023

Respectfully Submitted,

By: /s/ Shlomo Y. Hecht  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served Complainant’s Exceptions to the Initial Decision upon all of Respondents’ counsel of record by emailing a copy to each such person.

Dated: June 29, 2023

By: /s/ Shlomo Y. Hecht  
Shlomo Y. Hecht