

OJ Commerce, LLC,

v.

**Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft
A/S & CO. KG and Hamburg Sud North America, Inc.**

Docket No. 21-11

Respondents' Reply to Complainant's Proposed Findings of Fact

Confidential – Restricted

**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.

RESPONDENTS' REPLY TO COMPLAINANT'S PROPOSED FINDINGS OF FACT

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Respondents Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft A/S & CO KG (“HSDG”) and Hamburg Sud North America, Inc. (“HSNA,” and together with HSDG, “Respondents”) hereby reply to the Proposed Findings of Fact of Complainant OJ Commerce, LLC (“OJC,” “OJ Commerce,” or “Complainant”).¹

1. While the COVID crisis was taking place, the ocean carriers, including Respondents/Maersk, profited \$500 Billion. CX 8-9.

Response: Denied. Complaint provides no evidentiary support for its statement other than the cited Bloomberg article—titled “Opinion”—which states that the container shipping lines combined made \$200 billion of profit in 2021 and “are expected” to make \$300 billion 2022.

2. In 2022, Maersk is having its most profitable year in its 118-year history. CX 14-15.

Response: Denied as stated. Complaint provides no evidentiary support for its statement other than the cited Bloomberg article, which states that “A.P. Moller-Maersk A/S is having either its greatest year in its 118-year history or the worst in more than a decade, depending on whether you look at its profits or stock performance.” The profit projections are based on “the latest survey by Bloomberg, which includes 13 analysts.”

3. In May 2002, Maersk continued to boast about its ability to rake in ever-increasing profits in the face of decreased demand through their hiking of shipping rates:

In Ocean, revenue increased 64[%] to USD 15.6 Billion during Q1 as strong

¹ In Paragraph 20 of its Proposed Findings of Fact, OJC states “HSNA and HSDG are collectively referred to as ‘Maersk.’” As described herein and in the evidence cited to previously by OJC, HSNA, after becoming a wholly-owned, indirect subsidiary of Maersk A/S on November 1, 2021, was merged into Maersk Agencies USA, Inc., the U.S. subsidiary and general agent of Maersk A/S on January 1, 2022. CX101. HSDG is now simply a brand under the broader Maersk A/S as of November 1, 2021. CX067, n.1. OJC’s Proposed Findings of Fact make over 150 references to “Maersk,” a non-party, and thus improperly conflate Respondents with an unspecified “Maersk” affiliate. On this basis, the vast majority of OJC’s Proposed Findings of Fact are objectionable. Respondents preserve this objection but do not repeat it in every possible instance in order to streamline their responses.

rates more than offset a 7[%] decline in volumes. Revenue for the full year is expected to continue to be strong as **the increase in freight rates on our long-term contract portfolio will add approximately USD 10 Billion to revenue in 2022 compared to 2021.** CX 17 (emphasis added).

Response: Denied as stated. Admit that the excerpt from the A.P. Moller-Maersk A/S press release dated May 4, 2022, which speaks for itself, is quoted correctly. This directly contradicts OJC's suggestion that Maersk agreed to enter a new service contract with OJC for 2021-22 at the same rates OJC paid in 2020-21.

4. The ocean carriers are organized into three alliances. CX 24-25.

Response: Admit CX24-25 refers to three global alliances. Deny that all ocean carriers are members of these alliances. CX066.

5. Ocean carriers have been granted federal antitrust immunity by the Shipping Act. 46 U.S.C. § 40307.

Response: Denied. This statement is overly broad and mischaracterizes the protections afforded to ocean carrier alliances under the Shipping Act. Furthermore, this is a legal conclusion, and the statute speaks for itself.

6. During the COVID pandemic, Amazon and Walmart leased ships of their own to transport their goods. CX 29-31.

Response: Denied as stated. The article found at CX29-31 speaks for itself. The article mentions Walmart in passing (CX30), but does not indicate that Walmart leased ships.

7. President Biden stood on the banks of the Pacific Ocean at the Port of Los Angeles in June 2022 and underscored the singular role of the Federal Maritime Commission. CX 34.

Response: Denied. According to the article, which speaks for itself, President Biden visited the Port of Los Angeles and urged Congress to crack down on foreign-owned shipping

companies. Nothing in CX034 supports the statement that President Biden’s focus was on the “singular role” of the FMC.

8. President Biden highlighted the issue and called upon Washington to let the shipping carriers know that “the rip-off is over.” CX 34.

Response: Admit that President Biden stated “the rip-off is over.” Deny that President Biden “highlighted the issue” or urged Washington to do anything.

9. Maersk calculates strategies to conceal their improper pricing practices from regulators ([REDACTED] [REDACTED] [REDACTED]). CX 41.

Response: Denied. The characterization of pricing practices as “improper” is a legal conclusion, not a statement of fact. Moreover, OJC’s omission of a portion of the quoted sentence is misleading. The full sentence states that “ [REDACTED] [REDACTED] [REDACTED] ” CX041.

10. Maersk even colludes with its largest competitor, Mediterranean Shipping Company SA (“MSC”), to improperly share shipping rates, ([REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]). CX 48.

Response: Denied. States a legal conclusion rather than a statement of fact. Moreover, the document cited does not identify the person or persons to whom the information in question was communicated, thereby making it impossible to determine the propriety of the communication from the document alone.

11. Commissioner Rebecca Dye recently testified that the FMC has been self-initiating complaints against carriers due in part to a lack of complaints filed directly from exporters:

We didn't get as many complaints as we wanted, because our exporters are concerned about retaliation. ... I can assure you that that is a violation of the Shipping Act. And we would take prompt and decisive action if we heard about any carrier actually retaliating against any exporter or any other supply chain actor for coming to the FMC with a complaint. CX 60.

Response: Denied. CX060 contains a statement that appears to have been made by Commissioner Dye in June of 2021. Pursuant to 46 C.F.R. § 502.226, the Presiding Officer may take notice of the fact that the Commission has initiated three (3) enforcement proceedings against ocean common carriers between June of 2021 and the present: FMC Dockets No. 21-09, 21-16, and 21-17, none of which involve allegations of retaliation.

12. On December 28, 2021, the FMC also issued the "Statement of the Commission on Retaliation," wherein it assured shippers and the public that "[t]he Commission has, and will continue, to take seriously and investigate thoroughly allegations of carrier retaliation[,] ... [and] it will interpret 46 U.S.C. § 41104(a)(3) – the anti-retaliation provision – broadly to effectuate Congress's intent that shippers feel free to air their grievances to the Commission, and to address new shipping practices and new forms of retaliation." Statement, Dkt. 21-15 at 1.

Response: Denied as stated. The evidence cited speaks for itself.

13. In its proceeding, MSC has abjectly 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.

Response: HSDG lacks sufficient knowledge of MSC proceeding to respond to this

paragraph, which is in any event not relevant to this proceeding.

14. Both Maersk and MSC are in the same 2M Alliance, consistently the top two container companies in the world, and collectively responsible for shipping around 40% of all containers. CX 66.

Response: Admit that Maersk and MSC are parties to the Maersk/MSC Vessel Sharing Agreement, which is commonly referred to as the 2M Alliance. Deny the remainder of this allegation. The geographic scope of the data contained in CX066 is not clear, and such data is subject to change from time to time.

15. OJC's claim of unreasonable practices under 46 U.S.C. § 41102(c) is no longer at issue, as Maersk paid the full amount of the wrongful demurrage charges sought in its Verified Amended Complaint (\$40,680.32). (CX 466 ¶ 3).

Response: Admit that OJC's claim under 46 U.S.C. § 41102(c) is no longer at issue. Admit that Maersk refunded \$40,680.32 in demurrage charges. Deny that the demurrage charges were "wrongful." Such characterization is a legal conclusion and not a statement of fact.

16. OJC is a company headquartered in Florida. CX 466 ¶ 2.

Response: Admit.

17. OJC is an e-commerce retailer that sells dropship products from domestic inventory of hundreds of brands. CX 467 ¶ 4.

Response: Admit OJC is an e-commerce retailer that sells dropship products. Aside from Jacob Weiss's declaration (which Respondents consider to be unreliable), there is insufficient evidence in the record to support or refute the remainder of these claims. OJC refused to produce virtually all documents sought by Respondents in discovery, and

therefore Respondents have limited details about the products, inventory, and brands OJC sells. Furthermore, what information has been produced (including damages calculations) do not clearly delineate between the dropship business and other types of business at OJC, although it does appear that [REDACTED] OJC's revenue appears to come from its dropship business, and it is not clear if the dropship business has been included in or excluded from OJC's damages calculations. *See Ex. 101* (showing a variety of data without clarity about what content applies or does not apply to dropship products).

18. OJC also has a direct import program where OJC buys household goods, including a wide variety of furniture and office products, globally for sale in the United States. OJC's imports come from Asia and Brazil and are delivered to California or Kentucky. CX 467 ¶ 4.

Response: Admit that OJC imports goods from Asia and Brazil to California and Kentucky. Deny these are the only destinations as OJC also ships its goods to Mexico. RX1009 (74:10-14, 76:23-77:16) ([REDACTED] [REDACTED] [REDACTED]).

19. This case primarily concerns the latter, import business of OJC. CX 467 ¶ 4.

Response: Denied. Aside from Jacob Weiss's declaration and OJC's allegations, there is insufficient evidence in the record to support or refute these claims. OJC refused to produce virtually all documents sought by Respondents in discovery, therefore Respondents have limited information about the business of OJC. Furthermore, what information has been produced (including damages calculations) do not clearly delineate between the dropship business and other types of business at OJC, although it does appear that [REDACTED] OJC's revenue appears to come from its dropship business, and it is not clear if the dropship

business has been included in or excluded from OJC’s damages calculations. See Ex. 101 (showing only contents of containers without distinguishing dropship from other types of products).

20. Hamburg Sud North America, Inc. (“HSNA”) was, until November 1, 2021, a wholly-owned subsidiary of the common carrier, HAMBURG SÜDAMERIKANISCHE DAMPFSCIFFFAHRTS-GESELLSCHAFT A/S & CO KG (“HSDG”). HSNA and HSDG are collectively referred to as “Maersk.” (CX 101 ¶ 2.)

Response: Admit the first sentence. Admit that OJC refers to HSNA and HSDG as “Maersk,” but deny that such usage is proper. HSDG was not merged into Maersk until November 1, 2021. CX67.

21. The FMC has jurisdiction over HSNA because (a) it is a “person” subject to regulation by the FMC based on its acts in conjunction with HSDG in violation of 46 U.S.C. §§ 41104(a)(3), and 41104(a)(10) (for all, (a) “A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not...” (emphasis added)), (b) HSNA is a party to the Service Contract with OJC and both Respondents, and (c) as shown herein, HSNA and its employees were part and parcel of the decision to retaliate and refuse to deal with OJC. CX 212-231.

Response: Denied. This is an erroneous legal conclusion and not a statement of fact. HSNA was exclusively a general agent of its ocean carrier parent, HSDG. CX101-102.

22. Both HSNA and HSDG are owned by Maersk A/S, one of the two largest ocean carrier container companies in the world. (CX 67, n.1; CX 89, 109:23 - 112:5.)

Response: Denied. As described above and in the evidence cited to previously by OJC, HSNA, after becoming a wholly-owned, indirect subsidiary of Maersk A/S on

November 1, 2021, was merged into Maersk Agencies USA, Inc., the U.S. subsidiary and general agent of Maersk A/S on January 1, 2022. CX101. HSDG is now simply a brand under the broader Maersk A/S as of November 1, 2021. CX067, n.1.

23. In its Answer in this proceeding, HSDG stated that “HSDG no longer exists. HSDG was merged into its former parent company Maersk A/S on November 1, 2021.” CX 67, n.1.

Response: Admit.

24. Juergen Pump – a former top executive for Respondents – testified that Maersk acquired Hamburg in 2017 and “[REDACTED]” CX 89, 109:23 - 112:5.

Response: Deny characterization of Juergen Pump as a “top executive,” which is vague and ambiguous. Admit this is an accurate description of the testimony cited.

25. As for HSNA, Respondents represented that on November 1, 2021, “HSNA became a wholly-owned, indirect subsidiary of Maersk A/S. On January 1, 2022, HSNA was merged into Maersk Agencies USA, Inc., the U.S. subsidiary and general agent of Maersk A/S.” CX 101 ¶ 2.

Response: Admit.

26. HSNA and HSDG are collectively referred to as “Maersk” or “Respondents.”

Response: Admit that OJC refers to HSNA and HSDG collectively as Maersk. Deny that such usage is proper. HSDG was not merged into Maersk until November 1, 2021, after the events at issue in this proceeding occurred. CX067; CX101

27. HSDG is a common carrier that is subject to the jurisdiction of the FMC. CX 68 ¶ 2.

Response: Denied. HSDG was an ocean common carrier through October 31, 2021 but ceased to exist as a separate entity as of November 1, 2021. CX068.

28. Maersk's profits in 2021 exceeded its profits for the past nine years combined. CX 103-104.

Response: Denied as stated. The article cited by OJC was published during 2021 (prior to the year's end) and refers to A.P. Moller-Maersk A/S, not what OJC has decided to characterize as "Maersk" here. Complainant's Proposed Finding of Fact #26; CX103-104. Furthermore, taken alone, OJC's statement ignores important contextual facts such as a chart showing that Maersk posted negative profits in two of the years considered and shows zero profits in 2019. CX103-104.

29. OJC and Respondents' (collectively, the "Parties") relationship began on or about June 23, 2020, when OJC entered into what the Shipping Act calls a "Service Contract" with Respondents for the shipment of goods by sea from foreign countries to the United States and for the delivery to warehouse facilities within the United States via truck. CX 119-135; CX 467 ¶ 5.

Response: Admit that HSDG and OJC entered into a service contract with an effective date of June 23, 2020. That contract, found at CX119-135, speaks for itself. Deny the allegation contained in CX467 that the contract is between OJC and Maersk. CX119-135.

30. The Contract governed the Parties' relationship between June 23, 2020 to May 31, 2021 (the "Active Term"), with minimum volume/quantity commitment ("MQC") for 400 TEU containers. CX 119-135; CX 467 ¶ 5.

Response: Admit that the document found at CX119-135 governed the relationship between OJC and HSDG between June 23, 2020 and May 31, 2021 and contained an MQC of 400 TEUs (200 FFEs).

31. The Parties' Contract's Number was AECC0000291. CX 119.

Response: Admit this accurately describes the contract between HSDG, on the one hand, and OJC and its affiliate Naomi Home, Inc., on the other, found at CX119-135.

32. The shipping lanes were from East Asia to North America West Coast; the Parties also entered into a contract with shipping lanes from Brazil to North America East Coast and North America West Coast (collectively, “Shipping Lanes”). CX 119-135; 136-146; CX 467 ¶ 5.

Response: Admit that the contract found at CX119-135 covered transportation from ports in China and Vietnam to City of Industry, California. CX119-135. While HSDG did handle some shipments for OJC from Brazil to the U.S., it did so on a case-by-case basis through rate quotations that were typically valid only for 60 days. None of these quotes constitute a service contract. CX 136-146; RX563-91 (HS-003394-HS-003421 (showing rate quotes, including NOAQ1006436 on March 1, 2021; NOAQ1009430 on March 31, 2021; NOAQ1014177 on May 18, 2021)); RX736-45 (HS-009170-HS-009178 (showing rate quote NOAQ1028947 on October 28, 2021)); RX775-82 (HS-010436-HS-010442 (showing HSDG’s effort to assist OJC with Brazil shipping on November 5, 2021)).

33. TEU is short for “Twenty-Foot equivalent unit” – which is the same as 200 FFE, short for “Forty-Foot Equivalent.” In other words, two TEUs equals one FFE. CX 467 ¶ 5.

Response: Deny the first sentence. One TEU equals 0.5 FFE, not 200 FFE. Admit that two TEUs equals one FFE.

34. The Parties also entered into a Brazil to United States Agreement in March 2021. CX 136-146; CX 467 ¶ 5.

Response: Denied. While HSDG did handle some shipments for OJC from Brazil to the U.S., it did so on a case-by-case basis through rate quotations that were typically valid only for 60 days. None of these quotes constitute a service contract. RX563-91 (HS-003394-

HS-003421 (showing rate quotes, including NOAQ1006436 on March 1, 2021; NOAQ1009430 on March 31, 2021; NOAQ1014177 on May 18, 2021)); RX736-45 (HS-009170-HS-009178 (showing rate quote NOAQ1028947 on October 28, 2021)); RX775-82 (HS-010436-HS-010442 (showing HSDG's effort to assist OJC with Brazil shipping on November 5, 2021)).

35. In the Contract, the parties also agreed the cargo shipped would be reasonably spaced throughout the Active Term. CX 125.

