FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

OJ COMMERCE, LLC, *Complainant* v. HAMBURG SÜDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO. KG AND HAMBURG SUD NORTH AMERICA, INC., *Respondents*.	**DOCKET NO. 21-11**

Served: June 7, 2023

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION[1]

I. INTRODUCTION

A. Overview

This proceeding began on December 13, 2021, when the Federal Maritime Commission ("Commission" or "FMC") issued a notice of filing of complaint and assignment, indicating that Complainant OJ Commerce, LLC ("OJC") had filed a complaint against Respondents Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft A/S & CO. KG ("HSDG") and Hamburg Sud North America, Inc. ("HSNA"). As the decision shows, much of the conduct at issue was performed by HSNA employees acting as agents for HSDG, therefore, this decision will refer to "Hamburg," in the singular, to include both entities.

An amended complaint, entered on February 18, 2022, alleges that Hamburg violated the Shipping Act of 1984 ("Shipping Act") at 46 U.S.C. §§ 41102(b)(2), 41102(c), 41104(a)(3), 41104(a)(5), 41104(a)(9), and 41104(a)(10). On August 31, 2022, OJC's claims under sections 41102(b)(2), 41104(a)(5), and 41104(a)(9) were dismissed. In addition, OJC's claim of unreasonable practices under section 41102(c) is resolved, as Hamburg refunded the full amount of the demurrage charges at issue. Brief at 9 n.15.[2] Therefore, the remaining claims are sections 41104(a)(3) (retaliation), and 41104(a)(10) (refusal to deal).

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

[2] The parties' filings are abbreviated as follows: Complainant's brief ("Brief"), Complainant's proposed findings of fact ("CPFF"), Respondents' reply brief ("Opposition"), Respondents' proposed findings of fact ("RPFF"), Respondents' response to Complainant's proposed findings

This case raises novel legal issues about refusal to deal claims, retaliation claims, and calculation of reparations. In addition, the parties disagree about many of the factual allegations. The parties heavily litigated this proceeding, with multiple motions to compel evidence filed. Indeed, both parties allege that the other party violated discovery requirements.

OJC asserts that after receiving a demand letter on April 28, 2021, from OJC's attorneys threatening to file an FMC complaint, Hamburg refused to deal and retaliated both by refusing to fulfill existing contractual obligations under the 2020-21 service contract and by refusing to renew or negotiate a 2021-22 service contract. Hamburg contends that it did not retaliate or refuse to deal or negotiate, that OJC fails to prove damages with reasonable certainty, and that an adverse decision would require it to consent to any terms demanded by a shipper.

Commission case law is clear that an ocean common carrier does not have a duty to grant a contract to every potential party. However, long-standing Commission precedent prohibits common carriers from shutting out any person for reasons having no relation to legitimate transportation-related factors and from retaliating against shippers. As outlined in detail below, the evidence shows that here, Hamburg's decision on April 29, 2021, to "disengage" from fulfilling the 2020-21 service contract and negotiating a 2021-22 service contract was made due to the "litigation risk" posed by OJC, which under these facts is not a legitimate transportation-related factor. The specific conduct in the record here establishes both the refusal to deal and retaliation claims.

The parties also contest how damages should be determined. OJC seeks lost profit damages for failure to meet the service contract's minimum quantity commitment ("MQC"), also referred to as minimum volume commitment ("MVC"), by 15 containers[3] in 2020-21; failure to meet weekly allocation by 105 containers in 2020-21; extra shipping charges for 143 containers shipped on the spot market in 2021-22; and loss from refusal to renew the contract in 2021-22 for up to 4,700 containers, equaling a total damages claim of over 100 million dollars. Hamburg asserts that OJC is not entitled to any damages because of contractual limitations, damages being speculative and based on insufficient data, and OJC failing to prove damages with reasonable certainty, for example, the projected 4,700 containers including trade routes and volumes beyond what is included in the 2020-21 service contract.

As explained below, OJC has established that HSDG violated the Shipping Act by refusing to deal and by retaliating against OJC. However, OJC does not establish that it is entitled to the over $100 million in damages that it seeks. OJC establishes that 15 of the contracted 200 containers were not shipped in 2020-21 and taking this shortfall of 15 times the average profit per container of $22,892.48 measures its 2020-21 actual injury as $343,387.20. OJC does not establish that Hamburg failed to meet the 2020-21 weekly allocation, nor that 2021-22 damages should be calculated based on up to 4,700 containers. Rather, the damages for 2021-22 are calculated based on the trade routes and volume in the 2020-21 contract, resulting in actual injury of $4,578,496.

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of fact ("RRPFF"), Complainant's reply brief ("Reply"), and Complainant's response to Respondents' proposed findings of fact ("CRPFF").

[3] This decision will use "container" to refer to forty-foot equivalent units ("FFEs"), as OJC's expert did. RX 1032-1033. One FFE equals 2 twenty-foot equivalent units ("TEUs").

Therefore, OJC establishes that it sustained a total actual injury in the amount of $4,921,883.20. Moreover, because OJC establishes a violation of the anti-retaliation provision, additional damages may be awarded. Given that the violation was knowing and willful, double damages are found to be appropriate. Accordingly, OJC is awarded reparations of $9,843,766.40 from HSDG.

B. Procedural History

On December 13, 2021, the Commission issued a notice of filing of complaint and assignment, initiating this proceeding. On January 18, 2022, Hamburg filed a partial answer and a motion to dismiss and/or for summary judgment. On February 2, 2022, OJC filed a motion for leave to file an amended complaint ("Amended Complaint"). On February 18, 2022, an order was issued allowing the entry of the amended complaint and dismissing as moot Hamburg's motion to dismiss and/or for summary judgment. On March 1, 2022, HSDG and HSNA filed answers to the amended complaint.

On March 10, 2022, a scheduling order was issued. On April 26, 2022, and June 22, 2022, confidentiality stipulations and protective orders were issued. On June 29, 2022, OJC's motion to compel and the joint motion to modify the scheduling order were granted in part and denied in part.

On July 26, 2022, Hamburg filed a partial motion to dismiss and/or for summary judgment. On August 31, 2022, Hamburg's partial motion to dismiss and/or for summary judgment was granted in part and denied in part, dismissing OJC's claims under sections 41102(b)(2), 41104(a)(5), and 41104(a)(9); OJC's motion for expedited relief was granted in part; and Hamburg's motion for a protective order was denied.

On September 30, 2022, an order was issued denying Hamburg's motion to compel, denying OJC's motion for clarification, and granting in part and denying in part OJC's motion for an extension of time for limited discovery.

On November 9, 2022, OJC filed its brief, proposed findings of fact, and appendix (exhibits labeled as CX). On December 8, 2022, Hamburg filed its reply brief, proposed findings of fact, appendix (exhibits labeled as RX), response to OJC's proposed findings of fact, and request for confidential treatment. On December 23, 2022, OJC filed its reply brief, response to Hamburg's proposed findings of fact, and supplemental appendix (exhibits labeled as SCX).

On January 31, 2023, the parties were ordered to resubmit confidential versions of filings in order to properly indicate confidential material and to submit clarifying information concerning requests for confidential treatment of appendix material. On February 6, 2023, OJC submitted the requested information and corrected filings, along with a motion justifying confidential treatment. On February 8, 2023, Hamburg submitted the requested information and corrected filings.

On February 24, 2023, the parties were ordered to review confidentiality requests for deposition testimony in the appendices. On March 10, 2023, OJC responded with a list of de-designations and provided updated materials. On March 14, 2023, OJC filed a supplement to its motion for confidential treatment incorporating Hamburg's updates. On March 14, 2023,

Hamburg provided its updated materials, including a revised motion for confidential treatment of certain materials.

C. Arguments of the Parties

OJC argues that Hamburg retaliated against OJC by unreasonably refusing to renew or even negotiate a service contract with OJC, and by refusing to fulfill Hamburg's existing contractual obligations; Hamburg should be sanctioned and precluded from challenging OJC's damages based on Hamburg's repeated violations of court orders and FMC Rules; and OJC is entitled to reparations for the actual injury it sustained as a result of Hamburg's violations of the Shipping Act with damages doubled due to Hamburg's willful violation of section 41104(a)(3). Brief at 16-49; Reply at 8-52.

Hamburg asserts that OJC has the burden of proof; Hamburg did not refuse to deal or negotiate with OJC; Hamburg did not retaliate against OJC; OJC fails to prove damages with reasonable certainty; and Hamburg complied with its discovery obligations. Opposition at 7-49.

D. Motions for Confidential Treatment

On April 26, 2022, an order entering confidentiality stipulation and protective order was issued as requested by the parties. On June 22, 2022, in response to a joint request by the parties, an amended confidentiality stipulation and protective order was entered.

On December 8, 2022, Hamburg filed a motion for confidential treatment of certain materials included or referred to in Respondents' filings. On January 31, 2023, the parties were ordered to resubmit confidential versions of filings in order to properly indicate confidential material and to submit clarifying information concerning requests for confidential treatment of appendix material. On February 6, 2023, OJC filed a motion justifying confidential treatment of certain material and corrected filings. On February 8, 2023, Hamburg submitted the requested information and corrected filings.

On February 24, 2023, the parties were ordered to review their confidentiality requests for deposition testimony included in their appendices. On March 10, 2023, OJC filed a supplement to its motion for confidential treatment, stating that it "removed 95% of its deposition designations and the vast majority of its designations on its damages reports," and requested confidentiality for OJC annual sales revenues and OJC company valuations. On March 14, 2023, Hamburg filed a revised motion for confidential treatment of certain materials which limited the confidentiality requests, updated deposition transcripts in the appendix to reflect line-by-line redactions as ordered, and noted no objection to OJC's requests. Also on March 14, 2023, OJC filed a notice of its compliance with order on motions for confidential treatment which included objections to Hamburg's confidentiality designations.

Commission Rule 5 authorizes confidential treatment for confidential commercial information. The revised requests for confidential treatment significantly limit the amount of information for which confidential treatment is sought. Confidential treatment is sought for annual sales revenues; company valuations; non-public financial, marketing, and business activities; and non-public, commercially sensitive information about prices, pricing policies and strategies, marketing strategy, and customer relations. As narrowed, the requests are reasonable.

Further, this decision is readable without the need for quotations from material designated as confidential. In the future, the parties must review all exhibits and only mark sections or pages that contain confidential material and depositions should be conducted with confidential material covered separately from non-confidential material. Accordingly, it is hereby ordered that as revised and supplemented, the motions requesting confidentiality be **GRANTED**.

E. Evidence

Under the Administrative Procedure Act, an administrative law judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 98-102 (1981). This initial decision is based on the pleadings, exhibits, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations in the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

Specific findings of fact are in part two, prior to the analysis and conclusions of law in part three, and the order in part four.

II. FINDINGS OF FACT

A. Relevant Entities

1. Complainant OJC is a limited liability company organized and existing under the law of the State of Delaware, with a principal place of business in Miramar, Florida. Amended Complaint at ¶ 1; Brief at 10.

2. OJC is an e-commerce retailer that sells "dropship products" from domestic inventory of hundreds of brands. OJC also has a direct import program where OJC buys household goods, including a wide variety of furniture and office products globally for sale in the United States. OJC's imports come from Asia and Brazil and are delivered to California or Kentucky. CX 467.

3. Respondent HSDG was previously a corporation organized and existing under the laws of Germany, with a principal place of business in Hamburg, Germany. Amended Complaint at ¶ 2.

4. HSDG was merged into its former parent company, Maersk A/S, on November 1, 2021. HSDG Answer at 1 n.1.

5. HSDG was a common carrier as defined by the Shipping Act, 46 U.S.C. §40102(7), through October 31, 2021. Amended Complaint at ¶ 2; HSDG Answer at ¶ 2.

6. Respondent HSNA is a corporation organized and existing under the laws of the State of Delaware, with a principal place of business in Morristown, New Jersey. HSNA Answer at ¶ 3; Amended Complaint at ¶ 3.

7. HSNA was a wholly-owned subsidiary of HSDG that acted as the United States general agent of HSDG until November 1, 2021, when it became a wholly-owned, indirect subsidiary of Maersk A/S. CX 101.

8. On January 1, 2022, HSNA was merged into Maersk Agencies USA, Inc., the United States subsidiary and general agent of Maersk A/S. CX 101; HSNA Answer at 1 n.1; Brief at 10 n.18.

9. HSDG became a wholly owned subsidiary of Maersk A/S, although HSDG did not cease to exist as a separate legal entity until late 2021. RX 1120 at ¶ 4.

10. Maersk continues to operate the "Hamburg Sud" brand, which offers different services than Maersk A/S. Opposition at 1 n.1; RX 1120 at ¶ 4.

B. Relevant Contracts and Communications

11. Fiscal year 2020 is defined as June 1, 2020, through May 31, 2021, and fiscal year 2021 is defined as June 1, 2021, through May 31, 2022. CX 423.

12. In June 2020, OJC and HSDG "c/o" HSNA entered a service contract numbered AECC0000291 ("2020-21 service contract"), effective June 23, 2020, to May 31, 2021. CX 119; CX 467 at ¶ 5.

13. The 2020-21 service contract had signature lines for OJC President Jacob Weiss as well as Pestana Rodrigo and Serena Cheung, both listed as signing for HSNA. CX 120.

14. The copy of the service contract in the record is not signed, however, according to internal Hamburg emails, there may not be "a version of this contract which has been formally executed by both parties" as the record contains "the page of the contract signed by the customer. Carrier signed page was not provided to the customer." CX 155.

15. The 2020-21 service contract was for the shipment of goods by sea from foreign countries to the United States and for the delivery to warehouse facilities within the United States via truck. CX 467 at ¶ 5.

16. In the 2020-21 service contract, OJC agreed to tender, and Hamburg agreed to transport, a minimum volume/quantity commitment of 400 TEUs (equal to 200 FFEs) from Asia to California at specified rates. CX 125-126 (noting as trade/shipping lane: East Asia – North America West Coast); CX 467 at ¶ 5.

17. Among other provisions, the 2020-21 service contract indicated that "Shipper agrees . . . that the tender of cargo under this Contract shall be reasonably spaced throughout the term hereof." CX 125.

18. The service contract includes a liquidated damages provision stating in relevant part:

> In the event that the Minimum Volume Commitment of this Contract is reduced by 10% or more as a result of Carrier's failure to provide space, Carrier agrees to pay, and Shipper agrees to accept, in lieu of other damages from Carrier, liquidated damages calculated by subtracting the number of TEUs actually shipped under the Contract from 90% of the MVC and multiplying the TEU deficit, if any, by USD250 per TEU.

CX 125.

19. Hamburg initially referenced OJC as being allocated 8 TEU/week under the 2020-21 service contract. *See, e.g.,* CX 147 (July 13, 2020, internal Hamburg email stating, "Based on signed MQC (400 TEU) they would have 8 TEU/wk to USWC. Anything above this number we can only accept if customers pays [sic] a premium . . . ."); *see also* RX 794 (July 13, 2020, email from Ms. Casanova to Mr. Weiss, stating "Based on signed MQC (400 TEU) OJ Commerce would have 8 TEU/wk to USWC, The only way we can provide space to USWC is if customer accepts an extra fee of $800/40'hc (this amount we have agreed with other BCOs).").

20. On August 3, 2020, OJC was informed by email that space protection ("SP") was increased to 10 TEU per week. CX 156. Internal Hamburg emails afterwards referred to OJC as being allocated 10 TEUs per week. *See, e.g.*, CX 153 (September 22, 2020, internal Hamburg email stating "Customer OJ Commerce reported we are not confirming bookings to their agent Syntrans. Please note that there is a MQC of 10 TEUS per week under agreement # AECC0000291. I appreciate you confirm them at least to meet the MQC . . . ."); *see also* CX 206.

21. On October 16, 2020, OJC sent a demand letter to HSNA and HSDG, which stated in part:

> Pursuant to the "Minimum Volume Commitment" clause of the agreement, [Page 7], HAMBURG SÜD committed to a minimum of 400 TEU between June 23, 2020 and May 31, 2021. Since June 23, 2020, HAMBURG SÜD refused to accept the agreed upon 10 TEUs per week.
>
> **OJC hereby provides HAMBURG SÜD notice of breach of the Service Agreement, which has caused significant economic harm to OJC. I hereby demand that HAMBURG SÜD immediately honor the Service Agreement rates and minimum TEU quantities. Failure to cure the breach by October 22, 2020, may result in legal action against you and your affiliates.**

CX 159 (bold in original) ("OJC first demand letter").

22. HSNA Risk Management Michael Gast sent an email on October 19, 2020, discussing OJC's first demand letter and asking whether there was "any formal documentation confirming our obligation to carry the additional 2 TEUs a week or does this fall under the terms of the contract which stipulate we can accept more cargo at our discretion" and Ms. Casanova responded that there "was not a formal documentation" but that "Customer was informed by email that SP was increased to 10 TEU per week on 08/03/2020." CX 155-157; *see also* CX 208.

23. On October 21, 2020, Mr. Gast emailed HSNA Product Management Rodrigo Pestana, cc'ing other Hamburg employees and RNA-claims, writing:

> I just spoke with Andrea about this situation. What can we do to provide at least space for 8-10TEU per week for this account? I understand space is limited and other customers are paying a premium for space presently but any additional profit gained from those premiums is going to quickly go out the window if this matter goes to trial. I can tell you that based on the tone of the lawyer's initial email and their response they are quite confident in their ability to recover significant damages from us and that they are more than ready to pursue this course of action on an immediate basis if we do not fix the space issue.
>
> Per the response I received they are confident that [their] liquidated damages of $250/TEU will not apply and be considered invalid based on a case precedent set by the US Supreme Court. They indicate that such a limitation is only admissible in the case that actual losses cannot be reasonably substantiated however, they have indicated they are able to easily and clearly [substantiate] losses in the thousands of dollars for each TEU we have failed to carry. While our contract states we are only liable for any short shipments in excess of 40TEU I would not be surprised if they attempt to recover their losses for 56TEUs. With a weekly average of 8 calculated by the MVC and number of weeks in the contract term we are indeed behind by 56.
>
> This is a very bad case for us which we will likely lose so I must ask that special dispensation be granted for this customer and they be treated with hyper care for the immediate future until such time that things have stabilized and they have backed off their threats of formal lawsuit. If we can at least establish we are working to uphold our contractual obligations I would feel much more comfortable about this case. At present based on the emails I have seen I do not have confidence in our ability to establish that we are doing our part under these terms. It also sounds like they have a lot of emails showing we have canceled their bookings [which] will only serve to make us look bad in front of a judge and jury.
>
> Should there be any questions please do let me know but again we must please take into account that our losses could easily exceed US$100,000 between our lawyer fees and any final judgment which may be awarded to them by a court. If

> the customer does not know the services or vessels on which they are entitled to have space it would be Risk Management's recommendation that we provide a clear overview of the services they are entitled to book against and the vessels which operate under those services. Also, if the customer makes a booking against the wrong service we should assist them to correct the issue.
>
> We hope it is understood that even if it is outside the standard procedures we need to make every reasonable effort to pacify this customer and their lawyer in the short term so that we can correct this shortfall over the course of the contract term and avoid an unnecessary lawsuit.

CX 161.

