BEFORE THE
FEDERAL MARITIME COMMISSION

OJ COMMERCE, LLC,

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

v.

HAMBURG SÜDAMERIKANISCHE
DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO KG

and

HAMBURG SUD NORTH AMERICA, INC.,

Respondents.

COMPLAINANT'S REPLY

Complainant OJ Commerce, LLC ("OJC," "OJ Commerce," or "Complainant"), by and through its undersigned counsel, hereby files its Reply, pursuant to 46 C.F.R. § 502.214, and the Scheduling Order dated 03/10/2022 at 2-3.

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INTRODUCTION

The Commission should find that Maersk violated the broadly-construed Shipping Act because OJC has clearly met its burden of showing "it's more likely than not" that Maersk willfully "retaliate[d] against [OJC] by refusing, or threatening to refuse, cargo space accommodations when available, . . . or has filed a complaint, or for any other reason[,]" and "unreasonably refuse[d] to deal or negotiate[.]" 46 U.S.C. § 41104(3), (10). Specifically, OJC presented ample evidence that – in the midst of the global COVID-19 pandemic – Maersk retaliated against OJC by (1) refusing to provide otherwise-available cargo space as required by the parties' service contract for 2020-21, so Maersk could sell it on the spot market for unprecedented profits; and (2) unreasonably refusing to renew the service contracts for 2021-22.

The sole reason Maersk did so was because OJC had engaged in protected activity under the Shipping Act. Namely, on April 28, 2021, OJC threatened to file a complaint with the Federal Maritime Commission challenging Maersk's refusal to honor the parties' 2021 service contract.[1] The very next day, on April 29, Maersk made an "executive decision" to "not provide [OJC] with space under the existing contract [for 2020-21]" and to "not engage in any renewal discussions with customer [for 2021-22] in light of potential litigation."[2] Maersk thus immediately ceased all renewal negotiations with OJC and refused to provide any further cargo space accommodations to OJC—despite acknowledging that "[t]his is a very bad case for us which we will likely lose[.]"[3] The Commission itself has identified this very set of facts as a quintessential case of retaliation:

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

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[1] CX210.
[2] CX220.
[3] CX161.

shipper and other shippers from complaining to the Commission.[4]

Accordingly, contrary to Maersk's disingenuous claim that OJC has no claim and has not met its burden of proof, OJC has clearly shown that it's undoubtedly "more likely than not" that Maersk violated the Shipping Act and is therefore liable for the resulting damage to OJC.

OJC also presented ample competent evidence, including lay and expert testimony, that Maersk's willful violations caused actual damage to OJC. Specifically, OJC's expert analyzed the facts of this case, including millions of data points about OJC's sales and shipments, and concluded that Maersk's Shipping Act violations proximately caused damages to OJC in the range of [redacted] to [redacted] (Lost Profits) or, alternatively, [redacted] to [redacted] (Shipping Rate Differential), depending on the yardstick. And while Maersk takes issue with OJC's projected need for 4200-4700 containers in 2021-22 based upon the increase in demand for home goods during the pandemic, Maersk does not dispute that the demand for its own shipping services increased exponentially during that time period (e.g., a **3800%** increase in profit).[5] Given Maersk enjoyed unprecedented profits during that time, it is undoubtedly "more than likely than not" that OJC likewise would have enjoyed unprecedented profits but for Maersk's willful and egregious Shipping Act violations. The Commission, therefore, should not hesitate to award OJC double damages due to Maersk's willful violations of law.

Nothing in Maersk's response Brief compels any other conclusion. At best, Maersk's response inadvertently overlooks substantial material evidence, ignores key undisputed facts, and misreads the relevant legal authorities. At worst, Maersk has sought to avoid liability for its "executive decision" to retaliate against and refuse to deal with OJC for the sake of billions in

[4] Statement of the Commission on Retaliation ("Statement"), Dkt. 21-15 (Issued December 28, 2021), at 8 (emphasis added).
[5] CX434.

unprecedented profits by deliberately misleading the Commission with countless red herrings, strawman arguments, baseless factual and legal assertions, and flip-flopping positions based on the situation. As an example, Maersk simultaneously alleges that OJC did not mitigate its damages suffered as a result of Maersk's cutting OJC off from its past and future service contracts, while in the same breath attempting to use OJC's mitigation efforts – which included shipping containers on the limited and extremely-expensive spot market that were ultimately carried by Maersk – as a get-out-of-jail-free card for its Shipping Act violations. As another example, Maersk contended during discovery that the reason it did not renew OJC's service contract in April 2021 was because OJC's volume commitment was *too low*, but then rewrote history in its Brief, arguing that Maersk didn't renew because OJC's volume commitment was *too high*. These and other after-the-fact excuses identified below illustrate plainly that Maersk is willing to do and say whatever is expedient at the time in order to avoid responsibility for its actions.

Notably, Maersk also violated the Presiding Officer's Orders on at least ***four occasions***, including its most recent violation whereby Maersk submitted for the first time with its Brief a new 30-page expert report, months after the discovery deadline in order to sandbag OJC.

Undeterred by Maersk's tactics before and during the litigation, OJC has brought these matters to the attention of the Commission that recently reiterated "that it is absolutely illegal for ocean carriers to discriminate or retaliate against a shipper for filing a complaint or challenging a charge. The FMC will thoroughly investigate any allegation of illegal behavior and prosecute aggressively when warranted."[6] Regardless, Maersk has not heeded this or any of the Commission's other warnings nor learned its lesson. This is consistent with Maersk's business

[6] https://www.fmc.gov/fmc-probing-shipping-lines-anti-retaliation-compliance/

practice of avoiding compliance with regulatory authorities at all costs.[7]

Even after being caught red handed violating the Shipping Act, Maersk has made every conceivable excuse and continued to disregard authorities in a vain effort to escape the consequences for its actions. Maersk's pattern of misconduct must be stopped. Maersk's egregious and willful violations of the Shipping Act and the Presiding Officer's Orders must not be countenanced, and OJC must be fully compensated for the injuries it has sustained at the hands of Maersk.

ARGUMENT

I. LIABILITY.

A. Maersk willfully violated the Shipping Act by (1) retaliating against OJC for threatening to complain to the Commission and (2) refusing to deal with OJC.

Maersk's brief is rife with smoke and mirrors. Maersk[8] manufactures a slew of red herrings to conceal its willful violations of the Shipping Act. Each one of these excuses are illogical, blatant misrepresentations, ignore the contemporaneous communications that refute them, or strawman arguments not even made by OJC.

1. Maersk unlawfully retaliated against OJC by refusing to ship any more containers under their 2021-22 Service Contract, because OJC threatened to file a legal action with the Commission.

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[7] CX41 (calculating strategy for a "); CX48 (after ").

[8] Maersk's continued assertion that Hamburg Sud and Maersk are separate entities is belied by its own witnesses and statements. Hamburg Sud has admitted that "**HSDG no longer exists**. HSDG was merged into its former parent company Maersk A/S on November 1, 2021." (CX 67, n.1) (emphasis added); *see also* Maersk Brief, p. 1, n.1. Additionally, Juergen Pump – a former top executive for Respondents – testified that Maersk acquired Hamburg Sud in 2017 and " ." (CX 89, 109:23 - 112:5.) Maersk thus stands in HSDG's shoes in this proceeding. Maersk's attempt at musical corporate chairs shows it is incapable of even conceding points disproven by its own submissions.

Under the Shipping Act, "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 has filed a complaint, or for any other reason[.]"[9] 46 U.S.C. § 41104(3). This anti-retaliation provision is interpreted "*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."[10] For example, "[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."[11]

That is exactly what happened here. There is no dispute that Maersk entered into a service contract with OJC in June 2020 to ship 200 FFEs during 2020-21.[12] By October 2020, however, Casanova confirmed that Maersk needed to "make up the shortfalls [of 28 FFEs] due to [Maersk's] cancellations and declined bookings."[13] Gast likewise confirmed that Maersk already had a deficit of 28 FFEs and OJC needed to be given more space to make up for that, otherwise, all the "additional profit gained" from "premium" prices paid by others for OJC's space would "go out the window if this matter goes to trial."[14] Given Maersk's deficient performance of its shipping

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[9] "The Ocean Shipping Reform Act made it clear that it is absolutely illegal for ocean carriers to discriminate or retaliate against a shipper for filing a complaint or challenging a charge. The FMC will thoroughly investigate any allegation of illegal behavior and prosecute aggressively when warranted." FMC Probing Shipping Lines' Anti-Retaliation Compliance, Dec. 15, 2022 at: https://www.fmc.gov/fmc-probing-shipping-lines-anti-retaliation-compliance/.

[10] Statement, Dkt. 21-15, at 1 (emphasis added).

[11] Statement, Dkt. 21-15, at 8.

[12] OJC's Proposed FOF and Maersk's Responses, 29-30.

[13] CX 164.

[14] CX 161 ("What can we do to provide at least space for 8-10 TEU 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**.") (emphasis added). This email directly contradicts Maersk's baseless

obligations, on October 16, 2020, OJC sent Maersk a demand letter threatening "legal action."[15] Still, Maersk failed to cure its deficient performance. So, on April 28, 2021, OJC sent another demand letter, in which it again threatened to file "a petition to the Federal Maritime Commission to seek relief."[16]

The very next day, on April 29, 2021, Maersk made the "executive decision" to retaliate against OJC. Contrary to Maersk's baseless argument that OJC "offers no evidence [Maersk] refused, or threatened to refuse, cargo space accommodations when available during the contract term,"[17] 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.)

In sum, Maersk's contention that there is no evidence that it ever refused to ship containers for OJC when it had space available is patently false.

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contention that "there is no evidence that HSDG demanded any premium for space it was contractually obligated to provide or that OJC paid any premiums." (Maersk's Brief, p. 8, n.3.) To the contrary, Maersk admitted that it sold OJC's contracted-for space to others for a premium instead of providing it to OJC.

[15] CX 159.

[16] CX 210.

[17] Maersk Brief, p. 15.

Because Maersk cannot credibly rebut these facts, Maersk instead makes much ado about its transportation of 66 FFEs after OJC threatened to file a petition with the Commission on April 28, 2021. Maersk's argument is a blood-red herring of epic proportion, because Maersk knows 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.[18] In other words, the fact that Maersk forced OJC into the spot market in the midst of the global pandemic, where it had no choice but to pay premium prices to third-party freight forwarders whom happened to contract with Maersk, does *not* absolve Maersk of its liability for retaliation under the Shipping Act.

2. Maersk unlawfully retaliated against OJC by refusing to renew and enter into the 2021-22 contracts – including ripping up a 400 FFE service contract with an assigned number.

Maersk argues that there is no evidence that it "threatened" OJC, because there was purportedly "never a communication to OJC in which HSDG threatened to decline space."[19] This argument is another red herring. Indeed, Maersk's contention only evidences its clear bad faith in retaliating, because Maersk hid its true intentions and deceived OJC instead. A brief timeline of events, consisting of just a few days, illustrates this plainly:

- On April 28, 2021, Maersk communicated with OJC about nailing down the exact MQC OJC would be willing to sign (SCX 513-514.)[20] **No lack of space or equipment is mentioned**.
- That same day, OJC sent its demand letter stating that Maersk's failures "may result in

[18] SCX509-512, ¶¶ 3, 8.
[19] Maersk Brief, p. 15, n.6.
[20] Maersk argues that OJC "was unwilling to commit to a specified MVC for a new service contract." (Maersk Brief, p. 2.) Maersk's contention is entirely unsupported. Weiss gave a range between 4200-4700 FFE for the renewal commitment, which was agreed to by Casanova. (CX 468, ¶ 11; CX 219.) But Maersk retaliated against OJC less than two days after the new deal points were agreed to, before the final number within that range could be nailed down, as shown above. (CX 220.)