Response: Denied. Under the service contract between the parties, OJC agreed to give proper booking notice and “further agree[d] that the tender of cargo under this Contract shall be reasonably spaced throughout the term hereof.” CX125. There is no obligation in Service Contract AECC0000291 which would require HSDG to reciprocate with its provision of space. CX 119-135.

36. OJC was entitled to 8 TEU/week under the Contract. (CX 147, July 13, 2020 4:28 PM email.)

Response: Denied. Nothing in the Contract entitles OJC to 8 TEUs per week. CX119-135. The evidence cited by OJC is an internal HSDG email chain which discusses space protection (“SP”), which is separate and distinct from the contractual commitment. RX961, 209:14-210:10 (describing the difference between SP and MQC). Furthermore, “Clause 10. Entire Contract” of the Contract is an integration clause which precludes any modification to the Contract that is not in writing and signed by the parties.” CX123.

37. 8 TEU per week multiplied by 49 weeks (the length of the Contract) is approximately 400 TEU (the service commitment in the Contract. (See CX 125; CX 147, July 13, 2020 4:28 PM email.))

Response: Admit that 8 x 49 equals 392. Deny that HSDG was contractually obligated to provide 8 TEUs/week to OJC, as the Contract contains no such obligation. CX119-135.

38. Maersk's commitment was increased to 10 TEU/week on August 3, 2020. CX 153.

Response: Denied. Maersk is not a party to the Contract. CX119-135. Also, the Contract contains no weekly commitment. CX119-135; RX944, 89:25-90:16. Furthermore, "Clause 10. Entire Contract" of the Contract is an integration clause which precludes any modification to the Contract that is not in writing and signed by the parties." CX123.

39. On September 22, Andrea Casanova produced an internal chart that showed that Maersk was behind in fulfilling their obligations of 10 TEU/week under the Contract. CX 153.

Response: Denied. Maersk was not a party to a contract with OJC and thus had no obligations thereunder. CX119-135. Moreover, the contract did not obligate Maersk or HSDG to provide OJC with space for 10 TEU/week. CX119-135; RX944, 89:25-90:16.

40. Two days later, Casanova communicated internally at Maersk that OJC was again refused space and that Maersk was not on track to meet OJC's 10 TEU/week MQC. CX 148.

Response: Admit that Ms. Casanova communicated that OJC claimed to have been denied space. Deny that she communicated this to Maersk. CX 148. Further deny that the Contract obligated any carrier to provide OJC with space for 10 TEUs/week. CX119-135; RX944, 89:25-90:16.

41. Maersk's failure to provide space as promised lead to them falling farther behind on living up to the terms of the Parties' Contract, and to OJC sending a demand letter on October 16, 2020, "regarding [Maersk's] unavailability to confirm our 10 teus [per week] commitment from Asia." CX 157-160.

Response: Admit that OJC’s counsel sent a letter dated October 16, 2020 to HSDG. That letter speaks for itself. Deny that Maersk failed to provide space, as Maersk was not a party to the Contract, and the Contract contained no commitment to provide 10 TEUs/week. CX119-135.

42. After the demand letter was sent, on October 19, Casanova again internally confirmed that the weekly commitment was 10 TEU and that OJC “was seeking for an additional space of 28 FFE to make up for the shortfalls due to our cancellations and declined bookings,” with a breakdown of “Space rejected by carrier.” CX 156.

Response: Deny that Casanova confirmed the weekly commitment was 10 TEUs. CX156 (“Rodrigo is correct that the contract terms do not in any way stipulate 10 TEUs a week.”). Casanova confirmed that the SP was 10 TEU per week. CX156. The SP is not a contractual commitment. RX944, 89:25-90:16. Admit CX156 states OJC is seeking space for an additional 28 FFE.

43. Casanova is an Account Executive for Respondents and point person in Maersk’s dealings with OJC. (See, e.g., CX 155.)

Response: Denied. Ms. Casanova was an Account Executive for HSDG and the primary person at HSDG who communicated with OJC during the Service Contract term. CX155 (Ms. Casanova’s email address and signature block indicate that she worked for HSDG). Additionally, Ms. Casanova coordinated with HSDG’s trade team with respect to OJC’s interest in a new contract for 2021-22. RX955-56, 177:10-181:24.

44. On October 21, 2020, Michael Gast of Maersk’s Risk Management sent a lengthy internal email about the situation, stating in part:

- 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.

- With a weekly average of 8 calculated by the MVC and number of weeks in the contract term **we are indeed behind by 56 [containers].**
- **This is a very bad case for us which we will likely lose** so I must ask that space dispensation be granted for this customer and they be treated with hyper care for the immediate future until such time that things have stabilized and they have backed off their threats of formal lawsuit.
- At present **based on the emails I have seen I do not have confidence in our ability to establish that we are doing our part under these terms.** It also sounds like they have a lot of emails showing we have canceled their bookings w[hich] will only serve to make us look bad in front of a judge and jury. CX 161 (emphasis added).

Response: Admit Michael Gast sent an email on October 21, 2020 which contains the statements quoted above, among others. Deny that these statements are evidence of the truth of the matters asserted therein. Michael Gast was a member of the HSGD risk management team. CX156.

45. As of March 2021, OJC was still not receiving its contracted-for space from Maersk. CX 169-173; CX 467 ¶ 7.

Response: Denied. Maersk had no contract with OJC during March of 2021 and hence no obligation to provide any space. Additionally, the contract governing the relationship between OJC and HSDG between June 23, 2020 and May 31, 2021 and contained an MQC of 400 TEUs (200 FFEs), but there was no requirement on the part of HSDG to meet a certain MQC as of March 2021.

46. OJC was identified internally by Maersk as a “loyal customer with [a] long collaboration history.” CX 173.

Response: Denied. While page CX173 partially contains the quoted language in an

internal email from Ivan Cheung dated March 1, 2021, the overwhelming evidence, including statements from HSDG personnel that worked most closely with OJC, demonstrates that OJC was not a “loyal customer” or “collaborat[ed]” with HSDG, but instead repeatedly threatened Respondents with baseless claims throughout the contract period. See responses to ¶¶ 71, 102, 173; see also OJC PFF No. 29 (“OJC and Respondents’ ... relationship began on or about June 23, 2020”).

47. As a result, throughout early 2021, Maersk sought to secure much more of OJC’s business. CX 467 ¶ 8.

Response: Denied. OJC cites no evidence other than the Weiss Declaration. Other, contemporaneous and more reliable evidence refutes this proposed statement of fact. For example, a February, 2021 message from HSDG to OJC advised that a “shortage of truck power and port Congestion in Los Angeles/ Long Beach terminals” had caused HSDG to refuse to accept new business to or from those areas. RX746-52 (HS-009540-HS-009545). During the contract term HSDG repeatedly informed OJC that HSDG could not support additional business to Kentucky, and, during April of 2021, internal discussions revealed that HSDG was focused on California business only. CX224. Furthermore, in internal correspondence, Ms. Casanova, the primary point of contact for OJC, stated on April 28, 2021 that “[OJC] did not mention a specific MQC target.” CX224. In fact, in the absence of a number from OJC, Ms. Casanova suggested 400 FFEs as a minimum quantity commitment for a contract with the caveat of “if it is possible” and “if we truly can satisfy this volume.” CX222. Later, Ms. Casanova characterizes OJC as wanting more space rather than HSDG soliciting business. CX226.

48. Maersk did so through Casanova by promising to make OJC a priority customer by

supplying more containers, dedicated space protection (or “SP”), and committed personnel to ensure better service for OJC’s shipments. CX 467 ¶ 8.

Response: Denied. OJC cites no evidence other than the Weiss Declaration. Other, contemporaneous and more reliable evidence refutes this proposed statement of fact. RX756-52 (HS-009540-HS-009545) (HSDG not accepting new business to California); CX222 (question as to whether HSDG could satisfy 400 FFE in a new service contract); CX173 (OJC had space protection under 2020-21 service contract).

49. In reliance on Maersk’s promises, OJC did not renew its service contracts with other carriers it had been using in 2020-2021 and agreed to consolidate all its imports with Maersk. CX 467 ¶ 8.

Response: Denied. OJC cites no evidence other than the Weiss Declaration. Other, contemporaneous and more reliable evidence refutes this proposed statement of fact. See response to proposed finding of fact #48 above. In addition, OJC offers no written evidence of the alleged agreement. The existence of the alleged agreement is refuted by the fact there was no written offer made by either party for a 2021-22 service contract, and no agreement on a volume commitment for such a contract. CX222-226. Moreover, OJC refused to produce records relating to the service contracts it had with other ocean carriers, its performance under these service contracts, and its decision not to seek new contracts for 2021-22 with other carriers it had been using in 2020-2021. Since OJC refused to produce any of these documents in discovery, it should not be permitted to establish that its alleged “reliance on Maersk’s promises” caused it to “not renew its service contracts with other carriers it had been using in 2020-2021” solely by means of a declaration.

50. With the Contract set to expire on May 31, 2021, the Parties began negotiating in

early 2021 about a service contract renewal for the 2021-2022 season. CX 80, 194-195, ¶ 41; CX 468 ¶ 9.

Response: Denied. CX080 and CX194-195 evidence only that the parties were engaged in negotiations with respect to a 2021-22 service contract during April of 2021.

51. Jacob Weiss of OJC and Casanova of Maersk were the lead negotiators. CX 468 ¶ 9; CX 203.

Response: Admit that Jacob Weiss was the lead negotiator for OJC and that Ms. Casanova of HSDG was the primary point of contact for OJC at HSDG. CX203. Additionally, Ms. Casanova coordinated with HSDG's trade team with respect to OJC's interest in a new contract for 2021-22. RX955-56, 177:10-181:24.

52. Weiss informed Casanova that OJC had the demand during the 2020-2021 season to move 3500 High Cube ("HC") FFEs had Maersk provided OJC the space it was asking for, and that based on that demand, it could ship 4200 to 4700 containers with Maersk in 2021. CX 468 ¶ 10; (CX 203).

Response: Admit that Weiss informed Casanova that OJC claimed it had plans to move between 4200 and 4700 FFE in 2021. CX203. Deny that Weiss told Casanova that OJC had the demand to move 3500 High Cube FFEs during 2020-21. CX203 ("According to the customer, they moved 3500x40HC in 2020..."). Ms. Casanova also relayed during mid-April that Jacob Weiss had told her "that last year they moved 2000 40hc to Louisville KY and 1000x40hc to City of Industry CA." RX696 (HS-007683). Further deny that movement by OJC of 3500 FFE in 2020-21 was contingent upon provision of space by HSDG, given Weiss's statements to Casanova that OJC was using other ocean carriers in 2020-21, including OOCL and MSC. RX962, 216:11-19 (stating that Jacob Weiss told her

that other carriers were providing service to OJC during the 2020-2021 contract period). Finally, deny that Maersk was under any obligation to provide space to OJC during 2020-21. CX119-135.

53. Casanova's email confirmed Weiss's statements but mistakenly stated that OJC had in fact moved 3500 FFEs in 2020, when Weiss had actually conveyed that demand for OJC's products was such that it could have moved 3500 containers if Maersk had made that space available. CX 468 ¶ 10.

Response: Denied. The email from Ms. Casanova, which was contemporaneous with ongoing discussions, is clear that Jacob Weiss stated OJC moved 3,500 FFEs in 2020. CX203 (stating "According to the customer, they moved 3500x40HC in 2020."); RX953, 171:24-172:3 (confirming that Jacob Weiss told her that OJC shipped 3,500 containers in 2020); RX962, 215:22-216:4 (affirming again that Jacob Weiss told her that OJC moved 3,500 FFEs in 2020). Ms. Casanova also relayed during mid-April that Jacob Weiss had told her "that last year they moved 2000 40hc to Louisville KY and 1000x40hc to City of Industry CA." RX696 (HS-007683). Nothing in these emails suggests that Ms. Casanova "confirmed" any of Mr. Weiss's statements concerning demand for OJC's products.

54. This narrative is consistent with Casanova's testimony at deposition where she confirmed that during the 2020 service period, OJC continuously asked her to provide them with more space than [sic] had been allocated under the contracts. Specifically, "[REDACTED]" more per week. (CX 206-208, 175: 8-22 and 208:20 - 209:1.)

Response: Denied. OJC's "narrative" was created for purposes of its brief and is not consistent with the contemporaneous emails or Ms. Casanova's testimony. The cited testimony does not suggest that OJC requested more space than the 400 TEUs (200 FFEs)

contemplated by the service contract. Any requests OJC made for “██████████” TEUs in certain unspecified weeks do not evidence a demand for 3500 40HC FFE in a year. Such a conclusion is highly speculative. Moreover, the best available evidence of OJC’s demand for space in 2020-21 would be records relating to the service contracts it had with other ocean carriers, its performance under these service contracts, and records relating to orders/sales. Since OJC refused to produce any of these documents in discovery, it should not be permitted to establish its alleged level of demand solely by means of a declaration.

55. The goal of both OJC and Respondents was to lock in a higher MQC/week to better meet OJC’s increasing demand for containers. CX 468 ¶ 10; CX 203.

Response: Denied. It is denied that OJC and Respondents had the same goal. As to Respondents’ “goal,” OJC cites no evidence other than the Weiss Declaration and an email that does not support this proposed statement of fact. Other, contemporaneous and more reliable evidence refutes this proposed statement of fact. CX215 (“since we are working to renew the contract, I want to ask if it is possible to [i]ncrease MQC by 200 FFE” to “cover the deficit” and participate in more volume “if we can truly satisfy this volume.”).

56. OJC and Maersk agreed to the 4200-4700 container MQC for 2021-2022, and Casanova worked on getting the new contract drafted. CX 203. CX 468 ¶ 11; CX 203.

Response: Denied. There was never any agreement for a Minimum Volume Commitment of 4200-4700 FFEs for 2020-21. The first time OJC made this claim is in its brief. CX203 does not support this statement in any way. OJC offers no documentary evidence in support of this alleged fact, which is contradicted by Ms. Casanova’s proposal to HSDG that it offer a service contract for 400 FFE for 2021-22. CX215. Moreover, this statement is inconsistent with OJC’s proposed finding of fact #67, below, which suggests—

also incorrectly—that there was an agreement between HSDG and OJC for a Minimum Volume Commitment of 400 FFEs for 2021-2022. This statement is also inconsistent with the Verified Amended Complaint, which alleges negotiations but never alleges that any agreement was reached. Verified Amended Complaint, ¶ 41.

57. Casanova confirmed those deal points on April 27, 2021. CX 203.

Response: Denied. CX203 is an internal email within HSDG and confirms absolutely nothing to OJC. In CX203, Ms. Casanova merely relayed what Mr. Weiss told her and inquired whether HSDG had interest in entering into a new service contract with OJC. The email chain which OJC references goes on, in the immediate two emails which follow, to state 1) that OJC’s account would be a “100% P1 opportunity” meaning that only the movement of containers “shipped via Trans-Pacific Ocean to all the US – west coast” and 2) that OJC “did not mention a specific MQC target.” See CX224-225 (stating that consideration for OJC was confined to P1 and that OJC did not provide a proposed volume); RX980, 135:7-136:2 (clarifying the meaning of the email, specifically what a “100% P1 opportunity meant).

58. That same day, Maersk confirmed internally that OJC’s account should be added to Maersk’s TPEB team’s “target list,” meaning that OJC’s account was a priority target for renewal. CX 411, 134:3 - 135:17; CX 203.

Response: Denied. The list was not Maersk’s internal list but rather a list maintained by HSDG. CX203. The cited deposition testimony states that the “target list” includes possible existing customers and possible new customers. CX411, 134:24-135:6. Furthermore, the email chain which is referenced clearly indicates that OJC was viewed as a limited opportunity and that no quantity had yet been requested by OJC. See CX224-225

(stating that consideration for OJC was confined to P1 and that OJC did not provide a proposed volume); RX980, 135:7-136:2 (clarifying the meaning of the email, specifically that a “100% P1 opportunity meant only Asia to United States West Coast service).

59. Service Contracts are negotiated during the spring of each year for the contract year starting between April-May until April-May of the following year. (CX 94, 161:1 - 163:1)

Response: Denied. The cited deposition testimony is limited to the Asia to North America sling and states that the contract season for that sling takes place during the first quarter of each calendar year. CX 94, 161:1 - 163:1. Kevin Li’s testimony affirms that the majority of negotiation for contracts like the one OJC had would be completed in the first quarter of the year with exceptions in April and possibly May. RX977-78, 23:8-25.

60. TPEB is short for Trans-Pacific East Bound, in other words, shipments from Asia to North America. CX 410, 128:8-14.

Response: Admit.