24. The 2020-21 service contract was set to expire May 31, 2021. CX 120.

25. Throughout the 2020-21 service contract, OJC repeatedly asked for more space per week. *See, e.g.*, CX 206-208 ("Q: Did Jacob Weiss 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."); RX 622 (July 15, 2020, email from Ms. Casanova to Mr. Pestana and Mr. Maldonado, writing "The customer requests any additional space that we can accommodate beyond the MQC and assures that its volume is constantly peaking and that anything we can offer today they can compromise to us for the months when we would need cargo, their projection is growing."); RX 638 (May 26, 2020, email from Ms. Casanova to Mr. Li, Mr. Gonzalo, and Mr. Pestana stating "According 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. Due to the above, they trust that they have and will have volume to meet the amount committed to each carrier. Price is very important for this product as it is a low value product.").

26. OJC also expressed frustration on multiple occasions regarding space cancellations by Hamburg and falling behind on bookings for the 2020-21 service contract. *See, e.g.*, RX 823 (OJC arguing that the parties agreed to 10 TEUs per week, but that Hamburg had not even honored 8); RX 647 (October 15, 2020, email from Ms. Casanova stating "It is worth mentioning, that the customer is no [sic] happy that we were unable to accommodate additional space to cover the rejected and canceled spaces from the previous weeks, resulting in not meeting with the SP per week provided to the customer."); RX 653 (October 13, 2020, email from Mr. Pestana stating "Dear allocation team, pls note customer complaint about SPL not being honored. any particular issue resulting on bookings being cancelled/rejected? We must honor the SPL."); RX 685; RX 688; RX 687; RX 787; RX 695; RX 693; RX 817.

27. OJC began negotiations for a 2021-22 service contract with Hamburg in early 2021, with OJC President Weiss as lead negotiator for OJC and HSNA Account Executive Andrea Casanova as lead negotiator for Hamburg. CX 466-467; CX 203; RX 799 (showing Jan. 2021 discussions regarding a renewal with increased allocation).

28. HSNA Cargo Flow Specialist Kevin Li testified that the majority of contracts will be negotiated and entered in the first quarter of the year, through April, or possibly May. RX 977; *see also* RX 988A (generally contracts for Asia to North America run starting May 1 for 12 months).

29. 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. CX 467. OJC based this decision on interactions with Ms. Casanova, which OJC interpreted as a promise that in return for OJC consolidating all of its imports with Hamburg, Hamburg would make OJC a priority customer with benefits including supplying more containers, dedicated space protection, and committed personnel to ensure better service for OJC's shipments. CX 467; RX 1010-1011; RX 1017-1018; RX 1024.

30. On January 11, 2021, Ms. Casanova emailed Ivan Cheung of Maersk[4] and HSNA Manager East Coast Sales Gonzalo Maldonado writing:

> We are moving regularly shipments with furniture for [Trans-Pacific Eastbound ("TPEB")] through the account OJ COMMERCE - NAOMI HOME to PLD City of Industry CA and 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.
>
> In addition, 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 space to this destination point.

RX 799-800 (wording as in original); CX 410.

31. On February 9, 2021, Ms. Casanova declined Mr. Weiss's request to re-route OJC's cargo because OJC had run out of space in its City of Industry, California warehouse. RX 747-751. Ms. Casanova stated: "Due to the current situation in Asia with lack of equipment and space and the shortage of truck power and port Congestion in Los Angeles/Long Beach terminals, we are not negotiating new lanes in the trade since we cannot guarantee service due to the reasons mentioned above." RX 747.

32. Hamburg provided OJC a short-term spot rate quote valid from March 3, 2021, to April 30, 2021, for Brazil to the United States, Quotation No. NOAQ1006436, dated March 3, 2021. RX 768-774; CX 136-146. The record shows that OJC shipped at least 3

[4] Mr. Cheung's email address ends in @maersk.com, unlike the majority of Respondents' emails, which end in @hamburgsud.com. RX 799. Mr. Cheung works in Hong Kong. Opposition at 47. References to Mr. Cheung in this decision are to Mr. Ivan Cheung.

FFEs pursuant to this quotation. RX 16-17 (dated April 22, 2021); RX 18-19 (dated April 30, 2021); RX 6-7 (dated May 4, 2021); *see also* CX 467 at ¶ 5.

33. During March and April 2021, the parties engaged in discussions about renewing the service contract. Throughout those discussions, there were conversations about the minimum quantity commitment of the renewal, but never about there being no renewal at all. Amended Complaint 14 at ¶ 41; HSNA Answer at ¶ 41; HSDG Answer at ¶ 41.

34. On March 2, 2021, Mr. Weiss received an email from Hamburg Sud (China) key account manager stating "Checked with concern party, and learn that no SPL for this account on UPAS1 (Ningbo and Qingdao). Pls ask contract holder to further communicate with HSDG concern sales." RX 688. On March 4, 2021, Mr. Weiss forwarded this email to Ms. Casanova, writing "Andrea, any update? This is again cauing [sic] a major backlog as for many weeks we haven't been able to secure the contracted space." RX 688.

35. On March 4, 2021, Ms. Casanova responded to Mr. Weiss, writing "The Space Protection (SP) expired at the end of December. We are working with our Origin office to reinstate the SP who are reviewing the performance to make a decision." RX 687.

36. Later on March 4, 2021, Mr. Weiss emailed Ms. Casanova, writing "Our team in china keeps working locally and escalates only after they keep hitting a brick wall. Do u want me to tell them to email you every attempt for space?" RX 685. Ms. Casanova replied, also on March 4, "If your team in China were not getting space as per SP we should have been informed as they did now so we can address the situation with our Trade Manager otherwise we are not able to know and seems that we did not get the participation as agreed. I will inform the below to our Trade Manager and revert back to you." RX 684.

37. On April 12, 2021, Mr. Weiss sent an email to Ms. Casanova stating: "Please advise what time today we can get on a call to discuss the current situation with us not getting our contracted space for many weeks. I urgently need to get this resolved today." RX 787.

38. On April 13, 2021, Mr. Weiss sent an email to Ms. Casanova stating: "Please advise when u have a few minutes for a call. Urgently need your help resolving the space issue." RX 787.

39. On April 13, 2021, Ms. Cananova responded to Mr. Weiss, stating: "I was out office Friday and Monday and today I was catching up emails including your request. I will call you tomorrow at 10 am so it will give me time to collect information about your cases/requests." RX 786.

40. On April 15, 2021, Ms. Casanova emailed Mr. Cheung and Mr. Maldonado, writing "Customer OJ Commerce insists that we have declined space in the past weeks and months. I spoke with customer and advised that the first time we received this type of information was on March and it was immediately addressed with our team in origin. However, customer is asking for our support with space in next weeks to catch up all the backlog for the weeks of no space releases." RX 695 (spelling in original).

41. On April 19, 2021, Mr. Weiss emailed Ms. Casanova, stating: "Haven't heard back from you on a plan for our backed up containers? Also are we going to meet up this week in Miramar?" RX 786.

42. On April 20, 2021, Ms. Casanova emailed Mr. Weiss, stating: "I have not received response from our team in Asia. We have followed up with them. We will be back with response about the space and meeting as soon as possible." RX 785-786.

43. On April 24, 2021, Ms. Casanova emailed Mr. Cheung and Mr. Maldonado, writing that OJC "claims for the space that has been declined during these weeks, since March according to the customer. Could you please advise how we are going to fulfill the declined space plus current SP with this account? . . . Customer told us yesterday that we continue declining space." RX 693.

44. On April 27, 2021, Mr. Weiss emailed Ms. Casanova, stating: "At this point I have run out of options, Hamburg's ignoring this dire situation at the detriment of OJC. Unless I hear back from you by noon today I will turn it over to legal." RX 785.

45. On April 27, 2021, Ms. Casanova emailed Mr. Weiss, stating: "We received from our office in Asia that due to the existing situation of lack of capabilities/space in this market, we are not able to compensate space at this time, but we are trying to be flexible when the situation allows it. It was been [sic] approved to release 2x40' additional at POL Ningbo on top of ex PINE (area) regular SPL (2teu), on UPAS1-vessel GEMSK 113N." She provided a list with the confirmed bookings for the next weeks. RX 784-785.

46. In an internal Hamburg email on April 27, 2021, Ms. Casanova conveyed that OJC planned to move between 4,200 to 4,700 FFE in 2021:

> Customer OJ Commerce contract is expiring on May 31, 2021, and the customer wants to renew the contract and if possible to increase the MQC and add the route to Louisville KY.
>
> The current contract AECC0000291 has a validity of year and contains routes to City of Industry CA and MQC of 400 TEUs
>
> According to the customer, they moved 3500x40HC in 2020 and plans to move between 4200 to 4700 FFE in 2021. 70% of this volume is to Kentucky and the remaining is to California
>
> If we are interested in KY business, their warehouse if very close to the CSX Rail Yard for the drop and pull moves.
>
> Attached is the contract with lanes and current rates and below is the customer's performance from Tableau.
>
> Appreciate any advice and if there are any new guideline regarding TPEB contracts so we can start working on this contract renewal.

CX 203.

47. Later on April 27, 2021, HSNA Manager East Coast Sales Gonzalo Maldonado emailed Mr. Li, Mr. Cheung, and Ms. Casanova, writing: "Hi Kevin, This is the account that we spoke [about] during the TPEB account review that you need to add to our list." CX 218. Mr. Li replied on April 27, 2021, asking "What's the MQC for this account?" CX 218.

48. Ms. Casanova replied to the same group on April 28, 2021, at 1:14 PM, writing: "Hi Kevin, Thank you, the client did not mention a specific MQC target but he mentioned the projected volume and is open to our proposal. They are willing to give us also KY business if we can carry it. In the past, it was declined since were [sic] not pursuing business to this IPI." CX 217.

49. Mr. Li replied to the same group on April 28, 2021, at 4:32 PM, writing: "Hi Andrea, We will need a clear target in order to put it on target list. They signed 200 FFE last year for City of Industry, CA and almost fulfilled that this year. Based on that what would be the MQC target for next year with and without KY business? I do suggest to maintain focus on local destination only." CX 217.

50. Ms. Casanova emailed Mr. Weiss on April 28, 20921, at 4:25 PM: "I did not receive a response from our office in Asia regarding the additional space and contract renewal. Please allow us to follow up with them again today." RX 784.

51. Ms. Casanova reached out to OJC on April 28, 2021, at 6:04 PM, to confirm an exact MQC OJC was willing to sign to continue with process renewal, considering place of delivery as City of Industry CA only. RX 808-809 ("As we spoke yesterday, we are working on your contract renewal so we would like to know an exact minimum quantity commitment you are willing to sign to continue with process renewal.").

52. On April 28, 2021, at 10:27 AM, an attorney representing OJC emailed a demand letter to Respondents, copying Mr. Weiss, asserting that failure to cure the described breach of the service agreement may result in the "filing of a petition to the Federal Maritime Commission to seek relief." CX 209. This demand letter read in part:

> Please be advised that the undersigned represents OJ COMMERCE, LLC ("OJC") against [Hamburg] in connection with a breach of Service Contract that was executed between HAMBURG SÜD and OJC. A copy of the agreement is hereby attached.
>
> Pursuant to the "Minimum Volume Commitment" clause of the agreement, [Page 7], HAMBURG SÜD committed to a minimum of 400 TEU between June 23, 2020 and May 31, 2021. Over the last few months, HAMBURG SÜD refused to accept the agreed upon 10 TEUs per week, as a result OJC has accumulated over 40 containers waiting for shipment, causing significant economic harm and interruption of business.
>
> **OJC hereby provides HAMBURG SÜD notice of breach of the Service Agreement, which has caused significant economic harm to**

> **OJC. I hereby demand that HAMBURG SÜD immediately honor the Service Agreement rates and minimum TEU quantities. Failure to cure the breach by May 3, 2021, 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 209 (bold in original) ("OJC second demand letter").

53. April 28, 2021, is the first time in the record that a threat to complain to the FMC is explicitly conveyed from OJC to Respondents. CX 209.

54. Ms. Casanova continued to work on a contract renewal with OJC, creating a contract template in Hamburg's computer system with a 400 FFE MVC (double the MVC from 2020-21). She "picked this MVC as a way of potentially offsetting the anticipated deficit in 2020-21 and showing an interest in handling more of OJC's volume." RX 1139 at ¶ 44. This template existed only within HSDG's computer system, was not provided to OJC contemporaneously, and contained the same rates as 2020-21 because those were the rates in the system from the prior contract. RX 1139 at ¶ 45; RX 963.

55. Ms. Casanova sent an internal Hamburg email on April 29, 2021, at 10:16 AM, stating: "I created the new SVC NOAC1000728 Effective June 1, 2021, until May 31, 2022. The new contract contains the same lanes, rates, and conditions of the current contract AECC0000291 and an increased MQC 400 FFE." CX 214.

56. There are no contemporaneous emails from Hamburg suggesting they are willing to ship 4,200 to 4,700 containers in a 2021-22 service contract with OJC; rather Ms. Casanova's 400 FFE MQC was the largest volume incorporated into a draft 2021-22 service contract with OJC. CX 214.

57. On April 29, 2021, at 10:38 AM, Ms. Casanova emailed Mr. Li, Mr. Cheung, Mr. Gast, and Mr. Maldonado, presumably attaching OJC's attorney's letters, stating:

> Regarding the current contract that will expire on May 31, 2021, as of today, we are short to satisfy the MQC of 200 FFE by 18 FFE since space has been declined since last month, according to the customer. This situation has been addressed with our team at origin but at this time we are not able to commit with additional space on top of the current SP 4 TEU a week until the end of the contract. The customer is claiming for this space and we received a letter from his lawyer about this. Attached are the emails (1st and 2nd attachments), you were not in copy.
>
> I have spoken with the customer and he has stated that he does not want to end the relationship with us and just look for the fair that we promised. He is open to any solution that can offset this deficit.
>
> Therefore, based on the above and since we are working to renew the contract, I want to ask if it is possible to Increase MQC by 200 FFE giving a total of $400 [sic] FFE, that will not only cover the deficit by also show

> our interest to participate more of their volume, of course, if we truly can satisfy this volume.
>
> This is not a short term account and the customer has been constant in his volumes and is willing to commit to much more of the current MQC.

CX 215 (wording as in original).

58. On April 29, 2021, at 2:04 PM, Mr. Li emailed HSNA Senior Vice President Juergen Pump:

> Sorry to trouble you but I need your executive decision on this account, it was the one being mentioned in our call with AEC this Tuesday. I was completing unaware of the legal action they put against us during the time I left the TPEB team, and I don't believe it was shared in our call as well.
>
> Long story short, they are threatening us on liquidated damage against the space that we couldn't provide under committed 200 FFE MQC, which so far we already fulfilled 182 FFE and their contract will only expire by end of May. Meanwhile, they are proposing a renewal contract with 400 FFE MQC but all rates remain the same from last year contract.
>
> In my opinion this is pathetic and unacceptable, it will be a risk to continue work with this account especially considering our space situation this coming year. I can work with APAROM to ensure they will get the remaining 18 FFE before end of May. But let me know if you still want to engage this account with contract renewal, we can setup a call to discuss if needed.

CX 220-221 (spelling in original); CX 89.

59. In his deposition, Mr. Li was asked: "So, when you gave your opinion of this was pathetic and unacceptable. What were you attempting to convey to Mr. Pump in this email?" Mr. Li responded: "That was a comment that I make to the fact that we did not know about all this potential litigation during our call with Seth." RX 981.

60. On April 29, 2021, at 1:13 PM,[5] Mr. Pump emailed: "Fully agree. We should not engage in any renewal discussions with customer in light of the potential litigation, I would also not provide them with space under the existing contract. The shortfall will be compensated as per contract terms." CX 220.

61. Mr. Li responded on April 29, 2021, at 4:52 PM to Ms. Casanova's 10:38 AM email, directing her to disengage on renewal negotiations with the OJC account, writing in part:

> Hi Andrea,

[5] Because of different time zones, times listed on emails may not be consistent.

> As you mentioned, I was completely unaware of their legal action against us since I left the TPEB team. I consulted with Juergen and the executive decision is that we should not engage in any renewal discussion with customer in light of potential litigation. Please disengage on renewal negotiation with this account, thanks.
>
> Hi Ivan,
>
> Please reject the new agreement mentioned below. Meanwhile, we will leave it up to APAROM's decision to handle the remaining 18 FFE that required to fulfill the 200 FFE MQC on current contract. But just to express our position on this, we should also consider not to provide them with space under existing contract. The shortfall will be compensated as per contract terms, considering we already fulfilled over 90% of the MQC agreement. Thanks.

CX 213 (also asking Mr. Gast "if it is definitely required to provide the remaining 18 FFE from your prospective.").

62. On May 4, 2021, Mr. Maldonado emailed Hamburg ("HS") employees including Mr. Li, Ms. Casanova, and Mr. Cheung stating: "Please note we were advise from customer in case that HS will not fulfill its contractual volume, it will proceed with legal actions against HS. We believe due to the small volume remaining to fulfil MQC of 200 FFE; this could be avoid it. I would appreciate please your feedback and authorization to grant space for this month of May for those 18 FFE's needed." CX 227.

63. On May 4, 2021, Mr. Cheung responded to Mr. Maldonado and other Hamburg recipients, writing:

> Hi Gonzalo and Andrea, I've been working with the area here at APA for additional volume acceptance, and now we have found a space ex YTN for customer as below:
> UPAS2 Maersk Eindhoven 120N – 12FFE (ex YTN)
> This is already confirmed and our local booking desk will release the additional volume on above sailing to customer.

RX 755; RX 728; *see also* RX 725 (email from Mr. Cheung to Ms. Casanova identifying 12FFE (ex YTN) and another 6 FFE (ex NGB)); RX 726 (Ms. Casanova responding "With this space (18FFE), we should fulfill MQC of 200FFE"). But ultimately Hamburg only fulfilled 185 FFE. CX 212.

64. On May 5, 2021, Ms. Casanova responded to Mr. Cheung's email, writing "Good Morning Ivan – That is great news and our effort to fulfill the contract. I have shared this information with the customer," and Mr. Maldonado replied to Ms. Casanova, writing "Despite the fact that we will lose this volume for next term. Nice job handling this account to avoid conflict with them." RX 728; RX 754-755.

65. On May 4, 2021, Ms. Casanova emailed Mr. Weiss, stating:

> As per our conversation, we are not able to renew the contract at this time due to the lack of space and equipment in Asia and the shortage of truck power in the US that we and the entire industry are facing. This situation does not allow us to commit with space for another period, however, we can work case by case. We deeply apologize contract cannot be renewed and thank you for your support and understanding.

RX 808.

66. Hamburg admitted that "Out of the blue and with no prior notice, on May 4, 2021, Respondents unilaterally notified Complainant that there would be no service contract renewal under **any terms**, but instead that Respondents would 'work case by case' with Complainant using spot market rates. Thereafter, Complainant attempted to negotiate a contract with an even more limited scope – such as a port-to-port only contract – but Respondents rejected Complainant's proposal out of hand within hours, leaving Complainant entirely without a shipping service contract of any sort past May 31, 2021." 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.