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.)

- The next morning, April 29, Maersk acknowledged receipt of the letter and noted that "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 [deal] that we promised. He is open to any solution that can offset this deficit." (CX 215.)

- Later that same day on April 29, Maersk made "the executive decision" to "not engage in any renewal discussions with customer **in light of the potential litigation**" and to "not provide [OJC] with space under the existing contract." (CX220 (emphasis added).) Again, no lack of space or equipment is mentioned, even internally, to justify the refusal to deal – only OJC's legal complaint to the Commission.

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

- On May 4, Maersk speciously informed OJC that it would not renew the service contract because of "the lack of space and equipment in Asia and the shortage of truck power in the US," which were not previously mentioned and were not the stated basis for Maersk's actual "executive decision" to cut off OJC. (*Compare* SCX 513 *with* CX220.)

- On May 5, OJC responded that it was "super disappointed" to learn of Maersk's decision not to renew, especially when the "size of the renewal [was the conversation]," not there being "NO renewal at all." (SCX 480.) OJC even suggested a solution to Maersk's equipment shortage issue, making the contract just "PORT to PORT so chassis and truckers are not HAMBURG's concern." (*Id.*)

- But of course, the equipment issue was just a ruse to hide Maersk's illegal retaliation. So Maersk responded that same day, again refusing to negotiate or deal. Nonetheless, Maersk stated that "I am going to check with our Trade team again and let you know if there is any change." (*Id.*) This was yet another misrepresentation from Maersk, as it had already made the "executive decision" to cut off OJC in retaliation for its audacity to complain to the Commission.[21]

As the emails plainly show, Maersk retaliated against OJC based solely on its threat to

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[21] Maersk's "lack of space" pretext is also belied by the fact that Maersk had entered into service contracts similar to OJC's renewal contract for [redacted] **TEUs <u>after</u>** Maersk made the "executive decision" on April 29, 2021 to retaliate against OJC. (OJC's Brief, p. 24 (citing CX214, CX 469 ¶ 16; CX 283-284; *see also* CX 285-286, HSDG's Resp. to OJC RFA 1-4 (Respondents admitting that they entered into service contracts after they retaliated against OJC)). Because Maersk has no credible response to this critical fact, Maersk simply ignores it in its response.

complain to the Commission. But instead of communicating that real reason to OJC – which Maersk knew was illegal – Maersk concocted a slew of pretexts. Maersk's actions and words speak volumes about its malicious intent to retaliate against OJC. They also show that Maersk was attempting to conceal its unlawful retaliation from OJC with deception. Indeed, Maersk wants the Commission to bless its retaliatory cover up—despite the Commission's policy of "interpreting 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*[.]"[22] Maersk even dares to ask the Commission to approve its cover-up by suggesting that retaliation should only be illegal when done in the open, but *not* when done behind closed doors.

Maersk next argues that simply declining to enter a service contract with a customer is not retaliation. Once again, Maersk's argument is misleading. Maersk did not just "decline" to enter into a service contract with OJC. Nor did OJC claim anything like it. Rather, Maersk agreed to enter into a renewal contract for 2021-22, but then abruptly made the "executive decision" to cease its performance under the existing contract and renege on its deal to enter into a renewal contract, **based on an illegal reason**: OJC threatened to air its grievances about Maersk's violations of the Shipping Act in a formal complaint to the Commission. **That** conduct was clearly prohibited by the broadly-construed anti-retaliation provision. *See* 46 U.S.C. § 41104(a)(3). And Maersk knew that its actions were prohibited, as Pump – the top executive who made the decision to retaliate – had been instructed so during its compliance training.[23]

Undeterred by that inconvenient truth, Maersk goes on to argue that it was "reasonable" not to enter a service contract with OJC in 2021-22 for five pretextual reasons.[24] Although OJC

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[22] Statement, Dkt. 21-15, at 1 (emphasis added).
[23] OJC Brief, pp. 19-21 (citing CX 96, 208:4-18; CX 95-96, 204:24 – 206:19).
[24] Maersk Brief, pp. 16-18.

preempted and disproved each of these pretexts in its opening Brief,[25] Maersk completely ignores OJC's evidence and just plows ahead with its groundless after-the-fact "reasons"—all of which ignore that Maersk solely and unambiguously retaliated against OJC "in light of the potential litigation:"[26]

- *Maersk Pretext 1 (supply chain congestion)*:[27] Maersk's own documents and discovery responses disprove its bare allegation that it had no space available. (*See* OJC's Brief, pp. 22-24.)

- *Maersk Pretext 2 (hesitant to enter into a renewal due to large MQC increase)*:[28] This new pretext is a complete reversal of position by Maersk, who had stated during discovery that it decided not to renew due to "**OJC's relatively low volume commitment**."[29] But again, even on its own merits, Maersk's own documents and discovery responses disprove Maersk's pretext that it did not have sufficient space available for OJC's renewal of 4200-4700 FFEs. (*See* OJC's Brief, pp. 22-24.)

- *Maersk Pretext 3 (OJC wanted the same rates as 2020-21)*:[30] Maersk entirely ignores that it was ***Maersk who proposed*** a "**new contract [with] the same … rates … of the [then-] current contract**"[31] and that the market rates did not increase significantly until months after Maersk's retaliation. (*See* OJC's Brief, p. 24.).[32]

- *Maersk Pretext 4 (trade lane issue)*:[33] Maersk ignores the fact that it **regretted** not accepting OJC's Kentucky business in 2020-21,[34] its admission that shipping through that

[25] OJC Brief, pp. 21-26.
[26] CX220.
[27] Maersk Brief, pp. 16-17.
[28] Maersk Brief, p. 17.
[29] CX236 (emphasis added).
[30] Maersk Brief, p. 17.
[31] CX214 (emphasis added).
[32] As part of its frivolous argument that it was "unreasonable" to continue the same rates in 2021-22 that existed in 2020-21, Maersk misrepresents the timing and nature of the "market rate increases." (Maersk Brief, p. 20.) Nowhere does OJC "acknowledge" that the **contract rates** for 2020-21 had "increased substantially" in April 2021 for the 2021-22 contract season. To the contrary, OJC noted that increases to the **spot market rates** took place months after Maersk retaliated. (CX 468 ¶ 12.) Maersk also points to OJC's charts about what the **spot market rates** were during mid-late 2021 in order to justify Maersk's misrepresentation on contract pricing (Maersk Brief, p. 20), but again those charts are about **spot market rates, not contract rates**. Thus, Maersk is attempting to mislead the Commission into conflating service contract rates and spot market rates, essentially calling apples the same as oranges.
[33] Maersk Brief, pp. 17-18.
[34] CX 242-243; *see also* OJC Brief, pp. 23, 47-48.

lane would make OJC "more attractive" as a customer,[35] and it had confirmed internally that OJC's warehouse was very close to the railyards needed for the movement of those containers, so Maersk could handle that lane.[36] Even if that lane could not be used, either partially or fully, Maersk knew that OJC would be flexible with where its shipments were sent.[37] Maersk failed to address any of this evidence in its response, but instead just made broad excuses. Furthermore, OJC was able to ship to Kentucky with Maersk using a third-party reseller, United Shippers Association, during the same time period it claimed that it could not ship to Kentucky, further evidencing that this is just yet another blatant post hoc pretext.[38]

- *Maersk Pretext 5 (OJC's "disputatious manner of doing business")*:[39] Maersk ignores the facts and instead opts for a smear campaign approach, generally citing irrelevant lawsuits from the last decade in an attempt to tarnish OJC and avoid a discussion of the evidence in **this case**. That evidence shows Maersk admitted internally that it was wrong and OJC was right.[40] Instead of addressing those actual facts in any way, Maersk complains that OJC made "almost daily demands for additional container space"[41] as if OJC seeking the MQC guaranteed by Maersk and/or to purchase more space from Maersk was an unforgivable sin justifying retaliation.

Importantly, during the litigation, Maersk also asserted two more pretexts during the litigation: (6) that OJC did not purchase ancillary services from Maersk, and (7) the timeliness of OJC's payment history.[42] Despite listing these supposed reasons for its refusal to deal with OJC on April 29, 2021, Maersk has now abandoned those excuses. Indeed, OJC showed in its Brief that those pretexts were blatantly false.[43] Maersk has taken a throw-every-excuse-possible-against-the-wall approach, and see what sticks; when one falls, move on to the next excuse. But regardless of the baseless nature of Maersk's pretexts, none of the contemporaneous internal communications show that Pump - the real Maersk decisionmaker - used anything other than a prohibited basis to

[35] CX 92-93, 137:13 - 139:20, 142:3-21.
[36] CX 203; CX 410, 125:25 - 127:25.
[37] CX 475 ¶ 35; CX 119-135.
[38] SCX509-512, ¶¶ 3, 8.
[39] Maersk Brief, p. 18.
[40] CX 161, 215.
[41] Maersk Brief, p. 18.
[42] CX236.
[43] OJC Brief, pp. 24-25.

make his "executive decision" to cut off OJC.

The fact is, Pump himself stated exactly why Maersk was cutting off OJC: "the potential litigation."[44] And Pump knew that was a violation of the Shipping Act.[45] Maersk then deceived OJC about why it was being cut off by Maersk.[46] If its motives were indeed so "reasonable," Maersk wouldn't have had to lie to OJC – unless, of course, Maersk desired, as it did for many months – to avoid detection of its illegal conduct.

Maersk also asserts, "[i]f … [Mr. Weiss] and Ms. Casanova had agreed on a contract for 4,200-4,700 FFEs, … why would she suggest a contract for 400 FFEs? She would not."[47] This is another lie belied by Maersk's own internal emails. As shown in its Brief, OJC cited Casanova's email where she noted Maersk's container deficiency from the 2020-21 contract and suggested that it enter into the 400 FFE "not only to cover the deficit [but] also show our interest to participate more of their volume" in 2021-22.[48] Therefore, according to Casanova herself, the 400 FFE contract – which bore an official service contract number[49] – was a bridge to make up for Maersk's past failings and to earn OJC's increased business in the 4200-4700 FFE contract.

Maersk's next hair-splitting argument defies all logic: Although Maersk admits that the Shipping Act prohibits retaliation when a shipper has filed a complaint with the Commission, Maersk contends that it was totally legal for Maersk to retaliate against OJC for **threatening** to file a complaint with the Commission.[50] This frivolous contention shows the brazen and unrepentant nature of Maersk's willful conduct, and its intent to flout the Shipping Act by any

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[44] CX 220.
[45] CX 96, 208:4-18; CX 95-96, 204:24 – 206:19.
[46] SCX480-481.
[47] Maersk Brief, p. 19.
[48] CX 222.
[49] CX 214 (service contract number "SVC NOAC10000728").
[50] Maersk Brief, pp. 20-22.

means necessary. What a get-out-of-jail free card for Maersk – just make sure to retaliate after the shipper threatens to file a complaint to the Commission but **before** the shipper actually does and there's no problem! Retaliate away!