61. On April 28, 2021, OJC sent a demand letter to Respondents on the subject:

Pursuant to the “Minimum Volume Commitment” clause of the agreement, [Page 7], HAMBURG SÜD committed to a minimum of 400 TEU between June 23, 2020 and May 31, 2021. **Over the last few months, HAMBURG SÜD refused to accept the agreed upon 10 TEUs per week, as a result OJC has accumulated over 40 containers waiting for shipment, causing significant economic harm and interruption of business.**

OJC hereby provides HAMBURG SÜD notice of breach of the Service Agreement, which has caused significant economic harm to OJC. I hereby demand that HAMBURG SÜD immediately honor the Service Agreement rates and minimum TEU quantities. **Failure to cure the breach by May 3, 2021, may result in legal action against you and your affiliates, as well as the filing of a petition to the Federal Maritime Commission to seek relief.** CX 210 (emphasis added).

Response: Admit that OJC sent this demand letter. Deny that the letter is evidence of the truthfulness of the statements contained therein. After receipt of this letter, HSDG

continued to provide space to OJC per the terms of the Service Contract. Ex. 101 (damages data provided by OJC showing continued shipping by HSDG of OJC cargo).

62. On April 29, 2021, the day after the demand letter was sent, Casanova confirmed internally that Maersk had indeed failed to satisfy the MQC by 18 FFE because space for OJC had been declined. CX 215.

Response: Denied. Ms. Casanova’s internal HSDG email of April 29, 2021 states that “as of today” HSDG was short of the 400 TEU (200 FFE) Minimum Volume Commitment by 18 FFEs. As OJC states in ¶ 30 above, the “Minimum Volume Commitment” under the Service Contract between HSDG and OJC was 200 FFEs during the term of the Contract from June 23, 2020 to May 31, 2021. CX120 § 3(a) and CX125 (“Minimum Volume Commitment” ¶ 1). Thus, on April 29, 2021, HSDG still had another month (until May 31, 2021) under the Contract term within which to meet the Minimum Volume Commitment of 200 FFEs. In addition, HSDG determined that OJC was attempting to book space on a service (or “sling”) on which OJC did not have any space protection. RX646-54 (HS-004993-HS-005000). Thus, during the term of the Service Contract, OJC was booking on the wrong service and missing the opportunity to ship containers on the services under which it had space protection (which simultaneously hindered HSDG’s ability to effectively manage those spaces). RX648-49 (HS-004994-HS-004995).

63. Casanova also confirmed that she had spoken to Weiss and “he does not want to end the relationship with us and just look for the fair that we promised,” and that “[h]e is open to any solution that can offset this deficit.” CX 215.

Response: Admit that the partial quote from CX 215 is accurate.

64. Casanova went on to state that “based on the above and since we are working to

renew the contract” that Maersk should initially increase the MQC by 200 FFE giving a total of 400 FFE, in order to cover the deficit and commit to handling more of OJC’s shipping volume. CX 215.

Response: Denied as stated. Ms. Casanova wrote to her supervisor with regard to HSDG that: “I want to ask if it is possible to Increase MQC by 200 FFE giving us a total of \$400 FFE” going on to state “of course, if we can truly satisfy this volume.” CX215.

65. Casanova put together a new service contract, “NOAC10000728 Effective June 1, 2021, until May 31, 2022,” which contained “the same lanes, rates, and conditions of the current contract AECC0000291 and an increased MQC 400 FFE.” CX 214.

Response: Denied. Ms. Casanova created a contract template for internal purposes, using a Minimum Volume Commitment of 400 FFE because Mr. Weiss never responded to her with the Minimum Volume Commitment that OJC was requesting for 2021-2022. CX217 (stating that OJC never provided a specific MQC). The template could then be used to generate rates for a possible contract with a Minimum Volume Commitment of 400 FFEs. RX963, 220:13-20. However, HSDG decided not to enter into a new 2021-22 services contract with OJC before any rates were added into this template and before any offer was extended to OJC. Had HSDG made an offer to OJC for 2021-2022, the rates would have been greater than the rates paid in 2020-2021. CX17 (increased revenue expected as a result of higher long-term contract rates); CX435 (showing Maersk container freight rates climbing as early as Q4 2020).

66. All negotiations and agreements for 2021-2022 took place months before the spot market rates went through the roof. CX 468 ¶ 12

Response: Denied. OJC cites no evidence other than the Weiss Declaration. Other,

contemporaneous and more reliable evidence refutes this proposed statement of fact. CX435 (rates increasing beginning in Q3/Q4 2020 through Q1 2022).

67. Consistent with her internal email, Casanova had informed Weiss after the demand letter was sent that the 400 FFE (800 TEU) contract was a good faith commitment by Respondents to placate OJC for the shortfalls under the first contract – both for the weekly commitment that was 105 TEU short and the MQC that was 15 TEU short – but also to lock in the entirety of OJC’s shipping volume. CX 215; CX 468 ¶ 13.

Response: Denied. The cited email was sent by Ms. Casanova internally within HSDG, and confirms nothing to OJC. CX215. The statement that 400 FFE would lock in the entirety of OJC’s volume is contrary to OJC’s claims that it had demand for 4200 to 4700 FFE in 2021-22. CX203. Also, since HSDG repeatedly declined to carry OJC cargo from Asia to Kentucky (CX242-243 (showing that Louisville service was a negative on HSDG’s PnL and was undesirable in 2020); CX224 (noting that Kentucky business was previously declined and suggesting that it be excluded again in 2021-22)) , any claim that HSDG was interested in carrying all of OJC’s cargo is simply untrue

68. Casanova and Weiss reached agreements to make up for the past and to finalize the written agreement for 4200-4700 FFE for 2021-2022. CX 215; CX 468 ¶ 13.

Response: Denied. CX215 is an internal HSDG email which demonstrates there was no agreement between HSDG and OJC for 2021-2022. There was never any agreement between HSDG and OJC on the Minimum Volume Commitment or any other material term for 2021-2022. CX217 (Ms. Casanova stating that OJC never provided any MQC proposal); CX215 (Ms. Casanova suggesting on her own part that 200 FFEs might be suitable if HSDG could actually “satisfy this volume”). There was never any agreement between HSDG and

OJC on the rates for 2021-2022. RX953, 171:10-23 (stating that rates were never discussed between OJC and HSDG and that Ms. Casanova was the only person at HSDG negotiating with OJC); RX963, 220:13-20 (noting that Ms. Casanova never received rates for OJC from the trade team and that the trade team would have been responsible for providing proposed rates for a new 2021-22 services contract). The allegation that the parties agreed on a contract for 4200 to 4700 FFE is also contradicted by Casanova’s proposal to her HSDG colleagues that HSDG offer OJC a contract for 400 FFE. CX214 (proposing to Kevin Li a contract with 400 FFE with a request for his review and input).

69. On April 29, 2021, within hours after Casanova’s email describing a renewal contract and the day after receiving a threat from OJC to file a complaint with the FMC, Kevin Li of Maersk, sent an email entitled “OJ Commerce (Naomi Home Brand) Contract Renewal / AECC0000291 Expire May 31, 2021” to Juergen Pump. CX 220-221.

Response: Admit that Kevin Li of HSDG sent an email to Juergen Pump on April 29, 2021. Deny that Casanova’s email describes a new 2021-22 services contract. CX215.

70. Pump was the then-top executive of HSNA. CX 91, 128:6-10; CX 412, 143:23 - 144:11.

Response: Admit.

71. Li informed Pump that Maersk had not provided the agreed-upon space in the Parties’ Service Contract and OJC had threatened litigation. CX 220-221.

Response: Denied as stated. Mr. Li, of HSDG, described the threat as stating that HSDG couldn’t provide space under the contract and not that HSDG failed to provide the space. CX220. At the time this email was sent, 182 FFE out of 200 FFE had been shipped by HSDG while approximately a month remained in the contract’s term. CX220; CX119-

135. 200 divided by 11 is just over 18. With a month remaining in what was approximately an 11-month contract, at the time OJC threatened HSDG over its performance under the contract, HSDG was actually on track to fulfill its obligations. In effect and despite Mr. Li's characterization about difficulty providing space, OJC was threatening HSDG despite its conformity to the contract.

72. Pump responded to Li's question as to whether Maersk "still want[ed] to engage this account with contract renewal" by stating:

Hi Kevin.

Fully agree. **We should not engage in any renewal discussions with customer in light of the potential litigation. I would also not provide them with space under the existing contract.** The shortfall will be compensated as per contract terms.

Brgds

JP (CX 220 (emphasis added).)

Response: Admit that the portion of CX220 quoted above is quoted accurately. Deny the characterization of Mr. Li's inquiry, which contains information relevant to Mr. Pump's decision, including the mistaken characterization of the template prepared by Casanova as an offer from OJC. CX220-221.

73. Subsequently, Li informed the service contract negotiating team of Pump's "executive decision" to "not engage in any renewal discussion with [OJC] in light of potential litigation":

As you mentioned, I was completely unaware of their legal action against us since I left the TPEB team. I consulted with Juergen [Pump] and **the executive decision is that we should not engage in any renewal discussion with customer in light of potential litigation. Please disengage on renewal negotiation with this account, thanks.** CX 227 (emphasis added) (April 29, 2021 email).

Response: Denied as stated. The email quoted speaks for itself, but cannot be properly understood without the context of the information contained in Mr. Li's April 29, 2021 email to Mr. Pump. CX220-221.

74. Li also relayed Pump's decision to cut off OJC from any further available space under the parties' then-existing Service Contract: "But just to express our position on this, **we should also consider not to provide them with space under existing contract.**" CX 227 (emphasis added) (April 29, 2021 email).

Response: Denied as stated. The email quoted speaks for itself, but cannot be properly understood without the information contained in Mr. Li's April 29, 2021 email to Mr. Pump. CX220-221.

75. The decision to cut off OJC in retaliation for sending its threat of an FMC complaint spread throughout Maersk within hours:

As it stands I believe we are unlikely to meet our duties under these contract terms. I have raised this issue to both commercial teams here and colleagues at origin responsible for accepting these bookings. The first time this occurred I stressed the financial impact such a lawsuit could carry and I have done so again. **It appears our local sales colleagues had tried to address the capacity issue with origin but were advised that no additional space would be granted for this customer.** CX 229 (emphasis added), in a chain with OJC's email and demand letter dated April 28, 2021 (CX 209-211).

Response: Admit that the portion of CX229 quoted above is quoted accurately, but deny that it is evidence of the truth of the statements contained therein. Deny that there was a decision to cut off OJC Ex. 101 (showing shipments following the email, including shipments under the rates of the contract and additional shipments thereafter); RX608 (HS-003666) (providing OJC with a quotation for service from Asia to the United States in July of 2021); RX563-91 (HS-003394-HS-003421 (showing rate quotes, including NOAQ1006436 on March 1, 2021; NOAQ1009430 on March 31, 2021; NOAQ1014177 on May 18, 2021)); RX736-45 (HS-009170-HS009178 (showing rate quote NOAQ1028947 on October 28, 2021)); RX775-82 (HS-010436-HS-010442 (showing HSDG's effort to assist OJC with Brazil shipping on November 5, 2021)). Further deny that the decision spread throughout Maersk

(CX229, all addresses are at HSDG). Finally, deny that the decision not to offer OJC a service contract for 2021-2022 constituted retaliation.

76. Maersk admitted that the following in their Answers to Amended Complaint:

41. During April 2021, the parties were engaged in discussions about renewing the parties' service contract. Throughout those discussions, there were conversations about the MQC of the renewal, but never about there being no renewal at all.

Admit.

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

Admit. (CX 80, 194-195 (emphasis added).)

Response: Admit that the foregoing accurately reflects HSDG's answer to paragraph 42 of the Amended Complaint. Deny that these are admissions by Maersk.

77. Maersk's retaliation was also done **knowingly** in violation and in willful disregard of the Shipping Act. Pump – who made "the executive decision [] that [Hamburg] should not engage in any renewal discussion with customer [OJC] in light of potential litigation" (CX 227) – admitted in his deposition that Maersk knew it was not allowed to retaliate against OJC based on the threat of a lawsuit or FMC complaint:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CX 96, 208:4-18.)

Response: Denied. As an initial matter, the question and answer regarding retaliation should be excluded based on counsel’s objection that the question called for the witness to provide a legal conclusion. Even if the testimony is admitted into evidence, this proposed finding of fact is denied. First, it is denied that the decision not to offer OJC a service contract for 2021-22 was made by Maersk – it was made by HSDG. CX220 (email from Juergen Pump with a hamburgsud.com email address). Second, it is denied that the decision constitutes retaliation. Third, the proposed finding of fact is itself a legal conclusion and not a statement of fact.

78. In fact, Maersk had internal compliance training on the Shipping Act. As a result, Maersk knew that a customer threatening or actually bringing a lawsuit or FMC complaint was not a legitimate reason to refuse to deal or negotiate with that customer:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CX 95-96, 204:24 – 206:19 (emphasis added).)

Response: Denied. This is a legal conclusion and not a statement of fact. Furthermore, this characterization inaccurately describes Maersk despite the deposition testimony cited applying to HSDG, Mr. Pump’s employer. HSDG did not refuse to deal or negotiate with OJC. Ex. 101 (showing continued service to OJC following the end of the service contract); RX563-591 (HS-003394-HS003421 (showing rate quotes, including NOAQ1006436 on March 1, 2021; NOAQ1009430 on March 31, 2021; NOAQ1014177 on May 18, 2021)); RX736-45 (HS-009170-HS-009178 (showing rate quote NOAQ1028947 on October 28, 2021)); RX775-82 (HS-010436-HS-010442 (showing HSDG’s effort to assist OJC

with Brazil shipping on November 5, 2021)); RX602-18 (HS-003661-HS-003676 (showing a continued relationship between HSDG and its affiliates with OJC, including through negotiated rate quotes and other arrangements)).

79. As a result of Maersk's retaliation, in 2021-2022, OJC was forced to mitigate its losses, and obtain what limited space it could on the spot market at extremely high rates. CX 468-469 ¶ 14.

Response: Deny that HSDG or Maersk engaged in retaliation. OJC cites no evidence other than the Weiss Declaration. The best evidence of OJC's efforts to mitigate its alleged damages and obtain space during 2021-22 would be its correspondence with other carriers, and records of shipments made with other carriers. OJC has refused to produce documents relating to its shipments and efforts to ship in 2021-22 in response to discovery requests by HSDG, and thus should not be permitted to establish this alleged fact through a declaration.

80. But often OJC was unable to secure shipments, and in most cases was forced to forgo making shipments of goods to the United States altogether because the spot rates became too expensive to justify the cost of container freight. CX 468-469 ¶ 14.

Response: Denied. OJC cites no evidence other than the Weiss Declaration. Despite discovery requests by HSDG, OJC has refused to produce documents relating to its efforts to secure space from any ocean carrier through contracts or otherwise during 2021-22. Such documents would constitute the best evidence of OJC's shipments during 2021-22. In light of OJC's refusal to provide documentary evidence, it should not be permitted to establish this alleged fact through a declaration. Moreover, this allegation is contradicted by OJC's own data, which shows that OJC stood to profit by ██████████ per container, even under OJC's own unsubstantiated damages calculations. CX464 (showing average "Shipping

Cost Differential” damages on 4,700 containers of [REDACTED], or [REDACTED] per container), CX428 (showing “Gross Profit per Container” of [REDACTED]). Thus, OJC’s own exhibits demonstrate that it made the decision to forego shipping when it could have realized a profit even when shipping at higher rates, which means OJC failed to mitigate its alleged damages.

81. Due to its retaliating against OJC for complaining about Maersk’s violations of the Shipping Act, Maersk massively harmed OJC’s direct import product business and in the process caused an enormous amount of damages to OJC. CX 468-469 ¶ 14.

Response: Denied. OJC cites no evidence other than the Weiss Declaration. Other, contemporaneous and more reliable evidence refutes this proposed statement of fact. Deny that Maersk or HSDG retaliated against OJC. Deny that OJC complained about Maersk. CX210. Deny that OJC complained about violations of the Shipping Act. CX210.

82. OJC asked Maersk in its First Interrogatory No. 7 (“OJC INT 7”) to “[i]dentify and describe in detail the reasons, policies, and considerations concerning [Maersk’s] unwillingness or refusal to renew or enter into a Service Contract with OJC.” CX 236.

Response: Deny that the interrogatory was directed to Maersk. CX232. Admit that the referenced Interrogatory was directed to HSDG.

