BEFORE THE
FEDERAL MARITIME COMMISSION

OJ COMMERCE, LLC,

Complainant, **DOCKET NO. 21-11**

v.

HAMBURG SÜDAMERIKANISCHE
DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO KG

and

HAMBURG SUD NORTH AMERICA, INC.,

Respondents.

COMPLAINANT'S REPLY TO HSDG'S EXCEPTIONS TO THE INITIAL DECISION

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

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INTRODUCTION

The Initial Decision (I.D.) contains well-reasoned decisions finding, *inter alia*, that (i) HSDG unreasonably refused to deal or negotiate with OJC, (ii) HSDG retaliated against OJC, (iii) OJC suffered reparations $343,387.20 for 2020-21, (iv) OJC was entitled to reparations for 2021-22, and (v) doubling of OJC's reparation was justified due to Hamburg's[1] knowing and willful retaliation.[2] But instead of acknowledging its wrongdoing and pledging not to engage in such behavior again, HSDG adamantly refuses to accept any responsibility and instead shifts the blame onto others. It is even more outrageous that HSDG continues to maintain its stance that it acted within the bounds of the law, indicating its intention to persistently disregard the Shipping Act. With utmost respect, OJC urges the Commission to revise the reparations ruling made by the ALJ, as outlined in OJC's Exceptions, in order to provide OJC with appropriate compensation for the entirety of its damages. In doing so, this action will send a clear message that deliberate violations of the Shipping Act will not be tolerated and will ensure that other shippers feel encouraged to report such violations without hesitation.

The ALJ indeed correctly found that the reason Hamburg committed its violations was because, on April 29, 2021, OJC threatened to file a complaint with the Federal Maritime Commission challenging Hamburg's refusal to honor the parties' 2021 service contract.[3] ***The very next day***, Hamburg made an "executive decision"[4] to refuse to deal with and retaliate against OJC

[1] Like the ALJ, the term "Hamburg" is used herein to refer to *both* Respondents Hamburg Südamerikanische Dampfschifffahrts-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.
[2] OJC filed its Exception seeking the Commission to modify the amount of OJC's reparations for 2021-22 to base them on 4,700 FEE rather than 200 FFE.
[3] CX 210.
[4] CX 227.

"in light of potential litigation."[5] Hamburg thus immediately ceased all renewal negotiations with OJC and refused to provide any further cargo space accommodations to OJC—despite acknowledging internally that "[t]his is a very bad case for us which we will likely lose[.]"[6] The Commission itself has identified this very set of facts as a quintessential case of retaliation and refusal to deal:

> **[I]t is not hard to envision situations where a carrier might engage in retaliatory conduct** that has nothing to do with competition with other carriers. **A carrier might engage in conduct detrimental to a shipper (e.g., refusing to enter into, renew, or amend a service contract) to "get even" with or deter that shipper and other shippers from complaining to the Commission.**[7]

Despite smoking-gun evidence proving these points, HSDG filed frivolous and insulting exceptions to virtually every conclusion the ALJ made. HSDG's baseless arguments include:

1. *OJC's claim that it threatened to bring to the FMC against HSDG was "baseless."*[8] HSDG ignores its own internal emails that acknowledged "[t]his is a very bad case for us which we will likely lose[.]"[9]

2. *As a result of COVID-19, Hamburg only shipped 185 of 200 FFE.*[10] HSDG conveniently ignores its numerous smoking-gun, internal emails where it admittedly cut off OJC from further shipments due to its "executive decision" to retaliate against OJC.[11]

3. *"OJC has filed at least 17 lawsuits in the past few years."*[12] Not only is this irrelevant and gratuitous, but it is also a blatant falsehood. HSDG's inclusion of this false statement illustrates the depths to which it will sink to besmirch and intimidate shippers who dare complain to the Commission about HSDG's illegal conduct.

4. *The fact that Hamburg lied to OJC about why Hamburg cut off service contract negotiations proves that "there was no refusal to provide space and no retaliation."*[13] The

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[5] CX 220.
[6] CX 161.
[7] Statement of the Commission on Retaliation ("Statement"), Dkt. 21-15 (Issued December 28, 2021), at 8 (emphasis added).
[8] HSDG's Exception, p. 14.
[9] CX161.
[10] HSDG's Exception, p. 2.
[11] *See, e.g.,* CX 220; CX 227; CX 229, SCX 515.
[12] HSDG's Exception, p. 3.
[13] HSDG's Exception, p. 17.

ALJ rightly rejected this specious argument, concluding that "[t]he reasons provided by Hamburg to OJC did not match the reasons Hamburg discussed internally. This does not constitute the good faith communication required by the Shipping Act."[14]

5. *HSDG's deficient discovery responses on its service contracts signed after retaliation are a defense to space being available.*[15] HSDG's attempt to use any uncertainty caused by its own misconduct against OJC flies in the face of U.S. Supreme Court and FMC precedent.[16] It is a wrongdoer doubling down on its misconduct to flout the rules and court orders to their advantage, thereby turning the very purpose of FMC proceedings on its head.

6. *OJC and its expert, Richard Berning, allegedly "fail[ed] to consider declining demand for OJC's retail consumer products after the fall of 2020."*[17] and *"There was no evidence that anyone in HSDG's management was interested in renewing the Service Contract with OJC at any MQC."*[18] With yet more contentions that insult the intelligence of the Commissioners, Hamburg again conveniently ignores internal emails that it had been courting OJC for months before the retaliation not just for a renewal, but also for a significant increase in volume.[19] It would make no sense for Hamburg to court OJC for ***significantly more*** of its containers if Hamburg thought that demand was declining. Indeed, Hamburg's own contemporaneous emails put the lie to its "declining demand" narrative, as the undisputed evidence shows that demand exploded in 2021-22.[20] Consistent

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[14] I.D. at 30.

[15] HSDG's Exception, pp. 17-18.

[16] *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)) ("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[,]" because "[a]ny other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim.").

[17] HSDG's Exception, p. 35.

[18] HSDG's Exception, p. 36.

[19] *See, e.g.,* I.D. at 14, ¶ 57 (quoting CX 215); CX 468 ¶ 11; SCX 481; 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); CX 203; CX 410, 125:25 - 127:25.

[20] *See also* OJC's Exception, pp. 11-12; The ALJ further 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." I.D. at 43. Hamburg's internal emails also noted that OJC's "volume is constantly peaking" and "OJ Commerce grew nearly 400% in sales." 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.

with those communications, the ALJ correctly found that "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***."[21]

7. *Compliance and deterrence are irrelevant as to whether HSDG should pay double damages because "HSDG no longer exists."*[22] This argument is shameless and illustrates yet another game of corporate-musical-chairs by HSDG, whereby it thinks it can just change its name to avoid accountability for its illegal conduct.[23] As HSDG has admitted, HSDG was merged into Maersk, and therefore Maersk stands in the shoes of HSDG.[24] Moreover, as shown by HSDG's top executive knowingly retaliating against OJC even after compliance training[25] -- an undisputed fact completely ignored by HSDG throughout its brief – there certainly is a strong need for compliance and deterrence of HSDG/Maersk going forward.