Not only is Maersk's absurd position contrary to the Shipping Act – which prohibits retaliation based on "the shipper ha[ving] filed a complaint, or for any other reason,"[51] but it is also contrary to the Commission's policy to interpret the anti-retaliation "*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."[52] This is especially true as the Commission has held that "providing information to Commission investigators and enforcement attorneys, seeking assistance from CADRS, and commenting on Commission rules and notices fall within the same class of conduct as filing a complaint."[53] Maersk's suggested interpretation that threats to complain aren't covered would stifle communications not only with the Commission but also between shippers and carriers who have disputes, serving no useful end. It would essentially **encourage** carriers to retaliate if a dispute arose *before* the shipper could file its complaint, as a loophole to avoid liability. Such a result would clearly be contrary to Congress's intent to stop retaliation and allow shippers to "feel free to air their grievances."

Finally, Maersk dramatically catastrophizes an adverse ruling against it, arguing that "finding retaliation here would create unworkable precedent" and that "every shipper would file, or threaten to file, claims with the FMC against ocean carriers during contract negotiations."[54] Yet again, Maersk makes a generic and broad sweeping statement without any reference to the facts of

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[51] 46 U.S.C. § 41104(a)(3).
[52] Statement, Dkt. 21-15 at 1 (emphasis added).
[53] Statement, Dkt. 21-15 at 7.
[54] Maersk Brief, pp. 22-23.

this case. Here, Maersk explicitly confirmed, in its own internal emails, that its reason for retaliating against OJC was due to "the potential litigation."[55] Maersk being caught red-handed does not in any way justify the slippery-slope argument that it makes about "unworkable precedent." Moreover, Maersk's conduct towards OJC after its Commission threat is not some fanciful scenario plucked out of thin air, but rather the precise illegal actions the Commission envisioned:

> **[I]t is not hard to envision situations where a carrier might engage in retaliatory conduct** that has nothing to do with competition with other carriers. **A carrier might engage in conduct detrimental to a shipper (e.g., refusing to enter into, renew, or amend a service contract) to "get even" with or deter that shipper and other shippers from complaining to the Commission.**[56]

That "situation" is **exactly** what happened here: Maersk retaliated against OJC by refusing to provide any more space under an existing service contract, and refusing to renew a service contract, to "get even" with and deter OJC from complaining to the Commission. Far from "creat[ing] dangerous precedent," finding retaliation here is necessary *in order to be consistent* with the Shipping Act, the intent of Congress, and the Statement of the Commission on Retaliation. The only dangerous precedent that may result here is if Maersk is permitted to use hyper-technical excuses to continue its retaliatory policies and avoid liability.[57]

3. Maersk unlawfully refused to deal and negotiate with OJC.

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[55] CX 220.

[56] Statement, Dkt. 21-15 at 8 (emphasis added).

[57] Maersk even makes the argument that, because OJC's demand letter that admittedly triggered Maersk's retaliation also asserts breaches of contract, its retaliation was not illegal. (Maersk Brief, pp. 21-22.) Putting aside the fact fatal to Maersk's argument that the letter explicitly threatens "the filing of a petition to the Federal Maritime Commission" (CX 210), Maersk knows that "[t]he Commission has an obligation to determine whether an entity has violated the Shipping Act, even when the allegations may constitute both breach of contract claims and claims that the entity violated the Shipping Act." (SCX486-487 (citing *e.g., Baltic Auto Shipping, Inc. v. Hitrinov*, Docket No. 14-16, 33 S.R.R. 1230, 1232-33 (ALJ Feb. 2, 2015)).) Thus, Maersk's contention is yet another misleading argument that is contrary to law.

Next, Maersk disputes its liability under the Shipping Act for "unreasonably refus[ing] to deal or negotiate" the service contract renewal with OJC. 46 U.S.C. § 41104(1). Maersk's unreasonable refusal to deal or negotiate with OJC are intertwined, a fact entirely ignored by Maersk. Indeed, Maersk makes a series of arguments that it did not "refuse to negotiate" because the parties had correspondence about trade lanes, MQC, and rates. These arguments are misleading. As the evidence shows, Maersk's and OJC's substantial communications and negotiations about renewing the service contract **before** Pump's "executive decision" were entirely and unilaterally cut off when Maersk made the "executive decision" to cut off OJC due to its threat of litigation. No subsequent service contract negotiations or deals were permitted by Maersk.[58]

Nonetheless, Maersk conjures a series of strawman arguments to distract from its admittedly "very bad case."[59] First, Maersk argues that it did not "shut out" OJC, because Maersk shipped 185 of the 200 FFEs required by the 2020-21 Service Contract.[60] Maersk blatantly misrepresents OJC's position. As Maersk well knows, these shipments were scheduled *before* the retaliation took place. Maersk did not and would not allow any further space to OJC under the 2020-21 contract after its "executive decision" to retaliate.[61] As for 2021-22, Maersk refused to honor the two service contracts – one of which already had an assignment number for 400 FFEs[62] and another within the 4200-4700 FFE range[63] – that it had agreed to with OJC.[64] Thus, Maersk's argument that it did not refuse to deal with OJC because of pre-retaliation shipments is irrelevant and misleading.

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[58] SCX480.
[59] CX 161.
[60] Maersk Brief, p. 8.
[61] CX 220.
[62] CX 221.
[63] CX 219.
[64] CX 220.

Maersk next makes another strawman argument that it did not refuse to deal with OJC because "**the mere fact** of not entering a service contract does not constitute a refusal to deal, unreasonable or otherwise."[65] But Maersk did not "merely" fail to enter into a service contract with OJC for 2021-22. Maersk's refusal to deal arose from it using illegal means – retaliating against OJC for threatening legal action before the Commission.[66]

Maersk then contends that (i) OJC had never previously asserted that OJC and Maersk agreed on the 4200-4700 container MQC for 2021-22 and (ii) OJC's assertion that Casanova promised that Maersk would provide an initial contract of 400 FFE MQC for 2021-22 was "inconsistent" with the 4200-4700 container agreement.[67] Again, Maersk disregards the unambiguous contemporaneous written communications between the parties, wherein Casanova summarized the 4200-4700 container deal points internally,[68] requested an exact MQC for the final service contract for 2021-22,[69] and noted that the 400 FFE contract was a bridge to "not only cover the deficit [from 2020-21] b[ut] also [to] show our interest to participate [sic] more of [OJC's] volume."[70] And Weiss also testified about the 4200-4700 container deal, consistent with the contemporaneous communications:

> We did all of our projections. We gave the numbers to Hamburg in, I think, somewhere around the period -- the time frame of about March of 2021. The conversations constantly was, with Hamburg, about the lanes, which lanes we're going to break it down to; the amount of containers, somewhere between 4200 and 4700. And that's how OJ Commerce and me myself was planning the next contract season. Didn't renew with anybody. We were going to make Hamburg our only carrier.[71]

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[65] Maersk Brief, p. 9 (emphasis added).
[66] CX 220.
[67] Maersk Brief, p. 13.
[68] CX217-219.
[69] SCX481.
[70] CX215.
[71] RX1024, 228:25 – 229:9; *see also* RX1024, 227:9-23.

Maersk's assertions are therefore, yet again, contradicted by the clear evidence of record.[72]

Maersk further contends that it transported 66 FFEs for OJC after the retaliation and thus there was no refusal to deal.[73] As discussed above, all these containers were shipped via a third-party freight forwarder, United Shippers Association, or via limited spot quotes from Brazil.[74] Indeed, Maersk attempts to make much of its nonsensical argument that, because OJC attempted to mitigate its damages after Maersk's rampant violations of the Shipping Act, this somehow absolves it of any legal consequences.[75] The fact that OJC obtained limited, inconsistent space on the open spot market as a way to mitigate its damages – a far cry from the consistency of a year-long service contract with a locked-in rate and volume commitment – does nothing to cure Maersk's unreasonable refusal to deal. Nor does Maersk cite any authority that it does. To the contrary, in addition to the prohibition against retaliation, the Shipping Act also prohibits a common carrier from "shutting out" a shipper from a service contract for reasons having no relation to legitimate transportation related factors. *New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans*, 29 S.R.R. 345, 351 (ALJ 2001). Here, Maersk is plainly liable for refusing to negotiate and deal with OJC, because the evidence clearly shows that

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[72] Maersk even argues that its retaliation and refusal to deal were OJC's fault, citing "Weiss' dubious decision" to consolidate all of OJC's shipping with Maersk in 2021-22, as Maersk was OJC's only problematic carrier. (Maersk's Brief, p. 6.) This is incredible because, according to its own emails, Maersk was looking to ship ***significantly more*** containers for OJC in 2021-22 and put OJC's account on the "target list" for priority renewal. (CX 203; CX 411, 134:3 - 135:17; CX 203; CX 468 ¶ 11.) Weiss acknowledged that "in hindsight" – after "Hamburg decided one day to retaliate and not give us any contract whatsoever" – "what a big mistake [it] [wa]s to put all my eggs in one basket." (RX1024, 228:7 - 229:15.) But after Weiss discovered that Maersk flaunts the law, and completely disregards the Shipping Act, he "was really fooled and got drawn into a terrible situation; but at the time it made perfect sense." (RX1026, 245:18:21.) Maersk's attempt to use Weiss' regret over having believed Maersk's lies does nothing to provide a defense to Maersk's violations of the Shipping Act.

[73] Maersk Brief, p. 15.

[74] SCX509-512, ¶¶ 3, 8.

[75] Maersk Brief, pp. 9-10.

Maersk completely shut OJC out of a service contract for 2021-22,[76] and that Maersk did so for a prohibited reason.[77]

Maersk's after-the-fact excuses for its violations of the Shipping Act are post facto, illogical, unsupported, and contradicted by the record. Maersk should be found liable for its illegal conduct.

II. MAERSK'S SANCTIONABLE CONDUCT

Not satisfied with harming OJC's business through its willful violations of the Shipping Act, Maersk's pervasive, illegal actions continued during the litigation, and included the violation of at least **four court orders**. OJC pointed out Maersk's vexatious litigation tactics in its opening Brief. Maersk's responses only further confirm that it should be sanctioned.

A. Maersk Violated the Presiding Officer's Orders At Least Four Times.

Concerning its failure to produce all relevant pricing information, Maersk contends that it "provided a fulsome response to OJC's RFP 26, both in terms of documents and relevant witnesses."[78] That is patently untrue. Maersk admits that it was ordered to produce "any policies, procedures, guidance, training, or instructions regarding pricing for shipping or determining prices charged for shipments under service contracts and on the spot market" in response to OJC RFP 26,[79] and after failing to do so was "again ordered to **provide complete responses to OJC RFP 26 and all responsive documents must be provided** [by] [September 7, 2022]."[80] Maersk admits that it failed to comply with the orders.