67. On May 5, 2021, OJC responded to Ms. Casanova, stating: "I am super disappointed to learn that after all these conversations we've had over the last few weeks on size of renewal, were now told NO renewal at all. Will you be able to offer a contract for PORT to PORT so chassis and truckers are not HAMBURG's concern?" RX 811.

68. Casanova replied to OJC later on May 5, stating: "Unfortunately, we are no in the position to provide a contract primarily due to the space situation in Asia more than truck power and chassis availability in the US. Nevertheless, I am going to check with our Trade team again and let you know if there is any change." RX 811 (spelling in original).

69. In a separate email chain, on April 29, 2021, an email from "Customer Claims, Maersk Legal" to Mr. Gast stated: "just noted this in the general claims mailbox, trust you have seen it already… Looking forward to further comments / background info from your side in due course." CX 230.

70. On April 29, 2021, Mr. Gast replied, copying additional internal Hamburg emails:

> As background this is the second time we have received such a threat of suit for this same reason and I believe the third time this customer has threatened to sue us this year. I believe the other time was related to demurrage charges.
>
> As it stands I believe we are unlikely to meet our duties under these contract terms. I have raised this issue to both commercial teams here and colleagues at origin responsible for accepting these bookings. The first time this occurred I stressed the financial impact such a lawsuit could carry and I have done so again. It appears our local sales colleagues had

> tried to address the capacity issue with origin but were advised that no additional space would be granted for this customer.
>
> The contract stipulates the merchant can request to reduce the minimum volume commitment under the terms however I believe they are unlikely to do so and instead would pursue commercial damages for any shortfall under this contract citing that the shortfall is our fault due to a failure to provide proper weekly space.
>
> The first time this came up I engaged with the lawyer and can advise he seems to be on the aggressive side and seemingly would prefer to sue us rather than discuss amicable resolutions. Further while the contract contains a provision for consolidated damages at a rate of $250/TEU he has indicated that he would waive the consolidated damages and instead pursue actual damages which would of course be a significantly higher amount.
>
> It also seems we are considering signing another contract with this customer with an increased capacity. I understand sales needs to meet certain quotas and more business is always great but personally I would not want to do business with someone who repeatedly jumps to threat of lawsuit such as this. Should 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.
>
> At this point I do not know what more could be done from my side other than to wait for May 31 to see how bad the shortfall is and perhaps hope that due to the customer wanting to sign a renewal contract that they would choose to not pursuit this breach of contract suit for minor shortfalls under the present agreement.

CX 229.

71. OJC's second demand letter was sent to Hamburg on April 28, 2021, and one day later, on April 29, 2021, Hamburg made the "executive decision" to "disengage on renewal negotiation" and "consider not to provide them with space under existing contract." CX 209; CX 220; CX 213.

72. No contract was ultimately concluded between OJC and HSDG for 2021-22. Opposition at 2-3; CX 212 (the "contract expired on May 31st and renewal was not approved by Upper Management.").

73. HSDG did not provide all of the space it had committed under the 2020-21 service contract, moving 185 of the 200 FFEs from June 23, 2020, to May 31, 2021. Opposition at 2; CX 212.

74. An email from Ms. Casanova to Mr. Li, Mr. Gast, Mr. Cheung, and others at Hamburg on June 10, 2021, stated: "The MQC was not fulfilled, we closed with 185 out 200 FFE and the customer is claiming the remaining 15 FFE. The contract expired on May 31st and renewal was not approved by Upper Management. Please advise how we are going to proceed with this claim. Thank you." CX 212.

75. The 15 FFE shortfall under the 2020-21 service contract was not a result of space being unavailable, rather these final containers were not shipped due to the "potential litigation." CX 220; CX 213.

76. After April 29, 2021, Hamburg entered into service contracts with other shippers for a significantly higher amount of space than OJC was requesting. CX 469 at ¶ 16; CX 283-284; *see also* CX 285-286.

77. Hamburg transported shipments for OJC after April 29, 2021, including shipments that were already scheduled, obtained via third-party freight forwarder such as United Shippers Association, or obtained via limited spot quotes. SCX 509 at ¶ 3.

78. Hamburg provided short-term spot rate quotes to OJC prior to April 29, 2021, including from Brazil, RX 768-774 (Quotation No. NOAQ1006436, dated March 3, 2021), and RX 673-678 (Quotation No. NOAQ1009430, dated March 31, 2021).

79. Hamburg also provided short-term spot rate quotes to OJC after April 29, 2021, including from Asia, RX 608-618 (Quotation No. NOAQ1020050, dated July 20, 2021), and from Brazil, RX 596-601 (Quotation No. NOAQ1014177, dated July 20, 2021), and RX 741-745 (Quotation No. NOAQ1028947, dated October 28, 2021).

80. OJC shipped a small number of containers with Hamburg from Brazil to the United States under these short-term spot rate quotes including in April and May 2021 under Quotation No. NOAQ1006436; May and June 2021 under Quotation No. NOAQ1009430; and in August and September 2021 under Quotation No. NOAQ1014177. RX 2-21; RX 45-56.

81. "While HSDG did handle some shipments for OJC from Brazil to the U.S., it did so on a case-by-case basis through rate quotations that were typically valid only for 60 days. None of these quotes constitute a service contract." RRPFF No. 87 (citing to NOAQ1006436, NOAQ1009430, NOAQ1014177, and NOAQ1028947).

C. Reparations

1. Pricing

82. Mr. Pump testified that from 2019 to 2021, contract rates doubled or more and spot rates tripled if not more. RX 989; *see also* RX 577; RX 913.

83. Mr. Pump testified:

> Our biggest challenge in 2021 was capacity, as the existing customers, all asked, with very few exceptions, all asked for higher MQC, more capacity commitments, that was the overriding objective. And that was our biggest single challenge. Because we could not get a firm handle on the capacity that we would be able to sell in 2021. And then we had the challenge of who do we give more capacity to where, where does it come from.

RX 993.

84. After Respondents cut off 2021-22 service contract negotiations, OJC could not obtain a shipping contract with any other carrier. CX 469.

85. Because OJC did not obtain a contract with Respondents for 2021-22, OJC obtained what limited space it could on the spot market at extremely high rates. But often OJC was unable to secure shipments, and in most cases was forced to forgo making shipments of goods to the United States altogether because the spot rates became too expensive to justify the cost of container freight. CX 468.

86. OJC shipped 143 containers in 2021-22 on the spot market and/or through freight-forwarders. SCX 511; Brief at 21. OJC described that these 143 FFEs were lower than regular spot market rates at the time, "as they were through a shipping organization or the result of last-minute fill-ins when other companies could not take the space." SCX 511 at ¶ 8.

87. Mr. Berning testified that when he referred to a "container," he meant a standard 40-foot container. RX 1032-1033.

88. Mr. Weiss computed, and Mr. Berning validated, average gross revenue per container of $60,250.30 and average gross profit for container of $22,892.48 for the time period of June 1, 2020, through July 16, 2022. CX 423; CX 470; RX 1033-1034.

89. Mr. Berning and Mr. Weiss stated that gross profit "is revenue less the costs of the product" and that OJC "captured all the costs including the purchase cost, sales commissions, fulfillment center costs, shipping costs and any other costs directly associated with the product. OJC utilizes third parties for shipping, fulfillment, warehousing and other needed tasks to sell the product. All of these costs have been captured." CX 423; CX 470.

90. Mr. Berning and Mr. Weiss calculated average net profit per container to also be equal to $22,892.48, explaining that due to the structure of the company, the direct variable costs included produce the net profit per container. CX 423; CX 470.

2. Routes

91. On July 8, 2020, Ms. Casanova emailed Mr. Pestana concerning OJC, writing "I Want to revisit the Kentucky business. If we are not able to offer inland ramp and ramp/door business to this interior point, Can we offer port-to-port service to the nearest port of

discharge, either Charleston to Norfolk? There is potential with this account and client is interested in our service." CX 243.

92. Later on July 8, 2020, Ms. Casanova emailed a larger group of Hamburg recipients regarding OJC, writing:

> Is there anything we can do to obtain this business for Louisville KY?
> Port to port alone does not work for the customer, as a ramp needs to be involved for delivery to Louisville KY (door) and all motor movement will be very costly for this product.
> The original volume was 1266x40hc per year (pls see attached), but the customer had already signed a contract with other carriers since we rejected it initially.
> The customer has offered their overflow volume that is expected to be 300x40'hc for the rest of the year and possibly more, since the online furniture retailer business has increased due to the pandemic. There is also the possibility of obtaining the full volume next year or a significant percentage. The main POLs are Ningbo, Xiamen, Yantian and Ho chi Minh.
> Please note that we closed the California business for this account.

CX 242-243.

93. On July 8, 2020, HSNA Logistics and Services Manager Dennis Seeraj replied to Ms. Casanova and others, writing: "If they already booked with another carrier via Louisville Rail they will not pay a much higher cost for us to arrange direct trucking from CHS or SAV port. Trucking cost will be approximately $2400. @ Tawab, do we have a running list of rail ramps which we don't want to service perhaps I can look into cross dock options. Especially for this kind of volume, I would have love to take a look before we declined 2500TEU." CX 242. Mr. Maldonado replied later on July 8, 2020, noting in part "Louisville is one of the ramps with negative impact in our PnL." CX 242.

94. On October 9, 2020, Mr. Weiss emailed Ms. Casanova, writing "Wondering if you would be open to entertain a 6 month (Oct- March) contract for 60 40' HQ containers monthly from the below listed ports to our KY warehouse . . . .We are experiencing a spike way above our original projections and can award additional containers to carrier." RX 803.

95. On October 13, 2020, Ms. Casanova replied to Mr. Weiss regarding the opportunity, writing "we have to respectfully decline our participation, as our volume will continue on demand as it is now until the Chinese New Year, which does not allow us to have more space to sign a new long term contract and no additional volume for interior point intermodal shipments." RX 802.

96. Hamburg transported cargo to inland destinations, including Kentucky, from Brazil and other South American ports. RPFF at ¶ 25; CRPFF at ¶ 25; *see also* CX 287 (During 2021 and during 2022 HSDG shipped cargo from Brazil to Kentucky).

D. Knowledge

97. Mr. Pump testified that he did not "receive or review copies of any correspondence from OJ Commerce or any representative of OJ Commerce threatening legal action against Hamburg Sud" but rather made his decision based on the emails he received from Mr. Li and conversation with Mr. Li. RX 994-995.

98. In the deposition of Mr. Pump, the following was discussed:

> Q But complaining to the FMC could not be a reason not to negotiate with customers. Correct?
>
> A That is right.
>
> Q That was part of the compliance training?
>
> A Yes.

CX 96.

99. Mr. Pump also stated:

> 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.

CX 96.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

The Shipping Act provides that a "person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Docket No. 02-04, 30 S.R.R. 991, 2006 WL 2007808, at *11 (FMC May 10, 2006); *see also Cargo One, Inc. v. COSCO Container Lines Co.*, Docket No. 99-24, 28 S.R.R. 1635, 1645, 2000 WL 1648961, at *15 (FMC Oct. 31, 2000). OJC alleges violations of the Shipping Act within the Commission's jurisdiction by both HSNA and HSDG.

2. Burden of Proof

To prevail in a proceeding to enforce the Shipping Act, a complainant bears the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.203; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 WL 9966245, at *14 (FMC Dec. 17, 2014). Under the preponderance standard, a complainant must show that their allegations are more probable than not. *Crocus Investments, LLC v. Marine Transport Logistics, Inc.,* Docket No. 15-04, 2021 WL 3732849, at *3-4 (FMC Aug. 18, 2021) (Order Affirming Initial Decision on Remand). It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, Docket No. 93-15, 26 S.R.R. 1173, 1180 (ALJ Dec. 9, 1993), adopted in relevant part, 26 S.R.R. 1424, 1994 WL 279898 (FMC June 13, 1994).

B. Relevant Law

The remaining two claims in the proceeding both involve section 41104(a), which, as of the filing of this complaint, stated:

> (a) In general. – A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not – …
>
> > (3) retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason; . . .
> >
> > (10) unreasonably refuse to deal or negotiate.

46 U.S.C. §§ 41104(a)(3), (10). Section 41104(a)(3) was previously section 10(b)(3). Section 41104(a)(10) was previously section 10(b)(10), and before OSRA-1999, section 10(b)(12). *See Canaveral Port Authority - Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, Docket No. 02-02, 29 S.R.R. 1436, 2003 WL 723336, at *5 n.6 (FMC Feb. 24, 2003).

OJC filed the amended complaint prior to the June 16, 2022, changes to the Shipping Act. In the Ocean Shipping Reform Act of 2022 ("OSRA 2022"), Congress modified section 41104(a) to: "(3) unreasonably refuse cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods;" and "(10) unreasonably refuse to deal or negotiate, including with respect to vessel space accommodations provided by an ocean common carrier." OSRA 2022, Pub. L. No. 117-146, §7, 136 Stat. 1272, 1274 (2022). These changes do not apply to this proceeding and are not discussed. In addition, in September of 2022, the Commission issued a refusal to deal Notice of Proposed Rulemaking. Notice of Proposed Rulemaking, Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier, Docket No. 22-25, 87 Fed. Reg. 57674, 2022 WL 4356068 (Sept. 21, 2022) ("NPRM Refusal to Deal"). The proposed rule is not binding and it has not been adopted.

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including common carriers, which are subject to sections 41104(a)(3) and (10) at issue in this proceeding. The Shipping Act defines the term common carrier.

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(7).

The statutory definitions are echoed in the Commission's regulations:

> *Common carrier* means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:
>
> (1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and
>
> (2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . . .

46 C.F.R. § 515.2(e).

The Shipping Act provides for reparations "for actual injury caused by a violation." 46 U.S.C. § 41305(b). In addition, double damages are available for certain claims, including violations of section 41104(a)(3), the anti-retaliation provision. The additional reparations provision applicable to this proceeding states:

> On a showing that the injury was caused by an activity prohibited by section 41102(b), 41104(3) or (6), or 41105(1) or (3) of this title, the Commission may order the payment of additional amounts, but the total recovery of a complainant may not exceed twice the amount of the actual injury.

46 U.S.C. § 41305(c). OSRA-22 changed "41104(3) or (6)" to "paragraph (3) or (6) of section 41104(a)," which appears to have clarified, but not changed, the citation. 46 U.S.C. § 41305(c).

C. Discussion

This section will address the 41104(a)(10) allegations of refusal to deal before addressing the section 41104(a)(3) allegations of retaliation. At times, the parties' arguments conflate the

two, but they are separate statutory provisions. Each section will discuss the legal framework before addressing the necessary elements.

1. Section 41104(a)(10): Refusal to Deal

OJC asserts that Hamburg unlawfully refused to deal and negotiate with OJC and that Hamburg's after-the-fact pretexts for its retaliation and refusal to deal are all baseless. Brief at 21-26; Reply at 18-22. Hamburg contends that it did not refuse to deal and that it did not refuse to negotiate, asserting that there was never a meeting of the minds on the material terms of a new contract. Opposition at 7-14.

Section 41104(a)(10) prohibits a common carrier from unreasonably refusing to deal or negotiate. 46 U.S.C. § 41104(a)(10). The Commission has found that a common carrier should "refrain from 'shutting out' any person for reasons having no relation to legitimate transportation-related factors." *New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans*, Docket No. 00-11, 29 S.R.R. 1066, 1070, 2002 WL 33836158 (FMC June 28, 2002), *aff'd sub nom. New Orleans Stevedoring Co. v.* FMC, 80 Fed. Appx. 681 (D.C. Cir. 2003). The Commission has stated that "in determining reasonableness, the agency will look to whether a marine terminal operator gave actual consideration to an entity's efforts at negotiation." *Canaveral Port Authority*, 2003 WL 723336, at *18. "Refusals to deal or negotiate are factually driven and determined on a case-by-case basis," although the ultimate burden of persuasion remains with the complainant to show that the refusal to deal or negotiate was unreasonable. *Canaveral Port Authority*, 2003 WL 723336, at *13, *18. To establish a violation of section 41104(a)(10), the Complainant must establish that (a) Respondents are common carriers, (b) Respondents refused to deal or negotiate, and (c) such refusal was unreasonable. Each element is discussed below.

a. Common Carrier

Because section 41102(a) only governs the activities of common carriers, to violate it an entity must be a common carrier within the meaning of the Shipping Act. Each Respondent is discussed below.

i. HSDG

The parties agree that HSDG was a common carrier as defined by the Shipping Act, 46 U.S.C. §40102(7), through October 31, 2021. Amended Complaint at ¶ 2; HSDG Answer at ¶ 2. HSDG became a wholly owned subsidiary of Maersk A/S, although HSDG did not cease to exist as a separate legal entity until late 2021. RX 1120 at ¶ 4. Maersk continues to operate the "Hamburg Sud" brand, which offers different services than Maersk A/S. Opposition at 1 n.1; RX 1120 at ¶ 4. This element is not in dispute and the evidence establishes that HSDG operated as a common carrier during the timeframe at issue in this proceeding.

ii. HSNA

OJC asserts that the FMC has jurisdiction over HSNA because it is a "person" subject to regulation by the FMC based on its acts in conjunction with HSDG; HSNA is a party to the

service contract with OJC and both Respondents; and HSNA and its employees were part and parcel of the decision to retaliate and refuse to deal with OJC. Brief at 10 n.17.

Respondents assert that HSNA should be dismissed, stating:

> HSNA should be dismissed. In two verified complaints, OJC alleged that HSNA is either a marine terminal operator (Complaint ¶ 3) or an ocean transportation intermediary (Amended Complaint ¶ 3). OJC offers no evidence to support either categorization. Instead, it offers an argument—unsupported by facts or precedent—that HSNA is subject to regulation without falling into one of the categories of persons subject to regulation under the Act. OJC Brief at 10, n.17. OJC fails to meet its burden of proof with respect to the existence of FMC jurisdiction over HSNA.

Opposition at 7 n.2.

OJC argues that HSNA is an "other person" under section 41104(a), which begins: "A common carrier, either alone *or in conjunction with any other person*, directly or indirectly, may not . . . ." 46 U.S.C. § 41104(a)(10) (emphasis added). Commission decisions considering the "other person" language have found that the language "either alone or in conjunction with any other person" does not extend section 41104's prohibitions to new classes of persons, rather it clarifies that an ocean carrier cannot excuse its prohibited conduct on the basis that it did not commit the conduct alone. The Commission explained:

> Section 10(b) forbids carriers from certain practices undertaken by the carriers alone or with other persons. It does not provide that if a carrier engages in one of the condemned activities 'in conjunction with' someone else, that other person has violated the statute as well and is equally liable for reparations to an injured party. As section 10(a) shows, Congress did make all 'persons' liable for some Shipping Act violations. In enforcing section 10(a), the Commission may reach any U.S. or foreign individual or enterprise. If Congress had wished to make a similar choice with respect to the practices covered by section 10(b), the statutory language would have so indicated. The legislative history of the 1984 Act reflects awareness on Congress's part that section 10(b) was more restricted in coverage than section 10(a).

Int'l Assoc. of NVOCC's v. Atlantic Container Line, Docket No. 81-5, 1990 WL 427461, at *12 (FMC Feb. 5, 1990) (citations omitted).