HSDG's feeble excuses starkly reveal how low it will go to avoid the consequences of its deliberate and conscious misconduct. They also ignore that Hamburg had for months been rolling out of the red carpet for the consolidation of all OJC's 2021-22 container business until OJC dared threaten Hamburg with legal action for actions that Hamburg knew were wrong. The ALJ's unequivocal determination that HSDG willfully and knowingly violated the Shipping Act and is unquestionably responsible for the resulting harm inflicted upon OJC must be affirmed.

ARGUMENT

I. BASED ON THE OVERWHELMING RECORD EVIDENCE, IT IS CLEAR THAT HSDG UNREASONABLY REFUSED TO DEAL WITH OJC.

As the ALJ rightly found, "[b]ased on the totality of the evidence, Hamburg's failure to negotiate or deal was unreasonable, and its justifications are not consistent with the facts as established by the evidence in the record, including the contemporaneous emails identifying **the**

[21] I.D. at 60 (emphasis added) (citing CX 467; RX 1024).
[22] HSDG's Exception, pp. 41-42.
[23] Hamburg made similar corporate-musical-chairs arguments during discovery and throughout the proceeding. *See* OJC's Final Briefing Reply, pp. 8 n.8, 30.
[24] I.D. at 5, FOF 4, citing HSDG Answer at 1 n.1.
[25] I.D. at 63; I.D. at 22, FOF 97-99; CX 220; CX 96, 208:4-18; CX 95-96, 204:24 – 206:19.

reason as 'potential litigation.'"[26] Regardless, HSDG argues, by regurgitating the same arguments over and over, that the ALJ erred in holding that as of April 29, 2021, HSDG stopped dealing or negotiating in good faith about its remaining 2020-21 contractual commitment and a 2021-22 service contract.[27] But HSDG's many admissions disprove its own excuses.

It is crystal clear based on Hamburg's and OJC's substantial communications and negotiations **before** April 29, 2021 that the parties were on the cusp of fulfilling the 2020-21 commitment and renewing the service contract for a huge increase in the amount of containers for 2021-22 when Hamburg executive, Juergen Pump, made the "executive decision" to entirely and unilaterally cut off OJC due to its threat of litigation.[28] Indeed, Hamburg ***admitted*** that "[o]ut of the blue and with no prior notice, on May 4, 2021, [Hamburg] unilaterally notified [OJC] that there would be no service contract renewal under any terms."[29] No subsequent shipments under the 2020-21 contract or negotiations or deals for a 2021-22 service contract were permitted by Hamburg.[30]

In its cut-off notification to OJC, Hamburg blamed "space" and "equipment" issues instead of the real reason: retaliation for OJC's threat of litigation.[31] Incredibly, HSDG argues – without a hint of shame – that ***because*** it sent a deceptive email notifying OJC that HSDG would not be entering into a service contract for 2021-22, this somehow proves HSDG was "willing to deal."[32] But the ALJ rightly rejected this insulting contention, finding that "[t]his [misleading email from

[26] I.D. at 35 (emphasis added).
[27] HSDG's Exception, p. 6.
[28] *Compare* I.D. at 60 (emphasis added) (citing CX 467; RX 1024) *with* CX 220, 227.
[29] I.D. at 17 (emphasis added), FOF 66 (citing Amended Complaint at ¶ 42 (bold in original); HSNA Answer at ¶ 42 (admitted); HSDG Answer at ¶ 42 (admitted); *see also* CPFF at ¶ 42; RRPFF at ¶ 42; RX 529; RX 568; RX 593).
[30] SCX 480.
[31] SCX 513.
[32] HSDG's Exception, pp. 12-13.

Hamburg] does not constitute the good faith communication required by the Shipping Act" because "[t]he reasons provided by Hamburg to OJC did not match the reasons Hamburg disclosed internally."[33] This logical conclusion is completely ignored by HSDG.

Furthermore, Mr. Pump – who made "the executive decision [] that [Hamburg] should not engage in any renewal discussion with customer [OJC] in light of potential litigation"[34] – admitted in his deposition that ***HSDG and he knew*** from compliance training they were not allowed to refuse to negotiate or deal based on the threat of a lawsuit or FMC complaint, but did it anyway:

> Q Was there -- **during this compliance training, was there any discussion about if a customer threatened to or actually filed a lawsuit as opposed to a FMC complaint, whether or not that would be allowed in that situation to retaliate or refuse to deal with that customer**?
>
> A I do not remember whether we had that specific example, meaning, a lawsuit. **But it is clearly understood in the organization that this is not a factor in the decision whether or not to negotiate a service contract.**
>
> Q When you say it is not a factor, whether to negotiate a service contract, what do you -- what do you mean by that?
>
> A So, in other words, **if the customer was involved in litigation against another ocean carrier or against Hamburg Sud or anyone, as I said, no such case in the past certainly, but this would not be something that would enter the picture**.
>
> Q **In determining whether or not Hamburg Sud would continue a relationship or enter into a relationship with that shipper?**
>
> A **Correct.**[35]

Consistent with Mr. Pump and HSDG's understanding, the ALJ succinctly concluded:

> [F]or a refusal to deal claim there is no requirement that the unreasonable conduct be limited to or related to filing of a complaint before the Commission. Whether Mr. Pump decided not to pursue a new service contract due to a threat to file contractual arbitration, a Commission proceeding, or litigation in some other venue is not determinative. The decision made in this case to "disengage on renewal

[33] I.D. at 30.
[34] CX 227.
[35] CX 95-96, 204:24 – 206:19 (emphasis added).

> negotiations with this account" and "also consider not to provide them with space under existing contract," CX 213, *see also* RX 981, was explicitly articulated as being based on "potential litigation" – not based on perceived unreasonable contractual requests or any other legitimate business decision or transportation factors – and is therefore unreasonable.[36]

Yet despite HSDG being caught red-handed, it makes the absurd argument that the ALJ's ruling that HSDG unreasonably refused to deal "renders Section 40502(f) of the Shipping Act a nullity."[37] HSDG, however, ignores that the conduct it exhibited towards OJC following the assertion of its threat was precisely the unlawful behavior envisioned by the Commission:

> **[I]t is not hard to envision situations where a carrier might engage in retaliatory conduct** that has nothing to do with competition with other carriers. **A carrier might engage in conduct detrimental to a shipper (e.g., refusing to enter into, renew, or amend a service contract) to "get even" with or deter that shipper and other shippers from complaining to the Commission.**[38]

That "situation" is **exactly** what happened here: HSDG retaliated against OJC by ***refusing*** to provide space under an existing service contract and ***refusing*** to renew a service contract that it had been negotiating for weeks, to "get even" with OJC and deter all other shippers from complaining to the Commission or filing a lawsuit. Far from creating dangerous precedent, as HSDG alleges, ***any outcome other than affirming*** the ALJ's finding of an unreasonable refusal to deal would set a perilous precedent, essentially rendering the Shipping Act's prohibitions meaningless. The only "nullity" that may result here is if HSDG avoids the consequences of its Shipping Act violations.

Despite these logical and obvious conclusions based on Hamburg's own admissions and a textbook example from the FMC, HSDG nonetheless conjures a series of pretexts that are contrary to the evidence of record and common sense.

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[36] I.D. at 35.
[37] HSDG's Exception, p. 8.
[38] Statement, Dkt. 21-15 at 8 (emphasis added).