83. In response, Maersk gave, in part, the following answer:

[T]he decision was based in part on [i] OJC’s relatively low volume commitment, [ii] OJC’s lack of cargo volume in other trade lanes, [iii] the availability of space in the Transpacific trade, [iv] the rate levels sought by OJC, [v] Respondent’s past experience with the timeliness of OJC’s payment and the perceived credit risk associated with that payment history, and [vi] the fact that OJC did not purchase ancillary services from Respondent. Respondent’s decision was also based in part on [vii] OJC’s disputatious manner of doing business and its repeated and excessive threats to pursue litigation against Respondent, which threats were disproportionate to the issues between the parties and also disregarded the dispute resolution

procedures and remedies for breach of contract set forth in the service contract between the parties. CX 236.

Response: Deny that Maersk responded to the interrogatory. HSDG's full response, found at CX236, speaks for itself.

84. Casanova promised that Maersk would provide an initial contract of 400 FFE MQC, to make up for past failures by them and to show its interest in handling more of OJC's shipping volume. CX 214-215.

Response: Denied. CX214-215 are internal HSDG emails and promise nothing to OJC.

85. Maersk sought to win more of OJC's shipping business and admitted that OJC could move between 4200-4700 FFE with a renewal contract. CX 203.

Response: Denied. CX203 does not evidence any effort by Maersk or HSDG to win more of OJC's shipping business. CX203 does not constitute an admission that OJC could move between 4200 to 4700 FFE.

86. Casanova even testified that during the term of the first Contract, OJC was always asking for more containers, above and beyond the 10 TEUs per week that Respondents were already obligated to provide:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED] (CX 206, 175:8-22 (emphasis added).)

Response: Denied. Although the quotation from the Casanova transcript is admitted, it does not support the prefatory statements that “during the term of the first Contract, OJC was always asking for more containers,” and there were “10 TEUs per week that Respondents were already obligated to provide.” The cited testimony does not suggest that OJC requested more space than the 200 FFEs contemplated by the service contract. Any requests OJC made for “[REDACTED]” TEUs in certain unspecified weeks do not evidence a demand in excess of 200 FFEs in the 2020-2021 contract year. Such a conclusion is highly speculative. Moreover, the best available evidence of OJC’s demand for space in 2020-21 would be records relating to the service contracts it had with other ocean carriers, its performance under these service contracts, and records relating to orders/sales. Since OJC refused to produce any of these documents in discovery, it should not be permitted to establish its alleged level of demand solely by means of a declaration. In addition, the service contract did not obligate HSDG to provide OJC with space for 10 TEUs/week. CX119-13; RX944, 89:25-90:16.

87. OJC had a contract with Maersk for shipments from Brazil and even planned to move thousands of additional containers through Kentucky. CX 136-146; CX 203; CX 469 ¶ 15.

Response: Denied. While HSDG did handle some shipments for OJC from Brazil to the U.S., it did so on a case-by-case basis through rate quotations that were typically valid only for 60 days. None of these quotes constitute a service contract. CX 136-146; RX563-91 (HS-003394-HS-003421 (showing rate quotes, including NOAQ1006436 on March 1, 2021; NOAQ1009430 on March 31, 2021; NOAQ1014177 on May 18, 2021)); RX736-45 (HS-

009170-HS-009178 (showing rate quote NOAQ1028947 on October 28, 2021)); RX775-82 (HS-010436-HS-010442 (showing HSDG’s effort to assist OJC with Brazil shipping on November 5, 2021)). Such quotations are from HSDG, not Maersk. There is no documentary evidence with respect to OJC’s plans to move “thousands” of additional containers through Kentucky.

88. According to Pump, OJC shipping to Kentucky made OJC “more attractive” as a customer. CX 92-93, 137:13 - 139:20, 142:3-21.

Response: Denied. The cited testimony concerns factors involved in service contracting generally. It does not mention Kentucky or OJC. CX92-93. Mr. Pump’s cited testimony notes the desirability of the port locations like Savannah and Charleston as distinct from inland locations like Kentucky (even though the latter may be served via the former). CX92-93. Mr. Pump testified that inland locations such as Boise, Idaho were undesirable because imports were not supported by corresponding export business. RX986, 135:6-12. Pump’s testimony is consistent with documentary evidence that HSDG’s trade team, which had ultimate authority to enter into service contracts, was not interested in the Kentucky business. CX248 (May 15, 2020 email from Serena Cheung stating “This is mainly IPI to inland Louisville, KY that we are trying to reduce. Please decline.”); CX244 (May 27, 2020 email from Serena Cheung stating: “As previously advised for TPEB we have declined to quote inland ramp and ramp/door business.”).

89. Maersk’s own internal emails admit that for the 2020-2021 contract, OJC originally proposed a minimum volume of “1266x40hc per year” that included a Kentucky line, but Maersk “rejected it initially.” CX 242-243.

Response: Denied. The internal emails are HSDG emails, not Maersk emails. The

HSDG emails indicate that OJC had a forecasted volume of 1,266 FEE and that OJC told HSDG that it had contracts with other ocean carriers to support that volume. CX242-243. Despite these arrangements, OJC only shipped a portion of that volume, according to its data. Ex. 101 (showing OJC shipped ■■■ FFEs during 2020-2021). The same evidence cited here provides the reason HSDG did not accept the volume which was because “both services EC/WC are running full/rolling. At this moment, all BCOs are being limited to their MQC signed. . . Also Louisville is one of the ramps with negative impact in our PnL.” CX242-243.

90. Maersk subsequently regretted its decision to reject OJC’s 2020-2021 volume – which was significantly higher than the 400TEU MQC in the Contract – stating “[e]specially for this kind of volume, I would have love[d] to take a look before we declined 2500TEU.” CX 242.

Response: Denied. Mr. Seeraj at HSDG suggested that he would have appreciated an opportunity to consider the volume described. CX242. In response to Mr. Seeraj’s email, Mr. Pestana, the Transpacific Manager for HSDG, explained the business was declined because HSDG was operating at full capacity and even rolling cargo and also because service to Louisville had a “negative impact in our PnL.” CX242. Mr. Pestana then went on to clarify that any offer of space to OJC into Louisville would require HSDG to address the space shortages by borrowing space protection from other accounts. CX242.

91. OJC’s supposed lack of shipping volume in other trade lanes was Maersk’s fault, not OJC’s. CX 242-243.

Response: Denied. It is unclear what this statement refers to from the evidence cited. The evidence cited demonstrates that HSDG was managing its space in light of market conditions and space constraints and that its services were full at that time. CX242-243.

92. OJC demanded that Maersk “[i]dentify how many Service Contracts [Maersk]

entered into during 2021 on or after April 28, 2021, including for each such Service Contract the date it was entered into, total FFEs or TEUs, the shipping lines included, and the shipping prices.”
CX 255.

Response: Admit that this interrogatory was directed to HSDG. CX250.

93. Maersk refused to produce the shipping prices, but it did produce a list of such contracts and the MQC for each. CX 7; CX 283-284.

Response: Denied as stated. In the Order dated June 29, 2022, the Presiding Officer held that Respondents were not required to disclose the rates for HSDG’s service contracts. CX300 (stating “Respondents will not be required to review or provide documents regarding pricing for individual shippers”). Admit that HSDG produced a list of HSDG’s contracts and corresponding MQCs.

94. That list showed that Maersk had entered into service contracts with a prefix of NOAC for [REDACTED] TEUs after April 29, 2021. CX 214; 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).

Response: Deny that HSDG or Maersk retaliated against OJC. Admit that HSDG produced a list of service contracts entered into after April 29, 2021. CX283-284.

95. The prefix for Maersk’s 400 FFE MQC contract proposed by Casanova to make up for their shortfalls in 2020-2021 was NOAC. (CX 214.)

Response: Admit that the prefix of the template contract that Ms. Casanova completed in her internal proposal to consider a contract for OJC in 2021-2022 was NOAC. CX214. Deny that this template contract constituted an offer, and deny that it was ever sent to OJC. CX214 (showing Ms. Casanova created the form and populated the MQC as 400

to allow Mr. Li to move forward adding OJC to the target list).

96. Pump testified that it was “unreasonable” for OJC to request the same contract rates for its renewal. CX 98-100, 227:25 - 229:3, 235:4 - 236:8.

Response: Denied. Mr. Pump stated that, in light of market conditions, including rates which “substantially increased” from 2020-2021, a proposal of the same rates was not a “reasonable starting position.” CX098, 228:3-11.

97. But it was Maersk who proposed a “new contract [with] the same ... rates ... of the [then-]current contract.” CX 214.

Response: Denied. See response to proposed finding of fact #95.

98. Shipping rates only started to significantly increase after April 29, 2021. CX 468 ¶ 12.

Response: Denied. OJC cites no evidence other than the Weiss Declaration. Other, contemporaneous and more reliable evidence refutes this proposed statement of fact. CX435; CX098, 228:3-11. In addition, in an article published in mid-February of 2021, rates were described as climbing from 2020 and continuing to climb. (Joe Wallace, *Shipping Container Shortage Gives Commodity Prices Extra Boost*, Wall Street Journal, (Feb. 18, 2021)) (“At \$4,709 per container, rates from Asia to the U.S. West Coast are almost four times higher than they were in March 2020. For taking goods to the East Coast, rates have more than doubled to \$5,658 per container.”)

99. Maersk produced no documents that supported statement that Maersk’s past experience with the timeliness of OJC’s payment and the perceived credit risk associated with that payment history was a reason why it did not deal with OJC. *See, e.g.*, CX 292-294; CX 469 ¶ 17; CX 466 ¶ 3.

Response: Denied. HSDG produced documents relating to credit issues with OJC. See RX488-92 (HS-001750-HS-001753); RX655-59 (HS-005260-HS-005263).

100. The only dispute that the Parties had about payments was when Maersk charged OJC demurrage fees and OJC had to pay them to obtain its shipments. CX 292-294; CX 469 ¶ 17; CX 466 ¶ 3.

Response: Denied. See response to Complainant's Proposed Finding of Fact #99.

101. Maersk ended up refunding all of OJC's claimed demurrage fees after this case was filed. CX 469 ¶ 17; CX 466 ¶ 3.

Response: Denied as stated. HSDG refunded the demurrage in order to narrow the issues in this case and simplify discovery.

102. OJC had only sent two threats of litigation to Respondents. CX 296, 131:4-21.

Response: Denied as stated. OJC sent the initial threat of litigation on October 16, 2021. CX159-160. OJC's second threat of litigation occurred on April 28, 2021. CX209-211. OJC later sent its third litigation threat on September 2, 2021. CX292-294. In the interim, OJC was disputatious in a variety of other ways, including telling Ms. Casanova during the start of the contract that HSDG's inability to fix OJC's own overweight shipment must be handled by HSDG. RX705-24 (HS-007801-HS007819) (documenting OJC shipping heavier cargo than could be moved over the road and then complaining to HSDG that because the service is Port to Door that HSDG must fix the issue of OJC's own making and stating that OJC would not be accountable for resulting demurrage charges); RX822-28 (HS-012498-HS-012503) (threatening and badgering Mr. Gast in October of 2021 over OJC's perceived entitlement to additional space than required by the Service Agreement); RX493-15 (HS-002550-HS-002571) (Weiss badgering Ms. Casanova while she tried to assist with

issues caused by OJC's warehouse being full).

103. In both instances, Maersk admitted in their internal emails that it was in the wrong, not OJC. CX 161, 215.

Response: Denied. OJC mischaracterizes the first document, an October 21, 2020 email in which, Mr. Gast, a junior claims representative at HSDG, encourages HSDG persons to “pacify this customer” and “avoid an unnecessary lawsuit” because of OJC’s attorney, Sam Hecht, threatening a breach of contract claim only four months into the eleven-month agreement. CX161. In his email, Mr. Gast appears to restate some of the statements made by Mr. Hecht, and encouraged HSDG colleagues to comply with OJC’s demands. CX161; see RX822-28 (HS-012498-HS-012503) (OJC’s attorney, Sam Hecht badgering Mr. Gast and making threats and demands to HSDG at the height of the pandemic and during significant market disruptions). The second document, an April 29, 2021 email from Andrea Casanova, was written one month before the service contract expired and reflects Ms. Casanova’s efforts to try and achieve the contractual MQC target. CX215.

104. Maersk knew that it was explicitly precluded from retaliating against OJC for its threats to take its complaints to the FMC. CX 96, 208:4-18; CX 95-96, 204:24 – 206:19.

Response: Admit that Mr. Pump testified [REDACTED]. CX96, 205:6-8. Deny that any of the testimony supports the conclusion that a threat of litigation could be the basis for retaliation. Further deny that this constitutes knowledge on the part of Maersk. The testimony at CX 96, 208:12-18 should not be admitted into evidence based on counsel’s objection that it calls for a legal conclusion.

105. Maersk has also argued the inability of the parties to come to a renewal contract

was about Maersk “refus[ing] to accede to every demand of [OJC].” (Respondents’ Partial Motion to Dismiss and/or for Summary Judgment, dated July 26, 2022, at 6.)

Response: Denied. The statement is argumentative and not properly stated as a fact. The statement also restates a portion of the Motion, characterizing it in a misleading manner by appearing to attribute to Respondents what was Respondents’ description of a case it cited in the Motion. (Respondents’ Partial Motion to Dismiss and/or for Summary Judgment, dated July 26, 2022, at 6.)

106. Maersk refused to produce any documents in response to OJC RFP 26, which was originally served on March 7, 2022. CX 300.

Response: Denied. HSDG produced numerous emails, which showed pricing under spot market rates, and pointed out that HSDG’s tariff is and has been publicly available for OJC to view. See Respondents’ Opposition to Complainant’s Motion for Clarification of the Presiding Officer’s August 31, 2022 Order at p.3. HSDG also produced the documents ordered to be produced by the Presiding Officer despite OJC’s contention otherwise. *Id.* (providing Bates numbers for RX829-33 (HS-013468-HS-013471) and RX861-70 (HS-013497-HS-013505) to direct OJC to the information it alleges was not produced).

107. On June 29, 2022, the Presiding Officer granted OJC’s motion to compel responses, ordering Maersk 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.” CX 300.

Response: Denied as stated. The Presiding Officer narrowed OJC’s RFP 26 in her order and ordered the production of certain documents by Respondents. CX300.

108. Maersk did not comply with the Court’s Order. CX 309.

Response: Denied. CX309 is the order itself, and does not prove non-compliance with same. HSDG produced numerous emails that showed pricing under spot market rates and pointed out that HSDG’s tariff is and has been publicly available for OJC to view. See Respondents’ Opposition to Complainant’s Motion for Clarification of the Presiding Officer’s August 31, 2022 Order at p. 3. HSDG also produced the documents ordered to be produced by the Presiding Officer despite OJC’s contention otherwise. *Id.* (providing Bates numbers for RX829-33 (HS-013468-HS-013471) and RX861-70 (HS-013497-HS-013505) to direct OJC to the information it alleges was not produced).

109. On August 31, 2022, after OJC moved for expedited relief, the Presiding Officer stated that “Respondents are again ordered to provide complete responses to OJC RFP 26 and all responsive documents must be provided within seven calendar days of the date of this order [September 7, 2022].” CX 309.

Response: Admit.

110. The Presiding Officer “warned that failure to do so may result in sanctions, including directing facts to be established, prohibiting claims or defenses, striking pleadings, or dismissing claims or defenses. 46 C.F.R. § 502.150(b).” CX 309.

Response: Admit.

111. The Court also found that “the spot market rates reflect pricing and pricing strategy ... [that is] information ... highly relevant to the claims in this proceeding.” CX 308.

Response: Denied as stated. The Order speaks for itself. CX308.

112. The documents Respondents have produced clearly do not reflect the prices that Maersk really charged shippers. CX 320-321.

Response: Admit that the documents produced by Respondents do not reflect prices

charged by Maersk. The documents produced reflect the establishment of spot rates/guidance to HSDG personnel regarding the level of spot rates. *See, e.g.*, CX230-321; RX882-88 (HS-014891-HS-014896); RX861-70 (HS-013497-HS-013505). Actual rates charged to customers can be found in HSDG’s tariff (which is available to the public and OJC) or in service contracts, which the Presiding Officer ruled did not have to be produced. CX299.

113. When this issue was previously raised, Maersk intentionally misled the Court leaving it confused about what in fact was produced. CX 317.

Response: Denied. Neither Maersk nor Respondents misled the Presiding Officer, and nothing in CX317 supports such an allegation. The proposed finding of fact is argumentative and improperly presented as a fact here. The cited portion of the Presiding Officer’s order indicates that “[i]t is not clear” what documents Respondents produced to OJC. CX317.

114. The documents Maersk claims are fully responsive to this request state that the prices do not include “Origin Charges, BAF, ISPS, and ECA.” CX 320-321.