The evidence shows that HSNA was a wholly-owned subsidiary of HSDG that acted as the United States general agent of HSDG until November 1, 2021, when it became a wholly-owned, indirect subsidiary of Maersk A/S. CX 101. On January 1, 2022, HSNA was merged into Maersk Agencies USA, Inc., the U.S. subsidiary and general agent of Maersk A/S. CX 101.

The evidence further shows that the 2020-21 service contract names OJC and HSDG, identified as carrier, "c/o" HSNA as parties. CX 119. The contract has signature lines for OJC President Jacob Weiss and two employees of HSNA. CX 120. HSNA employees were integral to

the conduct at issue here. Although the contract does not explicitly identify HSNA as the agent of HSDG, the evidence establishes that HSDG was the "carrier;" HSNA was holding out HSDG to provide transportation by water of cargo between the United States and foreign countries; HSDG assumed responsibility for the transportation; and HSDG vessels were operating on the high seas. Therefore, the actions of HSNA employees discussed herein are found to be within the scope of their authority as agent for HSDG and attributable to HSDG.

Based on the facts in this proceeding, HSNA is not a regulated entity under this section, but rather is an "other person" with whom HSDG operated. Moreover, here, HSNA was acting as an agent of a disclosed principal, and such agents are typically not liable for the acts of their principal. 12 Williston on Contracts § 35:34 (4th ed.); *Landstar Express America, Inc. v. FMC*, 569 F.3d 493, 497 (D.C. Cir. 2009). Accordingly, OJC has not established that HSNA is an entity regulated by section 41104(a)(10). Therefore, the allegations against HSNA are denied.

b. Refusal to Deal or Negotiate

Because OJC's refusal to deal arguments are intertwined with its retaliation claim, it is sometimes difficult to determine which arguments correspond with which claim. However, OJC asserts that after the April 28, 2021, demand letter, Hamburg responded by "immediately and abruptly cutting off (i) all renewal negotiations and (ii) all shipping under the Parties' existing service contract." Brief at 7.

Hamburg contends that they did not "shut out" OJC, but rather transported 185 of the 200 FFEs they committed to transport during the term of the 2020-21 service contract; the mere fact of not entering into a service contract does not constitute a refusal to deal; and Hamburg continued to transport significant amounts of OJC's cargo throughout 2021 and 2022. Opposition at 8-10. Moreover, Hamburg contends that they did not refuse to negotiate; their actions were reasonable; there is no evidence that HSDG refused to communicate with OJC during the contract term; there was no agreement on minimum volume commitment, trade lanes, and rates; and parties agreed on rates and HSDG transported OJC's cargo from Asia and Brazil in 2021-22 after OJC threatened to sue. Opposition at 10-14.

In *Canaveral Port Authority*, the Commission found a refusal to deal where the Port set up a procedure that would only award a tug franchise by a public hearing of convenience and necessity, and the Port refused to hold such a hearing to consider a request for a tug franchise. 2003 WL 723336, at *16.

In *Global Link*, the ALJ dismissed a refusal to deal claim, finding that Hapag-Lloyd did not unreasonably refuse to deal or negotiate by refusing to reduce service contract rates when market shipping rates declined during the life of the contract. *Global Link Logistics, Inc. v. Hapag-Lloyd AG*, Docket No. 13-07, 33 S.R.R. 512, 2014 WL 5316345, at *18 (ALJ April 17, 2014), proceeding dismissed due to settlement, 2015 WL 3955128 (FMC April 14, 2015). The *Global Link* decision enforced the terms of the parties' contract, stating:

> Focusing on Global Link's claim that Hapag-Lloyd unreasonably refused to deal or negotiate on Global Link's request to reduce the 2012 Service Contract rates, the question in this proceeding becomes: When an ocean common carrier has

> negotiated with a shipper and entered into a service contract, does that carrier unreasonably refuse to deal or negotiate with the shipper in violation of section 41104(10) if the carrier will not *renegotiate* the terms of the exiting service contract when the shipper so demands? In other words, when a shipper states it is no longer satisfied with the terms of an existing contract - in this case, by claiming that the rates set forth in the service contract are too high because market shipping rates declined after the parties signed the contract and the shipper wants to renegotiate for lower rates - does section 41104(10) require the carrier to abandon its rights established by the contract and agree to lower rates? I conclude that the answer is no.

Global Link, 2014 WL 5316345, at *18 (emphasis in original). This case involves OJC seeking to enforce the terms of the 2020-21 service contract and to negotiate a 2021-22 service contract.

Hamburg asserts that it did not refuse to negotiate with OJC and that "[c]ommunications between parties constitute 'negotiation' even if no agreement is reached." Opposition at 10-11 (citing *Global Link*, 33 S.R.R. at 527).

In reply, OJC states:

> OJC has presented ample smoking-gun emails and testimony showing that Maersk refused OJC available cargo space during the contract term, in retaliation for threatening to air its grievances with the Commission:
>
> ● 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).)
>
> ● Maersk'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, Maersk reiterated that "[t]he MQC [of the 2020-2021 Service Contract] was not fulfilled" as ordered. (SCX 515.)

Reply at 10 (emphasis and changes in original) (OJC referred to Hamburg as Maersk).

Before the afternoon of April 29, 2021, the evidence demonstrates that Hamburg was negotiating in good faith with OJC, including regarding the minimum quantity commitment. For example, on April 27, 2021, HSNA Account Executive Andrea Casanova sent an internal email stating that OJC wanted "to increase the MQC and add the route to Louisville KY." CX 203. HSNA Cargo Flow Specialist Kevin Li then sent an email stating that OJC "signed 200 FFE last year for City of Industry, CA and almost fulfilled that this year. Based on that what would be the MQC target for next year with and without KY business? I do suggest to maintain focus on local

destination only." CX 217. The hesitation to include the Kentucky route is consistent with Hamburg's decision in October 2020 to decline to bid on the Asia to Kentucky route. RX 802-803.

The morning of April 29, 2021, Ms. Casanova continued to work on a contract renewal with OJC, starting with a draft contract with "the same lanes, rates, and conditions of the current contract" and "an increased MQC 400 FFE." CX 214. Also on April 29, 2021, at 10:38 AM, Ms. Casanova emailed Mr. Li and Mr. Cheung, asking: "if it is possible to Increase MQC by 200 FFE giving a total of $400 FFE, that will not only cover the deficit by also show our interest to participate more of their volume, of course, if we truly can satisfy this volume." CX 215. This email also discussed and attached the two OJC demand letters from October 16, 2020, and April 28, 2021. CX 215.

After Ms. Casanova's April 29, 2021, 10:38 AM email, Hamburg's willingness to negotiate a service contract with OJC ended and Hamburg frankly identified the reason. On the afternoon of April 29, 2021, Mr. Li emailed HSNA Senior Vice President Juergen Pump, stating:

> Sorry to trouble you but I need your executive decision on this account, it was the one being mentioned in our call with AEC this Tuesday. I was completing [sic] unaware of the legal action they put against us during the time I left the TPEB team, and I don't believe it was shared in our call as well.
>
> Long story short, they are threatening us on liquidated damage against the space that we couldn't provide under committed 200 FFE MQC, which so far we already fulfilled 182 FFE and their contract will only expire by end of May. Meanwhile, they are proposing a renewal contract with 400 FFE MQC but all rates remain the same from last year contract.
>
> In my opinion this is pathetic and unacceptable, it will be a risk to continue work with this account especially considering our space situation this coming year. I can work with APAROM to ensure they will get the remaining 18 FFE before end of May. But let me know if you still want to engage this account with contract renewal, we can setup a call to discuss if needed.

CX 220-221 (spelling in original).

Mr. Pump replied on the afternoon of April 29, 2021, writing: "Fully agree. *We should not engage in any renewal discussions with customer in light of the potential litigation, I would also not provide them with space under the existing contract.* The shortfall will be compensated as per contract terms." CX 220 (emphasis added).

Mr. Li responded on April 29, 2021 at 4:52 PM, to Ms. Casanova's 10:38 AM email, directing Ms. Casanova and Mr. Cheung to disengage on renewal negotiations, writing:

> Hi Andrea,
> As you mentioned, I was completely unaware of their legal action against us since I left the TPEB team. *I consulted with Juergen and the executive decision is that*

> *we should not engage in any renewal discussion with customer in light of potential litigation. Please disengage on renewal negotiation with this account*, thanks.
>
> Hi Ivan,
> Please *reject the new agreement mentioned below*. Meanwhile, we will leave it up to APAROM's decision to handle the remaining 18 FFE that required to fulfill the 200 FFE MQC on current contract. But just to express our position on this, *we should also consider not to provide them with space under existing contract*. The shortfall will be compensated as per contract terms, considering we already fulfilled over 90% of the MQC agreement. Thanks.

CX 213 (emphasis added).

On May 4, 2021, HSNA Manager of East Coast Sales Gonzalo Maldonado emailed Mr. Li, Ms. Casanova, Mr. Cheung, and Mr. Gast about Hamburg ("HS") stating:

> Please note we were advise from customer in case that HS will not fulfill its contractual volume, it will proceed with legal actions against HS. We believe due to the small volume remaining to fulfil MQC of 200 FFE; this could be avoid it. I would appreciate please your feedback and authorization to grant space for this month of May for those 18 FFE's needed.

CX 227. The response by Mr. Cheung that "we have found a space," RX 755, and his later identification of 18 FFE supposedly available for OJC, RX 725, suggest that Hamburg had the ability to fulfill the entire 200 FFE MQC. *See also* CX 221; RX 725-726. But, the evidence shows that the remaining volume requirements were not fulfilled by Hamburg, leaving a 15 container shortfall.

The evidence shows that under the 2020-21 service contract, Hamburg agreed to transport a minimum commitment of 200 FFEs. CX 125; CX 467 at ¶ 5. OJC was initially allocated 8 TEU/week, however, OJC was told that that number was increased to 10 TEUs/week in August of 2020. CX 147, CX 156, CX 206. By April 29, 2021, Hamburg had fulfilled 182 FFEs. CX 220-221. Ultimately, Hamburg moved 185 of the 200 FFEs during the June 23, 2020, to May 31, 2021, contract period. Opposition at 2; CX 212. Regarding the 2021-22 contract, no contract was ultimately concluded between OJC and HSDG for 2021-22. CX 212 (the "contract expired on May 31st and renewal was not approved by Upper Management.").

Hamburg contends that communication between the parties constitutes negotiation even if no agreement is reached. Opposition at 10. After April 29, 2021, the parties continued to communicate. For example, Ms. Casanova emailed Mr. Weiss stating that "we are not able to renew the contract at this time due to the lack of space and equipment in Asia and the shortage of truck power in the US that we and the entire industry are facing. This situation does not allow us to commit with space for another period, however, we can work case by case" and "[w]e deeply apologize contract cannot be renewed and thank you for your support and understanding." SCX 513. The 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.

Hamburg contends that they shipped OJC containers after April 28, 2021, including during what would have been the 2021-22 contract year. Opposition at 9-10. The evidence shows that Hamburg provided short-term spot rate quotes to OJC after April 29, 2021, for cargo moving from Asia and Brazil to the United States. RX 608-618, RX 596-601, RX 741-745. Moreover, OJC shipped a small number of containers with Hamburg from Brazil to the United States under these and earlier-provided short-term spot rate quotes after April 29, 2021. RX 2-21, RX 45-56.

OJC testified that Hamburg's transportation of containers after April 29, 2021, included shipments that were already scheduled prior to that date, shipped from Asia via a third-party freight forwarder, or shipped from Brazil via limited spot quotes. SCX 509 at ¶ 3. This testimony is credible, especially in light of the agreed fact that Hamburg did not ship all of the containers contracted for in 2020-21 and there was no renewal of the 2020-21 service contract. Indeed, Respondents clarify that while "HSDG did handle some shipments for OJC from Brazil to the U.S., it did so on a case-by-case basis through rate quotations that were typically valid only for 60 days. None of these quotes constitute a service contract." RRPFF No. 87. Moreover, offering higher spot market rates does not ameliorate the problems caused by not having a predictable, year-long service contract.

Hamburg also contends that there was no meeting of the minds regarding the contractual terms for the 2021-22 service contract. Opposition at 11. While this is true, the evidence shows that 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." CX 213. At that point, staff was instructed to "disengage on renewal negotiations with this account" and "also consider not to provide them with space under existing contract." CX 213. Thus, Hamburg made a decision on April 29, 2021, not to further negotiate any terms for a 2021-22 service contract and to consider not providing additional space under the 2020-21 contract. The lack of a meeting of the minds, therefore, was directly related to Hamburg's decision to disengage from negotiations.

The preponderance of the evidence establishes that as of the afternoon of April 29, 2021, Hamburg stopped dealing or negotiating in good faith with OJC regarding both meeting its remaining 2020-21 contractual commitment and negotiating a service contract for the following year. This constitutes a refusal to deal or negotiate. The next issue is whether or not that refusal was unreasonable.

c. Whether the Refusal was Unreasonable

OJC asserts that the refusal to deal was unreasonable and was retaliation for OJC's threat to file a complaint. Brief at 16-21. Hamburg, however, asserts that its actions were reasonable because there is no evidence that Hamburg failed to ship containers for OJC when they had available space and because there were legitimate reasons not to enter into a new contract with OJC. Opposition at 15-18.

The Commission "recognizes that an ocean common carrier does not have a duty to grant a contract to every potential party." NPRM Refusal to Deal, 87 Fed. Reg. at 57677. "The Act does not guarantee the right to enter into a contract, much less a contract with any specific

terms." *Global Link,* 2014 WL 5316345, at *18 (citation omitted). In a case affirmed by the Commission and DC Circuit, Administrative Law Judge Lang explained:

> The Act does not guarantee the right to enter into a contract, much less a contract with any specific terms; such a right has not existed either before or since the passage of the OSRA [1999]. All that is required is that common carriers . . . refrain from 'shutting out' any person for reasons having no relation to legitimate transportation-related factors.

New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans, Docket No. 00-11, 29 S.R.R. 345, 351 (ALJ June 27, 2001), *aff'd* 29 S.R.R. 1066, 2002 WL 33836158 (FMC June 28, 2002), *aff'd sub nom New Orleans Stevedoring Co. v. FMC*, 80 Fed. Appx. 681 (D.C. Cir. 2003).

The Commission recently discussed its prior application of the term "reasonableness" with regard to a refusal to deal or negotiate claim, stating:

> Case law indicates that "reasonableness" of the refusal to deal or negotiate has historically been interpreted broadly in this context, with courts deferring to the Commission's reading of that term in administering its statutes and regulations. The Commission has previously found reasonable those decisions that are connected to a legitimate business decision or motivated by legitimate transportation factors. "Reasonableness" can be given its dictionary definition but is judged on a case-by-case basis, with particular attention paid to the relevant circumstances; the Commission has said that a just and reasonable practice is one otherwise lawful but not excessive and suited to the end in view.
>
> Transportation-related factors can include, without limitation, the character of the cargo, vessel safety and stability, operational schedules, and the adequacy of facilities. Generally, however, transportation-related factors relate to the characteristics of the cargo or vessel, not the status of the shipper.
>
> The Commission has found various situations that inform what refusal to deal entails. It has found that a common carrier must avoid shutting out any person or party for reasons not connected to legitimate transportation-related factors. A common carrier must therefore give actual consideration to the other party's efforts or attempts at negotiation. For example, a common carrier's repeated refusal to respond to email or telephone requests for negotiations over an extended period of time may be viewed as an unreasonable method of shutting another party out. Similarly, there must be an affirmative act by a party to deal or engage in negotiations with the common carrier. Commercial convenience alone is not a reasonable basis for a common carrier's refusal to deal or negotiate. A common carrier granting special treatment to one party over another because that party is a regular customer is likewise likely to be viewed as unreasonable.
>
> The Commission also has a history of recognizing that it is appropriate to defer to a party's reasonable business decisions and not to substitute its business

> judgement for that of an entity conducting negotiations. However, this precedent does not eliminate the Commission's responsibility to evaluate whether a party's decision-making practices resulted in a violation of the Shipping Act.
>
> The Commission continues to acknowledge that its "role is not to ensure that all interested parties get the same deal or make a certain profit. Rather, the Commission's role is to ensure that parties are not precluded from obtaining preferential treatment due to unreasonable or unjustly discriminatory reasons." The Commission further recognizes that an ocean common carrier does not have a duty to grant a contract to every potential party. However, upon establishing its criteria for granting preferential terms to parties who are able to meet those specified terms, the ocean common carrier then has a duty under the Shipping Act to apply such criteria in a consistent and fair manner without differentiating based on illegitimate transportation factors. An ocean common carrier may be viewed as having acted reasonably in exercising its business discretion to proceed with a certain arrangement over another by taking into account such factors as profitability and compatibility with its business development strategy.

NPRM Refusal to Deal, 87 Fed. Reg. at 57676-57677 (footnotes omitted).

OJC asserts that the refusal to deal was unreasonable because it was retaliation for threatened litigation, which is discussed more below. The question in this section is whether or not Hamburg's conduct was unreasonable. The emails stating that an "executive decision" was made that Hamburg would "not engage in any renewal discussion with customer in light of potential litigation" – combined with the instruction to "disengage on renewal negotiations with this account" and "also consider not to provide them with space under existing contract" – establish that the refusal to deal or negotiate was based on potential litigation. CX 213. Moreover, there is no suggestion in these communications that the litigation was unwarranted or that OJC was demanding more than they were entitled to under the existing contract and Shipping Act regulations.

Hamburg asserts that its decision not to enter a service contract with OJC in 2021-22 was reasonable for numerous reasons, including: (1) the pandemic continued to cause supply chain congestion, especially at West Coast ports, (2) HSDG missed the 2020-21 MVC by 15 FFE and it was not clear that they could perform, (3) HSDG believed that OJC wanted the new contract to have the same rates, (4) HSDG was reducing the Asia to Kentucky trade lanes dues to increased inland transport costs as well as operational issues such as trucker and chassis shortages, and (5) "OJC's disputatious manner of doing business—including almost daily demands for additional container space—also contributed to HSDG's decision." Opposition at 16-18.

Many of the reasons identified by Hamburg as reasons for not entering a service contract may be legitimate, transportation-related factors that could reasonably justify a common carrier's decision not to enter into a service contract. However, the facts do not support Hamburg's assertion that *in this particular case*, any of those five factors was the actual reason that *this particular service contract* was declined. Rather, the evidence shows that this particular service contract negotiation ended because an "executive decision" was made that Hamburg would "not engage in any renewal discussion with customer in light of potential litigation." CX 213. Indeed,

the timing of the decision on April 29, 2021, one day after OJC sent the second demand letter, for the first time mentioning the Federal Maritime Commission, further supports the finding that the decision was based on OJC's demand letters and not on legitimate transportation factors.

An allegation of refusal to deal due to litigious behavior has been previously raised in a Commission proceeding. The Commission found a cognizable claim had not been raised and dismissed a refusal to deal claim where one party "made the decision not to engage in any more transactions with a party who had filed what appeared to be a baseless claim against its related company." *Cornell v. Princess Cruise Lines, Ltd.*, Docket No. 13-02, 2014 WL 5316340, at *8 (FMC Aug. 28, 2014). On appeal, the D.C. Circuit "expresse[d] no view as to whether the FMC engaged in reasoned decision-making by giving deference to 'discretionary business decisions' without assessing whether there are 'legitimate transportation-related factors' for the refusal to deal or whether the FMC's position was otherwise an unexplained departure from precedent and past practice." *Cornell v. FMC*, 634 Fed. Appx. 795, 797-98 (D.C. Cir. Dec. 2, 2015).