A. HSDG's "breach of contract" pretext

First, HSDG claims the Commission has no jurisdiction over its Shipping Act violations. HSDG's supporting rationale is that as a result of the ALJ's finding that HSDG unreasonably refused to deal, "virtually every breach now becomes actionable under the Shipping Act."[39] In HSDG's world, because OJC's demand letter also asserts breaches of contract, its refusal to deal was not illegal.[40] Putting aside the fact that the letter explicitly threatens "the filing of a petition to the Federal Maritime Commission"[41] and that a refusal to deal claim is not limited to a Commission claim anyway,[42] the law is clear that "[t]he Commission has an obligation to determine whether an entity has violated the Shipping Act, even when the allegations may constitute both breach of contract claims and claims that the entity violated the Shipping Act."[43] Thus, HSDG's baseless contention is contrary to law.

B. HSDG's "baseless claim" pretext

HSDG next argues that it should not be held accountable for its Shipping Act violations because OJC's threat to file a complaint with the FMC was allegedly "a baseless claim."[44] As an initial matter, it is illegal to refuse to deal based on anything other than legitimate transportation-related factors, and potential litigation is not one of them.[45] Moreover, HSDG's contention that OJC had "a baseless claim" wasn't true then and it isn't true now. Upon receiving OJC's purported "baseless" claim, Hamburg itself contemporaneously admitted it was in the wrong (**not OJC**).[46]

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[39] HSDG's Exception, p. 8.
[40] HSDG Exceptions, pp. 7-8.
[41] CX 210.
[42] I.D. at 35.
[43] SCX 486-487 (citing *e.g., Baltic Auto Shipping, Inc. v. Hitrinov*, Docket No. 14-16, 33 S.R.R. 1230, 1232-33 (ALJ Feb. 2, 2015)).
[44] HSDG's Exception, pp. 13-15.
[45] I.D. at 35.
[46] CX 161, 215.

Indeed, HSDG's internal emails revealed its own analysis that "[t]his is a very bad case for us which we will likely lose"[47] and "actual damages . . . would of course be a significantly higher amount" and that "[s]hould such a lawsuit occur I can easily imagine the cost would easily wipe out any profits gained from the commercial relationship due to potential breach of contract judgements against us and the cost of our own legal representation."[48] This is indeed exactly what the ALJ found, and it is beyond the pale that HSDG tries to deny it now. Accordingly, HSDG's argument that "it was a reasonable exercise of business discretion for HSDG not to offer OJC a service contract for 2021-22"[49] because of "a baseless claim" goes to confirm that HSDG has willfully acted and will continue to act in this illegal manner.

C. HSDG's "space issue" pretext

HSDG then claims that it "provided space under the Service Contract after April 29, 2021."[50] This contention is belied by HSDG's contemporaneous emails on and after April 29, 2021, which show HSDG refused OJC available cargo space during the contract term:

- On April 29, 2021, Pump made the "executive decision" "in light of the potential litigation" to "**not provide [OJC] with space under the existing contract**." (CX 220 (emphasis added).)
- That same day, Li disseminated Pump's "executive decision" that "**we should also consider not to provide them with space under existing contract**." (CX 227 (emphasis added).)
- HSDG's acknowledgement that its local sales team "**were advised that no additional space would be granted for this customer**." (CX 229 (emphasis added).)
- On June 10, 2021, HSDG reiterated that "[t]he MQC [of the 2020-2021 Service Contract] was not fulfilled" as ordered. (SCX 515.)

Nonetheless, despite this black-and-white evidence right from its mouth, HSDG makes the

[47] CX 161.
[48] CX 229.
[49] HSDG's Exception, pp. 14-15.
[50] HSDG's Exception, p. 9.

frivolous argument that "all parties clearly understood" that shipments of 66 FFEs made after April 29, 2021 by OJC through and entirely arranged by freight forwarders and a shipping association at much higher prices were "OJC shipments under the Service Contract with HSDG."[51] HSDG's contention is a blatant falsehood belied by its admission on June 10, 2021 that HSDG did not ship "the remaining 15 FFE"[52] that was pending at the time of HSDG's refusal to deal. Moreover, taking HSDG's contention to its (il)logical end, so long as it offered to ship one container for OJC on the spot market after it unlawfully retaliated and refused to deal, HSDG has a get-out-of-jail-free card. Of course, HSDG cites no support for its absurd proposition, as such a result would be abhorrent to the very purpose of the Shipping Act.[53] This pretext illustrates plainly that HSDG has still not learned anything from its wrongful actions and unless severely punished, will continue to flout the Shipping Act using its illogical excuses.

D. HSDG's attempt to hold OJC's mitigation efforts against it

Relatedly, HSDG also suggests that OJC's attempts to mitigate damages subsequent to HSDG's deliberate violations of the Shipping Act somehow exempt it from legal accountability.[54] This unfounded assertion highlights the extreme absurdity to which HSDG is willing to descend in order to avoid accountability for its actions. The fact that OJC obtained extremely limited, inconsistent space at significantly higher costs on the open spot market as a way to mitigate its damages – a far cry from the consistency of a 4,200-4,700 FFE year-long service contract with a locked-in rate and volume commitment that it was going to sign with HSDG – does nothing to cure HSDG's unreasonable refusal to deal.

In fact, the Shipping Act prohibits a common carrier from "shutting out" a shipper from a

[51] HSDG's Exception, p. 10.
[52] SCX515.
[53] I.D. at 39
[54] HSDG's Exception, p. 13.

space accommodation or a service contract for reasons having no relation to legitimate transportation related factors.[55] Here, as the ALJ correctly found,[56] HSDG is plainly liable for refusing to negotiate and deal with OJC in good faith, because the evidence explicitly shows that HSDG completely shut OJC out from its remaining space commitment for 2020-21 and a service contract for 2021-22,[57] and that HSDG did so for a prohibited reason.[58]

II. THE ALJ CORRECTLY FOUND THAT HSDG RETALIATED AGAINST OJC.

In its exceptions, HSDG argues that the ALJ erred in finding that HSDG retaliated against OJC by refusing to provide cargo space accommodations when available (i) for fifteen containers in the 2020-21 service contract year and (ii) during the 2021-22 contract year.[59] But HSDG ignores the clear evidence of record of its own internal contemporaneous communications and rehashes the same baseless arguments it made with respect to its unreasonable refusal to deal. HSDG's exceptions should all be rejected.

A. HSDG Admittedly Refused to provide cargo space accommodations to OJC

First, HSDG argues, citing to the Initial Decision at 39, that "it is well-established, undisputed, and acknowledged by the ID that an ocean common carrier is under no obligation to grant a service contract to every potential customer."[60] HSDG, however, conveniently turns a blind eye to the very next legal truism that the ALJ recites, which is that "ocean common carriers' decisions ***must be based on legitimate transportation factors or legitimate business decisions***."[61]

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[55] *New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans*, 29 S.R.R. 345, 351 (ALJ 2001).
[56] I.D. at 35.
[57] CX 220; SCX 480-481.
[58] CX 220.
[59] HSDG's Exception, p. 15.
[60] HSDG's Exception, p. 17.
[61] I.D. at 39 (emphasis added) (citing NPRM Refusal to Deal, 87 Fed. Reg. at 57676 (citing *Ceres Marine Terminals v. Maryland Port Administration*, Docket 94-01, 29 S.R.R. 356, 370 (FMC Aug. 15, 2001))). HSDG criticizes NPRM Refusal to Deal and *Ceres*, asserting that they are

As the ALJ correctly points out, HSDG did not have a legitimate transportation reason to cut off OJC's remaining 15 FFE under the 2020-21 service contract.[62]

Nor did HSDG use a legitimate transportation-related basis to cut off OJC from a service contract for 2021-22. To the contrary, HSDG itself identified it entered into service contracts with a prefix of NOAC[63] for **nearly three times the 4,700 FFE** (not counting the space it had for spot rates) **after** Hamburg made the "executive decision" on April 29, 2021 to retaliate against OJC.[64] And Hamburg had been courting OJC throughout 2021 to secure *all* its shipping business for 2021-22, which Hamburg would not have done if it lacked the capacity or intention to accommodate OJC's request for increased volume in the first place.[65] HSDG's own documentation and contemporaneous actions, therefore, disprove that it had no space available. The ALJ's correctly concluded that HSDG illegally refused to provide space accommodations to OJC.