Incredibly, Maersk contends that producing documents reflecting the prices that Maersk

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[76] CX 220; SCX480-481.
[77] CX 220.
[78] Maersk Brief, p. 44.
[79] Maersk Brief, p. 44; *see also* CX 300, 309.
[80] CX 309 (emphasis added).

really charged shippers was not required.[81] This a blatant distortion of the June 29 Order. Nowhere in it did the Presiding Officer state that the actual prices charged by Maersk on the spot market generally were not to be produced.[82] To the contrary, the Presiding Officer gave the example that "an email with **information about pricing on a specific lane <u>must be disclosed</u>**."[83]

Instead of providing that information, Maersk argued – both in its Brief and during discovery – that it had "directed" OJC to its public tariff website[84] for the "rates actually charged to [Maersk's] customers to the extent required by the June 29 Order," and nothing more was required.[85] Maersk's excuse for not producing its pricing information is strikingly similar to the plaintiffs' in *Shatsky v. Syrian Arab Republic*, 312 F.R.D. 219 (D.D.C. 2015). In that case, the Court noted:

> **[P]laintiffs contend that they were not obligated to produce the disputed material because it was publicly available[,]** [and] "Defendants could have pursued [the at-issue] documents from these same third-party sources, Plaintiffs were not obligated to disclose such material in response to Rule 34 document requests." Pls.' Opp'n at 25. **<u>How absurd!</u>**[86]

"The Federal Rules do not shield publicly available documents from discovery merely because of their accessibility."[87] In support, the Court cited a slew of cases wherein "[c]ourts consistently hold that parties have an obligation to produce even publicly available documents."[88] The Court

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[81] Maersk Brief, p. 44.
[82] The Presiding Order only stated that Maersk would not be required to "provide documents regarding pricing for **<u>individual shippers</u>**," giving an example that "**<u>the negotiations with individual shippers</u>** would not be disclosed. CX 300 (emphasis added).
[83] CX 300 (emphasis added).
[84] https://www.hamburgsud.com/en/ecommerce/tariffs-and-surcharges/ocean-tariff-overview/ ("Maersk's Public Tariff Website").
[85] Maersk Brief, pp. 44-45.
[86] *Shatsky*, 312 F.R.D. at 223 (emphasis added).
[87] *Shatsky*, 312 F.R.D. at 223.
[88] *Shatsky*, 312 F.R.D. at 224 (citing *Martino v. Kiewit N.M. Corp.*, 600 Fed.Appx. 908, 911 (5th Cir. 2015); *Phillips v. Hanover Ins. Co.*, 14–cv–871–R, 2015 WL 1781873, at *2 n.1 (W.D. Okla., Apr. 20, 2015) ("Courts consistently hold that parties have an obligation to produce even publicly

then sanctioned the withholding party because "[n]otwithstanding their obligation to produce the contested material, plaintiffs failed to do so by the close of discovery,"[89] and precluded the plaintiffs from "reliance on *any* documents that were produced after the discovery deadline" and any related testimony.[90]

Maersk's conduct was even more egregious than in *Shatsky*. Here, the Presiding Officer had already found that "the spot market rates reflect pricing and pricing strategy … [that is] information … **highly relevant** to the claims in this proceeding,"[91] and **twice ordered**[92] Maersk to produce "complete responses" with "all responsive documents."[93] And unlike in *Shatsky*, where the withheld documents were from "third party sources,"[94] the documents Maersk withheld from OJC were **Maersk's own** documents.[95] As held in *Shatsky*, Maersk's excuse for not producing the documents as ordered was "absurd!"[96]

Moreover, Maersk's excuse completely ignores that OJC served additional requests for documents showing Maersk's actual spot market rates charged for 2021-22[97] and service contract

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available information."); *Morgan v. Safeway Inc.*, 11–cv–1667(WMN), 2012 WL 2135601, at *2 (D. Md. June 11, 2012) ("[E]ven publically available information might properly be the subject of a valid request for production of documents."); *Ochoa v. Empresas ICA, S.A.B. de C.V.*, 11–cv–23898, 2012 WL 3260324, at *5 (S.D. Fla. Aug. 8, 2010) ("Whether the documents are available to Plaintiffs through due diligence does not control whether [a litigant] should be compelled to produce them.").

[89] *Shatsky*, 312 F.R.D. at 224.

[90] *Shatsky*, 312 F.R.D. at 229 (emphasis in original).

[91] CX 308 (emphasis added). Despite the Presiding Officer's clear ruling, Maersk nonetheless argues that the relevance of "the spot rates HSDG charged" is "a dubious assumption." (Maersk Brief, p. 45.)

[92] In *Shatsky,* the withheld documents were just the subject of discovery requests, not court orders. 312 F.R.D. at 221-22.

[93] CX 309, 300.

[94] *Shatsky*, 312 F.R.D. at 223.

[95] Maersk Brief, pp. 44-45; Maersk's Public Tariff Website.

[96] *Shatsky*, 312 F.R.D. at 223.

[97] CX 367, 376-377 (OJC 2d RFP 4 and OJC 3d RFP 20).

rates for 2021-22.[98] Maersk does not even attempt to justify why it did not produce any documents responsive to these requests.[99] Failure to produce responsive documents warranted sanctions in *Shatsky*,[100] where the withholding party actually produced the requested documents after the close of discovery.[101] Here, Maersk refused to produce the documents **ever**.

"[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."[102] Moreover, when the wrongdoer's actions prevent the precise calculation of damages, the wrongdoer must bear the risk of that uncertainty.[103] Here, although Maersk refused to produce "highly relevant" spot rate documents, Maersk nonetheless attacks OJC for "incorrectly us[ing] spot market rates for 2021-22 from third party sources such as Xeneta and Drewry."[104] Maersk's argument is baseless, because (i) both publications are well-respected industry sources,[105] and (ii) Maersk refused to produce its own data because it knew that the actual spot rates it charged were much higher than the third-party sources' rates. Indeed, Maersk has the gall to use its own willful violation of two court orders to argue that OJC's shipping rate differential damages are somehow flawed and industry-respected data is unreliable. This tactic should be rejected out of hand, and only further supports the

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[98] CX 376 (OJC 3d RFP 19); CX 7, ¶ 54.
[99] Maersk Brief, pp. 43-49. Indeed, Maersk was obligated to produce service contract rates to justify its pretextual defense that it was "unreasonable" for OJC to seek the same rates for 2021-22 as for 2020-21. *See, infra*, p. 14 and *supra*, p. 40; *Shatsky*, 312 F.R.D. at 223 (holding that litigants are entitled to "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense" (quoting Fed. R. Civ. P. 26(b))).
[100] 312 F.R.D. at 224-29.
[101] 312 F.R.D. at 224.
[102] *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11, 25 (I.D.), finalized October 24, 1991.
[103] *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213, 1230 (1990)
[104] Maersk Brief, p. 41.
[105] SCX489-490, 145:14 - 150-1; SCX510, ¶ 4.

conclusion that an issue-related sanction is warranted here, so Maersk does not benefit from its misconduct.[106]

Issue-related sanctions that stem from a party's failure to obey a discovery order include adverse evidentiary determinations – such as adverse findings of fact, considering an issue established for the purpose of the action, and adverse inferences – and precluding the admission of evidence.[107] "A court can impose issue-related sanctions after finding by a preponderance of the evidence that the alleged misconduct occurred."[108] Courts have routinely found that an adverse evidentiary determination is appropriate when a preponderance of the evidence establishes that the failure to obey a discovery order was negligent.[109]

OJC has clearly met this burden. Maersk was more than negligent in its misconduct; as Maersk admits, it intentionally withheld its pricing information as to what it actually charged shippers on the spot market and in service contracts – information certainly more probative than just what policies Maersk had about pricing. Despite being the subject of two Orders and multiple OJC discovery requests, Maersk refused to produce that "highly relevant" information.

Like the *Shatsky* court noted when finding prejudice, Maersk's "failure to timely provide relevant material hampered [OJC's] ability to test these documents through the discovery process. Indeed, … [Maersk] effectively precluded defendants from taking any additional depositions" using the withheld documents.[110] This prejudice caused by Maersk compounds the harm it did by

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[106] *Adair*, 26 S.R.R. at 25.

[107] *Shepherd v. American Broadcasting Companies, Inc*., 62 F.3d 1469, 1475 (D.C. Cir. 1995); *3E Mobile, LLC v. Global Cellular, Inc*., 222 F. Supp. 3d 50, 53 (D.D.C. 2016).

[108] *3E Mobile*, 222 F. Supp. 3d 54 (citing *Shepherd*, 62 F.3d at 1478).

[109] *3E Mobile*, 222 F. Supp. 3d at 54.

[110] *Shatsky*, 312 F.R.D. at 227. That case quote is slightly edited to account for the fact that the withholding party actually produced the documents after discovery closed, while Maersk has never produced the withheld documents. 312 F.R.D. at 224.

waiting **<u>22 days after</u>** the Presiding Officer's deadline for providing a proposed date and time for the deposition of the court-ordered Maersk management witness.[111] Not only does Maersk never explain or even attempt to justify its willful violation of that deadline – its *third violation* of an order – but it also fails to account for the fact that such a deposition would have required OJC to fly blind, as the documents evidencing the actual shipping prices charged by Maersk were still not produced.

Regardless, OJC was willing to take the deposition anyway. But Maersk used its willful violation of the deadline in the August 31 Order – along with Maersk's unilateral decision to produce its witness for deposition on Yom Kippur and its refusal to reschedule for a day that would work for OJC because the witness was too busy[112] – to create the illusion that it was complying with the Order.[113] The truth was Maersk (i) had not produced the actual shipping pricing rates, and (ii) never produced the court-ordered witness, let alone with the benefit of the most pertinent pricing documents. Indeed, Maersk's above-the-law attitude is illustrated by the fact that even when Maersk is willfully violating FMC Orders, Maersk still feels that it can dictate if, when, and how long a court-ordered witness will appear. Far from "ring[ing] hollow" as Maersk contends,[114] OJC's complaint that it was unduly prejudiced by Maersk's flouting of the Presiding Officer's Orders and running out the clock on discovery is more than justified.[115]

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[111] CX 323.

[112] CX 338-341. Mr. Hecht was scheduled to take the pricing deposition, and Mr. Weiss was to attend on behalf of OJC. The holiday scheduling affected both, and Maersk was fully aware of this but nonetheless is feigning ignorance. CX 007, ¶ 53.

[113] CX 323, 325.

[114] Maersk Brief, p. 45.

[115] *Shatsky*, 312 F.R.D. at 226 ("A litigant's failure to abide by discovery deadlines is prejudicial when it prevents the opposing party from timely reviewing relevant evidence.") (collecting cases); *Parsi v. Daioleslam*, 778 F.3d 116, 133 (D.C. Cir. 2015) (affirming sanctions where party denied the existence of documents and disobeyed court orders to produce certain material).