It is not necessary to reach the issue of whether a common carrier can consider litigiousness or a "disputatious manner of doing business" in determining whether or not to contract with an entity because that issue is not raised by these facts. Rather, here, the evidence shows that OJC sought to obtain transportation to which it was entitled under the existing service contract, objected to demurrage fees that have since been refunded, and otherwise raised legitimate concerns regarding whether Hamburg was meeting its contractual and Shipping Act obligations. Thus, deference to legitimate business decisions would not extend to the conduct at issue here. Refusing service based on these facts is not related to legitimate business decisions or transportation factors and is therefore unreasonable.

Hamburg also asserts that Mr. Pump's email was based on an internal misunderstanding, stating:

> While OJC focuses on Mr. Pump's response—the so called "smoking gun"—it is important to consider the information he received from Mr. Li before providing his response. Mr. Li noted that OJC was "threatening us on liquidated damage against the space that we couldn't provide." CX 220. Mr. Pump had not seen the threats that OJC's counsel sent HSDG. RX 994-RX995. The primary focus of these threats was a breach of contract claim, which is precisely what Mr. Li described in his email. CX 220. Thus, on April 29, 2021, Mr. Pump had no indication that OJC was threatening action before the FMC. Moreover, the April 29, 2021 email from Mr. Li to Mr. Pump reflects Mr. Li's mistaken understanding that what Ms. Casanova sent him was a *proposal from OJC*: "they are proposing a renewal contract with 400 FFE MQC but all rates remain the same from last year contract." CX 220; *see also* RX981.
>
> As a result, Mr. Pump was being asked if HSDG should enter a 400 FFE contract at the same rates as 2020-21 with a customer that was threatening legal action for breach of contract. It is highly unlikely that any carrier would have agreed to a 400 FFE service contract for 2021-22 at the same rates as a 200 FFE service contract for 2020-21. As OJC itself acknowledges, the market rates increased substantially from June 2020 to May 2021. OJC Brief at 41-46; CX435. It is

> perfectly predictable and reasonable that Mr. Pump, when presented with what Mr. Li portrayed as a proposal from OJC for such a contract, combined with a threat of litigation, would decline to offer a service contract based on reasonable business considerations. The fact that Mr. Li and Mr. Pump misunderstood the source and nature of the proposal they were evaluating does not detract from the reasonableness of their actions based on their subjective understanding. Indeed, the FMC has historically deferred to a party's reasonable business decisions in the context of an unreasonable refusal to deal. 87 *Fed. Reg.* 57674, 57677 (September 21, 2022) (citations omitted). Finally, the record clarifies that Mr. Pump's suggestion that HSDG decline to provide space under the Service Contract was not adopted by HSDG in any event. *See* RX 726-28. As noted above, after Mr. Pump sent his email, HSDG and Maersk continued to transport cargo for OJC, accounting for 24% of OJC's volume after May 31, 2021. *Supra* at 4-5, 13-14.

Opposition at 19-20 (citations shortened) (footnotes omitted).

Unlike the retaliation claim, for 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 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.

Based 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 reason as "potential litigation." Accordingly, OJC has established that HSDG violated section 41104(a)(10)'s prohibition against refusals to deal.

2. Section 41104(a)(3): Retaliation

Section 41104(a)(3) provides that: "A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason." 46 U.S.C. § 41104(3). Therefore, common carriers are prohibited from retaliating against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resorting to other unfair or unjustly discriminatory methods, because: the shipper has patronized another carrier, the shipper has filed a complaint, or for any other reason. Statement of the Commission on Retaliation, Docket No. 21-15, 3 F.M.C.2d 201, 207, 2021 WL 9204128 (FMC Dec. 28, 2021) ("Statement on Retaliation"). Double damages may be available for a violation of the anti-retaliation provision. 46 U.S.C. § 41305(c).

OJC asserts that Hamburg retaliated against OJC by unreasonably refusing to renew or even negotiate a service contract with OJC, and by refusing to fulfill Hamburg's existing contractual obligations and that Hamburg's after-the-fact pretexts for its retaliation are all baseless. Brief at 16-26. In its reply, OJC asserts that Hamburg unlawfully retaliated against OJC by refusing to ship any more containers under the 2020-21 service contract and by refusing to renew and enter into the 2021-22 contract. Reply at 8-18.

Hamburg contends that they did not retaliate against OJC, arguing that Hamburg did not refuse, or threaten to refuse, cargo space accommodations when available; HSDG's decision not to enter a service contract in 2021-22 is not retaliation under the statute and was reasonable; HSDG's internal emails do not establish that Hamburg retaliated against OJC; the alleged retaliation is not actionable because it occurred before OJC filed its complaint with the FMC; and finding retaliation here would create unworkable precedent. Opposition at 15-23.

Retaliation in the shipping industry has long been a concern. The Report of the Committee on the Merchant Marine and Fisheries on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade under H. Res. 587 (1914) ("Alexander Report") investigated foreign and domestic shipping lines, proposing that among other things, Congress empower the Interstate Commerce Commission to "[a]dopt whatever measures it may deem necessary to protect the complainant against retaliation," and prohibit carriers from "retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason." Alexander Report at 421 (cited in Statement on Retaliation, 3 F.M.C.2d at 202).

"In passing the Shipping Act of 1916 . . . Congress followed the basic recommendations of the Alexander Committee." *Fed. Mar. Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 490 (1958).

> Section 14 of the 1916 Act prohibited deferred rebates, fighting ships, making discriminatory shipping contracts and "retaliat[ing] against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason." This language was carried forward with little change as section 10(b)(5) in the Shipping Act of 1984 and its codification as 46 U.S.C. § 41104(a)(3).

Statement on Retaliation, 3 F.M.C.2d at 202-203.

The Commission recently issued the Statement on Retaliation "to clarify that it will interpret 46 U.S.C. § 41104(a)(3) – the anti-retaliation provision – broadly to effectuate Congress's intent that shippers feel free to air their grievances to the Commission, and to address new shipping practices and new forms of retaliation." Statement on Retaliation, 3 F.M.C.2d at 201. The Commission concluded the policy statement with an example, stating:

> A complainant must show that a carrier engaged in prohibited conduct (refusing cargo space accommodations or other unfair or unjustly discriminatory methods),

> with respect to a protected entity (shipper), because the protected entity engaged in protected activity (patronizing other carriers, filing a complaint, or other activities of the same class).

Statement on Retaliation, 3 F.M.C.2d at 209. This section will address the retaliation arguments in this proceeding by discussing whether (a) each Respondent is a common carrier, (b) Respondents engaged in prohibited conduct by refusing, or threatening to refuse, cargo space accommodations when available, or resorting to other unfair or unjustly discriminatory methods, (c) Complainant is a shipper, and (d) Complainant engaged in protected activity by patronizing another carrier, or filing a complaint, or for any other reason. The first two elements focus on Respondents while the last two elements focus on Complainant. Each element is discussed below.

a. Respondent HSDG is a Common Carrier

Section 41104(a)(3) applies to common carriers, either alone or in conjunction with any other person. 46 U.S.C. § 41104(a)(3). Therefore, the first question is whether Respondents are common carriers. As discussed above, the evidence shows that HSDG was a common carrier and that HSNA was acting as its disclosed agent here. Therefore, the entity to which this section applies is HSDG, as HSNA was the agent and not the common carrier. This element is therefore met with regard to HSDG and the claim against HSNA is denied.

b. Respondents Engaged in Prohibited Conduct

Section 41104(a)(3) begins by prohibiting a common carrier from "refusing, or threatening to refuse, cargo space accommodations when available," or resorting "to other unfair or unjustly discriminatory methods." 46 U.S.C. § 41104(a)(3). Here, the first part prohibiting refusing or threatening to refuse cargo space accommodations when available is most relevant. However, the second part prohibiting resorting to other unfair or discriminatory methods could also apply to these facts and is helpful to understand.

The Commission recently explained the "resort to other unfair or unjustly discriminatory methods" clause.

> The "other unfair or unjustly discriminatory" language is a "catchall clause by which Congress meant to prohibit other devices not specifically enumerated but similar in purpose and effect to those barred by § 14 First, Second, and the 'retaliate' clause of § 14 Third." The Court in *Isbrandtsen* held that only conduct "designed to stifle outside competition" fell within this catchall. But it 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. Under a broad reading of *Isbrandtsen*, this type of carrier conduct would not violate § 41104(a)(3) because it would not involve conduct designed to stifle outside competition.

> While the Commission is bound by *Isbrandtsen*, the Commission does not believe it requires such a result and interprets it as not applying where a retaliation claim is based on complaint-related activity (filing a complaint, participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or bringing a dispute to CADRS). *Isbrandtsen* did not involve allegations that a carrier retaliated against a shipper because it "filed a complaint charging unfair treatment." Rather, at issue was a dual rate contract system designed to protect a conference from an independent carrier. Consequently, the Court had no reason to address, and did not purport to address, the language in the statute that protects shippers who file a complaint. Further, the Court deemed the purpose of section 14 Third was to outlaw practices used to stifle the competition of independent carriers but did not discuss the portions of the Alexander Report that referred to protecting complaining shippers.

Statement on Retaliation, 3 F.M.C.2d at 208 (footnotes omitted).

OJC alleges both that Hamburg refused cargo space accommodations when available and that Hamburg resorted to other unfair or unjustly discriminatory methods. Brief at 18-19. The refusal to provide cargo space accommodations when available, at issue here, is similar to the refusal to deal found above. By refusing to deal or negotiate, Hamburg effectively refused cargo space accommodations. Respondent's prohibited conduct is discussed first in regard to the 2020-21 service contract and then in regard to the decision not to enter into a 2021-22 service contract.

i. Prohibited Conduct 2020-21

OJC argues that Hamburg engaged in prohibited conduct for the 2020-21 contract year by refusing to transport additional containers after the April 28, 2021, second demand letter. Brief at 16. Hamburg contends that it "continued to transport OJC's cargo after OJC threatened litigation on October 16, 2020 and again on April 28, 2021," and that declining to enter a service contract is not a form of retaliation recognized under the Shipping Act. Opposition at 15. OJC replies that "those shipments (1) were already scheduled prior to the retaliation date, and (2) were obtained on the spot market by OJC using third-party freight forwarders—not Maersk." Reply at 11.

The facts show that Hamburg did not meet the minimum volume commitment in the 2020-21 service contract, only moving 185 of the 200 FFEs from June 23, 2020, to May 31, 2021. CX 212. Hamburg's transportation of additional shipments for OJC after April 28, 2021, included shipments that were already scheduled or were obtained via a third-party freight forwarder via limited spot quotes. SCX 509-512 at ¶¶ 3, 8. Moreover, the up to three containers that were shipped under the contract after April 29, 2021, do not absolve Hamburg of its decision not to meet its contractual commitment, but only shows a delay in implementing that policy. Therefore, the evidence establishes that Hamburg failed to transport 15 of the 200 FFE containers required by the 2020-21 service contract.

Hamburg committed to transport these 15 containers as part of the service contract. And, with a month left on the contract and an allocation of 8-10 TEUs (or 4-5 FFEs) a week, this minimum commitment should have been within reach. Indeed, Mr. Li's April 29, 2021, email to Mr. Pump offered "I can work with APAROM to ensure they will get the remaining 18 FFE

before end of May." CX 220-221. But instead, Mr. Pump said "I would also not provide them with space under existing contract" and then said "to express our position on this, we should also consider not to provide them with space under existing contract." CX 220, CX 213. The contemporaneous emails do not demonstrate that space was not available but rather that these final containers were not shipped due to the "potential litigation." CX 213. The evidence establishes a refusal to provide cargo space accommodations when available for fifteen containers in the 2020-21 service contract year.

ii. Prohibited Conduct 2021-22

OJC argues that Hamburg engaged in prohibited conduct for the 2021-22 contract year by disengaging from negotiations after the April 28, 2021, second demand letter. Brief at 7-8. Hamburg contends that declining to enter a service contract is not a form of retaliation recognized under the Shipping Act and asserts that other reasons justify the decision not to enter into a new contract. Opposition at 16-18. OJC replies that Hamburg "retaliated against OJC based solely on its threat to complain to the Commission" and attempted to conceal the unlawful retaliation with pretexts which it alleges it disproved. Reply at 12-14.

An ocean common carrier does not have a duty to grant a contract to every potential party, however, ocean common carriers' decisions must be based on legitimate transportation factors or legitimate business decisions. 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)). As discussed above in the refusal to deal section, here, the evidence shows that the decision to "disengage" from negotiations for a renewed service contract was made due to the "litigation risk" posed by OJC and not for the reasons argued by Hamburg in this proceeding, as the facts do not support Hamburg's assertion that *in this particular case*, any of those five factors were the actual reason that *this particular service contract* was declined.

Regarding whether space was available, the evidence shows that after April 29, 2021, HSDG entered into service contracts with other shippers for a significantly higher amount of space than OJC was requesting. CX 469 at ¶ 16; CX 283-284; *see also* CX 285-286, HSDG's Resp. to OJC RFA 1-4. Ms. Casanova's question regarding whether the new contract could be increased from 200 to 400 FFE further suggests that HSDG had space available to enter into a contract of at least 200 FFE, the same as the previous year, and that whether space was available for 400 FFE had not been determined. Therefore, the evidence shows that Hamburg had at least 200 FFE available space for 2021-22, the same minimum volume commitment and routes as the prior contract.

The record does not allow a determination as to whether 400 FFE or more were available in the 2021-22 contract year. Mr. Pump testified that:

> Our biggest challenge in 2021 was capacity, as the existing customers, all asked, with very few exceptions, all asked for higher MQC, more capacity commitments, that was the overriding objective. And that was our biggest single challenge. Because we could not get a firm handle on the capacity that we would be able to sell in 2021. And then we had the challenge of who do we give more capacity to where, where does it come from.

RX 993. This is consistent with Hamburg's emails prior to April 29, 2021, for example when Ms. Casanova asked whether it would be possible to increase the MQC from 200 to 400 FFE, suggesting that it was not clear that an increased capacity would be available. CX 215.

The statements made by Ms. Casanova to OJC that Hamburg could not provide a new contract "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" (SCX 481, RX 811) are not credible as they are not consistent with internal Hamburg emails. Indeed, 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. Accordingly, the evidence establishes a refusal to provide cargo space accommodations when available for 200 FFE for the 2021-22 contract year.

c. OJC is a Shipper

The Commission has indicated that "although § 41104(a)(3) protects 'shippers,' that term includes more than just cargo owners." Statement on Retaliation, 3 F.M.C.2d at 201. In this case, the parties do not contest that OJC was a shipper. The facts establish that OJC is an e-commerce retailer that sells "dropship products" from domestic inventory of hundreds of brands, has a direct import program where OJC buys household goods, and OJC's imports come from Asia and Brazil and are delivered to California or Kentucky. CX 467. Therefore, OJC is a shipper and this element is met.

d. OJC Engaged in Protected Activity

OJC contends that Hamburg retaliated against it because OJC threatened to file a complaint with the FMC. Brief at 19. Hamburg argues that its emails do not establish retaliation but rather a reasonable business decision based on a misunderstanding; the alleged retaliation is not actionable because it occurred before OJC filed its complaint with the FMC; and finding retaliation here would create unworkable precedent because "every shipper would file, or threaten to file, claims with the FMC against ocean carriers during contract negotiations." Opposition at 18-23.

OJC asserts that not finding retaliation here "would essentially *encourage* carriers to retaliate if a dispute arose before the shipper could file its complaint, as a loophole to avoid liability," which would be contrary to the Commission's policy to interpret anti-retaliation provisions broadly. Reply at 16-17 (emphasis in original). OJC asserts that its claim is "consistent with the Shipping Act, the intent of Congress, and the Statement of the Commission on Retaliation." Reply at 18.

Section 41104(a)(3) states that a common carrier may not retaliate against a shipper "because the shipper has patronized another carrier, or *has filed a complaint, or for any other reason*." 46 U.S.C. § 41104(a)(3) (emphasis added). The Commission described this type of protected activity as "patronizing other carriers, filing a complaint, or other activities of the same class." Statement on Retaliation, 3 F.M.C.2d at 209. The Commission has indicated that "protected activity includes not only filing a complaint with the Commission but also

participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or using CADRS' dispute resolution procedures." Statement on Retaliation, 3 F.M.C.2d at 201.

The complaint in this proceeding was filed on December 13, 2021. Thus, the FMC complaint was filed after the conduct at issue, which began the afternoon of April 29, 2021. Therefore, Hamburg's actions after April 29, 2021, were not because OJC had "filed a complaint" as no complaint had yet been filed. Rather, the argument is that "for any other reason" includes OJC's threat to file a petition with the FMC.

The first time in the record that a threat to complain to the FMC is conveyed by OJC to Hamburg is April 28, 2021, when an attorney representing OJC emailed the second demand letter to Hamburg, stating: "Failure to cure the breach by May 3, 2021, 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 (emphasis omitted). OJC contends that this threat to file a petition, presumably meaning a complaint, with the Commission constitutes a protected activity. Therefore, the primary issue here is whether under these facts, the "for any other reason" statutory language includes threats to file a complaint with the FMC.

Hamburg states:

> OJC did not file a complaint before the FMC or commence any other FMC activities covered by the statute before the alleged retaliation. OJC fails to cite any precedent—and Respondents are not aware of any—that threatening to file a complaint before the FMC is covered by Section 41104(a)(3), as in effect at the time of the conduct at issue.

Opposition at 21 n.10. Further, Hamburg asserts that the "any other reason" language applies only to other ways that shippers may bring allegations of unlawful activity to the Commission, such as participating in Commission investigatory or enforcement efforts. Opposition at 21 n.10.

Hamburg is correct that this is a novel issue and the parties have not identified any case law that addresses whether or not "any other reason" in the Shipping Act's anti-retaliation provision applies to threats to file an FMC complaint. In *California Shipping*, where Complainant had filed a complaint against another carrier, Korea Shipping Line, but was alleging retaliation by Yangming Marine Transport Corporation, the Commission found that although "section 10(b)(5) does prohibit retaliation against a shipper because the shipper has filed a complaint, we believe that this provision is limited to situations where the shipper has filed a complaint against the carrier who is allegedly retaliating against it." *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, Docket No. 88-15, 25 S.R.R. 1213, 1990 WL 427466, at *16 (FMC Oct. 19, 1990). Here, OJC threatened to file a complaint about Respondent, not some other carrier.

The statutory language, by including the phrase "or for any other reason" explicitly applies this section beyond cases where the shipper has patronized another carrier or has filed a complaint. The extent of that expansion is not unlimited, however, and the closeness of the alleged misconduct to the other items listed is relevant. Here, the action alleged to constitute an "other reason" is the threat to file a complaint with the Commission. This conduct is closely

related to the listed violations without being one of the listed violations. It is reasonable to anticipate that threats of prohibited conduct would be encompassed under the "for any other reason" language, and so finding is consistent with the Commissions' Policy Statement regarding interpreting the anti-retaliation provision broadly.