Response: Denied. The emails in question state that rates are subject to origin charges, BAF, ISPS and ECA. CX320-321. The BAF and ECA are expressly listed in separate columns in the document and are also included in the “all in” rates that appears at the far right-hand side of the document. CX320-321. With regard to ISPS charges, these are available on HSDG’s website or in quotes provided to OJC by HSDG or in the Service Contract between the Parties. *See* <https://www.hamburgsud.com/en/ecommerce/tariffs-and-surcharges/ocean-tariff-overview/> (showing a tariff of \$16USD for Los Angeles; *see also* RX608 (HS-003666) (showing also an ISPS charge of \$16 for Los Angeles); CX119-135

(showing the same). OJC was referred to HSDG's tariff in reviewing spot rate information in Respondents' responses as well. CX367.

115. And although the pricing charts contain entries for BAF and ECA charges, the Origin Charges and ISPS charges are not included. CX 320-321.

Response: Denied. Although origin charges and ISPS are not listed in the spot rate emails, ISPS charges were readily available to OJC. See response to Proposed Finding of Fact #114.

116. Nor are any "premium" charges included, which Maersk refers to itself in internal emails. CX 322 ("[OJC] ha[s] pushed several times for additional space which we informed only by **premium rate.**" (emphasis added)); CX 53 ("Premium Charge" column) in reference to other carriers.)

Response: Denied. CX053 is a Maersk document, separate and distinct from the HSDG documents described in Proposed Findings of Fact #114-#116. A Maersk document would not include any premium charges which might be relevant to HSDG. There is no evidence that the Maersk "premium" referenced in CX053 (which dates from April of 2021) is the same thing as the "premium" referenced in CX322, a HSDG document which dates from October of 2020.

117. This information was withheld and never produced by Maersk throughout the whole discovery period. CX 7.

Response: Denied. Maersk is not a party to this proceeding and is under no obligation to produce anything. HSDG has not produced information about premium charges because there are no such charges. The only "premium" which would have been charged by HSDG during 2020-21 would have been pursuant to a service contract. More specifically, if a

customer with an existing service contract wanted space in excess of what it was entitled to receive under the existing contract, HSDG would negotiate a separate service contract for additional space, which would be provided at a higher, “premium” rate than the space provided pursuant to the original service contract. RX951, 119:14-120:10 (describing how HSDG provided additional space to service contract customers when possible at a premium rate).

118. Without this information, OJC still does not have Maersk’s full spot market rate pricing information that is “highly relevant” to OJC’s claims. CX 7.

Response: Deny that any spot rate pricing of HSDG or Maersk is relevant to OJC’s claims. OJC knows what it paid for spot rate shipments in 2021-22 and has obtained spot rate information from third parties. These can be used to calculate its alleged damages and OJC has purported to do so, as reflected in Mr. Weiss’s declaration. Nothing about the spot rates of HSDG or Maersk are relevant to whether a Shipping Act violation occurred and, as noted, are not necessary to calculate OJC’s alleged damages. Further, deny that anything in CX007 supports this allegation.

119. In the Court’s August 31, 2022 Order, the Presiding Officer held:

Respondents are hereby ordered to identify Maersk management who would have information regarding pricing decisions. If appropriate Maersk witnesses are provided, then the depositions of Maersk CEO Soren Skou and CFO Patrick Jany will not be required. However, if appropriate witnesses at Maersk are not identified and provided for deposition, then the depositions of Maersk CEO Soren Skou and CFO Patrick Jany will be permitted. Even if Maersk were considered a non-party, if their managers have relevant information then their testimony can be subpoenaed. **Respondents must identify appropriate witnesses and within seven calendar days of the date of this order [September 7, 2022] agree on a date and time for their depositions.** CX 312 (emphasis added).

Response: Admit.

120. Maersk did not comply with this part of the Court’s Order. CX 323.

Response: Denied. Respondents identified appropriate witnesses to OJC’s counsel as ordered, including titles and descriptions of the information each witness could provide. RX478 (September 7, 2022 email from Wayne Rohde). OJC was advised before the Presiding Officer’s order that Mr. Ivan Cheung was the most appropriate witness but declined to depose him without explanation before stating that they wanted a witness with the information Respondents indicated Mr. Cheung actually had. RX471-73 (Email from Aaron Davis to Counsel for Respondents, dated August 30, 2022). Furthermore, on September 7, Respondents again advised that Mr. Cheung was the appropriate witness while advising that Mr. Rodrigo Pestana could also offer additional information. RX478 (September 7, 2022 email from Wayne Rohde). Respondents also advised that “the highest ranking person in the Maersk organization with authority over rates is Johan Sigsgaard, global head of Ocean from April of 2021 to present” and identified his predecessor as a potential witness. RX478 (September 7, 2022 email from Wayne Rohde). OJC then noticed the depositions of six witnesses, including only Johan Sigsgaard with regard to spot rates, on September 9. RX479-84 (September 9, 2022 email from Aaron Davis). HSDG also identified several Maersk employees with knowledge about rate issues in response to an interrogatory from OJC. RX478 (September 7, 2022 email from Wayne Rohde). OJC did not choose to depose any of those persons, other than Mr. Sigsgaard. CX324.

121. Maersk did not identify a proposed date and time for a Maersk management witness until September 29 – 22 days late – and after the initial discovery period had already expired. CX 323.

Response: Denied. Respondents identified potential witnesses for OJC to depose within the time specified in the Order, and OJC waited to identify which witnesses it wanted

to depose until September 9, 2022. RX479-84 (September 9, 2022 email from Aaron Davis). Upon identification of witnesses, Respondents undertook to identify times when Johan Sigsgaard could be made available in light of the geographic location of Mr. Sigsgaard as well as his schedule. OJC declined to depose other witnesses identified by Respondents who could have been made available on a shorter timeline. Sigsgaard Declaration (identifying and describing Mr. Cheung, Mr. Pestana, and Mr. Covre as appropriate witnesses based on their roles and experience).

122. The proposed date was Yom Kippur, on which Maersk knew OJC and undersigned counsel would not be available. CX 7, ¶ 53, 323.

Response: Admit that October 5 was Yom Kippur. Deny that this date was chosen due to the unavailability of Mr. Hecht and Mr. Weiss. October 5 and October 7 were proposed solely because that is when Mr. Sigsgaard was available. As explained to OJC counsel, after October 5 and 7, the next date on which Mr. Sigsgaard had 5 hours available was October 31. CX327. Further, upon information and belief, Mr. Aaron Davis is not a practicing member of the Jewish faith and could have taken a deposition on October 5. Mr. Davis is an attorney of record for OJC in this case, is author of the cited correspondence, and has taken other depositions in this case. When OJC indicated October 5 was not acceptable, Respondents offered to extend the time period for the deposition on October 7, while emphasizing the limited relevant information that Mr. Sigsgaard possesses. CX237-238.

123. Yom Kippur, October 5, 2022, is one of the most important Jewish holidays of every year. CX 7, ¶ 53, 323.

Response. Admit.

124. The proposed date was Yom Kippur, on which Maersk knew OJC and undersigned counsel would not be available. CX 7, ¶ 53, 323.

Response: Denied. This Proposed Finding of Fact is identical to Proposed Finding of Fact #122, and the response to Proposed Finding of Fact #122 is herein incorporated by reference.

125. A second date was simply an extra few hours the Friday after Yom Kippur for overflow questions that could not be completed on Yom Kippur. CX 7, ¶ 53, 323.

Response: Denied. Respondents initially proposed a few additional hours on October 7 to supplement the time made available on October 5th and later proposed a longer window of time on the 7th to allow Mr. Sigsgaard to testify to his very limited knowledge of facts relevant to this case. CX324-329.

126. Maersk's delay tactic violated the Court's Order by running out the clock, and precluded OJC from taking the deposition. CX 323.

Response: Denied. There is no evidence whatsoever that this was a "delay tactic" on the part of HSDG or Maersk. OJC insisted on taking the deposition of a very senior executive with global responsibility and a very inflexible schedule. He was made available to the extent his schedule permitted. CX327; RX1128 ¶ 6. There is no evidence that Mr. Davis could not have deposed Mr. Sigsgaard for several hours on October 5. There is no evidence that OJC or its counsel could not continue Mr. Sigsgaard's deposition on October 7. RX1128 ¶ 6. Alternatively, OJC could have started Mr. Sigsgaard's deposition on October 7 and reserved its right to seek additional time, which would not have been necessary given that Sigsgaard has no personal knowledge of the underlying events. Furthermore, OJC declined to depose witnesses identified by Respondents as having the information OJC alleged that it wanted.

RX479-84 (September 9, 2022 email from Aaron Davis).

127. Regardless, Maersk pretended to produce a witness on October 7, 2022 for an hour, knowing that there was no agreement that a unilaterally-limited deposition would take place on that date. CX 325.

Response: Denied. OJC’s counsel, Mr. Davis, stated “OJC can take Mr. Sigsgaard’s deposition on Friday, October 7.” CX329. Respondents in fact made Mr. Sigsgaard available on October 7, did not unilaterally limit the deposition, and indicated his future availability on October 31 when encouraging OJC to take testimony on October 5 and/or October 7. CX327-328.

128. Maersk’s charade – obviously concocted to make it appear like they were cooperating – went well past just violating the Judge’s August 31 Order and descended into mocking it. CX 325.

Response: Denied. This is a subjective argument, not a statement of fact. Respondents made Mr. Sigsgaard available for deposition to the extent his schedule permitted. Respondents also identified numerous other witnesses with more relevant information. CX324-329; RX478 (September 7, 2022 email from Wayne Rohde).

129. Maersk then compounded its contempt by subsequently ignoring OJC’s notice of deposition for Maersk’s CEO that the Court ordered if Maersk would not provide the pricing executive as required. CX 334-336.

Response: Denied. The Presiding Officer’s Order required Respondents to produce witnesses who could provide the information that OJC alleged to seek. CX311-312 (ordering Respondents to identify and provide appropriate witnesses). Respondents identified numerous witnesses who could provide this information, but OJC declined to depose all but

Mr. Sigsgaard. RX478 (September 7, 2022 email from Wayne Rohde). After declining to depose the appropriate witnesses and to take advantage of the availability of Mr. Sigsgaard, OJC cannot seriously contend that it had no opportunity to obtain the information OJC alleged it sought. RX478 (September 7, 2022 email from Wayne Rohde) (providing four names of persons with information allegedly sought by OJC); CX336-337 (OJC unilaterally deciding that a proposed witness “would have no more ‘Maersk management’ *pricing decision* knowledge than [Mr. Pump]”).

130. Maersk has made no attempt to overcome the presumption that material attached to or included in a substantive filing is subject to the public right to access.

Response: Denied. OJC cites to nothing here and misstates what is clear from the record. The Presiding Officer has limited the publication of Respondents’ sensitive information in her Order dated August 31, 2022 with the acknowledgment that Respondents’ productions include sensitive commercial information that is not required for public disclosure. CX308-309 (denying OJC’s challenge to Respondents’ confidential designations); CX299 (also recognizing the sensitivity of commercial information in her June 29, 2022 Order). Respondents’ productions and testimony include sensitive commercial information, and OJC’s efforts to publish commercially sensitive information, including the Service Agreement AECC0000291 which contained a confidentiality clause signed by Jacob Weiss and which was filed by OJC in a public docket, are further evidence of OJC’s ongoing harassment of Respondents and disregard for its obligations to protect confidential information. See Complainant’s Verified Complaint dated 11/23/21.

131. Maersk designated and continues to maintain the wrongful designations after challenges from OJC.

Response: Denied. Again, OJC cites to nothing from the record here and ignores the Presiding Officer's own statements on the subject. CX308-309 (denying OJC's challenge to Respondents' confidential designations); CX299 (also recognizing the sensitivity of commercial information in her June 29, 2022 Order).

132. Maersk refused to produce any documents – including all internal and external communications – concerning their policies, procedures, or plans concerning blank sailings (which are used to manipulate pricing and space), documents showing their actual spot market rates charged for 2021-2022, and documents showing their service contract rates for 2021-2022. CX 367 (OJC 2d RFP 2); CX 367, 376-377 (OJC 2d RFP 4 and OJC 3d RFP 20); CX 376 (OJC 3d RFP 19); CX 7, ¶ 54.

Response: Denied. Respondents were not required to produce the rates in individual service contracts. See, Order of June 29, 2022, narrowing RFP 26. The production of spot market rate information is addressed above in the responses to Proposed Findings of Fact 112-115 and 118. Further, HSDG has explained that it does not have policies, procedures or plans concerning blank sailings. Deny that blank sailings are used to manipulate pricing and space. RX456-59 (HSDG's Responses to OJC's Third Set of Interrogatories); RX465-68 (HSDG's Responses to OJC's Fourth Request for Production of Documents); RX334-37 (Testimony of FMC Chairman Daniel Maffei before Senate Commerce Committee, March 3, 2022, p. 2).

133. The Presiding Officer has already warned Maersk that it could sanction it for failing or refusing to obey an order requiring it to make disclosures or to respond to discovery requests. CX 309.

Response: Denied as stated. The Presiding Officer warned Respondents regarding

RFP 26 in the evidence cited by OJC here. CX309. As has been repeatedly demonstrated with record evidence, including fulsome productions, and correspondence between the parties and before the Court, OJC has received the documents requested to the extent they are not objectionable, privileged, and to the extent they exist and could be located. See responses above ¶¶112-118.

134. Maersk repeatedly refused to produce any documents that identify all the charges included in their spot market pricing – which was ordered multiple times by this court – effectively precluding OJC from discovering that “highly relevant” pricing information. CX 308; CX 7, ¶ 54.

Response. Denied. As described above in ¶¶ 112-115 and 118, Respondents have produced numerous emails and instructed OJC where additional information and details could be obtained through published tariffs.

135. Maersk also refused to produce any service contract pricing. CX 308; CX 7, ¶ 54.

Response. Denied as stated. The Presiding Officer addressed this issue directly in her June 29, 2022 Order and did not direct Respondents’ to produce service contract pricing. CX299.

136. Maersk’s refusals were persistent and continued even after being warned by the Court. CX 309.

Response. Denied. OJC cites only to the Presiding Officer’s Order dated August 31, 2022. CX309. In fact, Respondents produced numerous documents, and OJC has received the documents requested to the extent they are not objectionable, privileged, and to the extent they exist and could be located. See responses above ¶¶112-118.

137. Maersk clearly violated the Shipping Act by retaliating against OJC and refusing to deal with OJC. CX 220-221.

Response: Denied. This is a conclusion of law rather than a statement of fact. Respondents did not violate the Shipping Act nor did Respondents refuse to deal with OJC. In fact, since Respondents declined to enter into a 2021-2022 service contract with OJC, Respondents and their affiliates have continued their relationship with OJC through the carriage of cargo on behalf of OJC pursuant to rate quotes for the trades from both the Asia to the United States and from Brazil to the United States. See RX608 (HS-003666); RX519-27 (HS-002983-HS-002990) (a quotation for Asia to US Service dated July 20, 2021); RX563-91 (HS-003394-HS-003421 (showing rate quotes, including NOAQ1006436 on March 1, 2021; NOAQ1009430 on March 31, 2021; NOAQ1014177 on May 18, 2021)); RX736-45 (HS-009170-HS009178 (showing rate quote NOAQ1028947 on October 28, 2021); RX775-82 (HS-010436-HS010442 (showing HSDG’s effort to assist OJC with Brazil shipping on November 5, 2021)). Furthermore, Respondents and their affiliates have carried containers for OJC since the expiration of the Service Contract AECC0000291. (OJC Damages Data showing the carriage of nearly ■ containers since May 31, 2021).

138. Those violations seriously damaged OJC and caused it to sustain actual injury. CX 475, ¶ 32.

Response: Denied. Respondents did not violate the Shipping Act. Furthermore, the evidence cited is simply a declaration of Jacob Weiss to this effect. OJC’s own business decisions, including its decision not to negotiate or renew contracts with other ocean carriers despite the market conditions at the time, are the cause of any injury suffered by OJC. RX1010, 81:14-18 (stating Weiss declined a contract offer from OOCL for 2021-2022); RX1024, 229:13-15 (“obviously, you know, in hindsight, I felt, wow, what a big mistake is to put all my eggs in one basket”).

139. OJC is entitled to an order directing Maersk to pay OJC's reparations for its actual injuries sustained. 46 U.S.C. § 41305(b).

Response: Denied. This is a legal conclusion and cites only to a statute.

140. To assist the Commission in determining the appropriate measure of damages in this case, OJC retained Richard C. Berning. CX 438, 448-459.