In a *fourth willful violation of an order*, Maersk disclosed the Declaration of Richard Zayas – a purported rebuttal expert report – for the first time on December 8, 2022, the date Maersk's Brief was filed.[116] That Report is a clear attempt at trial by ambush, as it was served nearly **two months after** the "[c]lose of all discovery (fact and expert)" on October 14, 2022.[117]

Additionally, "[i]t is well settled that '[t]he district court's interest in deterrence is a legitimate one, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.'"[118] "Deterrence is an especially important consideration where, as here, a party has exhibited 'protracted recalcitrance' throughout the discovery process."[119] As shown above, Maersk has at least **four times** violated the Presiding Officer's Orders. The Presiding Officer even warned Maersk that failure to comply with her orders may result in sanctions.[120] And Maersk has refused to produce any documents in response to other OJC requests as well.[121] Like in *Shatsky*, Maersk's "habit of creatively interpreting—and at times, altogether ignoring—this Court's admonishments simply cannot be tolerated."[122]

Maersk cannot "pick and choose when to comply with a court order depending on counsel's unilaterally determined excuses or justifications not to comply with the order. The order is either

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[116] The Zayas Declaration is identified as RX 1145-73 in Maersk's Appendix.
[117] CX 318; This violation is discussed in more detail *infra,* pp. 36-39.
[118] *Shatsky*, 312 F.R.D. at 227 (quoting *Bonds v. District of Columbia*, 93 F.3d 801, 807 (D.C. Cir.1996)).
[119] *Shatsky*, 312 F.R.D. at 227 (citing *Jankins v. TDC Mgmt. Corp. Inc.*, 21 F.3d 436, 445 (D.C. Cir. 1994)).
[120] CX 309.
[121] CX 367, 376-377 (OJC 2d RFP 4 and OJC 3d RFP 20); CX 376 (OJC 3d RFP 19); CX 7, ¶ 54.
[122] *Shatsky*, 312 F.R.D. at 228.

obeyed or appealed."[123] "There is, moreover 'importance *per se* in not allowing a party to ignore orders' to ensure that the litigation process does not 'descend into chaos.'"[124, 125]

There can be no doubt that OJC has proven by a preponderance of the evidence that Maersk repeatedly violated the Presiding Officer's Orders, and it is undisputed that Maersk failed to produce documents responsive to other OJC requests. As all these violations related to pricing evidence "highly relevant" to OJC's damages, Maersk should be sanctioned with an adverse evidentiary determination of OJC's damages being conclusively established.[126]

B. Maersk also refused to respond to OJC's discovery requests.

Maersk's instances of disrespecting the Presiding Officer's Orders and the discovery rules do not end there, however. Maersk's next "creative interpretation"[127] is with respect to OJC's Interrogatory No. 3 of its Third Set of Interrogatories:[128]

> Identify the name, title, department name, and contact information for all persons who authorize or otherwise determine blank sailings for Your shipping lanes Asia to the United States and Brazil to the United States, from June 1, 2020 to the present, including for each the name, title, department name, and contact information for all the persons to whom they report.[129]

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[123] *Shatsky*, 312 F.R.D. at 228 (quoting *Moore v. Chertoff*, 255 F.R.D. 10, 34 (D.D.C. 2008), *objections overruled sub nom. Moore v. Napolitano*, 723 F.Supp.2d 167 (D.D.C. 2010) (internal quotation marks omitted)). Maersk never appealed any of the Presiding Officer's orders.
[124] *Id.* (internal quotation marks omitted); *see also Perez v. Berhanu*, 583 F.Supp.2d 87, 91 (D.D.C. 2008) (imposing a sanction to remedy counsel's "disrespect" for the judicial system, which was demonstrated by their failure to, among other things, respond to the opposing parties' discovery requests and to abide by the discovery deadline).
[125] The Commission's inherent power to deter others from violating orders and protect the judicial system are particularly important here, as another large carrier, Mediterranean Shipping Company SA ("MSC") has likewise refused to produce required discovery despite multiple court orders, which has resulted in an Order to Show Cause why default judgment shouldn't be entered. CX 63-65.
[126] 46 C.F.R. § 502.150(b); Fed. R. Civ. P. 37(b)(2)(A).
[127] *Shatsky*, 312 F.R.D. at 228.
[128] Maersk Brief, pp. 47-48.
[129] RX457.

In response:

> HSDG objected and responded that because it had not operated vessels in those trade lanes during the period covered by the Interrogatory, there were no persons to authorize or determine blank sailings for HSDG. RX457. HSDG further stated that any sailings which did not occur during that period were not intentional but were due to circumstances beyond HSDG's control. Id.[130]

Again, Maersk mischaracterizes OJC's request. As to Maersk's first objection, the interrogatory did not presume that Maersk "operated vessels" in its trade lanes; it simply wanted the contact information for those persons who did authorize blank sailings in Maersk's trade lanes.[131] Maersk refused to answer that question, instead choosing to obfuscate. Maersk's second objection fairs no better, as the interrogatory is not limited to those blank sailings that were "intentional," but covers all blank sailings.[132] Again, Maersk chose to make a "creative interpretation" rather than answer the question as posed.

But even more critically, Maersk again plays musical-chairs with its corporations to avoid answering straightforward questions. Despite Maersk admitting that "HSDG no longer exists,"[133] HSDG was merged into Maersk,[134] and "Hamburg Sud became part of the business of Maersk" in 2017,[135] based on its nonresponsive objections, it nonetheless states that it "did not produce documents because there are no responsive documents."[136] But in small font in a footnote on the same page, Maersk confirms – without a hint of shame – that "HSDG [in reality, Maersk] served its customers in the trans-Pacific trade using space chartered **from Maersk**."[137] Of course, Maersk

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[130] Maersk Brief, p. 48.
[131] RX457.
[132] RX457.
[133] CX 67, n.1.
[134] CX 67, n.1.
[135] CX 89, 109:23 - 112:5.
[136] Maersk Brief, p. 48.
[137] Maersk Brief, p. 48, n.22 (emphasis added).

completely avoids explaining why it did not answer the blank sailing interrogatory with **its own** information instead of concocting a fake difference between Maersk and HSDG that is belied by Maersk's admissions. This is yet another example of Maersk creating straw man arguments that are so frivolous that they are disproven by Maersk's own evidence, and further justify the levying of sanctions against Maersk.

C. Maersk provided no support for and thereby abused its confidential designations.

Finally, Maersk contends that it did not abuse its confidentiality designations because "[t]he vast majority of [its designated Confidential or AEO] documents consisted of documents with rate information."[138] Like with its liability pretexts, Maersk again takes whatever side of an issue that suits them best at the time. Initially, Maersk contended that it need not produce any actual spot rate pricing because all its spot rates are available on the public tariff.[139] But now when confronted about the confidentiality designations of what spot rate pricing-related documents it did produce, Maersk flip-flops and contends that its rate information is confidential. Why Maersk's spot rates that are allegedly published on a website should be considered confidential is anyone's guess, and Maersk doesn't elaborate. Maersk also makes no attempt to overcome the presumption of public access to its "indiscreet communications"[140] about evading regulators and colluding with other carriers on pricing.[141]

Maersk also attempts to make much of its filing of a motion for confidential treatment.[142] But instead of Maersk submitting evidence to carry its "burden to justify confidential treatment,"

[138] Maersk Brief, p. 49.
[139] Maersk Brief, pp. 44-45; Maersk's Public Tariff Website.
[140] *Callahan v. United Network for Organ Sharing*, 17 F.4th 1356, 1364 (11th Cir. 2021).
[141] *See, e.g.,* CX 41, 48.
[142] Maersk Brief, p. 49.

Maersk asserts that "OJC is actually the party that has failed to meet the presumption."[143] Once again, Maersk completely ignores the evidence, as Mr. Weiss' declaration submitted with OJC's Brief describes in detail what types of records OJC is filing under seal, how they are kept secret and confidential, and how the dissemination of those records could irreparably injure OJC and its business.[144] Maersk supplied no such evidence for its documents. Therefore, Maersk's arguments that it did not abuse its confidentiality designations are meritless.

Maersk's systematic refusals to comply with Orders and discovery rules continued throughout the case and collectively warrant the imposition of an adverse evidentiary determination of OJC's damages being conclusively established.

III. DAMAGES.

After all Maersk's straw man arguments, contentions that defy logic and the evidence, and new frivolous excuses that contradict each other, Maersk takes its baseless assertions to a new level in response to OJC's damages. Even though the undisputed evidence shows that Maersk willfully violated the Shipping Act – and attempted to cover it up – Maersk incredibly contends that OJC is not entitled to *any* damages as a result of those violations. The highest court in the land, however, disagrees. Indeed, "[t]he Supreme Court has indicated that the loss of expected profits resulting from an unjust and illegal denial of shipping space is real and compensable under the [Shipping Act]."[145] In this case, OJC has provided ample "competent evidence" that it sustained compensable losses with reasonable certainty, and that Maersk's egregious violations of

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[143] Maersk Brief, p. 49; *see also* Respondents' Motion for Confidential Treatment of Certain Materials.
[144] CX 476-477, ¶ 47.
[145] *California Shipping*, 25 S.R.R. at 1230 (citing *Consolo v. FMC*, 383 U.S. 607, 626 (1966)).

the Shipping Act were the proximate cause of those losses.[146]

A. Maersk's criticisms of OJC's damages are based on unsupported arguments that ignore the facts and the Presiding Officer's prior rulings.

Maersk's claim that OJC is entitled to no damages simply regurgitates several arguments that are – and have previously been – disproven.

First, Maersk asserts at least a dozen times that OJC's expert Richard Berning "did not review – and OJC refused to produce – the shipping records, sales records, financial statements, and other documentation from which the calculation [of damages] might be verified."[147] Maersk made this same argument in its motion to compel.[148] In response, OJC noted that it:

- 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.[149]

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[146] *Adair*, 26 S.R.R. at 25; *California Shipping*, 25 S.R.R. at 1230. As with other types of reparations, claims of lost profits must also be shown with reasonable certainty. *Rose Int'l Inc. v. Overseas Moving Network*, 29 S.R.R 119, 189 (FMC 2001).
[147] *See, e.g.,* Maersk Brief, pp. 27-31, 35, 36.
[148] CX316.
[149] SCX496; SCX511, ¶ 7.

OJC also asserted 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.[150]

The Presiding Officer denied Maersk's motion to compel, noting that Maersk "ha[s] 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."[151] With respect to OJC's shipping records, the Presiding Officer also found:

> [Maersk] ha[s] not identified specific problems with the detailed information provided in the spreadsheet. Moreover, these types of service contracts and agreements, some with [Maersk's] competitors, are highly sensitive and it is not clear that information beyond the data provided by Complainant is relevant. Also, given changing market conditions, it is not clear that past performance would be relevant to the timeframe at issue.[152]

OJC is an e-commerce company whose business is done electronically over the Internet.[153] Even now, Maersk has not identified any specific problems with the detailed information provided by OJC.[154] And Maersk completely ignores the fact that other financial reports would not be probative of house-brand product sales because other product lines would be included. Maersk also ignores that Mr. Berning testified: "So did we look at financial data, financial information?

[150] CX 316.
[151] CX 316 (emphasis added).
[152] CX 314. The Presiding Officer also ruled that "[g]iven the changing market conditions, it is not clear that past performance [of OJC's shipping volumes from before June 1, 2020] would be relevant to the timeframe at issue." CX 316.
[153] SCX509, ¶ 2.
[154] Instead, Maersk complains that "OJC also failed to provide any container data—even in summary fashion—after July 16, 2022." (Maersk Brief, p. 30.) But OJC is not seeking damages after **May 31, 2022** (what would have been the last day of its renewal contracts with Maersk), so shipping information after July 16, 2022 would not be relevant.

Of course we did. Looking at these tabs [of the spreadsheet], that's company financial data."[155] Simply put, there is no basis for Maersk's broken-record contentions that Mr. Berning should have audited OJC's records or that *some other* documents should have been reviewed to "verify" OJC's damages.