B. The ALJ correctly found that HSDG was prohibited from retaliating against OJC for threatening to file a complaint with the FMC.

HSDG then asserts that the ALJ erred in finding that threatening to file a FMC proceeding is protected by the prohibition against retaliation and it "establish[es] a dangerous and unworkable precedent."[66] Yet again, HSDG makes a generic, sweeping statement without any reference to the facts of ***this case***. Here, HSDG explicitly confirmed, in its own internal emails, that its reason for

"inconsistent with applicable law." (HSDG's Exception, p. 17.) But HSDG cites no "applicable law" that the ALJ's finding is "inconsistent" with, thereby conceding the point.

[62] I.D. at 38-39.

[63] The prefix for HSDG's 400 FFE MQC contract proposed by Andrea Casanova to make up for their shortfalls in 2020-2021 was NOAC. (CX 214.) (referencing "NOAC10000728 Effective June 1, 2021, until May 31, 2022").

[64] CX 255, HSDG's Resp. to OJC Int. 15 (identifying the document that contains "a list of Respondents' service contracts concluded after April 28, 2021 and the MQC of each"); CX 469 ¶ 16; CX 283-284; *see also* CX 285-286, HSDG's Resp. to OJC RFA 1-4 (Respondents admitting that they entered into service contracts after they retaliated against OJC).

[65] I.D. at 60; I.D. at 10.

[66] HSDG's Exception, pp. 18-19.

retaliating against OJC was due to "the potential litigation."[67] And sworn testimony from HSDG's President who made the "executive decision" to retaliate against OJC confirmed that he knew doing so was wrong and strictly prohibited by the Shipping Act and did it anyway.[68] The timeline of events during those critical few days clearly evinces that HSDG nefariously retaliated and tried to cover it up by hiding its true intentions from OJC:

- On April 28, 2021, Hamburg communicated with OJC about nailing down the exact MQC OJC would be willing to sign (SCX 513-514.)[69] Consistent with the numerous other contracts HSDB entered with other shippers during that same time period, **no lack of space or equipment is mentioned**.

- That same day, OJC sent its demand letter stating that Hamburg's failures "may result in legal action against you and your affiliates, as well as the filing of a petition to the Federal Maritime Commission to seek relief." (CX 210.) That was the trigger point that changed its whole tone going forward.

- The next day on April 29, Hamburg suddenly made a complete U-turn from its prior position, and made "the executive decision" to "not engage in any renewal discussions with customer **in light of the potential litigation**" and to "not provide [OJC] with space under the existing contract." (CX220 (emphasis added).) Still, no lack of space or equipment is mentioned, even internally, to justify the refusal to deal – only OJC's legal complaint to the Commission.

- On April 30, OJC emailed Hamburg requesting updates on the renewal. (SCX 513.)

- On May 4, Hamburg concocted its pretext and speciously informed OJC that it would not renew the service contract and for the very first time cited a "the lack of space and equipment in Asia and the shortage of truck power in the US." There was no prior mention of lack of "space," "equipment," or "truck power," and it was never part of Hamburg's actual "executive decision" to cut off OJC. (*Compare* SCX 513 *with* CX 220.)

- On May 5, OJC responded that it was "super disappointed" to learn of Hamburg's decision not to renew. (SCX 480.) OJC even suggested a solution to Hamburg's supposed "equipment" and "truck power" issue by agreeing to make the contract just "PORT to PORT so chassis and truckers are not HAMBURG's concern." (*Id.*)

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[67] CX 220.
[68] CX 96, 208:4-18; CX 95-96, 204:24 – 206:19.
[69] Mr. Weiss gave a range between 4200-4700 FFE for the renewal commitment, which was agreed to by Ms. Casanova. (CX 468, ¶ 11; CX 219.) But Hamburg retaliated against OJC less than two days after the new deal points were agreed to, before the final number within that range could be nailed down, as shown above. (CX 220.)

- But of course, the "space," "equipment," or "truck power," issues were just a ruse to hide Hamburg's illegal retaliation. So Hamburg again misled OJC that "I am going to check with our Trade team again and let you know if there is any change." (*Id.*) This was yet another misrepresentation from Hamburg, as it had already made the "executive decision" to cut off OJC at the highest level, in retaliation for its audacity to complain to the Commission, a decision which had nothing to do with space," "equipment," or "truck power," and everything to do with "get even," retaliate, and "deter" shippers from "complaining to the Commission."

As the emails plainly show, Hamburg retaliated against OJC based solely on its threat to complain to the Commission. And as the ALJ correctly concluded, "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***."[70]

Moreover, Hamburg's retaliatory conduct towards OJC after its Commission threat – as shown *supra* at 11 – is a textbook example given by the Commission in its Statement on Retaliation.[71] Far from "creat[ing] dangerous precedent," finding retaliation here is necessary *in order to be consistent with* the Shipping Act, the intent of Congress, and the Statement of the Commission on Retaliation.[72] Holding otherwise would render the Shipping Act's anti-retaliation provisions meaningless.

III. THE ALJ WAS CORRECT IN AWARDING OJC REPARATIONS FOR HSDG'S VIOLATIONS OF THE SHIPPING ACT.

Even though the evidence overwhelmingly shows that Hamburg willfully violated the

[70] I.D. at 40 (emphasis added).
[71] Statement, Dkt. 21-15 at 8.
[72] Hamburg even makes the argument that, because OJC's demand letter that admittedly triggered Hamburg's retaliation also asserts breaches of contract, its retaliation was not illegal. (Hamburg's Final Brief, pp. 21-22.) Putting aside the fact fatal to Hamburg's argument that the letter explicitly threatens "the filing of a petition to the Federal Maritime Commission" (CX 210), Hamburg knows that "[t]he Commission has an obligation to determine whether an entity has violated the Shipping Act, even when the allegations may constitute both breach of contract claims and claims that the entity violated the Shipping Act." (SCX 486-487.)

Shipping Act – and attempted to cover it up – HSDG incredibly contends that OJC is not entitled to any damages. The highest court in the land, however, disagrees. Indeed, "[t]he Supreme Court has indicated that the loss of expected profits resulting from an unjust and illegal denial of shipping space is real and compensable under the [Shipping Act]."[73] OJC has provided ample "competent evidence" that it sustained compensable losses with reasonable certainty, and that Hamburg's egregious violations of the Shipping Act were the proximate cause of those losses.[74] HSDG nonetheless throws a series of bad arguments against the wall to see what might stick. But all these contentions were correctly rebutted by the ALJ consistent with the evidence of record.