Response: Admit OJC retained Richard C. Berning on or about August 24, 2022, almost three full weeks after the deadline for submission of initial expert reports had passed. RX930-35 (Engagement Letter of Richard Berning). Deny that Mr. Berning was retained to assist the Commission. Deny that Mr. Berning's untimely reports, even if considered, would assist the Commission in determining the appropriate measure of damages in this case. Mr. Berning merely adopts wholesale the unsupported damages calculations of Mr. Weiss. RX1087, 230:11 (conceding he and Weiss "[REDACTED]" in calculating damages).

141. Mr. Berning has been involved in hundreds of matters involving damages and business valuations in a variety of venues over the past thirty years. CX 438, 448-459.

Response. Denied. Here, OJC cites to a statement and a list of instances where Berning appears to have spoken at CLE or other academic events, largely focused on family law and divorce. CX438, CX448-459. In fact, the list of Testimony Experience from Berning shows that he testified only 20 times since 2017 and virtually all of the cases appear to be divorce cases wherein the last names of both parties are the same. CX446-447. Mr. Berning has been retained in over 1,000 divorce cases, primarily in valuing the business assets of a separating married couple. RX1046, 66:13-15. Whatever expertise Mr. Berning may have in the field of business valuation is moot because OJC no longer seeks damages based on the company's alleged "loss of market value." Berning Ex. 200, CX 430; OJC Brief at 33, n.121.

142. Mr. Berning has been appointed by the Courts as an expert witness and Financial Early Neutral Evaluator and testified on more than 145 occasions. CX 438, 448-459.

Response: Denied as vague and unsupported by the evidence provided. Furthermore, the list of cases provided suggests that Berning’s expertise is in family law, primarily in valuing the business assets of a separating married couple. CX438, 446-459; RX1046, 66:13-15.

143. Mr. Berning is a frequent speaker locally and nationally on business valuation, damages and related topics, having developed and/or taught more than 170 courses to various professional and business organizations. CX 438, 448-459.

Response: Denied as stated. The cited evidence suggests that Berning speaks up to several times per year, largely – if not exclusively – in Minnesota, during CLE conferences on subjects including Family Law, Divorce, and Business, including combinations thereof. CX448-459.

144. Mr. Berning’s formal curriculum vitae is attached to his Expert Report. CX 438, 448-459.

Response: Admit to the extent Berning describes Exhibit D to his report as his “formal curriculum vitae.”

145. Mr. Berning has analyzed the injurious effects of Mearsk’s Shipping Act violations under three different methodologies, two of which are the focus of OJC’s brief: (1) Lost Profits; and (2) Shipping Rate Differentials. CX 422.

Response: Denied. Neither HSDG nor Maersk violated the Shipping Act. Deny that Berning analyzed or calculated anything, as his report appears to be a repetition of the damages calculation prepared by Jacob Weiss, during the preparation of which Mr. Berning

did not adhere to applicable professional standards, did not verify the information being “analyzed,” used flawed methodologies, and relied on faulty assumptions, provided without support by OJC, to inform his opinions. RX1087, 230:11 (conceding he and Weiss “ [REDACTED] [REDACTED]” in calculating damages); RX1148 (Zayas Decl. ¶ 10).

146. Jacob Weiss of OJC also calculated OJC’s damages consistent with the mathematics outlined below, and in Mr. Berning’s Reports. CX 469 ¶ 18.

Response: Denied. Weiss calculated what he views as OJC’s damages based on a flawed view of the facts and circumstances of the case and using assumptions that are consistent with his own financial interests but not based in reality. This statement does not cite to any evidence supporting what it alleges. CX469 ¶ 18.

147. Jacob Weiss has 30 years of experience calculating damages, profits, costs, financials, and other business- and litigation-related calculations. CX 469 ¶ 18.

Response: Denied. Weiss testified that he has an undergraduate degree in rabbinical studies and no other educational background. RX1004-05, 41:2-42:11. Weiss testified that he has no accounting background and took no courses in economics or accounting during college. RX1005, 42:17-43:1; 43:13-15. Weiss also testified that he has never served as a damages expert for anyone else and has never been hired to consult or testify in a litigation setting. RX1005, 44:3-13.

148. The following defined terms for the calculation of each of the four categories of lost profits:

Fiscal Year 2020: Shipping contracts in this instance cover the period starting June 1 through May 31 the following year. “Fiscal Year 2020” is for the period June 1, 2020 through May 31, 2021.

Fiscal Year 2021: “Fiscal Year 2021” is the period June 1, 2021 through May 31, 2022. CX 422-423; CX 469-470 ¶ 19.

Response: Denied as stated. This is not a full sentence. Admit to the extent that service contracts in the trade from Asia to the United States generally conform to the dates referenced.

149. OJC compiled an average revenue per container shipped during the period June 1, 2020 through July 16, 2022. CX 422-423; CX 469-470 ¶ 19.

Response: Denied. OJC cites no evidence other than the Weiss Declaration and Berning's report endorsing Weiss's unsubstantiated assertions. OJC's purported calculations of average revenue per container are unsupported because there is no documentary evidence of OJC's average revenue per container. As such, these figures are unreliable.

150. These amounts are based on actual products shipped and the selling price of the products. CX 423; CX 470 ¶ 20.

Response: Denied. OJC cites no evidence other than the Weiss Declaration and Berning's report endorsing Weiss's unsubstantiated assertions. These amounts purport to be based on products shipped and the selling price of those products, but there is no documentary evidence of the products actually shipped or the selling price of those products. RX1155 (Zayas Decl. ¶ 32). As such, these figures are unreliable.

151. The average revenue per container was computed to be [REDACTED]. CX 423; CX 470 ¶ 20.

Response: Denied. OJC cites no evidence other than the Weiss Declaration and Berning's report endorsing Weiss's unsubstantiated assertions. CX423 states that OJC calculated the average revenue per container to be [REDACTED]. There is no documentary evidence of the average revenue per container, and no evidence that Mr. Berning did

anything to verify OJC's calculations. RX1033, 15:17-17:4 (accepting the revenue per container number provided directly by OJC). Accordingly, this figure is unreliable. RX1156 (Zayas Decl. ¶ 35).

152. Based on the same containers that were used for the average revenue calculations above, OJC computed the average gross profit per container to be [REDACTED]. CX 423; CX 470 ¶ 20.

Response: Denied. OJC cites no evidence other than the Weiss Declaration and Berning's report endorsing Weiss's unsubstantiated assertions. CX423 states that OJC calculated the gross profit per container to be [REDACTED]. There is no documentary evidence of the gross profit per container, and no evidence that Mr. Berning did anything to verify OJC's calculations. RX1087, 230:11 (conceding he and Weiss "[REDACTED]" in calculating damages). Accordingly, this figure is unreliable. RX1148 (Zayas Decl. ¶ 10).

153. Gross profit is revenue less the costs of the product. CX 423; CX 470 ¶ 20.

Response: Denied as stated. OJC cites no evidence other than the Weiss Declaration and Berning's report endorsing Weiss's unsubstantiated assertions.

154. To compute the cost of the product, OJC captured all the costs including the [REDACTED]

[REDACTED] CX 423; CX 470 ¶ 20.

Response: Denied. OJC cites no evidence other than the Weiss Declaration and Berning's report endorsing Weiss's unsubstantiated assertions. The proposed finding of fact is merely a description of a methodology purportedly used by OJC to calculate damages. There is no documentary evidence of the costs used to compute the cost of the product, and no evidence that Mr. Berning did anything to verify OJC's calculations. RX1087, 230:11

(conceding he and Weiss “██████████” in calculating damages). Accordingly, this calculation is unreliable. RX1148 (Zayas Decl. ¶ 10).

155. OJC utilizes ██████████
██████████. CX 423; CX 470 ¶ 20.

Response: Denied. OJC cites no evidence other than the Weiss Declaration and Berning’s report endorsing Weiss’s unsubstantiated assertions. The proposed finding of fact is merely a description of one aspect of OJC’s business operations. It is unsupported by any actual evidence whatsoever.

156. All these costs were captured and deducted. CX 423; CX 470 ¶ 20.

Response: Denied. OJC cites no evidence other than the Weiss Declaration and Berning’s report endorsing Weiss’s unsubstantiated assertions. There is no documentary evidence of these costs, and no evidence that Mr. Berning did anything to verify OJC’s calculations. RX1087, 230:11 (conceding he and Weiss “██████████” in calculating damages). Accordingly, this figure is unreliable. RX1150-51 (Zayas Decl. ¶ 17).

157. Even though OJC was projecting significant increase in sales in fiscal 2021 (and resulting need for additional containers), ██████████
██████████. CX 423; CX 470 ¶ 20.

Response: Denied. OJC cites no evidence other than the Weiss Declaration and Berning’s report endorsing Weiss’s unsubstantiated assertions. This is a self-serving, conclusory statement that is unsupported by evidence, and not a statement of fact. There is no evidence that Mr. Berning did anything to attempt to verify this statement. RX1087, 230:11 (conceding he and Weiss “██████████” in calculating damages); RX1148 (Zayas Decl. ¶ 10).

158. Accordingly, the direct variable costs included produce the net profit per container. CX 423; CX 470 ¶ 20.

Response: Denied. OJC cites no evidence other than the Weiss Declaration and Berning's report endorsing Weiss's unsubstantiated assertions. This is a self-serving, conclusory statement that is unsupported by evidence, and not a statement of fact. Moreover, this purported finding of fact relies on the same type of statement contained in Proposed Finding of Fact #157. Again, there is no documentary evidence supporting this proposed Finding of Fact, and no evidence Mr. Berning did anything to verify OJC's calculations or methodology. RX1087, 230:11 (conceding he and Weiss "[REDACTED]" in calculating damages). Accordingly, the statement is unreliable. RX1148 (Zayas Decl. ¶ 10).

159. As a result, OJC has captured the vast majority, if not all, of the costs relating to the sale of products. CX 423; CX 470 ¶ 20.

Response: Denied. OJC cites no evidence other than the Weiss Declaration and Berning's report endorsing Weiss's unsubstantiated assertions. This is a conclusion, not a statement of fact. Moreover, since this statement, like the entirety of OJC's damages calculations, is completely lacking in any documentary support whatsoever, it is unreliable. There is no evidence Mr. Berning did anything to verify this statement. RX1087, 230:11 (conceding he and Weiss "[REDACTED]" in calculating damages); RX1156 (Zayas Decl. ¶ 35).

160. The calculations are included on an attached spreadsheet. CX 470-471 ¶ 20 and Weiss Ex. 101.

Response: Admit that Weiss Ex. 101 is a spreadsheet which purports to show OJC's

damages calculations. Deny the accuracy, reliability and admissibility of said calculations.

161. OJC experienced incredible demand for its products in late 2020 and early 2021 due in large part to the COVID pandemic during which millions purchased household goods – such as those sold by OJC – while they sheltered at home. CX 423; CX 206-208, 175: 8-22 and 208:20 - 209:1; CX 470-471 ¶ 20.

Response: Denied. OJC failed to produce documents supporting its claim that it experienced incredible demand for its products in late 2020 and early 2021 and the reasons why. The documents cited merely reflect that OJC was requesting more vessel space.

162. This increased demand was especially true for the company's direct import program. CX 423; CX 206-208, 175: 8-22 and 208:20 - 209:1; CX 470-471 ¶ 20.

Response: Denied. OJC failed to produce documents supporting its claim that it experienced incredible demand for its products in late 2020 and early 2021 and the reasons why. None of the deposition testimony cited supports the proposition that an increase in demand was especially true for OJC's direct import program as compared to OJC's products generally or the market generally.

163. The products sold through the direct import program produce higher profit margins than products that were sold from domestic inventory. CX 470-471 ¶ 20.

Response: Denied. This is unsupported by anything in the record aside from a statement from Jacob Weiss when order information, receipts, and data could have been but were not provided to demonstrate whether this is true.

164. This growth – driven by so many working from and staying home – is what precipitated OJC's need for more containers in Fiscal Year 2021. CX 471 ¶ 20.

Response: Denied. OJC cites no evidence other than the Weiss Declaration. The

purported statement is merely a description of an assumption used by OJC to calculate damages and/or a reiteration of the testimony of OJC’s expert witness, Richard Berning, or the testimony of Jacob Weiss.

165. Prior to the start of Fiscal Year 2021, OJC undertook a study to estimate the number of containers that they would need in that coming year. CX 471 ¶ 21; Weiss Decl., Ex. 100.

Response: Denied. The document cited appears to have been created in April of 2020 and is not reliable for the purposes OJC seeks to use it for in this case. Ex. 100 (metadata showing creation in April of 2020); RX1150-51 (Zayas Decl. ¶ 17). The purpose of the document is unclear from the evidence provided as are assumptions upon which the document was premised such as the availability of production capacity during the pandemic, the availability of shipping capacity, and OJC’s ability to sell its products. Ex. 100. This document also fails to break down what portion of the cargo belongs to which category of OJC or Naomi Home’s business. Ex. 100.

166. These projections estimated the sales of each product and the number of containers that would be needed, and came to the conclusion that 4,598 containers would be needed for Fiscal Year 2021. CX 471 ¶ 21; Weiss Decl., Ex. 100.

Response: Denied. See reasons stated in the response to Proposed Finding of Fact #165.

167. Because of these calculations, OJC communicated their desire to Respondents for 4,200 to 4,700 containers for fiscal 2021. CX 471 ¶ 21; Weiss Decl., Ex. 100.

Response: Admit that OJC told HSDG that it planned to move between 4200 and 4700 FFEs in 2021. CX203. Deny that OJC ever proposed a volume figure in this range as the minimum quantity commitment in a service contract. CX224 (stating “the client [OJC]

did not mention a specific MQC target but he mentioned the projected volume.”) Furthermore, OJC stated to Ms. Casanova that 70% of its planned volume would go to Kentucky where HSDG had previously declined service. CX224 (stating that the business was previously declined); CX242 (noting that service to Kentucky had a negative impact on HSDG’s profit and loss statement).

168. These amounts are corroborated in an April 27, 2021 email from Casanova sent to Ivan Cheung and Li (all with Maersk) which states that OJC “plans to move between 4200 to 4700 FFE in 2021.” CX 203.

Response: Denied. CX203 is an email from Casanova to others at HSDG reporting that OJC had told her that it planned to move 4200 to 4700 FFE in 2021, but this email does not in any way corroborate the figures in question. Deny that the recipients were “all with Maersk” as Mr. Cheung had an email from Maersk at the time, but Mr. Li was an employee of HSDG according to his email in the document cited. CX203; CX225 (the larger portion of the email chain produced shows that Mr. Li was a cargo flow specialist for HSDG North America, Inc. at the time of the email).

169. OJC’s increased expectations at that time was consistent in the marketplace for the types of products that OJC was offering, i.e., household goods that consumers were buying in huge numbers because they stayed home during the pandemic. CX 470-471 ¶¶ 20-21.

Response: Denied. OJC cites no evidence other than the Weiss Declaration. While HSDG admits that there was an increased demand for household goods generally at the time in question, it denies that OJC’s increased expectations were consistent with the marketplace. A volume of 4200 to 4700 FFE in 2021-22 would have represented an increase of some █% over OJC’s 2020-21 volume. Compare CX468 ¶ 10 with Ex. 101 Container

tab. HSDG denies that such a large increase is a reasonable assumption or that it is consistent with the marketplace at the time. RX1150-51 (Zayas Decl. ¶ 17).

170. These increased expectations are also consistent with Maersk's CEO's observations and experience with drastically increased volumes at that time:

“I mean pretty much everybody have bought the new couch, the new set of lounge furniture, the new TV screen, whatever, all the things that we were all spending our money on during the pandemic.” CX 406 (Q2 2022 Results – Earnings Call Transcript).

Response: While HSDG admits that there was a general increase in demand for household goods during the COVID-19 pandemic, it denies that the statement by the CEO of A.P. Moller-Maersk A/S relates to OJC specifically and further than denies that the foregoing statement contains any specifics with respect to increased demand that would permit one to conclude that OJC's expectations were consistent or inconsistent with that statement.

171. The support for 4,700 containers can be found in Maersk's own statements about increasing volume, OJC's detailed calculations used to plan the number of containers that would be needed, and the general increased demand for household goods, especially in an e-commerce setting. *Id.*; CX 470-471 ¶¶ 20-21; Weiss Decl. Ex. 100.

Response: Denied. OJC does not cite to any of Respondents' or "Maersk's own statements" here, and general statements about increasing volume do not support the conclusory statement that OJC could have shipped 4700 containers in 2021-2022. As for the validity of OJC's own calculations and the general increased demand for household goods, HSDG incorporates here by reference its responses to Proposed Findings of Fact #169 and #170.