Second, Maersk makes the unsupported argument that Mr. Berning did not calculate anything, and Weiss did all the calculating.[156] As an initial matter, Maersk's contention internally contradicts other arguments it makes about OJC's damages. On one hand, Maersk asserts that Mr. Berning "blindly accepted" in his report the preliminary damage calculations prepared by Weiss on July 14, 2022.[157] **But in the very next sentence**, Maersk complains that those calculations – made before Mr. Berning was even engaged – were **significantly lowered** in Mr. Berning's calculations contained in his report served on September 2, 2022.[158] Thus, Maersk knew that Mr. Berning did not just "blindly accept" OJC's preliminary calculations, yet still argues without any credibility that he did. Mr. Berning indeed testified that the numbers were lowered in his report because he did not "rubber stamp" OJC's prior figures but in fact "came up with [his] own opinion."[159] Maersk also ignored Mr. Berning's testimony where he repeatedly stated that **he** calculated the damages contained in his report.[160]

Third, Maersk regurgitates its argument that because OJC had not shipped 4200-4700 containers before that OJC would not have done so in 2021-22.[161] This argument was previously rejected by the Presiding Officer, when she held "[g]iven the changing market conditions, it is not

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[155] RX 1062, 130:3-23.
[156] Maersk Brief, pp. 27, 36.
[157] Maersk Brief, pp. 31-32.
[158] Maersk Brief, p. 32.
[159] RX 1044, 58:3 – 59:7.
[160] *See, e.g.,* RX 1041, 47:3 – 48:2.
[161] Maersk Brief, p. 30.

clear that past performance [of OJC's shipping volumes from before June 1, 2020] would be relevant to the timeframe at issue."[162] Maersk has not provided anything that would show otherwise. Indeed, Maersk ignores that Casanova testified that throughout 2020-21, OJC continuously asked her to provide OJC with more space than had been allocated under the contracts, specifically, "[REDACTED]" more containers per week.[163] Forty containers a week (10 committed plus 30 demanded) equates to thousands of containers annually. Thus, while the demand was there for OJC, the available space was not. And the 4200-4700 container range[164] was the subject of detailed projections put together during 2020 and early 2021 by analyzing detailed sales and product interaction data as part of renewal discussions with Maersk, so that OJC could secure the needed space that it could not get in 2020-21.[165] Maersk attempts to criticize OJC's projections because they also contained May 2021 shipping data, as well as shipping data from earlier in 2021 and 2020.[166] This is yet another misdirection device that goes nowhere. The fact is that during the time period Maersk cut OJC off, OJC projected to ship 4700 containers. Maersk - by its own admission - did not reveal its executive decision to retaliate back in April of 2021; instead, Maersk misled OJC into believing that there were just some logistical problems with the new contract; thus OJC continued projecting the full 4700 containers in May 2021.[167] Regardless, as Maersk well knows, the 4200-4700 range was calculated and communicated to Maersk in April 2021, because it was then communicated internally by Casanova.[168] Again,

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[162] CX 316.
[163] RX 954, 960-961, 175:8-22 and 208:20 - 209:1.
[164] The 4200-4700 container range included shipments from Brazil and to Kentucky, two lanes that were not included in the first service contract. CX 126-135.
[165] CX 468, 475 ¶¶ 11, 34; Weiss Decl, Ex. 100; OJC's Brief, p. 48.
[166] Maersk Brief, p. 34.
[167] SCX510, ¶ 5; *see also* CX 468-9, 475 ¶¶ 14, 34.
[168] CX 219.

Maersk deceptively tries to twist OJC's mitigation efforts into a negative while simultaneously claiming that OJC didn't mitigate at all.

Fourth, and most shockingly, throughout its Brief, Maersk repeatedly cites to a brand-new Declaration of Richard Zayas ("Improper Zayas Report"), Maersk's purported damages expert.[169] This Improper Zayas Report was served for the first time on December 8, 2022, the date Maersk's Brief was filed.[170] That Report is a clear attempt of trial by ambush, and in total violation of the rules by being inexcusably late, as it was served nearly **two months after** the "[c]lose of all discovery (fact and expert)" on October 14, 2022,[171] and **over three months** after Mr. Berning's expert report was served on September 2, 2022.[172]

Maersk's months late, new report clearly violates Rule 26:

> Rule 26(a)(2)(C) requires that [expert] reports be disclosed at least 90 days before the trial date or as directed by the Court. **The purpose of Rule 26(a)(2) is to prevent unfair surprise at trial and to permit the opposing party to prepare rebuttal reports, to depose the expert in advance of trial, and to prepare for depositions and cross-examination at trial.** *See Coles v. Perry*, 217 F.R.D. 1, 4 (D.D.C. 2003) (noting that **"the very purpose of the rule is nullified" when an expert "supplements" his report by addressing a new matter after discovery has ended**). **The Rule also prevents experts from "lying in wait" to express new opinions at the last minute, thereby denying the opposing party the opportunity to depose the expert on the new information or closely examine the expert's new testimony.** *See Keener v. United States*, 181 F.R.D. 639, 641 (D. Mont. 1998).[173]

Rule 37 therefore "'gives teeth' to Rule 26's disclosure requirements by forbidding the use at trial[, on a motion or at a hearing] of any information that is not properly disclosed. Rule 37(c)(1) is a 'self-executing,' 'automatic' sanction designed to provide a strong inducement for

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[169] *See, e.g.,* Maersk Brief, pp. 29-31, 33.
[170] The Zayas Declaration is identified as RX 1145-73 in Maersk's Appendix.
[171] CX 318.
[172] CX 438; CX 317.
[173] *Minebea Co., Ltd. v. Papst* ("*Papst*"), 231 F.R.D. 3, 5-6 (D.D.C. 2005) (emphasis added); *see also* 46 C.F.R. § 502.141(d) and (k) (disclosures must be supplemented in a "timely manner").

disclosure."[174] While the rule itself does not define "in a timely manner," supplementation must occur "in a fashion that will allow [the opposing party] to conduct meaningful discovery and avoid undue delay in the progress of [the] case."[175]

"In determining whether this sanction should be imposed, the burden is on the party facing the sanction to demonstrate that the failure to comply with Rule 26(a) is substantially justified or harmless."[176] "Courts have upheld the use of the sanction even when a litigant's entire … defense has been precluded."[177] As in *Papst*, neither of the exceptions in Rule 37(c)(1) are present here.

As an initial matter, Maersk does not even acknowledge that the Improper Zayas Report is months late or violates the Presiding Officer's discovery deadline. The information in the Improper Zayas Report should have and could have been disclosed before discovery closed, as Maersk had 42 days during which to respond to Mr. Berning's report before that deadline. Furthermore, Maersk had 68 days before OJC filed its Brief, and still failed to do so. Instead, Maersk resorted to "lying in wait"[178] for **97 days** – and a month after OJC filed its Brief – before it disclosed the Improper Zayas Report. Maersk provided no justification, much less "substantial

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[174] *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 826-27 (9th Cir. 2011) (quoting *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)).

[175] *United States v. Guidant Corp*., No. 3:03-0842, 2009 WL 3103836, at *4 (M.D. Tenn. Sept. 24, 2009); *cf. Wood v. Handy & Harman Co.*, 318 F. App'x 602, 609 (10th Cir. 2008) (affirming the district court's conclusion that a supplemental discovery response was untimely when filed two months after the close of discovery, especially where the party had ample time to provide this information to the other side).

[176] *Papst*, 231 F.R.D. at 6 (citing Fed. R. Civ. P. 37(c)(1)); *Torres v. City of L.A.*, 548 F.3d 1197, 1213 (9th Cir. 2008) (citing *Yeti by Molly*, 259 F.3d at 1107 ("Implicit in Rule 37(c)(1) is that the burden is on the party facing sanctions to prove harmlessness.")).

[177] *Yeti by Molly*, 259 F.3d at 1106 (citing *Ortiz–Lopez v. Sociedad Espanola de Auxilio Mutuo Y Beneficiencia de Puerto Rico,* 248 F.3d 29, 35 (1st Cir. 2001)).

[178] *Papst*, 231 F.R.D. at 6 ("The Rule also prevents experts from 'lying in wait' to express new opinions at the last minute, thereby denying the opposing party the opportunity to depose the expert on the new information or closely examine the expert's new testimony.").

justification," for its intentional delay, nor could it.[179] This tactic is consistent with Maersk's repeated flouting of rules and deadlines throughout this case.[180]

And Maersk's delay tactic was not harmless. By waiting until it filed its Brief and discovery was long over to serve the Improper Zayas Report, Maersk sandbagged and completely precluded OJC from deposing Mr. Zayas on his new report. Maersk also knew that OJC could not possibly analyze and respond to the nearly 30-page Improper Zayas Report within 15 days, during which OJC also must respond to Maersk's 50-page Brief, 178 Proposed Findings of Facts, and 1208 pages of exhibits. As such, like in *Papst*, the Improper Zayas Report should be stricken in its entirety because it was "filed too late to provide the opposing party with an adequate opportunity to respond or prepare a response" for this Reply, let alone for its final briefing.[181]

B. Maersk's "unreasonable assumptions" argument ignores the facts of record.

After throwing out the broad criticisms of OJC's damages addressed above, Maersk then largely repeats many of its same tropes that supposedly are "unreasonable assumptions" made about OJC's damages. Yet again, Maersk blatantly misrepresents the record and reiterates its same strawman arguments in an effort to distract from its willful misconduct. OJC addresses each of Maersk's misrepresentations below.

First, Maersk contends that "Mr. Berning and OJC assume that [Maersk] was **required** to enter a Service Contract for 2021-22."[182] Maersk's sole, so-called "support" for that assertion is

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[179] *Papst*, 231 F.R.D. at 6 (finding a party's late supplemental not substantially justified because the supplemental report could have been filed long ago and "the time for disclosure of additional evidence has long since passed"); *Wood*, 318 F. App'x at 609 (affirming the district court's conclusion that a supplemental discovery response was untimely when filed **two months** after the close of discovery, especially where the party had ample time to provide this information to the other side).
[180] *See* OJC's Brief, pp. 26-33.
[181] *Papst*, 231 F.R.D. at 6.
[182] Maersk Brief, p. 33 (emphasis added).

Mr. Berning's testimony wherein he simply states that he made the assumption "that if [OJC] had received the contract that [OJC] had anticipated for fiscal '21, what would [OJC's] damages be?"[183] Nothing in that testimony supports Maersk's misleading argument. Nor has OJC ever contended that Maersk was **required** to enter into a service contract. What OJC has claimed is that Maersk was **required by law not** to illegally retaliate against OJC by refusing to renew a service contract.

Second, Maersk contends that OJC made the "unreasonable assumption" that the shipping rates would be the same for 2021-22 as they were in 2020-21.[184] What Maersk intentionally omits from its argument is that it was **Maersk who proposed a "new contract [with] the same … rates … of the [then-]current contract**" for 2021-22.[185] Again, another misleading argument by Maersk that is belied by its own evidence. And Maersk cites no evidence from April 2021 that rolling over the same rates into 2021-22 was unreasonable. Nor did Maersk produce **any** service contract rates for 2021-22 – despite being repeatedly asked for it[186] – let alone any that showed that it would be "unreasonable" for contract rates to remain the same for those two years.

Third, Maersk asserts that it was "unreasonable" for OJC to believe that Maersk would have agreed to increase the volume to 4200-4700 containers in 2021-22.[187] This is contrary to: (i) Casanova's promise that Maersk would provide an initial contract of 400 FFE[188] MQC, to make up for its past failures and to show its interest in handling more of OJC's shipping volume;[189] (ii) Maersk seeking to win more of OJC's shipping business, and admitting that OJC could move

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[183] RX1048, 75:10 – 76:3.
[184] Maersk Brief, p. 33.
[185] CX 214; *see also* CX 468 ¶ 12; OJC's Brief, p. 24.
[186] *See* CX 376 (OJC 3d RFP 19); CX 7, ¶ 54.
[187] Maersk Brief, pp. 33-34.
[188] 400 FFE equals 800 TEU.
[189] CX 214-215.

between 4200-4700 FFE with a renewal contract;[190] (iii) Casanova testifying that during 2020-21, OJC was always asking for "15, 20, 30" more containers per week, above and beyond the 10 TEUs that Maersk was already obligated to provide;[191] (iv) Maersk regretting passing on OJC's originally proposed minimum volume of "1266[FFE]x40hc per year" in 2020-21;[192] (v) Maersk's own profit increase of 3800% during that same year;[193] and (vi) Maersk entering into service contracts with a prefix of NOAC78 for █████ **TEUs** (█████ **FFEs**) **after** Maersk made the "executive decision" on April 29, 2021 to retaliate against OJC.[194] OJC's desired increase to 4200-4700 was not just reasonable, but it was also agreed to by Maersk.[195]

Fourth, Maersk argues that OJC did not have the demand for its goods to fill 4200-4700 containers.[196] Maersk again ignores all the evidence above about OJC's constant demands to Maersk during 2020-21 for more space,[197] the 4200-4700 range was calculated using OJC's projections and communicated to Maersk in April 2021,[198] and the astronomical demand increase for home goods during the pandemic.[199] Maersk knows full well about the huge demand increase in 2021-22, as it enjoyed a **38-times increase** in profit during that period.[200] Thus, it appears that while large increases in demand were the reality for Maersk, Maersk nonetheless hypocritically contends that a **6-7 times increase** in demand for OJC was "unreasonable."