A. The ALJ explicitly stated that she considered Mr. Zayas' opinions

Mr. Zayas was the purported "expert" identified by Hamburg. In yet another argument contrary to the record, HSDG argues that the ALJ "failed to consider either Mr. Zayas's report or his declaration" in the Initial Decision.[75] HSDG, however, willfully ignores and contradicts the ALJ's explicit statement that she did consider Mr. Zayas's opinions, even citing to the beginning pages to his report and declaration in Hamburg's appendix:

> **Hamburg offers a number of critiques, many based on its expert's reports at RX 1180 and RX 1145**, which it argues apply across more than one damage calculation. ***These will be summarized here and are considered as they become relevant in evaluating OJC's specific damage calculations.***[76]

Hamburg cites Mr. Zayas's opinions that form the basis for the deficient arguments against the calculations of OJC's accomplished expert, Mr. Richard Berning. The record shows the ALJ considered and rejected Mr. Zayas's opinions throughout the Initial Decision, including those which follow below.

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[73] *California Shipping*, 25 S.R.R. at 1230 (citing *Consolo v. FMC*, 383 U.S. 607, 626 (1966)).
[74] Telling, HSDG did not file an objection with respect to the ALJ's finding of causation.
[75] HSDG's Exception, p. 23.
[76] I.D. at 45 (emphasis added).

HSDG also asserts without support that the ALJ "incorrectly concluded that [Mr. Zayas's] declaration was untimely."[77] But Mr. Zayas's declaration ("Improper Zayas Report") was served for the first time on December 8, 2022, the date Hamburg's Final Brief was filed.[78] That Report was a clear attempt at trial by ambush, and in total violation of the rules by being inexcusably late, as it was served nearly **two months after** the "[c]lose of all discovery (fact and expert)" on October 14, 2022,[79] and **over three months** after Mr. Berning's expert report was served on September 2, 2022.[80] Even so, the ALJ explicitly considered the Improper Zayas Report and found its criticisms to be unpersuasive.[81]

B. The ALJ was correct in relying on Mr. Berning's opinions

HSDG argues that Mr. Berning was "unqualified and his opinions merely rubber-stamped Mr. Weiss's questionable and unsubstantiated analysis."[82] Both of these contentions lack merit, as

[77] HSDG's Exception, p. 23 (citing I.D. at 45.)
[78] The Zayas Declaration is identified as RX 1145-73 in Hamburg's Appendix.
[79] CX 318.
[80] CX 438; CX 317.
[81] Hamburg's months late, new report clearly violates Rule 26, the purpose of which is to "prevent unfair surprise" and "prevents experts from lying in wait to express new opinions at the last minute denying the opposing party the opportunity to depose the expert." *Minebea Co., Ltd. v. Papst* ("*Papst*"), 231 F.R.D. 3, 5-6 (D.D.C. 2005) (collecting cases). Rule 37 therefore "'gives teeth' to Rule 26's disclosure requirements by forbidding the use at trial[, on a motion or at a hearing] of any information that is not properly disclosed. Rule 37(c)(1) is a 'self-executing,' 'automatic' sanction designed to provide a strong inducement for disclosure." *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 826-27 (9th Cir. 2011). Supplementation must occur "in a fashion that will allow [the opposing party] to conduct meaningful discovery." *United States v. Guidant Corp.*, No. 3:03-0842, 2009 WL 3103836, at *4 (M.D. Tenn. Sept. 24, 2009).

Instead, Hamburg resorted to "lying in wait" for **97 days** after discovery closed – and a month after OJC filed its Final Brief – before it disclosed the Improper Zayas Report, so as to leave OJC without an opportunity to respond, let alone an opportunity to subject the expert to examination under oath. Hamburg's delay tactic was not harmless. Hamburg knew that OJC could not possibly analyze and respond to the nearly 30-page Improper Zayas Report within 15 days, during which OJC also must respond to Hamburg's 50-page Brief, 178 Proposed Findings of Facts, and 1208 pages of exhibits. Condoning this conduct risks other wrongdoers attempting this same tactic to their benefit. As a result, the Improper Zayas Report should have been stricken in its entirety.
[82] HSDG's Exception, p. 25.

they stand in direct contradiction to the factual record, and were properly rejected by the ALJ.

1. The ALJ correctly found that Mr. Berning was qualified

The ALJ concluded that "Mr. Berning is qualified as an expert" because he "is a Certified Public Accountant, a Certified Valuation Analyst, and Certified in Financial Forensics, with an education in accounting and economics, and decades of experience in accounting and business valuations."[83] Despite Mr. Berning (i) having as one of his four "core competencies" "litigation economic/loss damage analysis and independent opinions,"[84] (ii) having testified over 150 times on damage- and valuation-related issues,[85] and (iii) never having his opinions excluded by a court in well over 1,000 cases,[86] HSDG contends that Mr. Berning was not qualified to render opinions on damages.[87] If Mr. Berning, with his extensive experience, is deemed unqualified to provide opinions on damages, then no one is.

HSDG also tries to make much about the fact that Mr. Berning has no prior experience testifying about damages arising specifically from alleged violations of the Shipping Act.[88] Of course, HSDG provides no authority – nor even contends – that calculating lost profits is different in the Shipping Act context than in any other commercial litigation. To the contrary, the Commission has cited common law, the U.S. Supreme Court, and Circuit Appellate Courts, as well as others, in identifying the "general principles pertaining to damage awards relevant to an award

[83] I.D. at 44 (citing CX 438, CX 449-459).
[84] RX1044, 61:3-9.
[85] RX1045-6, 65:17 - 67:7.
[86] RX1045-6, 65:17 - 67:7.
[87] HSDG's Exception, p. 25.
[88] HSDG's Exception, p. 25. Hamburg cites no authority for its ridiculous requirement that to opine on reparation damages in an FMC case an expert must have previously been a damages expert in an FMC case. No such requirement exists, of course, because if that were the case, no expert could ever opine in an FMC case because their first attempt would be their last, after they were excluded for having no prior experience in front of the FMC.

of reparation."[89] HSDG's unsupported argument that Mr. Berning is "unqualified" was properly rejected.[90]

2. HSDG's criticisms of Mr. Berning's methodology lack merit

Following its standard approach throughout this case, HSDG repeats several easily disproved tropes in an attempt to attack OJC and its expert.

First, HSDG erroneously claims that Mr. Berning simply adopted Mr. Weiss' work, but cites no evidence to support this contention. The fact that Mr. Weiss worked with Mr. Berning while determining OJC's damages is expected, as Mr. Weiss and OJC provided Mr. Berning access to OJC's confidential sales, shipping, and cost data. Yet, HSDG ignores Mr. Berning's testimony that he acted independently of the parties.[91]

Second, HSDG tries to discredit Mr. Berning by alleging that his calculations "matched *exactly*" the data prepared by Mr. Weiss.[92] But in its Final Briefing, HSDG took the opposite position, complaining that those calculations – made before Mr. Berning was engaged – were **significantly lowered** in Mr. Berning's calculations contained in his report served on September 2, 2022.[93] Indeed, the ALJ acknowledged those "[d]ifferences in the total damages calculations before and after Mr. Berning's involvement, ***which Hamburg has highlighted***, support the impact of Mr. Berning's participation."[94] Thus, HSDG knew that Mr. Berning did not just "blindly accept"[95] OJC's preliminary calculations, yet still shamelessly argues that he did. In reality, Mr.