172. Maersk was required to provide a minimum of 200 containers and only produced

185, or a deficit of 15 containers. CX 424; CX 471 ¶ 22.

Response: Admit to the extent that Respondents did not provide the full 200 FFE MQC prior to the end of the contract term, May 31, 2021. According to OJC’s own data, Respondents did provide shipping for an additional 12 containers during the first week in June under the pricing terms of the expired service contract, leaving it 3 containers shy of the 200 FFE commitment. Ex. 101.

173. Maersk’s internal emails state the following quotes:

This customer has threatened to take legal actions against Hamburg Sud **and now because allocation was not honored, we’ll need to increase their SPL to compensate the units not loaded.**

...

They have pushed several times for additional space which we informed only by *premium rate* but from what I was told, this is a low paying cargo and they can't afford so they found a way to get their additional space. In my almost 5 years with this trade I've never seen such action (and we had space issues every year) but legally is their right. CX 322 (Email dated October 22, 2020) (emphasis added).

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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. CX 161 (emphasis added).**

Response: Denied to the extent that these are characterized as “Maersk’s internal emails” when the exchanges are between HSDG personnel. The first email, from Mr. Pestana, is produced here without context while the second email, from Mr. Gast, was sent in response to a threatening email from OJC’s counsel and which was apparently viewed by Mr. Gast as rooted in legitimacy. CX159-161. The emails cited, in proper context, speak for themselves. See CX161 (Mr. Gast’s internal email on October 22, 2020 which followed the email from Sam Hecht, OJC’s counsel); RX822-28 (HS-012498-HS-012503) (showing Hecht

badgering and threatening Mr. Gast with improper and false allegations about the service contract the day before, on October 21, 2020).

174. Maersk had the strongest motive to deny OJC space under the Contract: so that Maersk could sell that space to others for a “premium” price. *Id.*

Response: Denied. Maersk had no contract with OJC and did not deny OJC space under the Service Contract. CX161 and CX322 do not support Proposed Finding of Fact #174, as neither of them suggest that HSDG was depriving service contract customers of space in order to sell said space at a premium. See also response to Proposed Finding of Fact #117 (any premium was a contract rate charged to an existing contract customer for space beyond that committed under their original contract). Moreover, the record reflects that Respondents undertook to work cooperatively with customers during the pandemic despite significant supply chain and market disruptions. RX990, 173:8-174:18 (describing extending a contract term or finding alternative routes to ship cargo for customers who were affected by the pandemic).

175. Maersk’s own emails explicitly admit that they retaliated against OJC by refusing to honor its shipping commitments in the Parties’ Contract. *See* CX 220-221, 227, 229.

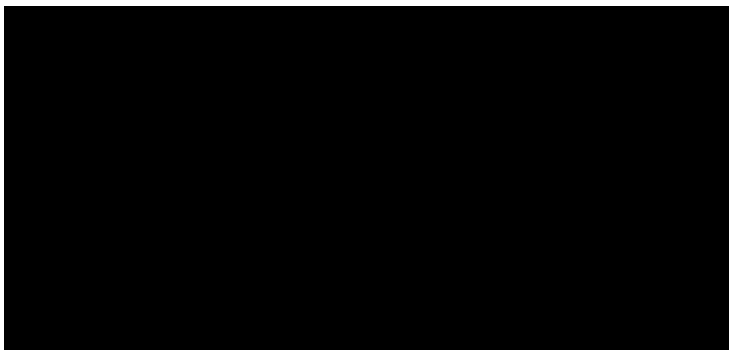
Response: Denied. These documents all date from April of 2021, 11 months into the Service Contract. They do not support a conclusion that HSDG was refusing to honor its contractual commitment to OJC during the first 11 months of the Service Contract. Moreover, the record shows that Respondents undertook to fulfill the MQC in the Service Agreement AECC0000291 following this email exchange in April of 2021. RX726-35 (HS-007959-HS-007968) (showing good faith efforts to provide the remaining cargo under the MQC); Ex. 101 (showing all but three containers of the 200 FFE shipped under the rates of

the agreement by the first week in June of 2021).

176. To compute the specific loss caused by that retaliation, the deficit of 15 containers would be multiplied by the anticipated average net profit per container of [REDACTED]. CX 424; CX 471 ¶ 22.

Response: Denied. This Proposed Finding of Fact conflates a garden variety breach of service contract (failure to provide the full amount of space contemplated by the contract) over which the Commission has no jurisdiction with retaliation. HSDG denies it retaliated against OJC. Even assuming that HSDG breached the Service Contract, its liability would be determined in accordance with the liquidated damages provision in the Service Contract. CX121.

177. The result is a loss of [REDACTED] computed as follows:



CX 424; CX 471 ¶ 22.

Response: Denied. See response to Proposed Finding of Fact #176.

178. Maersk was also required to provide a minimum number of weekly shipments during Fiscal Year 2020. CX 424; CX 153, 148; CX 472 ¶ 23.

Response: Denied. Nothing in the record demonstrates an obligation on the part of Respondents (or Maersk) to provide a minimum number of weekly shipments during FY2020. Service Contract AECC0000291 contains no such obligation and contains an integration clause. CX119-135.

179. Respondents repeatedly missed the weekly minimum and by the end of the year the weekly shortfalls totaled 105 containers. CX 424, 439-440. (See **Exhibit A.**)

Response: Denied. Nothing in the record demonstrates an obligation on the part of Respondents (or Maersk) to provide a minimum number of weekly shipments during FY2020. Service Contract AECC0000291 contains no such obligation and contains an integration clause. CX119-135.

180. The weekly minimum is confirmed in an email between Michael Gast and Andrea Casanova (both of Respondents), with the relevant portion reproduced here (CX 156):

4. 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 stipulate we can accept more cargo at our discretion [3.(a)(2)]. 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)

Response: Denied. Nothing in the record demonstrates an obligation on the part of Respondents (or Maersk) to provide a minimum number of weekly shipments during FY2020. Service Contract AECC0000291 contains no such obligation and contains an integration clause. CX119-135. The email cited follows the allegation made by OJC’s counsel that an obligation to carry 10 TEUs per week existed between the parties. CX159 (describing what Sam Hecht alleged was an obligation to carry “10 TEUs per week”). The internal emails confirm only that “space protection” (which is an internal mechanism to support Respondents’ customers with obtaining space and not an obligation to a customer) had been, for a period of time, increased to 10 TEUs per week in order to assist OJC. CX156; *see also* ¶182.

181. Maersk retaliated by (1) refusing to ship the weekly MQC of 10 TEU required by the Contract, and (2) unilaterally terminating a renewal contract that would have compensated OJC for these shortfalls. (See CX 214, 220-221, 227-228.)

Response: Denied. Service Contract AECC0000291 does not contain an obligation to move 10 TEUs a week and could not be modified to include such a commitment except in a writing signed by both parties. CX119-135. Moreover, Maersk was not a party to the Service Contract. In addition, the emails cited in support of this purported Finding of Fact all date from April of 2021. OJC had space protection for 10 TEUs per week in late 2020 (CX156 (stating that space protection was increased to 10 TEUs per week in August of 2020)), making it impossible for these emails to constitute evidence of retaliation months before they were written. With respect to a new 2021-22 services contract, as previously noted there was never any agreement on such a contract, and hence it would not have been possible to HSDG to have terminated such a contract. Verified Amended Complaint ¶ 41.

182. “SP” stands for “space protection,” which means that a particular customer will have space protected and prioritized for them. (CX 208, 114:16 - 115:18, 209:14-23.)

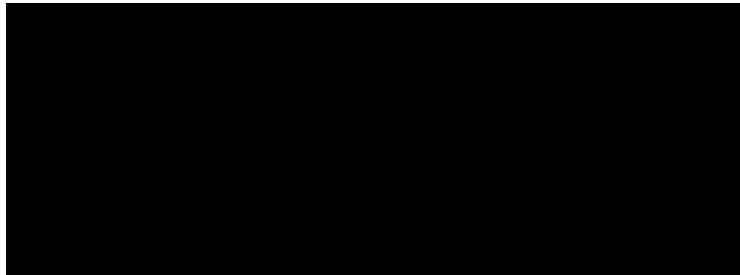
Response: Denied as stated. Pages 114 and 115 of the Casanova Deposition cannot be found at CX208, and are thus irrelevant. The testimony on page 209 of the Casanova Deposition indicates that space protection is an internal mechanism that is used to try to allocate certain space for certain customer needs.

183. To compute this specific loss, the deficit of 105 containers would be multiplied by the anticipated average net profit per container of [REDACTED]. CX 424; CX 472 ¶ 23.

Response: Denied. Because there was no contractual obligation to provide 10 TEUs per week, HSDG has breached no duty with respect to these containers. Accordingly, even assuming the Commission had jurisdiction over a breach of contract claim (which it does not), OJC is not entitled to damages with respect to these containers. To find that OJC is entitled to damages for these 105 containers would be inconsistent with the terms of the

Service Contract and would constitute unjust enrichment of OJC by providing it with damages for the purported breach of a non-existent commitment and would effectively increase the obligations of HSDG under the Service Contract from transporting the MQC of 200 FFE to transporting a minimum of 490 TEUs (10 TEUs/week x 49 weeks).

184. The result is a loss of [REDACTED] computed as follows:



CX 424; CX 472 ¶ 23.

Response: Denied. See response to Proposed Finding of Fact #183.

185. OJC was either unable to procure shipments, or was forced to not ship product at all because the containers would cost more than the goods in the containers. CX 472 ¶ 24.

Response: Denied. OJC cites no evidence other than the Weiss Declaration. The evidence cited does not satisfactorily show this when OJC has provided no correspondence, quoted rates, or other documents to support this statement. This statement is further undermined by OJC's assertion that its alleged gross profits per container were nearly [REDACTED]. See e.g., ¶ 184; CX424. When compared to the rates in the quotation provided by HSDG to OJC in July of 2021, OJC offers no justification for its not shipping containers under the quotation. RX608 (HS-003666) (showing shipping rates of approximately [REDACTED] per container); Ex. 101 (showing an average payment of [REDACTED] per container during the period between June of 2021 and May of 2022). OJC produced no details, documents, or supporting evidence regarding its efforts or ability to secure transportation from other carriers during this period.

186. Had Maersk not retaliated, OJC would have shipped 4200-4700 containers as projected given the enormous demand for home goods during 2021-2022. CX 475, ¶ 32; *See* CX 214, 220-221, 227-228; CX 472 ¶ 24.

Response: Denied. This is a conclusory statement that is not supported by any of the documents cited. In addition, OJC’s correspondence with its own suppliers in Brazil during this time indicated that its suppliers were unwilling to continue to produce OJC’s products until OJC could find transportation for its cargo. RX911-15 (July 2, 2021 email produced by OJC with subject line “RE: ENC: Hamburg Sud Bookings”). OJC could not overcome the capacity shortages in ocean shipping at the time.

187. The expected contract rates used for this analysis were those contained in the Contract and the Brazil agreement addition. *See* CX 214, 220-221, 227-228; CX 472 ¶ 24.

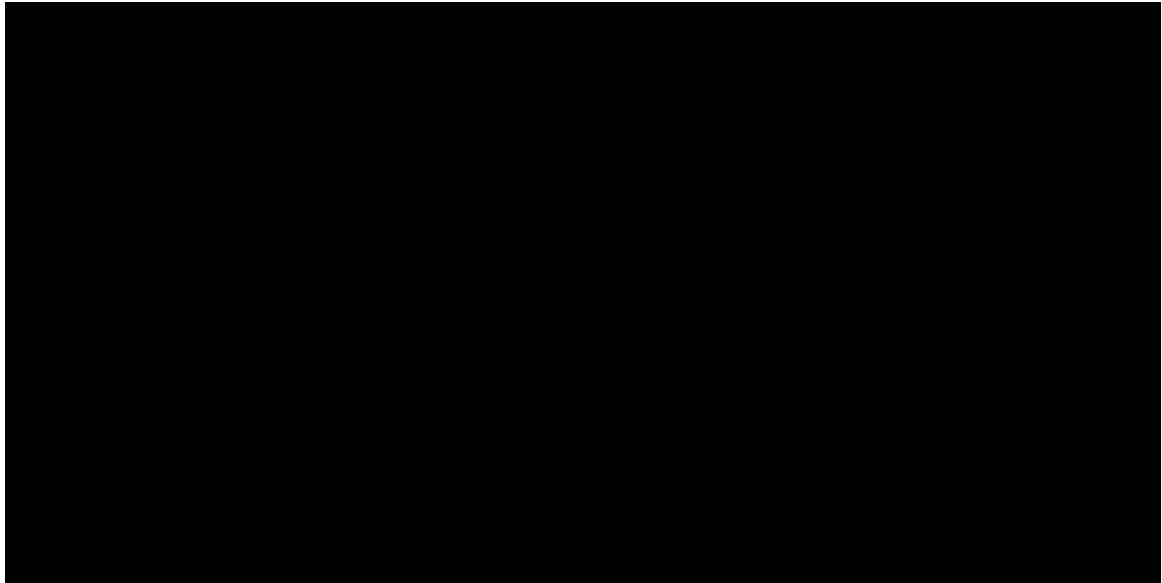
Response: Denied. The use of 2020-21 rates is inappropriate, given that rates for 2021-22 were higher than those for 2020-21, and OJC would not have received a contract with the same rates, even if its MQC had been increased to 400 FFEs. CX435; CX220-221; CX098, 228:3-11.

188. Those rates were also contained in the renewal contract proposed by Maersk – “NOAC10000728 Effective June 1, 2021, until May 31, 2022” – which contained “the same lanes, rates, and conditions of the current contract AECC0000291.” CX 214; CX 472 ¶ 24.

Response: Denied. HSDG never made a contract proposal to OJC for 2021-2022. The template contract forwarded with internal HSDG correspondence was never sent to OJC and was not a contract offer. See response to Proposed Findings of Fact 65, 72, and 95. HSDG would not have offered a 2021-22 service contract at the same rates as found in a 2020-21 service contract. CX435; CX220-221; CX098, 228:3-11. This is underscored by the

article cited in Complainant’s Proposed Finding of Fact #3 which described Maersk’s financial results on May 4, 2022. CX017 (“Revenue for the full year is expected to continue to be strong as the increase in freight rates on our long-term contract portfolio will add approximately USD 10 Billion to revenue in 2022 compared to 2021”).

189. They are listed below in this chart:



CX 425, 441-444 (See **Exhibit B** for a detailed calculation.); CX 472 ¶ 24.

Response: Admit that the Asia to California rates are the rates contained in the template contract prepared by Andrea Casanova, but deny that they were offered to OJC. See response to Proposed Findings of Fact 65, 72, 95, and 188. During April 2021, when discussions of a new 2021-22 services contract, no rate between Asia and Kentucky was proposed by HSDG as HSDG was not interested in providing OJC with service to Kentucky. See CX217-218 (stating that consideration for OJC was confined to P1 and that OJC did not provide a proposed volume); RX980, 135:7-136:2 (clarifying the meaning of the email, specifically what a “100% P1 opportunity meant); CX224 (noting that any potential new 2021-22 services contract “focus on local destination [California] only.” Rates between Brazil and the United States were made available to OJC upon request and fluctuated

approximately every two months. RX563-91 (HS-003394-HS-003421 (showing rate quotes, including NOAQ1006436 on March 1, 2021; NOAQ1009430 on March 31, 2021; NOAQ1014177 on May 18, 2021)); RX736-45 (HS-009170-HS-009178 (showing rate quote NOAQ1028947 on October 28, 2021)); RX775-82 (HS-010436-HS-010442 (showing HSDG's effort to assist OJC with Brazil shipping on November 5, 2021)).

190. The total of excess shipping charges OJC paid for these 143 containers (actual less contract rates) was [REDACTED]. CX 425, 441-444 (See **Exhibit B** for a detailed calculation.); CX 472 ¶ 24.

Response: Denied. Because OJC would not have received the 2020-2021 rates in a 2021-22 service contract (see response to Proposed Findings of Fact 65, 72, 95, and 188) and because OJC would not have received a service contract between Asia and Kentucky, this calculation is based on flawed and unsupportable assumptions.

191. Maersk's violations caused OJC to go to the spot market and pay prices that were considerably higher than contract rates. CX 472 ¶¶ 24, 25; and CX 425.

Response: Denied. OJC cites no evidence other than the Weiss Declaration and Berning's report endorsing Weiss's unsubstantiated assertions. Deny HSDG or Maersk violated the Shipping Act. The fact that OJC shipped in the spot market during 2021-2022 is the result of its own misguided business decision not to enter into new service contracts with other carriers when it knew that HSDG was not interested in carrying cargo from Asia to Kentucky, where the bulk of OJC's cargo was destined. RX1010, 81:14-18 (stating Weiss declined a contract offer from OOCL for 2021-2022); CX224 (noting that Kentucky business was previously declined and suggesting that it be excluded again in 2021-22).