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190 CX 203.
191 CX 206, 175:8-22 (emphasis added).
192 CX 242-243.
193 CX434.
194 CX 469 ¶ 16; CX 283-284; *see also* CX 285-286, HSDG's Resp. to OJC RFA 1-4 (Respondents admitting that they entered into service contracts after they retaliated against OJC).
195 CX 203; CX 468 ¶ 11.
196 Maersk Brief, pp. 34-35.
197 RX 954, 960-961, 175:8-22 and 208:20 - 209:1.
198 CX 219.
199 CX 406; RX 1084-85, 220:25 – 222:10.
200CX 434.

Maersk also attempts to deliberately mislead the Commission by concluding because OJC "only" had a 40-container backlog in April 2021 that equates to there not being higher demand than 40 containers for OJC's products.[201] But as Maersk well knows, that is not how business works. OJC did not just produce an unlimited number of products and put them into containers blindly, hoping that they could be shipped someday somehow. Manufacturers of OJC's import products needed a 60-90-day lead time to produce products. In order to commit to such orders, OJC had a plan to transport them to the United States before it would even have them manufactured. Otherwise, OJC could be stuck with products that it could not get transported to its customers in the United States because it did not have enough shipping space to do so, or because the rates cost more than the goods in the containers themselves. Without that predictability, OJC was left guessing as to how high the then-volatile spot market rates would go and if any space would be available at all. Meanwhile, OJC's competitors enjoyed the predictability of set prices and volume commitments. In that predicament, there was no way for OJC to compete. Not surprisingly then, once OJC was cut off from its then-existing and renewal service contracts by Maersk, OJC's import business came to a virtual stand-still.[202] This is the exact type of loss -- of expected profits resulting from an unjust and illegal denial of shipping space – that the Supreme Court deemed "real and compensable."[203]

Therefore, rather than proving that OJC could not meet the demand for 4200-4700 containers in 2021-22, Maersk's argument exposes just how extremely harmful its retaliation was for OJC. Because it was robbed of a service contract due to Maersk's retaliation, OJC's ability to sell its products during 2021-22 dropped to a bare minimum, because OJC had neither the

[201] Maersk Brief, p. 35.
[202] SCX510-512, ¶¶ 6, 8, 9.
[203] *California Shipping*, 25 S.R.R. at 1230 (citing *Consolo*, 383 U.S. at 626).

competitive shipping rates nor the allotted space enjoyed by its home-good competitors who had service contracts.[204]

Fifth, Maersk again argues that Kentucky was not a possible lane for Maersk.[205] Not only was this argument already debunked in OJC's Brief,[206] but it also ignores that Maersk regretted passing on OJC's Kentucky shipping business 2020-21 and it would have found a solution in order to get that business.[207] Moreover, Maersk carried containers to Kentucky via a third-party, United Shippers, for OJC in 2022, so the assertion that Kentucky was not a viable lane is a blatant misrepresentation.[208]

Sixth, Maersk takes issue with the inclusion of Brazil as a trade lane for 2021-22.[209] But Maersk admits that it handled shipments for OJC from Brazil in 2021, that it did so in 2020 as well on spot rates,[210] and Maersk identifies no reason why it wouldn't have done the same in 2021-22.[211] Plus, the Brazil to the United States lane was also contemplated as part of the consolidation of OJC's business with Maersk for 2021-22.[212] Thus, Maersk's conclusion that OJC's damages are "overstate[d]" as a result is both false and misleading.

C. Maersk's attacks on Mr. Berning's opinions are unfounded.

Tellingly, Maersk besmirches Mr. Berning and his competency by misrepresenting his testimony and warping the facts to make an argument for exclusion under *Daubert*.[213] Maersk's

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[204] SCX510-512, ¶¶ 6, 8, 9.
[205] Maersk Brief, p. 35.
[206] OJC's Brief, pp. 47-49.
[207] CX 242-243.
[208] SCX509-510, ¶ 3.
[209] Maersk Brief, pp. 35-36.
[210] Maersk Brief, pp. 13-14.
[211] Maersk Brief, pp. 35-36.
[212] CX 467-468 ¶¶ 5, 8-11.
[213] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

attacks take two approaches and both of them are fatally flawed. *First,* Maersk repeatedly tries to mislead the Commission into believing that Mr. Berning just adopted whatever Weiss said. Of course, Maersk cited no evidence to support that contention. The fact that Mr. Weiss worked with Mr. Berning while determining OJC's damages is not surprising or unusual, as Mr. Weiss and OJC provided Mr. Berning access to OJC's confidential sales, shipping, and cost data. But all the while, Mr. Berning acted independently of the parties.[214] And Mr. Berning testified that he did not "rubber stamp" OJC's prior figures but in fact "came up with [his] own opinion,"[215] and he calculated the damages contained in his report.[216]

Maersk's obvious goal in this regard was to twist the facts of this case into those like in *California Shipping*.[217] In that case, the complainant relied solely on a "basic damage summary" without any detailed supporting data that was entirely the work of its president.[218] Here, OJC's damage submissions include Mr. Berning's reports containing "[his] own opinion[s],"[219] and the review and analysis of supporting data that amounts to a total of 370,276 records, with 4,444,049 points of data related to shipping and sales for 2020-2022.[220] As a result – and as Maersk well

[214] RX 1043, 55:2-17.
[215] RX 1044, 58:3 – 59:7.
[216] *See, e.g.,* RX 1041, 47:3 – 48:2.
[217] Maersk Brief, pp. 36-37.
[218] *California Shipping*, 25 S.R.R. at 1230.
[219] RX 1044, 58:3 – 59:7.
[220] Weiss Decl., Ex. 101; The supporting financial information contained in these spreadsheets includes (a) data of the 737 containers shipped by OJC from June 1, 2020, around when the parties' Service Contract started, until June 2020 - 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; (b) 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; and (c) 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, qty ordered, cost of shipping, cost

knows – the damages in this case bear no relation whatsoever to the inadequate "basic summary" in *California Shipping*.

Maersk's second attack is incredible on its face. Despite Mr. Berning (i) having as one of his four "core competencies" "litigation economic/loss damage analysis and independent opinions,"[221] (ii) having testified over a 150 times on damage- and valuation-related issues,[222] and (iii) never having his opinions excluded by a court in well over 1,000 cases,[223] Maersk contends that Mr. Berning "is not qualified to render opinions on damages."[224] With all of his experience, if Mr. Berning is not qualified to render opinions on damages, then no one is.

Maersk also tries to make much about the fact that Mr. Berning has no prior experience testifying about damages arising specifically from alleged violations of the Shipping Act.[225] Of course, Maersk provides no authority – nor even contends – that calculating lost profits or the difference between shipping rates is different in the Shipping Act context than in any other commercial litigation. To the contrary, the Commission has cited common law, the U.S. Supreme Court, and Circuit Appellate Courts, as well as others, in identifying the "general principles pertaining to damage awards relevant to an award of reparation."[226] Once again, Maersk makes

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of fulfillment, commissions, marketing, discounts, sales, and gross revenue, all from OJC's internal database used for its day-to-day business operations. SCX511, ¶ 7.

[221] RX1044, 61:3-9.

[222] RX1045-6, 65:17 - 67:7.

[223] RX1045-6, 65:17 - 67:7.

[224] Maersk Brief, p. 26.

[225] Maersk Brief, p. 26. Maersk cites no authority for its nonsensical requirement that to opine on reparation damages in an FMC case an expert must have previously been a damages expert in an FMC case. No such requirement exists, of course, because if that were the case, no expert could ever opine in an FMC case because their first attempt would be their last, after they were excluded for having no prior experience in front of the FMC.

[226] *See, e.g., California Shipping*, 25 S.R.R. at 1229-30 (citing American Jurisprudence on Damages, the U.S. Supreme Court, and the Eighth Circuit Court of Appeals concerning damage principles).

an unsupported argument that is contrary to the law, and thus Maersk's contention that Mr. Berning is "unqualified" must be rejected.

D. Maersk's arguments against lost profits lack evidentiary support and are disproven as shown above.

OJC's lost profits resulting from Maersk's violations consist of the following categories of damages, which are each addressed below:

1. <u>Loss for failure to meet minimum TEU during 2020-21</u>

Maersk attempts to avoid lost profits being awarded for the 15 FFEs that it refused to ship in 2020-2021 by arguing that the liquidated damages clause "negates" OJC's claim.[227] In doing so, Maersk's positions the 15 FFEs as simply a "shortfall" under the service contract.[228] But that is a clear misrepresentation of what happened and what the consequences are. Maersk, as part of its retaliation against OJC, cut off and refused to provide any more space because OJC dared air its grievances with Maersk and threatened to do so with the Commission as well.[229] Maersk cites no authority that it can simply pay a minimal liquidated damages fee instead of reparations for OJC's actual injuries – as promised by the Shipping Act[230] – when Maersk willfully retaliates. Indeed, the liquidated damages clause would be more profitable to Maersk than its performance would be, thus the clause was void anyway.[231] OJC is entitled to its lost profits under this category of damages, and Mr. Berning provides a precise calculation for such damages with reasonable certainty.

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[227] Maersk Brief, p. 37.
[228] Maersk Brief, p. 37.
[229] CX 220.
[230] 46 U.S.C. § 41305(b).
[231] *See Red Sage Ltd. P'ship v. DESPA Deutsche Sparkassen Immobilien-Anlage-Gasellschaft mbH*, 254 F.3d 1120, 1126-27 (D.C. Cir. 2001) ("If, on the other hand, it appears that the [liquidated damages] stipulation is designed to make the default of the party against whom it runs more profitable to the other party than performance would be, it will be void as a penalty.").

2. Loss due to failure to provide the committed weekly MQC during 2020-21

In response to this category of lost profits,[232] Maersk attempts to run away from its promises to OJC and its own internal communications that OJC was entitled to 10 TEU per week.[233] This increase in TEUs per week was Maersk's promise made to OJC[234] that is consistent with the terms of the 2020-21 service contract wherein "Carrier agrees to make available to Shipper during the term of this Contract vessel capacity adequate to carry … **at Carrier's option**, any additional cargo tendered by Shipper during the term of this Contract."[235] Indeed, Casanova's exchange with Gast confirms that Maersk explicitly meant for this provision to apply to the increase of OJC's weekly TEUs:

> [Gast]: Was there 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 stipulates we can accept more cargo at our discretion. [3.(a)(2)].
>
> [Casanova]: There was not a formal documentation. Customer was informed by email that SP was increased to 10 TEU per week on 08/03/2020 (Third attachment).[236]

Based on the clear representations made internally at Maersk and to OJC, Maersk – as the carrier – amended the agreement and ***exercised its option*** to carry additional cargo for OJC during 2020-21. Maersk must not be allowed to escape accountability for its promises to OJC just because it illegally retaliated against OJC.