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[89] *See, e.g., California Shipping*, 25 S.R.R. at 1229-30 (citing American Jurisprudence on Damages, the U.S. Supreme Court, and the Eighth Circuit Court of Appeals concerning damage principles).
[90] I.D. at 44.
[91] RX 1043, 55:2-17.
[92] Hamburg's Exception, p. 27.
[93] Hamburg's Final Brief, p. 32.
[94] I.D. at 45 (emphasis added) (citing Hamburg's Final Brief, pp. 31-32).
[95] Hamburg's Exception, p. 27.

Berning clearly testified that he did not "rubber stamp"[96] OJC's prior figures but in fact "came up with [his] own opinion,"[97] and he calculated the damages contained in his report.[98]

HSDG attempts to twist the facts of this case into those like in *California Shipping*,[99] to no avail.[100] In *California Shipping*, the complainant relied solely on a "basic damage summary" without any supporting data that was summarized by its president.[101] Here, OJC's damage submissions include Mr. Berning's reports containing "[his] own opinion[s],"[102] and the review and analysis of supporting data that amounts to a total of 370,276 records, with 4,444,049 points of data related to shipping and sales for 2020-22.[103] As a result – and as Hamburg well knows – the damages in this case bear no relation whatsoever to the inadequate "basic summary" in *California Shipping*, as the ALJ likewise correctly concluded.[104]

C. The ALJ correctly found the average lost profit per container from 2020-22 was $22,892.48.

Next, HSDG deliberately attempts to construct a strawman argument, fully aware that OJC conducts all its business electronically and does not maintain paper records.[105] By fixating on non-existent paper records while disregarding the extensive electronic data points provided, HSDG aims to deflect attention from the substantial evidence against it.

To that end, HSDG ignores the fact that OJC provided Hamburg a total of 370,276 records, with 4,444,049 points of data, encapsulating all shipping containers during the relationship

[96] Hamburg's Exception, p. 29.
[97] RX 1044, 58:3 – 59:7.
[98] *See, e.g.,* RX 1041, 47:3 – 48:2.
[99] Hamburg's Final Brief, pp. 36-37.
[100] Hamburg's Exception, p. 28.
[101] *California Shipping*, 25 S.R.R. at 1230.
[102] RX 1044, 58:3 – 59:7.
[103] I.D. at 49-50; Weiss Decl., Ex. 101; SCX 511, ¶ 7.
[104] I.D. at 50 ("But the underlying data in *California Shipping* was vastly different than OJC's data.").
[105] CX 316; SCX 509, ¶ 2.

between the parties, and all sales records of products associated with those shipping containers.[106] Critically, HSDG "has not identified specific problems with the detailed information provided in the spreadsheet."[107] Even Mr. Zayas fails to identify any specific issues, and just makes general, *ipse dixit* contentions that fail to consider the ALJ's findings on OJC's data. HSDG intentionally and misleadingly ignores the fact that other financial reports would not be probative of house-brand product sales because other product lines would be included,[108] and that Mr. Berning testified: "So did we look at financial data, financial information? Of course we did. Looking at these tabs [of the spreadsheet], that's company financial data."[109] HSDG even ignores Mr. Berning's testimony that he reviewed the extensive financial data of OJC and determined that the average profit per container of $22,892.48 amount had proper foundation.[110] Simply put, there is no basis for HSDG's erroneous contentions that Mr. Berning should have audited OJC's records or that *some other* documents that don't exist should have been reviewed to "verify" OJC's damages.[111]

HSDG nonetheless tries to smear Mr. Bering by categorizing every single point in his report as "unreasonable" but has failed to point to a single error in Mr. Berning's report. The ALJ therefore rightly found that "OJC's average revenues per container and average profits per container, based on actual data over the time period June 2020 through July 2022, is therefore

[106] I.D. at 49-50; SCX 496; SCX 511, ¶ 7.
[107] I.D. at 48-49.
[108] I.D. at 49.
[109] RX 1062, 130:3-23.
[110] RX 1082, 212:4 – 214:8.
[111] Hamburg also throws in an entirely new argument that certain business valuation reports are inconsistent with Mr. Berning's calculations. But "[a]rguments not made below are deemed waived." *Marymount Hospital, Inc. v. Shalala*, 19 F.3d 658, 663 (D.C. Cir. 1994). Nonetheless, Hamburg provided no evidence that the figures identified in those documents related solely to house-brand products, as opposed to OJC's business as a whole that the ALJ found to be "not … probative." CX 316.

found to be well supported."[112]

D. The ALJ was correct in awarding reparations for 2021-22 but the amount should be modified

HSDG also argues that the ALJ erred by awarding reparations in 2021-2022,[113] because (i) OJC's ability and interest to move cargo with HSDG in 2021-22 is "pure speculation, unsupported by the record," (ii) "the record does not support the [ALJ's] assumption that HSDG would have agreed to a renewal Service Contract," (iii) "the parties never reached agreement of critical deal terms," and (iv) HSDG/Maersk continued to ship containers for OJC after May 31, 2021.

As to (i) and (ii) above, HSDG's contention is shown to be baseless in OJC's Exceptions at 11-14. There is ample evidence that Hamburg would have easily shipped 4,700 FFE for OJC in 2021-22, but for Hamburg's willful violations of the Shipping Act. Indeed, 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. That is 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 knew full well that it was able and ready to fulfill all OJC's shipping needs**. Additionally:

- 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."[114]

- "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."[115]

- The ALJ's finding that: "OJC believed, based on communications with Hamburg,

[112] I.D. at 50.
[113] HSDG's Exception, pp. 34-37.
[114] I.D. at 14, ¶57 (quoting CX 215 (emphasis added)).
[115] I.D. at 10.

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."[116]

- 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."[117]

- 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."[118]

- 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 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."[119] Indeed, in 2020 alone, OJC shipped 542 FFE through Hamburg and its competing carriers.[120]

Therefore, the record supports the fact that OJC had the ability and interest to move up to 4,700 FFE with HSDG in 2021-22 and HSDG desired such a contract.[121]

As to (iii) above, OJC rebutted Hamburg's attempted use of the alleged uncertainty it created by its willful violations of the Shipping Act in OJC's Exceptions at 14-22. "[W]here a

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[116] I.D. at 60 (emphasis added) (citing CX 467; RX 1024).
[117] CX 468 ¶11; SCX 481 (emphasis added).
[118] I.D. at 56 (emphasis added).
[119] 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.
[120] *See, e.g.,* Hamburg Final Brief, p. 34 ("542 FFEs that OJC shipped in 2020-21" and "OJC's 542 FFE volume in 2020-21").
[121] *See, e.g.,* OJC's Exceptions.

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."[122] 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."[123] Although a new contract for 2021-22 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.'"[124] 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."[125] Under such circumstances, the law prohibits "enabl[ing] the wrongdoer to profit by his wrongdoing at the expense of his victim,"[126] the exact outcome that HSDG desires here.