That this "any other reason" language may also apply to other conduct – such as participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or using CADRS's dispute resolution procedures – does not mean that "any other reason" may not also apply to threats to file an FMC complaint.

Hamburg also asserts that the threats here would not fall under this section because they related to alleged breaches of the service contract, which typically would not be heard by the Commission, and because the service contract contained arbitration and liquidated damages provisions. Opposition at 21. However, service contracts do not deprive the Commission of jurisdiction to hear allegations of Shipping Act violations. The anti-retaliation provision is not so limited, and Hamburg does not provide any legal support for this argument.

From a policy perspective, OJC contends that not including "threats" in "any other reason" could motivate carriers to retaliate quickly, before a complaint can be filed. Reply at 16-17. Hamburg, on the other hand, contends that "every shipper would file, or threaten to file, claims with the FMC against ocean carriers during contract negotiations." Opposition at 22-23.

Ideally, parties should be able to discuss what they think could be Shipping Act violations as soon as possible, so the parties can work toward resolving them before they become violations or lead to litigation. These conversations may be limited if "threats" to file a complaint are not included in the anti-retaliation provisions as shippers may hesitate to raise issues without the protection of the anti-retaliation provision. Moreover, just because a party threatens to file a complaint does not mean that the complaint is valid or would be successful. It simply advises the carrier that the shipper believes there may be a violation so that the carrier can ensure that their conduct conforms to the requirements of the Shipping Act. As long as carriers have a legitimate, transportation-related basis for their decisions and comply with the requirements of the Shipping Act, they will not face liability. Moreover, including "threats" to file a complaint as an "any other reason" is consistent with the Commission's statement that this section should be read broadly. Therefore, a threat to file a Commission complaint constitutes "for any other reason" in the anti-retaliation provision.

For the reasons discussed above, OJC's threat to file a complaint with the Commission establishes that OJC engaged in protected activity and this element is met. Therefore, all four factors are met. OJC has established that common carrier HSDG retaliated against shipper OJC by refusing cargo space accommodations when available or resorting to other unfair or unjustly discriminatory methods because OJC had filed a complaint or for any other reason, which includes the threat to file a Commission proceeding. 46 U.S.C. § 41104(a)(3). The next issue is what reparations, commonly referred to as damages, are appropriate.

3. Reparations

OJC alleges that it is entitled to reparations for the actual injury it sustained as a result of Hamburg's violations of the Shipping Act; Hamburg's criticisms of OJC's damages are just as baseless as its liability pretexts; and OJC's damages should be doubled due to Hamburg's willful violation of section 41104(a)(3). Brief at 33-49; Reply at 32-52.

Hamburg asserts that OJC failed to prove damages with reasonable certainty, arguing that OJC's expert is unqualified to offer opinions on damages and contesting OJC's alleged lost profits, "Shipping Rate Differentials" method, evidence of causation, and mitigation of alleged damages. Opposition at 23-42.

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. 46 U.S.C. § 41305(b). Complainants bear the burden of proving that they are entitled to reparations. *MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, Docket No. 16-16, 2022 WL 2209421, at *3 (FMC June 10, 2022). "As the Commission has explained: '(a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.'" *MAVL Capital*, 2022 WL 2209421, at *3 (citations omitted). Reparations will only be awarded based on actual damages. *MAVL Capital*, 2022 WL 2209421, at *3. "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." *MAVL Capital*, 2022 WL 2209421, at *3 (quoting *California Shipping,* 1990 WL 427466, at *23). "That does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained." *MAVL Capital*, 2022 WL 2209421, at *3.

> The statements of the Commission in *California Shipping Line Inc.* and the other cited cases are in the mainstream of the law of damages as followed by the courts, for example, regarding the principle that the fact of injury must be shown with reasonable certainty, that the amount can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences, the principle that the damages must be foreseeable or proximate or, in contract law, within the contemplation of the parties at the time they entered into the contract, the fact that speculative damages are not allowed, and that regarding claims for lost profits, there must be reasonable certainty so that the court can be satisfied that the wrongful act caused the loss of profits.

Tractors & Farm Equipment Ltd. v. Cosmos Shipping Co., Docket No. 81-57, 26 S.R.R. 788, 798-99 (ALJ Nov. 23, 1992), admin. final, Dec. 31, 1992. The parties agree that reasonable certainty is the appropriate standard. Reply at 33 n.146; Opposition at 23-24.

Both parties present experts, and the status of those experts and their reports will be addressed first. The specific damages calculations presented by OJC will then be evaluated, followed by an assessment of causation, mitigation, and additional damages.

a. Experts

The report of OJC's expert witness, Richard Berning, includes alternative calculations of damages based on either lost profits or shipping rate differentials. Brief at 33-49; CX 415 (Berning Report); CX 460 (Berning Supp. Report). The report and declaration of Hamburg's expert, Ricardo Zayas, dispute OJC's damages calculations. RX 1180 (Zayas Report); RX 1145 (Zayas Declaration).

Hamburg contends that Mr. Berning is unqualified, arguing that he did not obtain "sufficient relevant data" or verify the data provided to him; the assumptions underlying his opinions are not reasonable; and his opinions are insufficient as a matter of law. Opposition at 25-36. OJC asserts that all of these objections are unfounded. Reply at 43-52. Both parties also contest the timeliness of each other's expert reports.

i. Expert Qualification

"Qualifying an expert . . . requires only that the witness possess the 'knowledge, skill, experience, training, or education' necessary to assist the trier of fact. As the Supreme Court stated in the seminal opinion of [*Daubert*], the trial court must determine whether the proposed expert possesses 'a reliable basis in the knowledge and experience of [the relevant] discipline.'" *Robinson v. D.C.*, 75 F. Supp. 3d 190, 197 (D.D.C. 2014) (citing to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). "It is not necessary that an expert possess the highest possible or most appropriate qualifications." *Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake, LLC*, Docket No. 11-11, 2013 WL 9808672, at *23 (ALJ Jan. 10, 2013), admin. final Mar. 20, 2013.

Mr. Berning 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. CX 438, CX 449-459. Mr. Berning is qualified as an expert, and the criticisms offered will be considered in the weight given to his opinion. Hamburg's other arguments, regarding Mr. Berning's data, assumptions, and the sufficiency of his opinions are not a reason to disqualify Mr. Berning, but these will be considered in the evaluation of OJC's damage calculations below.

ii. Legal Sufficiency

Hamburg argues that Mr. Berning's opinions are insufficient as a matter of law because they merely parrot Mr. Weiss's calculations. Opposition at 36. OJC indicates that Mr. Berning did not rubber stamp OJC's prior figures but rather came up with his own independent opinion. Reply at 44; Brief at 33-34; RX 1044; *see also* CX 448; CX 469.

As the Commission observed in *Sea-Land Service, Inc.*: "Ordinarily, the fact that a party in interest has tendered an analysis does not automatically disqualify the analysis on the grounds of bias. However, bias is properly a factor to be considered in determining weight to be accorded any testimony." *Sea-Land Service Inc. - Proposed General Rates Increases in the Puerto Rico and Virgin Islands Trades*, Docket No. 81-10, 20 S.R.R. 1627, 1633 (FMC Sept. 25, 1981), *aff'd sub nom*, *Puerto Rico Maritime Shipping Auth. v. FMC*, 678 F.2d 327 (D.C. Cir. 1982). Mr. Weiss performing certain analyses does not disqualify the analyses; however, the source of

calculations will be taken into account in terms of weight. Differences in the total damages calculations before and after Mr. Berning's involvement, which Hamburg has highlighted, support the impact of Mr. Berning's participation. Opposition at 31-32.

iii. Timeliness

Both parties contest the timeliness of each other's expert reports. Hamburg asserts that Mr. Berning's two expert reports were served after the deadline for expert reports and are thus untimely. Opposition at 25. OJC contends that Mr. Zayas's declaration, constituting a rebuttal expert report, was served nearly two months after the close of all discovery in violation of the rules and is "trial by ambush." Reply at 28.

It appears that all three submissions were not timely filed. The Order on Respondents' Motion to Compel and Revised Schedule, served June 29, 2022, states that the cut-off for disclosure of initial expert reports was August 5, 2022, and the cut-off for all discovery was September 16, 2022. Mr. Berning's initial expert report is dated September 2, 2022, his supplemental report is dated October 17, 2022, and Mr. Zayas's Declaration is dated December 8, 2022. CX 415; CX 460; RX 1145.

The status of Mr. Berning's initial report was addressed in an earlier order in this proceeding, which held that the "expert report submitted by Complainant on September 2, 2022, was not filed timely. However, striking the report or not permitting Complainant to present a damages expert would be an extreme remedy. Rather, the discovery deadline will be extended briefly." Order on Respondents' Motion to Compel and Complainant's Motions for Extension of Time and for Clarification at 5. It is preferable to resolve this proceeding on the merits. Therefore, all three expert reports will be entered into the record and given the weight they are due. In the future, the parties should note that untimely expert reports may be stricken.

iv. Other Critiques

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.

Hamburg argues that Mr. Berning failed to verify OJC's data and calculations using source documents and the "lack of sufficient relevant data is obvious in eight respects": average revenue per container; average profit per container; containers OJC shipped in 2020-21; containers OJC would have shipped in 2021-22; products OJC would have sold in 2021-22; HSDG's alleged refusal to deal; OJC's alleged lost profits; and OJC's failure to mitigate. Opposition at 27-31.

Hamburg also argues that Mr. Berning's opinions depend upon six unreasonable assumptions, that: Hamburg was required to enter a service contract for 2021-22; the hypothetical service contract for 2021-22 would have had the same rates as 2020-21; Hamburg would have agreed to increase the MVC from 200 FFEs in 2020-21 to 4,700 FFEs in 2021-22; OJC would have been able to fill 4,700 containers with products and sell all those products in 2021-22; Hamburg would have agreed in the hypothetical 2021-22 contract to transport

containers from Asia to OJC's warehouse in Kentucky; and the hypothetical 2021-22 contract would have included trade lanes from Brazil to the U.S., even though the service contract for 2020-21 covered only Asia to California trade lanes. Opposition at 32-35 (emphases omitted).

Hamburg's argument that they were not required to enter into a service contract for 2021-22 goes to the merits, while this section addresses what reparations are appropriate for the Shipping Act violations established above. The other critiques offered by Hamburg are considered in evaluating OJC's damage calculations below.

Mr. Berning calculates average *gross* profit per container as revenue less the costs, including the purchase cost, sales commissions, fulfillment center costs, shipping costs, and any other costs directly associated with the product. CX 423. Mr. Berning also states that OJC utilizes third parties for shipping, fulfillment warehousing, and other needed tasks to sell the product, and that all of these costs have been captured and deducted. CX 423. He finds average *net* profit per container to be equal to *gross* profit per container, noting that due to the structure of the company, the direct variable costs included produce the net profit per container. CX 423. Because the numbers presented are the same and the costs deducted appropriately reflect OJC's variable costs, this decision simply refers to average profit per container. *See, e.g., Flota Mercante Grancolombiana v. Consolo v. FMC*, 373 F.2d 674, 677, 681 (D.C. Cir. 1967) (discussing and affirming reparations figure set by the Commission after *Consolo v. FMC*, 383 U.S. 607, 626 (Mar. 22, 1966)); *Rose Int'l Inc. v. Overseas Moving Network Int'l*, Docket No. 96-05, 29 S.R.R. 119, 2001 WL 865708, at *77-78 (FMC June 1, 2001).

b. Damages Calculation

OJC presents its expert's analysis of the injurious effects of Hamburg's Shipping Act violations under two alternate methodologies: (1) lost profits or (2) shipping rate differentials, each addressed separately below. Shipping rate differentials will be addressed only briefly, because the lost profits method more accurately measures OJC's actual injury.

i. Lost Profits

In assessing lost profit damages, the same damages standard elaborated above applies. Reparations will only be awarded based on actual damages which "does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained." *MAVL Capital*, 2022 WL 2209421, at *3. 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." *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).

The "goal of awarding damages is to make the injured party whole," thus, the "proper measure of damages is not reduced to one simple formula, but must be evaluated on the individual facts of the case and calculated in order to make the injured party whole." *Kobel v. Hapag-Lloyd A.G.*, Docket No. 10-06, 2014 WL 5316331, at *14 (ALJ July 30, 2014) (Remand Initial Decision), *aff'd* 2015 WL 3465821 (FMC May 26, 2015) ("*Kobel Remand ID*"); *see also* 22 Am. Jur. 2d Damages § 25. Therefore, regarding calculation methods for reparations claims

before the Commission, "[t]he method chosen depends on the evidence available and which calculation more accurately measures the actual loss." *MAVL Capital*, 2022 WL 2209421, at *3.

OJC presents four categories of lost profit damages: (1) loss for failure to meet minimum TEU during 2020-21, (2) loss due to failure to provide the regular weekly shipments during 2020-21, (3) freight charges above contract rates during 2021-22, and (4) loss due to refusal to renew contract during 2021-22. CX 422. OJC adds these four categories of lost profits to establish a total lost profits claim. Each of these four categories of lost profit damages requested will be assessed below. However, two sections have been reordered, to allow for more logical analysis: what OJC labels as "lost profit damage category #4" (loss due to refusal to renew contract) will be addressed third in the discussion below, followed by what OJC labels as "lost profit damage category #3" (freight charges above contract rates during 2021-22).

(a) Minimum TEU 2020-21

OJC contends that Hamburg was required by the 2020-21 service contract to provide a minimum of 200 containers and only produced 185, or a deficit of 15 containers; and proposes this loss be computed by taking the deficit of 15 containers, multiplied by the anticipated average net profit per container of $22,892.48, resulting in a loss of $343,387.18. Brief at 38; CX 424.

Hamburg acknowledges that it shipped only 185 out of the contracted 200 FFE. Opposition at 2; CX 212. But, Hamburg disputes OJC's calculation, asserting that section 3(c) of the service contract provides for liquidated damages of $250 per TEU "[i]n the event that the Minimum Volume Commitment of this Contract is reduced by 10% or more as a result of carrier's failure to provide space;" such provisions are valid and can negate claims for damages under the Shipping Act; the contract obviates any claim for damages arising from Hamburg's failure to meet the 200 FFE minimum, because the actual containers shipped by Hamburg (185 FFEs) were within ten percent of the MVC (200 FFEs); and even setting aside the ten percent threshold, the maximum damages OJC could receive under the service contract for a 15-container shortfall would be $7,500 (30 TEUs multiplied by $250 per TEU). Opposition at 37.

Many of the points made by Hamburg may be relevant were this a breach of contract claim, but this is not. This proceeding addresses violations of the Shipping Act. Thus, it is not contractual terms or liquidated damages, but rather OJC's actual injury that must be assessed. 46 U.S.C. § 41305(b). While *California Shipping* considered contract provisions, that was in the context of evaluating complainant's actual injury. 1990 WL 427466, at *25 (referencing contracts with clauses that lowered the minimum quantity commitment if the shipper was unable to secure space from the carrier; thus, the contracts alleged to have been owed to complainant were "much less valuable"). Indeed, Hamburg was well aware, as they made the decision to refuse to deal and to retaliate against OJC, that actual damages "would of course be a significantly higher amount" than $250/TEU. CX 229.

Here, there is no question concerning Hamburg's obligation to fulfill 200 FFE and the shortfall of 15 FFE, rather, the challenge is in evaluating OJC's calculation of damages, including average revenue per container and average profit per container. As explained below, the record demonstrates that both are calculated with reasonable certainty.

(1) Average Revenue and Profit per Container

OJC presents two averages, upon which several of its lost profit category calculations depend: average revenue per container of $60,250.30 and average profit per container of $22,892.48. OJC states that it compiled an average revenue per container shipped during the period June 1, 2020, through July 16, 2022, based on actual products shipped and the selling price of the products; and average profit per container based on the same containers used that that were used for the average revenue calculation, and taking revenue less costs of the product. Brief at 35.

Mr. Berning's report indicates that to compute the cost of the product, OJC captured "all the costs including the purchase cost, sales commissions, fulfillment center costs, shipping costs and any other direct costs directly associated with the product." CX 423; *see also* CX 470. OJC added that it "utilizes third parties for shipping, fulfillment, warehousing and other needed tasks to sell the product" and that all these costs were captured and deducted. *Id.* OJC explained as well that "[e]ven though OJC was projecting [a] significant increase in sales in fiscal 2021 (and resulting need for additional containers), their increase in fixed costs would be nominal due to the structure of the company." *Id.*

Hamburg disputes both averages and contends that Mr. Berning did not do anything to substantiate these numbers - he did not review, and OJC refused to produce - the shipping records, sales records, financial statements, and other documentation from which the calculation might be verified; OJC's use of these numbers is without evidentiary support; an earlier spreadsheet provided by Mr. Weiss calculated different numbers for each calculation, which Mr. Berning was not aware of, and OJC has not explained why the calculations changed; Mr. Berning's report does not address whether certain costs OJC characterized as fixed were, under applicable accounting standards, actually variable; and both OJC and Mr. Berning concede average profit per container may not have included all variable costs. Opposition at 28-29.

Mr. Berning's report indicates that OJC compiled an average revenue per container and computed the average profit per container. CX 423; *see also* RX 1041. Thus, these they will be evaluated, and any possible bias considered, in light of their being offered by OJC's President. Mr. Berning's level of review was appropriate for his use of these averages in subsequent calculations. While Mr. Berning did not calculate these numbers, he examined the methodology utilized by OJC, the data from OJC's accounting systems, and OJC's costs in light of the company's operational structure. RX 1082-1083 (noting "the way they operated is almost as . . . a virtual company. So their costs, overhead and stuff, are very limited because they outsource pretty much everything" and that "We did look to . . . the Excel spreadsheets which have the company data . . . that comes directly from the company's accounting and other systems . . . . [B]ecause it's Excel-based, we can see where the calculations are made to see what they're doing."). This was a reasonable level of review by Mr. Berning to support their inclusion in his calculations.

For both averages, Hamburg charges that OJC refused to produce the "shipping records, sales records, financial statements, and other documentation from which these calculations might be verified." Opposition at 28-29 (citing to RX 1121, RX 1033, RX 1034). Much of this

underlying data was the subject of an earlier motion to compel and subsequent order denying that motion to compel. As recounted in the September 30, 2022 Order:

> Respondents argue that OJC has provided a spreadsheet supporting its alleged damages but that OJC has not provided any of the documentation upon which the spreadsheet is based, and that lost sales or profits should be reflected in financial statements or some sort of financial reports.
>
> Complainant asserts that OJC is a private company which does not generate or possess any audited financials; overall company financials would not be relevant as the only line of business at issue is the import of house-brand products; OJC specifically generated the sales history of the house-brand products for Respondents; and OJC does not generate quarterly or annual profit and loss statements. . . .
>
> Respondents have not identified specific problems with the detailed information provided in this spreadsheet. In addition, Complainant's arguments are persuasive that certain financial reports are not available or would not be probative because other product lines are included.