3. Freight charges above contract rates during 2021-22

Next, Maersk recycles four of its previous, fatally-flawed arguments against OJC's third

[232] Maersk Brief, pp. 37-39.
[233] CX 156; OJC's Brief, p. 38.
[234] CX 156.
[235] CX120, § 3(a)(2) (emphasis added).
[236] CX 164.

category of lost profits, freight charges above contract rates 2021-22:[237] But as is shown above, (i) the Presiding Officer already rejected Maersk's demand for OJC's service contracts with other carriers, because the rate information was already disclosed to Maersk;[238] (ii) it was **Maersk that proposed** the same rates for 2021-22 as where in effect for 2020-21 in a service contract that had an official number assigned to it;[239] (iii) Maersk admittedly shipped from Brazil and never stated that it would not continue to do so in the renewal contract;[240] and (iv) Maersk ignores all the evidence that it wanted OJC's Kentucky business and that OJC would ship the containers to other ports if necessary to meet the MQC.[241] OJC is entitled to this category of lost profits as well.

4. Loss due to Maersk's retaliation by refusing to renew contract during 2021-22

For the fourth category of lost profits, Maersk falls back on its argument that OJC's projection of shipping 4200-4700 containers was "unreasonable" – a Maersk contention that has been repeatedly shown to be false.[242] Moreover, the contemporaneous correspondence shows that there was not a single conversation about OJC shipping 4200-4700 containers being "unreasonable." Maersk also makes a throwaway argument that OJC's "Average Gross Profit Per Container" amount of [redacted] is "unsupported."[243] Of course, Maersk ignores Mr. Berning's testimony that he reviewed the extensive financial data of OJC and determined that the [redacted] amount had proper foundation.[244] Maersk has failed to point to a single error in Mr. Berning's report; instead, Maersk tries to smear him by categorizing every single point in his report as

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[237] Maersk Brief, pp. 39-40.
[238] CX 315.
[239] CX 214.
[240] *Supra,* p. 43.
[241] *Supra,* p. 14-15, 43; OJC's Brief, pp. 47-49.
[242] *Supra,* pp. 14, 41; OJC's Brief, pp. 22-24, 47-49.
[243] Maersk Brief, p. 41.
[244] RX 1082, 212:4 – 214:8.

"unreasonable." Maersk has no legitimate basis to contest OJC's lost profits due to Maersk's refusal to renew its service contract during 2021-22.

E. Maersk recycles its same tired, already-rebutted arguments about OJC's Shipping Differential Method for calculating damages.

In response to this method, Maersk makes the same arguments it made in response to lost profits category #3 above (Freight charges above contract rates during 2021-22),[245] the first five of which OJC has repeatedly and thoroughly rebutted.[246] Maersk's sixth argument is that OJC had no reason to use third-party sources for spot market data.[247] As shown above, OJC had every reason to use such data because (i) Maesk refused to produce its own spot rate prices, despite being **twice** ordered to do so and thus the Presiding Officer should issue an adverse evidentiary sanction against Maersk wherein OJC's damages are conclusively established,[248] (ii) the data is from well-respected and widely-used industry publications that provides rates based on thousands of container data points, thereby determining a more reliable average,[249] and (iii) the 143 FFEs that OJC did ship in 2021-22 did not accurately reflect the 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.[250] Thus, these rates were lower – albeit very infrequent and a tiny fraction of the overall market – than regular spot market rates, which OJC could not afford.[251] Accordingly, Maersk has no basis to challenge OJC's use of third-party spot rate data in its shipping differential damages.

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[245] Maersk Brief, p. 41.
[246] CX 315; CX 214; *supra,* pp. 13-16, 39-43; OJC's Brief, pp. 47-49.
[247] Maersk Brief, p. 41.
[248] *See supra*, pp. 22-29.
[249] SCX489-490, 145:14 - 150-1; SCX510, ¶ 4; CX462; CX 474.
[250] SCX511-512, ¶ 8.
[251] SCX511-512, ¶ 8.

Indeed, these damages are as straightforward as they come: OJC's damages are the difference between the contract cost – that OJC would have had but for Maersk's retaliation – and the spot rate cost to ship 4200 to 4700 containers during 2021-22.[252] Mr. Berning made these calculations using the best available data – the contract rates that **Maersk proposed** for 2021-22[253] and spot rates from third-party shipping industry data – to determine that difference.[254] Although this method does not capture the lost profits that OJC suffered due to Maersk's violations, it at least compensates OJC for the increased shipping costs that it was confronted with after Maersk cut off OJC from its renewal service contract. That's the least Maersk can pay for its illegal acts after it took the containers that should have gone to OJC and sold them for a huge premium, and in the process pulled in **38x** more profits during that same period.[255]

F. Maersk's arguments that OJC offered "no evidence of causation" and failed to mitigate its damages ignore the facts and the law.

Coming on top of all of Maersk's provably false contentions, this perhaps may be Maersk's most frivolous "no damages" argument of them all. As an initial matter, Maersk's retaliation against OJC by refusing to renew a service contract is explicitly identified as an example of retaliation that is "conduct detrimental to a shipper."[256] Moreover, "[t]he Supreme Court has indicated that the loss of expected profits resulting from an unjust and illegal denial of shipping space is **real and compensable**,"[257] and that courts should not "wrongfully minimize the sting of losing expected profits resulting from being unjustly and illegally denied shipping space,"[258] which

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[252] CX 426; CX 473 ¶ 27.
[253] CX 214.
[254] OJC Brief, pp. 41-46.
[255] CX 434.
[256] Statement, Dkt. 21-15 at 8.
[257] *California Shipping*, 25 S.R.R. at 1230 (emphasis added) (citing *Consolo*, 383 U.S. at 626).
[258] *Consolo*, 383 U.S. at 626.

OJC suffered as the result of Maersk's violations. The law clearly supports the conclusion that Maersk'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.[259]

Incredibly, Maersk tries to use out-of-context quotes from Weiss' deposition about his regret in trusting Maersk and working with Casanova to consolidate all OJC's shipping business with Maersk as a basis to find that it was Weiss himself who caused OJC's harm.[260] Of course, Weiss had no way of knowing that Maersk would retaliate and cut off OJC from all further service contract shipments.[261] But evidently, according to Maersk, the victim of an illegal act should bear the burden of the offender's violations. This is consistent with Maersk's equally-incredible contention that just because it promised OJC 10 TEUs per week, OJC has no right to enforce that promise.

As for mitigation, OJC could not obtain a shipping contract with any other carrier, because Maersk retaliated against OJC so late in the contract season. Nonetheless, Weiss tried to obtain a service contract with another carrier, to no avail.[262]

Maersk also ignores the business reality that it forced OJC into a position where it simply couldn't operate its business because trying to predict the rates and whether space would be available at all was impossible.[263] Regardless, even when OJC shipped on the spot market or through third party forwarders that used Maersk, Maersk attempts to hold that against OJC.

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[259] SCX510-512, ¶¶ 6, 9.
[260] Maersk Brief, p. 42.
[261] *See* RX1026, 245:18-21 (Weiss testifying that he "was really fooled and got drawn into a terrible situation; but at the time it made perfect sense.").
[262] CX 468-469 ¶ 14.
[263] SCX510-512, ¶¶ 6, 8, 9.

According to Maersk, it carrying any of OJC's goods under any circumstances totally absolves Maersk from any of its violations of the Shipping Act. And adding insult to injury, Maersk simultaneously contends that OJC didn't engage in any mitigation efforts at all.[264] Maersk of course cites no authority for its absurd proposition, and indeed its own contradictory arguments rebut themselves.

Maersk's damage arguments are all fatally flawed. OJC must be fully compensated for Maersk's willful violations of the Shipping Act if this type of behavior is ever to be stopped.

G. Maersk's response provides yet more evidence that OJC's damages should be doubled.

"The power of the Commission to award reparations arose out of the intent of Congress to control the potential abuse of the broad antitrust immunity granted to regulated entities. Accordingly, the Commissions has been empowered to award reparations, attorney fees, and double damages."[265] In contesting this textbook case of retaliation, Maersk has made countless post hoc excuses, strawman arguments, misrepresentations, and flip-flopped positions whenever it suited Maersk best. Maersk's abuse of not only OJC through willful retaliation but also this complaint proceeding warrants the doubling of OJC's damages.

CONCLUSION

It is difficult to imagine more willful violations of the prohibitions against retaliation and unreasonably refusing to deal than Maersk's egregious conduct in this case. This is particularly true as Maersk ordered retaliation against OJC at the worst possible time. While Maersk raked in its largest profits **ever**, OJC was cut off by Maersk from what should have been OJC's most

[264] Maersk Brief, pp. 42-43.
[265] *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, Dkt. No. 09-01, 2013 FMC LEXIS 20, *75 (FMC July 9, 2013).

profitable period in its company's history as well, just for having the courage to complain to the Commission. This is the exact situation for which the FMC was created to remedy.

Nevertheless, Maersk has shown that it is willing to do and say anything to avoid accountability for its blatant violations of the Shipping Act, including deceiving the Presiding Officer, disregarding her authority, and ignoring her orders in this case. OJC, for its part, has been forced to bear the burden of Maersk's actions, both in the devastating effects of its unlawful conduct on OJC's business and in this litigation by being forced to contend with all of Maersk's vexatious tactics, frivolous excuses, and "above the law" attitude.

If any shipper is ever to be comfortable heeding the Commission's call to blow the whistle on carriers' abuses within the industry without fear of retaliation, then there must be real consequences for a carrier that makes an "executive decision" to unlawfully retaliate against and refuse to deal with a shipper who dares to air its grievances with the Commission. Awarding OJC its full damages – doubled due to Maersk's willful violations – is a good place to start. That is the only way to do justice to OJC. And that is the only way to deter Maersk and other carriers from continuing to abuse their iron grip on the shipping industry.

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

(i) find in favor of OJC on its claims under 46 U.S.C. §§ 41104(a)(3) and 41104(a)(10);

(ii) sanction Maersk for its violation of court orders and discovery failures with an adverse evidentiary determination of OJC's damages being conclusively established;

(iii) award OJC its reparations after doubling them under 46 U.S.C. § 41305(c), not including the loss of interest at commercial rates compounded from the date of injury that would need to be added pursuant to 46 U.S.C. § 41305(a);

(iv) strike the Improper Zayas Report in its entirety; and

(v) grant OJC such further relief that the Commission deems just and proper.

Dated: December 23, 2022

Respectfully Submitted,

By: /s/ Shlomo Y. Hecht

Shlomo Y. Hecht
Florida State Bar No.: 127144
Shlomo Y. Hecht, P.A.
4538 NW 85th Ave.
Coral Springs, FL 33065
Phone: (954) 861-0025
Email: sam@hechtlawpa.com
Attorneys for OJ Commerce, LLC

CERTIFICATE OF SERVICE

I hereby certify that I have this day served Complainant's Reply, Complainant's Responses to Respondents' Proposed Findings of Fact, and Appendix - Supplement upon all of Respondents' counsel of record by emailing a copy to each such person.

Dated: December 23, 2022

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