Finally, as to (iv) above, HSDG's argument is a non-sequitur. Because Hamburg forced OJC to mitigate its damages in the spot market and some of OJC's containers were carried by HSDG/Maersk as a result, that proves "HSDG and OJC would [not] have entered a renewal Service Contract for 200 FFEs"?? That baffling argument is beyond the pale and only further pounds Hamburg's credibility into dust. Hamburg nonetheless continues to misuse OJC's legally-obligated mitigation efforts against it in an attempt to avoid the consequences of its willful Shipping Act violations. Not only do Hamburg's arguments fail to show that awarding reparations

[122] *California Shipping*, 1990 WL 427466, at *23 (citing *Bigelow*, 327 U.S. at 264-65).
[123] *Adair v. Penn- Nordic Lines, Inc.*, Dkt. No. 1695(F), 26 S.R.R. 11, 1991 WL 383091, at *23 (ALJ Sept. 24, 1991), admin. final Oct. 24, 1991
[124] I.D. at 31 (emphasis added).
[125] I.D. at 31.
[126] *Bigelow*, 327 U.S. at 264.

was an error, but they also actually support OJC's Exceptions that the reparations awarded should be significantly increased.[127]

E. The ALJ correctly found that OJC mitigated its damages

In its last argument against reparations, HSDG makes the throw-away argument that OJC failed to mitigate its damages.[128] After a detailed analysis of the evidence and relevant case law, the ALJ correctly found to the contrary:

> Hamburg's points are not tenable. **There was nothing further that OJC could reasonably have done, as of April 29, 2021, beyond what OJC actually did.** OJC exerted efforts both to obtain an alternate 2021-22 contract, and to continue to ship on the spot market as many containers as it could manage to ship profitably in the absence of a service contract. OJC thus was reasonable in mitigating its losses, and there were no losses that OJC reasonably could have avoided without an undue risk or burden.[129]

Instead of addressing the ALJ's conclusion, HSDG makes the preposterous argument that "[i]f—as the [ALJ] determined—OJC was capable of transporting an additional 200 FFEs with HSDG on top of the 143 FFEs it actually transported in 2021-22, then OJC voluntarily elected to forgo more than $1.4 million of profits."[130] Of course, HSDG's assertion conflates a service contract's consistent availability, volume, and rates with the complete unpredictability of the volatile spot market. HSDG also ignores the business reality that it forced OJC into a position where it simply couldn't predictably operate its business.[131]

Indeed, OJC did not just produce an unlimited number of products and put them into containers blindly. Instead, OJC had to plan to import them to the United States before it would even have them manufactured. Without pricing and space predictability which comes from a

[127] *See, e.g.,* OJC's Exceptions.
[128] HSDG's Exception, pp. 37-38.
[129] I.D. at 61 (emphasis added).
[130] HSDG's Exception, p. 37.
[131] SCX 510-512, ¶¶ 6, 8, 9.

service contract, OJC was left guessing as to how high the then-volatile spot market rates would go and if any space would be available at all. Therefore, once OJC was cut off from its then-existing and renewal service contracts by Hamburg, OJC's import business came to a virtual stand-still.[132] The ALJ's finding on OJC's reasonable mitigation measures must be affirmed.[133]

IV. THE ALJ WAS RIGHT TO DOUBLE THE REPARATIONS AWARD

In an exception full of insulting assertions, one of the top contenders for HSDG's most baseless argument is that the ALJ's doubling of the reparations award was "erroneous for several reasons."[134] To the contrary, it is impossible to imagine a case where there would be more evidence than here that justifies doubling.

A. There is overwhelming evidence that Hamburg willfully retaliated.

Here, as the ALJ found:

> The evidence establishes that Hamburg's executive, Mr. Pump, knew that his executive decision violated the Shipping Act. In his deposition, Mr. Pump was asked: "Would a customer who had threatened to file a lawsuit or FMC complaint, or actually filed a lawsuit or FMC complaint, would that also be off limits with respect to discriminating against that client?" He responded "Yeah." When asked whether "during this compliance training was there any discussion about if a customer threatened to or actually filed a lawsuit as opposed to a FMC complaint, whether or not that would be allowed in that situation to retaliate or refuse to deal with that customer?" Mr. Pump responded in relevant part that "it is clearly understood in the organization that this is not a factor in the decision whether or not to negotiate a service contract." CX 95-96. Therefore, the decision was knowing and willful.[135]

These facts alone support the ALJ's finding that the violation was knowing and willful. Critically, ***HSDG makes no argument against – in fact it entirely ignores – this damning evidence right from their executive's mouth***, showing that even HSDG knew that this evidence is fatal to its

[132] SCX 510-512, ¶¶ 6, 8, 9.
[133] Notably, HSDG did not file an exception to the ALJ's finding that HSDG's violations of the Shipping Act caused OJC's reparations. I.D. at 58-59.
[134] HSDG's Exception, p. 38.
[135] I.D. at 63; *see also* I.D. at 22, FOF 97-99.

exception.

Furthermore, as the timeline of internal emails shows *supra* at 17-18, Hamburg not only retaliated against OJC, but it lied to OJC about "the real reasons" the 2021-22 contract negotiations were terminated.[136] Or as the ALJ politely puts it "[t]he reasons provided by Hamburg to OJC did not match the reasons Hamburg discussed internally," "[those communications] do[] not constitute the good faith communication required by the Shipping Act."[137] Hamburg's deception and cover up of its "real reasons" for cutting off OJC reflects its bad faith intentions, and fully justified the doubling of reparations.

B. The Gast admission email was not "work product" and further justifies the award of additional damages

HSDG argues disingenuously that the ALJ's finding of willfulness is "largely based on an internal October 21, 2020 from Michael Gast of HSDG's risk management department suggesting that HSDG's actions were willful" and that the email is protected work product, an argument not made in Hamburg's final briefing.[138] Nothing could be further from the truth.

First, the ALJ's willfulness finding was not "largely based" on this one email written by Mr. Gast, as shown by the smoking-gun evidence identified above and the fact that his email was only one of many internal Hamburg emails the ALJ cited in her conclusion.[139] Indeed, the three findings of fact the ALJ made on "Knowledge" were all related to Mr. Pump's testimony.[140]

Second, contrary to what HSDG argues, the 10/21/20 Gast email does not contain work product. Indeed, the ALJ correctly held:

Respondents have not established that the emails at issue involve attorney work

[136] I.D. at 40.
[137] I.D. at 30.
[138] HSDG's Exception, p. 39; *Shalala*, 19 F.3d at 663 ("Arguments not made below are deemed waived.").
[139] ID. at 62-63.
[140] I.D. at 22, FOF 97-99.

> product. Respondents state that the emails involved "Respondent's representative" but does not contend these representatives were attorneys or legal representatives. Rather, the emails appear to demonstrate contemporaneous employee statements. There is no indication that the emails include attorney's mental impressions, conclusions, opinions, or legal theories. Therefore, the emails are not entitled to the attorney work product protections.[141]

The ALJ's finding is consistent with the law. Tellingly, Hamburg never identified an attorney who authored the emails, nor do the emails contain any references to any "confidential communications with counsel" or attorney opinion. Hamburg's employees' opinions – which make no reference to "confidential communications with counsel" – are not work product,[142] and its assertions otherwise is yet another attempt to conceal its knowing misconduct.