Order on Respondents' Motion to Compel and Complainant's Motions for Extension of Time and for Clarification at 4 (citations omitted). The above has not changed – Hamburg still has not identified specific problems with the detailed information provided in the spreadsheet. Indeed, OJC has presented a wealth of rich actuals data (data about financials that have already occurred as opposed to what was forecast). OJC claims that it provided the following data to Hamburg:

- Produced data in spreadsheets on the 737 containers shipped by OJC from June 1, 2020, around when the parties' Service Contract started, until July 2022. For each container, OJC provided Maersk with 13 points of data, including but not limited to the exact origin, destination, shipping carrier, ship date, arrival date, container value, and the exact price paid.

- Provided Maersk a total of 2,830 records of all the contents in the 737 containers. For each line item, OJC provided 12 points of data, including but not limited to the product descriptions, total units, unit cost, profits, revenue, and pricing.

- Provided a total of 366,709 records of sales history on all those products, starting from January 1, 2020, to August 17, 2022. For each sales transaction, OJC provided 12 points of data, including the order number, order date, order source, price paid, item ordered, quantity ordered, cost of shipping, cost of fulfillment, commissions, marketing, discounts, sales, and gross revenue, all from OJC's internal database.

- All in all, in addition to the other documents and emails that OJC has produced, OJC provided Maersk a total of 370,276 records, with 4,444,049 points of data, encapsulating all shipping containers during the relationship

> between the parties, and all sales records of products associated with those shipping containers.

Reply at 33 (citations omitted). Hamburg nevertheless argues that OJC's "refusal to produce supporting documentation . . . casts significant doubt on Mr. Weiss's estimates," pointing to *California Shipping*, which Hamburg summarizes as "rejecting damages supported solely by summary exhibit that 'was entirely the work of [complainant's president].'" Opposition at 28 (citing 1990 WL 427466, at *24).

But the underlying data in *California Shipping* was vastly different than OJC's data. In *California Shipping*, the complainant's President was offering "estimates of the amounts and types of cargoes he could have generated if given access to the three contracts." 1990 WL 427466, at *24. He offered these projections based on "his experience in the industry, his knowledge of [complainant/CSL's] operations and customer base, and his knowledge of the market for service contract and tariff rates during the relevant time periods." *California Shipping*, 1990 WL 427466, at *23. The lists of "potential customers" CSL submitted were generated by CSL's salesmen, "included many customers that were not strictly CSL's," and showed "only a limited potential, as opposed to a probable commitment" causing the Commission to conclude there was "no convincing evidence, therefore, that CSL had a sufficient customer base to satisfy the particular volumes required by each contract." *California Shipping*, 1990 WL 427466, at *12. The Commission also noted there was "no indication in the damages summary as to what proportion of CSL's cargo estimate would have been its own and what would have been cargo supplied by its 'agents'" relevant because CSL "permitted, if not relied upon, certain foreign NVOCCs to move their cargo under CSL's contracts" and CSL acknowledged that "a 'good portion' of cargo moving to the East Coast would have been that of [its] 'agents.'" *California Shipping*, 1990 WL 427466, at *11, *24.

By contrast, OJC's average revenue and average profit per container calculations are based not on projections but on actuals data, providing an inherently more fact-based and reliable foundation. OJC also took care to exclude non-relevant shipments, providing data for the 737 containers shipped in the relevant time period corresponding to OJC's house-brand products line of business. While audited financials are not available, this was detailed data, and Hamburg still does not assert the data to be problematic in and of itself. If earlier preliminary calculations (which have not been presented in briefing by OJC) were different from OJC's final calculations, this is neither troubling nor surprising, and may be a consequence of OJC's efforts to provide as much actuals data as possible.[6]

OJC's average revenues per container and average profits per container, based on actuals data over the time period June 2020 through July 2022, is therefore found to be well supported. The variable costs taken into account by OJC were appropriate. OJC's acknowledgement that it has captured "the vast majority, if not all of the costs relating to the sale of products," and Mr. Berning's statement to the same effect, does not impugn the reasonableness of this number,

[6] Demonstrating OJC's efforts to provide comprehensive actuals data, OJC noted that it produced data supporting its damages claims on July 15, 2022, (including data from June 1, 2020, through March 24, 2022) and supplemented this on September 2, 2022, with additional shipments made since that time (through July 2022). OJC Counterstatement Brief, September 8, 2022.

where there is no indication of anything but good faith efforts from OJC to capture all relevant costs. For Complainant to show actual damages "does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained." *MAVL Capital*, 2022 WL 2209421, at *3; *see also Tractors & Farm*, 26 S.R.R. at 798-99 ("the amount [of damages] can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences.").

OJC has sufficiently established its average revenue per container of $60,250.30 and average profit per container of $22,892.48 as reasonably certain, and these averages will be utilized in the damages calculations below.

(2) Final Calculation for 2020-21

With average profit per container of $22,892.48 established, damages are calculated by multiplying this profit by the remaining 15 containers that OJC was owed under the 2020-21 service contract, in order to obtain OJC's actual injury of $343,387.20. Therefore, for Hamburg's failure to meet its minimum TEU by 15 FFEs (30 TEUs) in 2020-21, actual injury of $343,387.20 has been shown with reasonable certainty.

(b) Regular Weekly Shipments 2020-21

OJC claims that Hamburg was required to provide a minimum number of weekly shipments during 2020-21; this weekly minimum was confirmed in an email between Mr. Gast and Ms. Casanova; Hamburg repeatedly missed the weekly minimum and by end of the year the weekly shortfalls totaled 105 containers; and Hamburg has not compensated OJC for these shortfalls. Brief at 38-39. To compute this loss, OJC takes a deficit of 105 containers multiplied by the anticipated average profit per container of $22,892.48, resulting in a loss of $2,403,710.25. CX 424.

Hamburg contends that this damage claim is inconsistent with the terms of the service contract; there is no contractual requirement that Hamburg provide "regular weekly shipments" to OJC; the service contract merely imposes a 200 FFE MVC during the contract term; in arguing that OJC was entitled to 8 TEUs or 10 TEUs per week, OJC refers not to the terms of the contract, but to emails to OJC or internal Hamburg emails; these communications refer to "SP" or "space protection" that Hamburg allocated internally in an effort to meet OJC's weekly container requests and stay on track to meet the 200 FFE MVC for the contract term; these communications did not amend the contract to require regular weekly shipments; and in seeking damages for a weekly shortfall of 105 FFEs in addition to damages for failing to meet the 200 FFE MVC, OJC argues that Hamburg was contractually required to ship 305 FFEs during the contract term, which is inconsistent with the contract, which states that Hamburg has the "option," not the contractual requirement, to ship additional cargo beyond the MVC of 200 FFE. Opposition at 38 (citations omitted; emphases omitted).

This category of lost profit damages presented by OJC is not supported by the record. There is no enforceable commitment by Hamburg to provide a minimum number of weekly shipments. As Hamburg noted, the service contract refers to a minimum volume commitment of 400 TEUs (200 FFEs). CX 125. Regarding spacing of cargo, the most relevant contract term

binds OJC, not Hamburg. CX 125 ("Shipper agrees . . . that the tender of cargo under this Contract shall be reasonably spaced throughout the term hereof.").

It is not surprising that OJC might have been confused regarding a weekly allocation. Hamburg says it referred to SP, but the emails show the terms SP and MQC to have been used sometimes interchangeably by Hamburg. *See, e.g.*, CX 153 (internal Hamburg email indicating "Please note that there is a MQC of 10 TEUS per week under agreement # AECC0000291. . . . I appreciate that you confirm them at least to meet the MQC."). The emails cited by OJC, however, do not suffice to establish an enforceable commitment, in place of contract terms.

In any case, if OJC was to be compensated for its actual injury of $343,387.20 from loss for Hamburg's failure to meet minimum TEU during the service contract (discussed above), then OJC would already be made whole for 2020-21. "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." *Adair v. Penn-Nordic Lines, Inc.*, Docket No. 1695(F), 26 S.R.R. 11, 26, 1991 WL 383091, at *24 (ALJ Sept. 24, 1991), admin. final Oct. 24, 1991. If OJC was additionally compensated for regular weekly shipments during 2020-21, OJC would be made more than whole for the 2020-21 service contract. This category of lost profit damages claimed by OJC is therefore denied.

(c) Refusal to Renew Contract 2021-22

OJC asserts that Hamburg refused to renew the shipping contract with OJC for 2021-22; the parties agreed to between 4,200 and 4,700 containers; by unlawfully refusing to renew the contract, Hamburg forced OJC into a position where it could not profitably operate its business because shipping the containers would cost more than the goods in the containers were worth; and Hamburg made record-breaking multi-billion dollar profits but was doing so at the expense of OJC's business. Brief at 40. OJC offers alternate calculations based on the assumption of either 4,200 or 4,700 total containers expected for 2021-22, minus the 143 containers actually shipped, for a shortfall of 4,057 or 4,557 containers. OJC multiples this shortfall by the average profit per container of $22,892.48, for a total loss sustained of $92,874,785.49 or $104,321,024.77. Brief at 41; CX 425-426.

Hamburg contends that OJC's projection of 4,200 to 4,700 FFEs in 2021-22, a 767% increase over its container volume in 2020-21, is unsupported and unreasonable; and OJC's claim for $92,874,785.49 or $104,321,024.77 is pure speculation and must be rejected. Opposition at 41.

Actual damages must be proved by the party seeking them and to "warrant recovery, the actual detriment must be shown by competent evidence and with reasonable certainty." *California Shipping*, 1990 WL 427266, at *23. Here, a 2021-22 container volume assumption of either 4,200 or 4,700 has not been demonstrated with reasonable certainty. This would have constituted a markedly different scale of relationship between OJC and Hamburg, equating to more than a 21-fold increase over the MQC established by the 2020-21 contract. This volume proposal by OJC also included new routes, which had not been a part of the 2020-21 relationship (discussed further below). OJC has demonstrated that it communicated to Hamburg its plans to move between 4,200 to 4,700 FFE in 2021, and Hamburg had begun to discuss this volume and its associated routes internally; but negotiations had not advanced to the point where this increase

in volume can be reasonably assumed to have been contracted for in 2021-22. CX 203; CX 217-218; RX 809. As a result, OJC's calculation of actual injury predicated on volumes of either 4,200 or 4,700 is not supported by the record.

That does not mean OJC was not harmed in 2020-21. Mr. Pump emailed Mr. Li on April 29, 2021, that Hamburg "should not engage in any renewal discussions" with OJC, nor "provide them with space under the existing contract." CX 220. But right up until that point, contract negotiations had been proceeding for closing a 2021-22 contract. *See, e.g.*, CX 218-219 (April 27, 2021, Hamburg email discussing OJC's plans to move 4,200 to 4,700 FFE in 2021 and seeking to confirm the actual MQC target for a 2021-22 contract); CX 217 (On April 28, 2021, Mr. Li stated Hamburg would "need a clear target in order to put it on target list" adding they "signed 200 FFE last year for City of Industry, CA and almost fulfilled that this year. Based on that what would be the MQC target for next year with and without KY business?"); CX 215 (April 29, 2021, Ms. Casanova's email stating "since we are working to renew the contract, I want to ask if it is possible to Increase MQC by 200 FFE giving a total of $400 FFE" adding "the customer has been constant in his volumes and is willing to commit to much more of the current MQC."). Throughout those discussions, there were conversations about the MQC of the renewal, but never about there being no renewal at all. Amended Complaint at ¶ 41; HSNA Answer at ¶ 41; HSDG Answer at ¶ 41.

To determine damages for 2021-22, it is next necessary to discuss: (1) container volume; (2) routes; (3) use of average profit per container; and (4) the containers actually shipped by OJC in 2021-22.

(1) Container Volume

OJC asserts that it would have shipped 4,200 to 4,700 FFE in 2021-22. Brief at 39-41. Hamburg contends that this volume is speculative and not supported by the record, particularly where the previous contract was only for 200 FFEs. Opposition at 41.

To assess 2021-22 volume, it is first relevant that OJC shipped 185 containers and was prepared to meet its contractual commitment of 200 FFEs with Hamburg in 2020-21. CX 212. It 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, 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. *See, 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.").

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. The evidence shows that on the morning of April 29, 2021, Ms. Casanova asked whether Hamburg could "[i]ncrease MQC by 200 FFE giving a total of $400 FFE, that will not only cover the deficit by also show our interest to participate more of their volume" if Hamburg

could achieve that. CX 214; CX 213. This question suggests that it was not clear whether or not Hamburg could handle a higher volume.

Mr. Pump testified:

> Our biggest challenge in 2021 was capacity, as the existing customers, all asked, with very few exceptions, all asked for higher MQC, more capacity commitments, that was the overriding objective. And that was our biggest single challenge. Because we could not get a firm handle on the capacity that we would be able to sell in 2021. And then we had the challenge of who do we give more capacity to where, where does it come from.

RX 993. This testimony is consistent with Ms. Casanova's question about whether or not the volume could be increased – a question asked prior to the afternoon of April 29, 2021. Therefore, the evidence does not support a finding that Hamburg would have agreed to a higher volume than the previous year.

OJC asserts that it would have been able to ship 4,200 to 4,700 FFE. However, it was not clear that even before April 29, 2021, Hamburg had sufficient capacity to meet this higher volume request. Therefore, OJC's request for damages based on up to 4,700 FFEs is overly speculative. The evidence does not support a finding that Hamburg would have agreed to a 2021-22 contract of that volume. Therefore, 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. The next question is whether any adjustment needs to be made to account for routes, and as explained below, it does not.

(2) Routes

OJC's desired volume of 4,200 to 4,700 containers included routes that were not a part of the 2020-21 contract. Specifically, as part of OJC's projected volume of 4,200 to 4,700, OJC initially requested that seventy percent of containers be shipped to Kentucky, and the remaining thirty percent to California. CX 203; *see also* CRPFF No. 73 ("Admitted that OJC initially requested 70% containers to KY" although OJC insists that it "informed [Hamburg] that if Kentucky was again an issue, OJC could ship all [containers] through California.").

Based on the evidence, it is not reasonably certain that the route to Kentucky would have been included in a 2021-22 contract between the parties. 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. CX 242; CPFF No. 87; RRPFF No. 87; CX 287; *see also* RPFF No. 25; CRPFF No. 25. However, the clearest evidence on this point is Hamburg's declination of this route twice prior to April 29, 2021. Indeed, 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. *See, e.g.*, CX 217 ("I do suggest to maintain focus on local destination only."). Thus, if OJC's actual injury were being calculated based on an initial container volume of 4,200 or 4,700 FFE in 2021-22, that volume would have to have been adjusted downward, removing the container volume bound for Kentucky.

However, as already discussed, neither 4,200 nor 4,700 were accepted as a reasonably certain container volume for 2021-22. Just as 200 FFE is the reasonably certain container volume for 2021-22, so too is it reasonably certain to utilize the same routes from the 2020-21 contract (which did not include Kentucky). In effect, the route to Kentucky was already removed from the calculation of volume because the calculation of volume above does not include the Kentucky route. Therefore, while routes to Kentucky are not reasonably certain for 2021-22, this does not change the findings above.

As a calculation of actual injury to OJC then, it remains reasonable to take 200 FFE and multiply this by the average profit OJC would have achieved in 2021-22, but for Hamburg's retaliation and refusal to deal. But, prior to finalizing this calculation, two further questions must be addressed: whether it is appropriate to take average profit per container of $22,892.48 and to utilize this number for 2021-22 calculated losses; and whether an adjustment is necessary to account for the 143 containers actually shipped by OJC without the benefit of a contract with Hamburg. As elaborated below, OJC's calculated average profit per container is determined to be sufficiently accurate; and, it is not appropriate to subtract from the 200 containers for 2021-22, because the evidence establishes that OJC would have shipped these 143 containers on the spot market through alternate carriers, even if it had a contract with Hamburg for 200 FFE.

(3) Average Profit per Container

One of Hamburg's assertions is that it is an unreasonable assumption to think contract prices in 2021-22 would have been the same as contract prices in 2020-21, thereby lowering OJC's profits per container. The main question that must be answered regarding the appropriateness of using average profits calculated by OJC for 2021-22 is whether this reasonably accounts for changes in contract prices that likely would have occurred. Both facts and case law support that it does.

As described above, OJC calculated average profits per container of $22,892.48 by compiling the average revenue per container shipped during the period June 1, 2020, through July 16, 2022, based on actual products shipped and the selling price of the products. So, this average already includes actuals throughout the relevant timeframe for both 2020-21 and 2021-22, taking into account higher spot market rates paid by OJC in 2021-22.

The parties did not reach the point of exchanging 2021-22 contract rates before Hamburg disengaged from negotiations. OJC argues it can assume the same contract rates as 2020-21, citing to Hamburg's internal communication referring to the new contract containing the "same rates" as in 2020-21. CX 214. But this was not an offer presented to OJC. It is clear in context that Ms. Casanova was providing information internally to begin the contract renewal process. *See, e.g.*, CX 203 ("Appreciate any advice and if there are any new guideline regarding TPEB contracts so we can start working on this contract renewal.").

The evidence does not show precisely what 2021-22 contract rates would have been between the parties. But, this lack of information was caused by Hamburg's retaliation and refusal to deal. As already described, Hamburg was negotiating the 2021-22 contract, until the decision was made "in light of potential litigation" to "disengage on renewal negotiation with this account." CX 213. "[W]hen 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." *Adair,* 1991 WL 383091, at *23. The Commission has stated that "in situations where a wrongdoer has by its own action prevented the precise computation of damages, the 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." *California Shipping*, 1990 WL 427266, at *23 (*citing Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65 (1946)). The average profit per container calculated based on 2020-21 and 2021-22 actuals is sufficiently supported to utilize in calculating 2021-22 injuries, especially as the profit per container includes the spot rates that OJC utilized in 2021-22.

Therefore, the profit per container of $22,892.48 is reasonable to utilize to calculate the actual damages sustained by OJC due to Hamburg's violations for 2021-22. The next question is whether the containers actually shipped by OJC impact the calculations.

(4) Containers Actually Shipped by OJC

OJC subtracts the 143 containers it was able to ship from its expected shipment of 4,200 to 4,700 containers in its calculation of damages. Brief at 41. Hamburg asserts that "lost profits in 2021-22 is pure speculation and must be rejected." Opposition at 41.

To put the 143 containers actually shipped by OJC in 2021-22 in context, it is helpful to begin with an examination of OJC's recent shipping history. OJC shipped 185 out of its 2020-21 volume commitment of 200 FFE, and the evidence indicates that it would have shipped the final 15 FFE had OJC been so allowed. OJC shipped additional containers with carriers other than Hamburg. *See, e.g.*, CRPFF No. 40. As also demonstrated earlier, 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 highlights 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.

Thus, the evidence establishes that if OJC had a 2021-22 contract with Hamburg for only 200 FFE that OJC would have continued to try to secure additional shipping space. This is what these 143 containers actually shipped by OJC in 2021-22 represent: those containers it was able to ship profitably outside of a carrier contact, through spot rates. Had OJC obtained a 200 FFE 2021-22 contract with Hamburg, and also shipped an additional 143 FFE on the spot rate market, that would still have been significantly below its volume projection. Further confirming that OJC would have shipped 143 containers in addition to, not instead of, 200 FFE with Hamburg, Hamburg themselves point out that the 143 containers actually shipped by OJC in 2021-22 included shipments from Brazil to the United States and from Asia to Kentucky, trade lanes which were not a part of the 2020-21 contract. Opposition at 40; *see also* CX 442-444; CX 425.