Third, Hamburg also waived any potential work product protection, because it denied retaliating against and unreasonably refusing to deal or negotiate with OJC and have specifically claimed that their basis for refusing to deal with OJC was not "unreasonable."[143] Hamburg thus put the alleged "reasonableness" of their actions at issue in this dispute. Hamburg is not allowed "to wield the work-product protection as a sword to cut out the heart of an opposing party's case while simultaneously brandishing it as a shield from disclosure of any Achilles heels."[144]

And *finally,* even if work product protection applied (it didn't), OJC had substantial need for the materials to prepare its case and it cannot, without undue hardship, obtain their substantial equivalent by other means because, as shown above, the withheld as "work product"

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[141] CX 310.

[142] *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 75-76 (S.D.N.Y. 2010) (communications between non-attorneys are nonprivileged "unless they make reference to confidential communications with counsel"); *Barnext Offshore, Ltd. v. Ferretti Group USA, Inc.*, No. 10-23869, 2011 WL 13223710, at *2 (S.D. Fla. July 22, 2011) (rejecting work product claim because "there is no evidentiary basis to conclude that [who did] the testing procedure … act[ed] as an agent for [defendant]'s attorneys").

[143] *See, e.g.,* CX 084, HSDG's Answer at 18, Affirmative Defense No. 5 ("HSDG's conduct was reasonable in light of the totality of the circumstances"); HSDG's Exception, pp. 13-15.

[144] *Stern v. O'Quinn*, 253 F.R.D. 663, 676-77 (S.D. Fla. 2008) (collecting cases).

communications go to the heart of OJC's claim and Hamburg's defenses.[145] Hamburg knew that it did not have a reasonable position against OJC's claim. Indeed, its own non-attorney employee communicated with other non-attorney employees that "[t]his is a very bad case for us which we will likely lose."[146] This is yet another example of "[t]he reasons provided by Hamburg to OJC [and the FMC] did not match the reasons Hamburg discussed internally," which "do[] not constitute the good faith communication required by the Shipping Act."[147]

C HSDG could not escape the consequences of its willful retaliation by forcing OJC into the expensive spot market

Yet again, HSDG baselessly attempts to use OJC's mitigation of its damages by shipping on the highly-expensive spot market as a get-out-of-jail-free card for its knowing and willful violations. As the ALJ rightly found:

> OJC's shipment of 143 containers on the spot market in 2021-22, even though spot market rates were generally higher than service contract rates, is ***strong evidence of OJC's attempts to mitigate damages*** through shipping as much as it could ship profitably in 2021-22.[148]

It is frivolous for Hamburg to contend that this "strong evidence" of OJC's mitigation efforts can or should be used by HSDG to escape the consequences of its knowing and willful retaliation.

D. Additional factors support the award of additional damages

In a final series of insulting arguments, HSDG contends that "additional factors" "weigh against assessing double damages."[149] As an initial matter, Hamburg admitted that "HSDG was merged into its former parent company, Maersk A/S, on November 1, 2021."[150] That did not stop HSDG from contending double damages should not be awarded that "[s]ince HSDG no longer

[145] Fed. R. Civ. P. 26(b)(3)(A)(ii); *Stern*, 253 F.R.D. at 676-77.
[146] I.D. at 62 (quoting CX 161).
[147] I.D. at 30.
[148] I.D. at 60 (emphasis added).
[149] HSDG's Exception, p. 41.
[150] I.D. at 5, FOF 4, citing HSDG Answer at 1 n.1.

exists, future compliance and deterring HSDG from committing future violations are not factors."[151] Incredibly, HSDG makes that baseless assertion ***on the same page as Maersk's Head of US Litigation signature*** on its exception brief.[152] HSDG's contention that "future compliance and deterr[ence]" are irrelevant here shows that HSDG/Maersk is already preparing an excuse for its next case, has no intention of learning from and correcting its knowing and willful retaliatory conduct, and will even go as far as arguing it "no longer exists" to ignore the FMC's mandates. Moreover, Hamburg's own top executive admittedly knew from compliance training that his retaliatory actions against OJC were prohibited by the Shipping Act yet did them anyway.[153] Clearly, Hamburg's compliance training and deterrence have not worked, and thus these factors weigh heavily in favor of double damages.

The nature, circumstance, extent, and gravity of the violation all weigh heavily in favor of doubling the reparations award as well. Indeed, it is difficult to imagine a more willful violation of the prohibition against retaliation than Hamburg's egregious conduct in this case, given Hamburg's illegal conduct was (i) literally a textbook example of retaliation,[154] and (ii) ordered against OJC at the worst possible time. While Hamburg raked in its largest profits ***ever***, OJC was cut off from what should have been OJC's most profitable period in its company's history as well, just for having the courage to complain to the Commission. This is the exact situation for which the FMC was created to remedy.

Finally, Hamburg shamelessly attempts to cast itself as a victim of "supply chain disruption and operational difficulties."[155] This absurd and baseless contention is laughable at best and

[151] HSDG's Exception, p. 42.
[152] HSDG's Exception, p. 42.
[153] I.D. at 63; I.D. at 22, FOF 97-99; CX 220; CX 96, 208:4-18; CX 95-96, 204:24 – 206:19.
[154] Statement, Dkt. 21-15 at 8.
[155] HSDG's Exception, p. 42.

simply disingenuous, given that Hamburg/Maersk raked in unprecedented revenue – the highest in its history ***by far*** – of $61.8 billion in 2021 and $81.5 billion in 2022 (or **$29.71 million and $39.18 million per hour**, respectively)[156] by manipulating the captive shipping market with its space availability and pricing. As it stands, the ordered reparations with doubling amount to ***about 15 minutes of Maersk's revenue*** during 2021-22.[157] To describe the reparations awarded in the Initial Decision as a minor slap on the wrist would be a gross understatement. In light of the overwhelming evidence of Hamburg's deliberate and willful retaliation, the ALJ was more than justified in doubling OJC's reparations.

CONCLUSION

If anything has been apparent throughout this proceeding, it is that HSDG/Maersk has learned nothing from being caught red-handed knowingly and willfully violating the Shipping Act. And HSDG has no intention of changing its behavior. If any shipper is ever to be comfortable heeding the Commission's call to blow the whistle on carrier abuses within the industry without fear of retaliation, then there must be real consequences for a carrier that makes an "executive decision" to unlawfully retaliate against and refuse to deal with a shipper who dares to air its grievances with the Commission. Awarding OJC its full damages – doubled due to HSDG/Maersk's willful violations – is the only way to do justice to OJC. And that is the only way to deter Maersk and other carriers from continuing to flout the Shipping Act and abuse the

[156] 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 July 21, 2023).

[157] OJC filed exceptions on the awarded reparations. But even if the maximum reparations OJC is seeking are awarded with doubling, they will still amount to ***less than six hours*** of Maersk's revenue during 2021-22.

shipping industry.

WHEREFORE, for all the foregoing reasons and those in OJC's Exceptions, OJC respectfully requests that the Commission:

(i) affirm the ALJ's conclusions that HSDG "knowingly and willfully" retaliated against and unreasonably 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;

(iv) double OJC's reparations for 2020-21 and 2021-22 due to HSDG'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: July 21, 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 Reply to HSDG's Exceptions to the Initial Decision upon all of Respondents' counsel of record by emailing a copy to each such person.

Dated: July 21, 2023

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