Hamburg points out that some of the spot market transportation that OJC obtained was ultimately shipped by Hamburg. Opposition at 15. Indeed, the evidence shows that Hamburg transported shipments for OJC after April 28, 2021, including shipments that were already scheduled, obtained via third-party freight forwarder United Shippers Association, or obtained via limited spot quotes. SCX 509. But, as Hamburg acknowledges, these short-term spot market

shipments were not part of a service contract between the parties, rather they were shipments made on a "case-by-case basis through rate quotations that were typically valid only for 60 days," RRPFF No. 87, therefore being of a kind that would have occurred in addition to a 200 FFE 2021-22 contract. Thus, these spot market shipments do not change the calculation of OJC's injury.

Therefore, it is reasonably certain that had OJC shipped 200 FFE with Hamburg in 2021-22, it nevertheless would also have sought out the spot markets to try to accommodate additional shipments. OJC's total injury in 2021-22 may therefore appropriately be calculated by looking at the injury resulting from 200 FFE without subtracting the 143 containers OJC was able to ship on the spot market. Accordingly, damages for 2021-22 are calculated 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.

(d) Freight Charges Above Contract Rates 2021-22

The final category of lost profit damages to be considered is freight charges above contract rates during 2021-22. OJC contends it was forced to pay spot rates for containers during 2021-22 because of Hamburg's retaliation and not renewing their shipping contract; during this time, OJC could only ship 143 containers because the prices greatly exceeded the contract rates; in most cases, OJC was either unable to procure shipments, or was forced to not ship product at all because the containers would cost more than the goods in the containers; and had Hamburg not retaliated, OJC would have shipped 4,200 to 4,700 containers as projected given the enormous demand for home goods during 2021-22. Brief at 39. OJC therefore assessed "expected contract rates" for each of the 143 shipments, and calculated excess shipping charges, by comparing the actual less expected contract rates for each shipment. Brief at 39-40.

Hamburg claims this damage claim is flawed in several respects, including that OJC did not provide any documents to verify the 143 FFEs it claims to have shipped or the spot rates it allegedly paid; OJC's assumption that Hamburg would have agreed to the same rates in 2021-22 is unsupported and unreasonable; OJC incorrectly includes shipments from Brazil to the U.S. even though these trade lanes were not a part of the 2020-21 contract; and OJC incorrectly includes shipments from Asia to Kentucky even though these trade lanes were not a part of the 2020-21 contract. Opposition at 40.

As described above, this category is no longer needed. It is not necessary to assess charges over contract prices, because the lost profit calculations above account for the entirety of the actual injury OJC has demonstrated with reasonable certainty for 2021-22.

(e) Total Lost Profits

As explained above, OJC's actual injury includes $343,387.20 for Hamburg's failure to meet its minimum commitment for the 2020-21 contract by 15 FFE (30 TEU) plus $4,578,496 for 200 FFE in 2021-22 which equals a total lost profits of $4,921,883.20. In holding lost profits to be real and compensable under the Shipping Act, the Supreme Court asserted "we think the court below wrongly minimized the sting of losing expected profits resulting from being unjustly

and illegally denied shipping space." *Consolo*, 383 U.S. at 626. Compensating OJC with $4,921,883.20 would acknowledge the sting of lost profits and make OJC whole.

Shipping rate differentials will be briefly addressed next, however, that method does not provide as accurate of a measure of OJC's actual injury. Injury alone does not guarantee reparations, *MAVL Capital Inc.*, 2022 WL 2209421, at *3, therefore, causation must be shown. The Commission has also indicated that mitigation of losses may be a factor to consider. As elaborated below, causation is confirmed, and OJC acted reasonably in attempting to mitigate damages. Therefore, actual damages are established. One final issue will be whether or not additional damages are appropriate in this proceeding.

ii. Shipping Rate Differentials

As an alternative to damages calculated based on lost profits for 2021-22, OJC also presents damage calculations based on shipping rate differentials. OJC describes that it computed the difference between the contract cost (that OJC would have had but for Hamburg's retaliation) to ship either 4,200 or 4,700 containers versus the spot market cost to ship the same number of containers, which required OJC to project how many containers it would have shipped on each route, to determine contract rates for each route, and to multiple those rates by the number of containers to be shipped in each of those routes. Brief at 41-42. To determine spot prices, OJC used sources including Xenta and Drewry or made specified assumptions, in the absence of spot rates from Hamburg. Brief at 42-43.

Hamburg contends that there are multiple problems with this method, including that it assumes Hamburg would have agreed to a new contract in 2021-22 with the same rates as 2020-21; it assumes the new contract would have included the Asia to Kentucky lanes; contract rates used by OJC for Asia to Kentucky are not sourced and are inapplicable; OJC improperly included the Brazil to US trade lanes even though those trade lanes were not part of the 2020-21 contract; OJC's projection that it would have shipped 4,200 to 4,700 FFEs in 2021-22 is unreasonable and unsupported; OJC incorrectly uses spot market rates for 2021-22 from third party sources; and there is no reason to use third-party sources when OJC knows the precise rates it paid to ship 143 FFEs in 2021-22.

The goal of awarding damages is to make the injured party whole. Therefore, regarding calculation methods for reparations claims that come before the Commission "[t]he method chosen depends on the evidence available and which calculation more accurately measures the actual loss." *MAVL Capital*, 2022 WL 2209421, at *3. Here, assessing injury through calculating lost profits most accurately measures OJC's actual loss. Therefore, there is no need to consider shipping rate differentials damages in further detail. Instead, causation, mitigation, and additional damages can now be considered, premised on the total lost profits already established.

c. Causation

OJC contends that Hamburg's illegal cutting OJC off from a service contract caused OJC tremendous harm, because, as a result, OJC did not have the reliability and consistency of stable rates and volume commitments that are the great benefit of a service contract over the spot market; Hamburg inappropriately uses of out-of-context quotes from Weiss's deposition about

his regret in trusting Hamburg and working with Casanova to consolidate all OJC's shipping business with Hamburg as a basis to find that it was Mr. Weiss himself who caused OJC's harm; and Weiss had no way of knowing that Hamburg would retaliate and cut off OJC from all further service contract shipments. Reply at 51.

Hamburg asserts that OJC offers no evidence of causation; Mr. Berning simply assumed it; his assumption is unreasonable given Mr. Weiss's testimony that 'OJC did not renew its service contracts with other carriers it had been using in 2020-21 and agreed to consolidate all its imports with Hamburg; Mr. Weiss decided to seek a single service contract with a single carrier for 2021-22, but the carrier he chose - HSDG - was the only carrier that failed to meet its MVC in 2020-21 and the only carrier OJC repeatedly threatened to sue; Mr. Weiss also made his decision to break off negotiations with other carriers before he had even started to negotiate in earnest with Hamburg; any damages OJC suffered in 2021-22 were caused by this decision and Weiss appeared to concede as much during his deposition stating "you know in hindsight, I felt, wow, what a big mistake to put all my eggs in one basket . . . . it made absolutely no sense what I did." Opposition at 42 (citations and emphases omitted).

In order to be awarded reparations, Complainant must not only prove a violation of the Shipping Act, but also a causal relationship between that violation and any actual injury. *Prudential Lines, Inc. v. Farrell Lines, Inc.*, 1984 WL 136266, at *6 (FMC June 15, 1984); *see also MAVL Capital Inc.*, 2022 WL 2209421, at *3 ("damages must be the proximate result of violations of the statute in question." (citation omitted)).

Here, Hamburg violated the Shipping Act through refusal to deal and retaliation against OJC. The decision not to provide space under the existing contract and not to renew the contract caused the damages identified above. Just as "Complainants' losses were the direct result of the improper liquidation of their containers" in *Kobel*, OJC's losses here were the direct result of Hamburg's illegal retaliation and refusal to deal. *Kobel Remand ID*, 2014 WL 5316331, at *12. Therefore, OJC has established causation. Hamburg's arguments about OJC's negotiations with other carriers is more appropriately considered below, regarding mitigation.

d. Mitigation

OJC asserts that it could not obtain a shipping contract with any other carrier, because Hamburg retaliated against OJC so late in the contract season; nonetheless, Mr. Weiss tried to obtain a service contract with another carrier, to no avail; OJC obtained what limited space it could on the spot market at extremely high rates; but often OJC was unable to secure shipments, and in most cases was forced to forgo making shipments of goods to the United States altogether because the spot rates became too expensive to justify the cost of container freight. Reply at 51; Brief at 21.

Hamburg contends Mr. Berning's damage analysis is flawed because counsel instructed him not to assess mitigation; OJC failed to mitigate its alleged damages; and OJC failed to produce any emails or documentation showing that it made any effort to secure space or transport cargo with any other carrier, NVOCC, or forwarder. Opposition at 42-43.

As explained in *Rose Int'l Inc.*, "[m]itigation is a principle used in damages analysis to prevent a party from recovering damages for losses it could have reasonably avoided without an undue risk or burden, and is one applied by the Commission." 29 S.R.R. at 162, 2001 WL 865708, at *81; *see also* Restatement (Second) of Contracts § 350 (1981) ("As a general rule, a party cannot recover damages for loss that he could have avoided by reasonable efforts.")

The "mitigation principle only applies to mitigation actions the injured party takes *after* a breach, not to actions taken prior to a breach in order to prevent damages." *Kobel Remand ID*, 2014 WL 5316331, at *13 (emphasis added). *Kobel* applied this principle, stating "Respondents have not identified any actions that Complainants could have taken to mitigate the damages after the liquidation of their containers. To the extent that Respondents are arguing that Complainants' failure to timely pick up the containers caused the liquidation and loss, this delay did not justify the improper liquidation" and holding "Respondents [had] not established that the Complainants failed to mitigate their damages." 2014 WL 5316331, at *13.

Applied here, Hamburg's arguments concerning what OJC might have done prior to the afternoon of April 29, 2021, refer to actions taken before the violation, which are not relevant to mitigation. In any case, OJC's actions in focusing only on Hamburg for a 2021-22 contract, while not ideal in hindsight, were not unreasonable at the time. 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.

Subsequent to April 29, 2021, Mr. Weiss testified that he attempted to negotiate with other carriers but was unsuccessful, noting the difficulty of attempting to close a contract so late in the season. CX 468-469. While there is no contemporaneous evidence of Mr. Weiss's inquiries with other carriers, Mr. Weiss's testimony on this point is credible. This is consistent with Mr. Li's testimony that the majority of contracts will be negotiated and entered into in the first quarter of the year, through April, or possibly May. RX 977; *see also* RX 988A. Indeed, 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. It would be unlikely that OJC would work so hard to reach out to entities to secure space on the spot market without first (or simultaneously) attempting to secure a 2021-22 service contract elsewhere. As Hamburg also noted, OJC's other contracts had ended before May 2021. Opposition at 42 (summarizing that OJC's OOCL contract ended March 2021 and its COSCO contract ended a "month or two" before Hamburg's contract).

Overall, the circumstances in terms of mitigation here are not very different from *Consolo*, wherein the Commission explained:

> In mitigation of the Board's award Flota also urges upon us Consolo's failure to charter vessels and his failure to use space available on the Chilean Line. These points are not tenable. We agree with Consolo that it would have been a hardship for him to charter ships in order to ply his trade, and we think it unreasonable to

> contend he should have done so in the circumstances. Flota does not make clear what ships were a vailable for charter; or that Consolo could have used them; and if he could, on what terms. As to the Chilean Line, it has been shown, to our satisfaction, that Consolo did exert efforts to ship thereon and did, in fact, make several such shipments late in 1958.

Consolo v. Flota Mercante Grancolombianan, S.A., 7 F.M.C. 635, 643 (FMC Sept. 16, 1963), validity of Commission's reparations award *aff'd sub nom. Consolo v. FMC*, 383 U.S. 607 (1966).

Similarly here, 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.

e. Additional damages

OJC asserts that it "has shown that its injuries were caused by Maersk's violation of 46 U.S.C. § 41104(a)(3) (retaliation)," which "warrants the payment of additional damage amounts to OJC up to 'twice the amount of the actual injury.'" Brief at 49, Reply at 53. Hamburg does not directly address this argument, although they assert that OJC fails to prove damages with reasonable certainty. Opposition at 23-41.

The Shipping Act provides that where the injury was caused by retaliation, "the Commission *may* order the payment of additional amounts, but the total recovery of a complainant may not exceed twice the amount of the actual injury." 46 U.S.C. § 41305(c) (emphasis added). The parties do not cite any cases discussing this provision.

The use of the word "may" indicates that awarding additional damage amounts is discretionary. *American President Lines, Ltd. v. Cyprus Mines Corp.*, Docket No. 91-27, 1994 WL 33488, at *14 (FMC Jan. 31, 1994) (Order on Review of Summary Judgment). The Commission recently made a statement suggesting that there is no guidance regarding when additional amounts would be appropriate. Fact Finding 29 recommended adding section 41102(c) to the list of violations for which additional damages are available and if enacted, recommended that "the Commission should then develop guidance about under what circumstances it would order 'additional amounts' for violations of § 41102(c) [e.g., for certain types of cases (demurrage and detention only or other types of cases), or based on certain conduct (bad faith, willfulness)]." FMC Fact Finding No. 29, 2021 WL 3367606, at *2 (Jan. 1, 2021) (brackets in original).

The question is what factors are appropriate to consider when determining whether additional damages amounts are appropriate for the retaliation. It is clear that retaliation is among the types of cases for which additional damages are available. The additional damages do not appear to be compensation for actual damages nor for attorney fees, as both of those categories of damages are already available. Rather, it appears that the additional damages are

meant to be akin to a penalty. In Commission enforcement proceedings, enhanced civil penalties are awarded "if the violation was willfully and knowingly committed." 46 U.S.C. § 41107(a). This standard is consistent with the recommendation in Fact Finding 29, which suggests consideration of bad faith or willfulness. Therefore, a standard of knowing and willful will be used to determine whether or not additional damages are appropriate here.

The Commission has addressed the knowing and willful factor in the civil penalties context, stating:

> In order to prove that a person acted "knowingly and willfully," it must be shown that the person has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the Shipping Act, or purposeful or obstinate behavior akin to gross negligence. The Commission has further held that a person's "'persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a [person] was acting knowingly and willfully in violation of the Act.'"

Rose Int'l, 29 S.R.R. at 164-165, 2001 WL 865708, at *47 (citations omitted); *see also Pacific Champion Express Co., Ltd. – Possible Violations of Section 10(b)(1)*, Docket No. 99-02, 28 S.R.R. 1397, 1403, 2000 WL 534633, at *10 (FMC April 21, 2000) (similar language).

Here, the evidence shows that Hamburg was aware for months that it was not meeting its contractual commitment and that litigation was possible. As early as October 21, 2020, Mr. Gast, in risk management, stated:

> This is a very bad case for us which we will likely lose . . . . If we can at least establish we are working to uphold our contractual obligations I would feel much more comfortable about this case. At present based on the emails I have seen I do not have confidence in our ability to establish that we are doing our part under these terms.

CX 161.

On April 29, 2021, Mr. Gast emailed that "I believe we are unlikely to meet our duties under these contract terms" and it "appears our local sales colleagues had tried to address the capacity issue with origin but were advised that no additional space would be granted for this customer." CX 229. He further stated that "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." This does not suggest that the legal claims were not well-founded. Rather, Mr. Gast "hope[d] that due to the customer wanting to sign a renewal contract that they would choose to not pursuit this breach of contract suit for minor shortfalls under the present agreement." CX 229.

Hamburg was aware that they had not provided the space required by the 2020-21 contract and made a knowing decision not to provide that space, or to engage in further negotiations for the next contract year, due to "potential litigation." CX 220, CX 213. Initially, on April 29, 2021, Mr. Li emailed Mr. Pump and suggested that he would "ensure they will get

the remaining 18 FFE before the end of May." CX 220-221. However, Mr. Pump responded stating that "[w]e should not engage in any renewal discussions with customer in light of the potential litigation, I would also not provide them with space under the existing contract. The shortfall will be compensated as per contract terms." CX 220. Mr. Li then passed those instructions along, stating that they should "not engage in any renewal discussion with customer in light of potential litigation" and:

> Meanwhile, we will leave it up to APAROM's decision to handle the remaining 18 FFE that required to fulfill the 200 FFE MQC on current contract. But just to express our position on this, we should also consider not to provide them with space under existing contract. The shortfall will be compensated as per contract terms, considering we already fulfilled over 90% of the MQC agreement.

CX 213. OJC clearly explained why Hamburg's conduct violated the service contract and Shipping Act, but rather than resolve the issue, Hamburg committed an additional violation.

Hamburg knew that OJC would seek compensation for the failure to transport containers but nevertheless decided to "disengage." On May 4, 2021, Mr. Maldonado requested authorization to ship the remaining FFEs, stating:

> Please note we were advise from customer in case that HS will not fulfill its contractual volume, it will proceed with legal actions against HS. We believe due to the small volume remaining to fulfil MQC of 200 FFE; this could be avoid it. I would appreciate please your feedback and authorization to grant space for this month of May for those 18 FFE's needed.

CX 227. Hamburg's own employees were suggesting how to avoid legal liability but Hamburg still did not provide the last 15 FFE it had committed under the contract and the "contract expired on May 31st and renewal was not approved by Upper Management." CX 212; Opposition at 2.

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.

These facts support finding that the violation was knowing and willful. Hamburg was aware that OJC threatened litigation and instead of resolving OJC's legitimate concerns, Hamburg retaliated by not transporting containers under the service contract and ending negotiations for a new contract. This knowing and willful behavior supports ordering payment of the maximum amount of additional damage amounts, which is twice the amount of the actual injury.

As discussed above, the amount of actual injury is $4,921,883.20. The maximum award is no more than twice the amount of actual injury, or $9,843,766.40. Given the knowing and willful violation of the Shipping Act's prohibition on retaliation, the maximum amount of damages is appropriate in this proceeding.

4. Discovery violations

OJC asserts that Hamburg should be sanctioned and precluded from challenging OJC's damages based on Hamburg's repeated violations of court orders and FMC Rules and requests an adverse evidentiary determination that OJC's damages be conclusively established. Brief at 26-33; Reply at 22-32. Hamburg asserts that sanctions are not appropriate as it complied with discovery obligations; and, rather than seek sanctions for OJC's refusal to produce relevant information, Hamburg explains why the withheld information was necessary and why its absence shows a lack of support for OJC's expert's damage calculations. Opposition at 43-49.

This proceeding has been litigated thoroughly by the parties, including multiple motions to compel. 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**.

IV. ORDER

Upon consideration of the record herein, the arguments of the parties, the findings and conclusions set forth above, and the determination that OJ Commerce has established that Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft A/S & CO. KG, which is now part of Maersk A/S, violated the Shipping Act, 46 U.S.C. §§ 41104(a)(3) (retaliation), and 41104(a)(10) (refusal to deal), it is hereby

ORDERED that OJC's Amended Complaint against HSDG be **GRANTED**. It is

FURTHER ORDERED that OJC's Amended Complaint against HSNA be **DENIED**. It is

FURTHER ORDERED that HSDG is ordered to pay OJC reparations in the amount of $9,843,766.40, with interest on the reparations award running from April 29, 2021. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED.**

Erin M. Wirth
Chief Administrative Law Judge