192. The Parties had agreed to ship between 4,200 and 4,700 containers. CX 472 ¶¶ 24,

25; and CX 425.

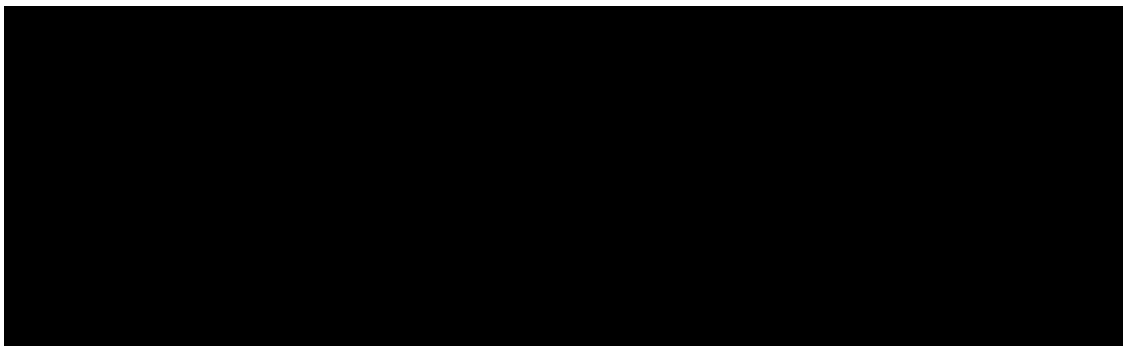
Response: Denied. OJC cites no evidence other than the Weiss Declaration and Berning’s report endorsing Weiss’s unsubstantiated assertions. There is no evidence of any agreement that this volume of cargo would be transported in 2021-22. CX425 does not support this statement. The fact that Ms. Casanova prepared a template contract for 400 FFEs contradicts this statement. Even if the parties had agreed on this volume, there is no contract created because there was no agreement on rates, volumes, or origins and corresponding destinations. Additionally, Ms. Casanova coordinated with HSDG’s trade team with respect to OJC’s interest in a new contract for 2021-22. RX955-56, 177:10-181:24.

193. By unlawfully retaliating against OJC and refusing to renew the contract, Maersk forced OJC into a position where it simply could profitably operate its business because shipping the containers would cost more than the goods in the containers were worth. CX 472 ¶¶ 24, 25; and CX 425.

Response: Denied. OJC cites no evidence other than the Weiss Declaration and Berning’s report endorsing Weiss’s unsubstantiated assertions. Deny that Maersk or Respondents retaliated against OJC. Here, OJC states that OJC “simply could profitably operate its business” which seems to conflict with its position but is not disputed by Respondents. This statement notwithstanding, the evidence cited does not satisfactorily show an unlawful refusal not to enter into a new 2021-22 services contract when OJC has provided no correspondence, quoted rates, or other documents to support its statement here. This statement is further undermined by OJC’s assertion that its alleged gross profits per container were nearly [REDACTED]. See e.g. ¶184. When compared to the rates of approximately [REDACTED] per container in the quotation provided by HSDG to OJC in July of 2021,

OJC offers no justification for its not shipping containers under the quotation. HS-003666. OJC produced no details, documents, or supporting evidence regarding its efforts to secure transportation from other carriers during this period. According to OJC's own damages chart, on the other hand, the chart indicates that OJC paid for [REDACTED] containers to move during the 2021-2022 contract period, and none of the containers shipped resulted in shipping costs greater than its alleged gross profits per container. Ex. 101. (showing the highest shipping cost charged to OJC for a container was for shipment from Ningbo to Kentucky at [REDACTED]; the average was [REDACTED] across all of the services OJC paid for during this time). Moreover, this allegation is contradicted by OJC's own data, which shows that OJC stood to profit by [REDACTED] per container, even under OJC's own unsubstantiated damages calculations. CX464 (showing average "Shipping Cost Differential" damages on 4,700 containers of [REDACTED], or [REDACTED] per container), CX428 (showing "Gross Profit per Container" of [REDACTED]).

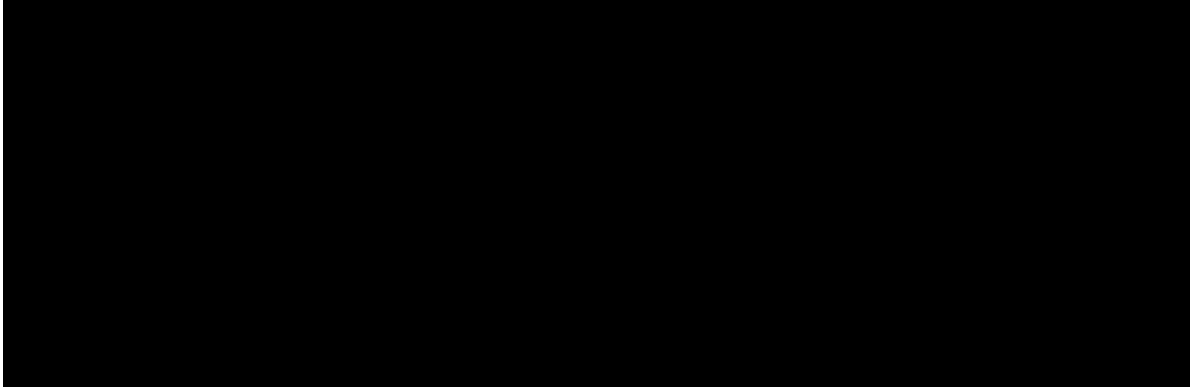
194. The damages for this category are measured by multiplying the shortfall of containers by the profit margin per container. These calculations are done using either the 4,200 or 4,700 total containers expected for Fiscal Year 2021, minus the 143 containers actually shipped, respectively as follows (CX 426; CX 473 ¶ 26.):



Response: Denied. OJC cites no evidence other than the Weiss Declaration and Berning's report endorsing Weiss's unsubstantiated assertions. The purported statement is

merely a description of a methodology purportedly used by OJC to calculate damages and/or a reiteration of the testimony of OJC's expert witness, Richard Berning, or the testimony of Jacob Weiss. See also response to Proposed Finding of Fact #152.

195. To summarize the four categories of lost profits discussed above, OJC's **total lost profits** are calculated as (CX 426; CX 473 ¶ 28(1)):



Response: Denied for the reasons set forth in responses to Proposed Findings of Fact, ##149-166.

196. As another method of calculating its damages, OJC computed the difference between the contract shipping cost and the spot rate shipping costs. CX 426; CX 473 ¶ 27.

Response: Deny knowledge or information concerning how OJC performed the calculations because OJC refused to produce backup data. .

197. The difference between the contract cost – that OJC would have had but for Maersk's retaliation – to ship either 4,200 or 4,700 containers and the spot market cost to ship the same containers is the measure of OJC's actual injury. CX 426; CX 473 ¶ 27.

Response: Denied. OJC cites no evidence other than the Weiss Declaration and Berning's report endorsing Weiss's unsubstantiated assertions. Deny that Maersk or Respondents retaliated against OJC. Deny that OJC could have shipped 4200 to 4700 FFE

in 2021-22 as unduly speculative and unsupported by documentary evidence. Deny HSDG had sufficient capacity to contract to provide OJC with space for 4,200-4,700 containers. Deny that OJC would have received 2020-21 rates in a 2021-22 Service Contract. See response to Proposed Finding of Fact #188.

198. In order to calculate the shipping rate difference damages, OJC projected how many containers it would have shipped on each route, such as, how many containers shipped from China, Brazil, and how many containers delivered to California and Kentucky. CX 473-474 ¶ 27; Weiss Decl., Ex. 100.

Response: Deny knowledge or information concerning how OJC performed the calculation because OJC refused to produce backup data. Deny that the calculation is proper where there was no contract between the parties for the trade from Brazil to the United States and any contract from Asia to the United States would not have included Kentucky.

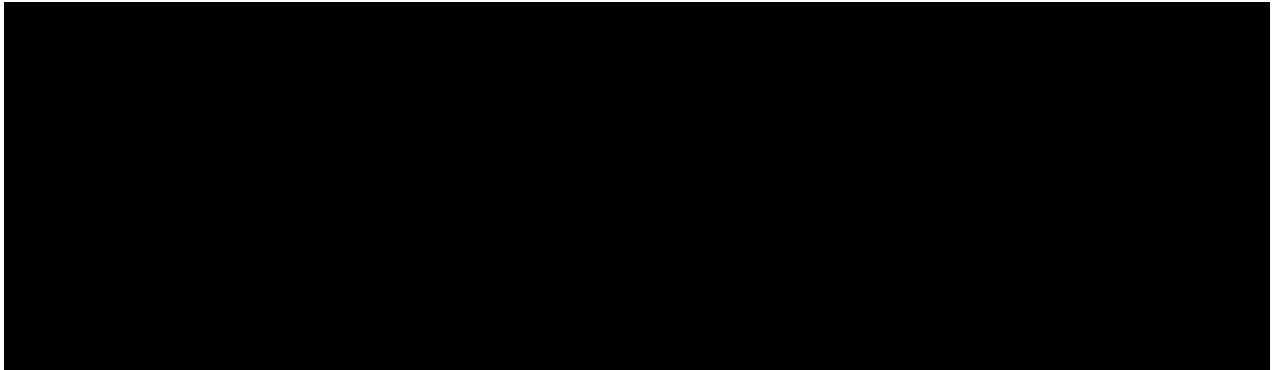
199. OJC looked at the contract rates for each of those routes, and multiplied those rates by the number of containers projected to be shipped in each of those routes. CX 473-474 ¶ 27.

Response: Deny knowledge or information concerning how OJC performed the calculations because OJC refused to produce backup data. The purported statement is merely a description of a methodology purportedly used by OJC to calculate damages and/or a reiteration of the testimony of OJC's expert witness, Richard Berning, or the testimony of Jacob Weiss.

200. The contract between OJC and Respondent included also drayage fees, however, the spot rates does not include drayage. Therefore, in order to compare apples to apples, OJC has removed drayage from this computation. CX 473-474 ¶ 27.

Response: Admit that OJC has removed drayage from the computation.

201. The result is as follows (CX 473-474 ¶ 27):



Response: Deny knowledge or information concerning how OJC performed the calculations because OJC refused to produce backup data. Deny the calculation is appropriate, accurate or reliable for the reasons stated in the response to Proposed Finding of Fact #188.

202. The next step is to do the same exercise using spot prices rather than contract prices. CX 473-474 ¶ 27.

Response: Deny knowledge or information concerning how OJC performed the calculations because OJC refused to produce backup data.

203. The next step is to do the same exercise using spot prices rather than contract prices. CX 473-474 ¶ 27.

Response: This is the same allegation contained in Proposed Finding of Fact #202. The response to Proposed Finding of Fact #202 is hereby incorporated by reference.

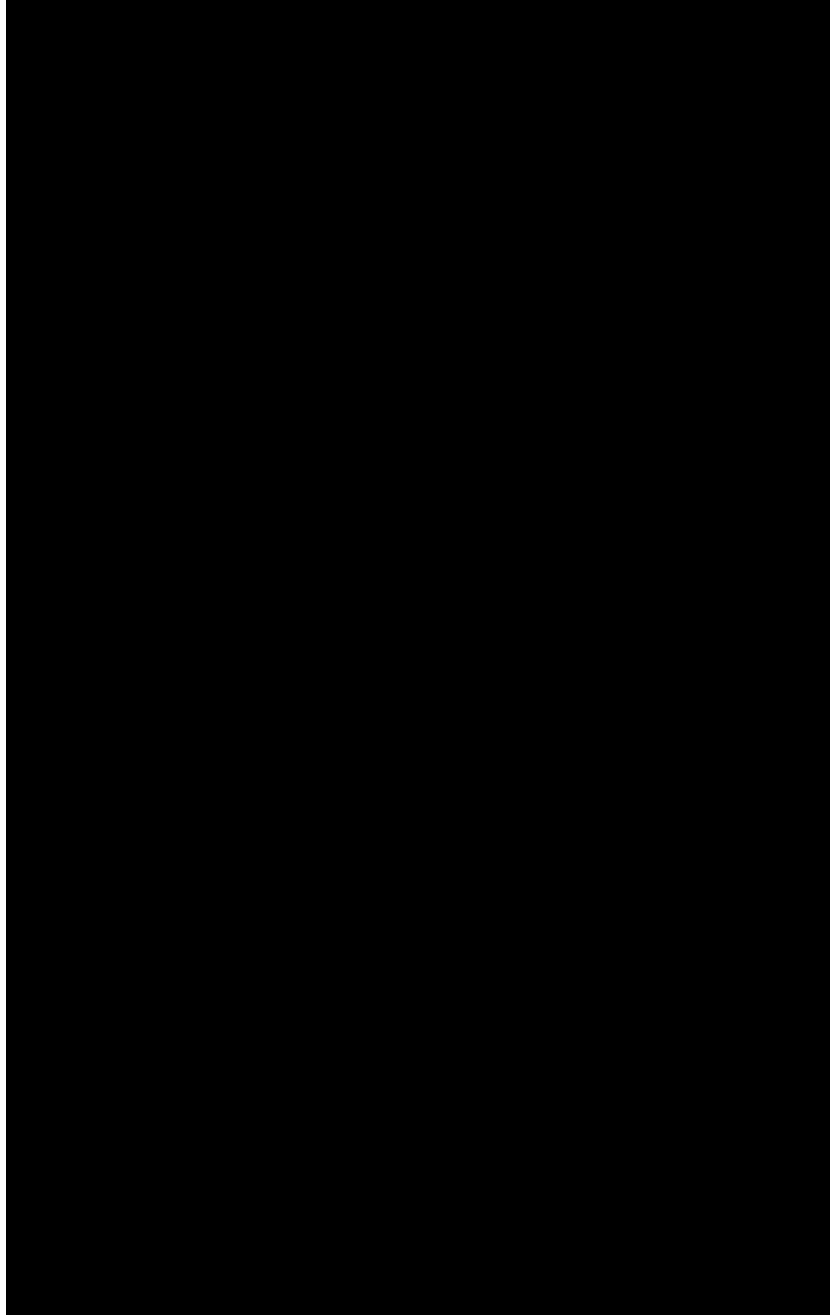
204. To determine the spot prices, OJC used the following sources or made the following assumptions absent Maersk's actual data that the Court ordered produced but Maersk refused to provide:

- OJC used spot rates from Xenta and Drewry for the China to California routes. (CX 427)

- For the China to Kentucky routes, neither Xenta or Drewry had sufficient data points that allowed them to confidently publish rates. Rather, OJC used a multiplier of China to California, at the same ratio as the contract rates. (CX 427)
- For the Brazil to California and Brazil to Kentucky routes, the spot rates were not available. OJC therefore used [REDACTED] for all periods as this amount approximates what OJC actually paid during this time frame. (CX 427, 462)
- As Respondents still have not released their spot shipping prices including all surcharges, OJC added an estimate to include the surcharges. OJC determined that surcharges during the relevant timeframe ranged from [REDACTED] to as much as [REDACTED]. The [REDACTED] (low end of the range) of surcharges has been added per container. CX 473-474 ¶ 27; CX 462; CX 474 ¶ 28(2). Spot rates calculations without the surcharges are available at CX 427-429.

Response: Deny knowledge or information concerning how OJC performed the calculations because OJC refused to produce backup data. Deny that Maersk or Respondents refused to produce spot rate information. See e.g. CX320-321. Furthermore, OJC had access to HSDG's public tariff information and numerous quotes provided to OJC directly by HSDG between June of 2021 and May of 2022 that could have been used to more accurately allege damages. See, e.g., RX608 (HS-003666); CX136-137; RX563-91 (HS-003394-HS-00003421 (showing rate quotes, including NOAQ1006436 on March 1, 2021; NOAQ1009430 on March 31, 2021; NOAQ1014177 on May 18, 2021)); RX736-45 (HS-009170-HS-009178 (showing rate quote NOAQ1028947 on October 28, 2021)); RX775-82 (HS-010436-HS--010442 (showing HSDG's effort to assist OJC with Brazil shipping on November 5, 2021)). Deny that OJC's methodology is appropriate where an Asia to U.S. contract with HSDG would not have included Kentucky. Further deny the surcharge calculations are appropriate without a more detailed explanation of what surcharges were included and how the range of [REDACTED] to [REDACTED] was determined. Further, OJC's own damages data undermine the actual amounts OJC paid on the spot market during this period as well. Ex. 101 (showing an average cost across all service lines of [REDACTED] per container)

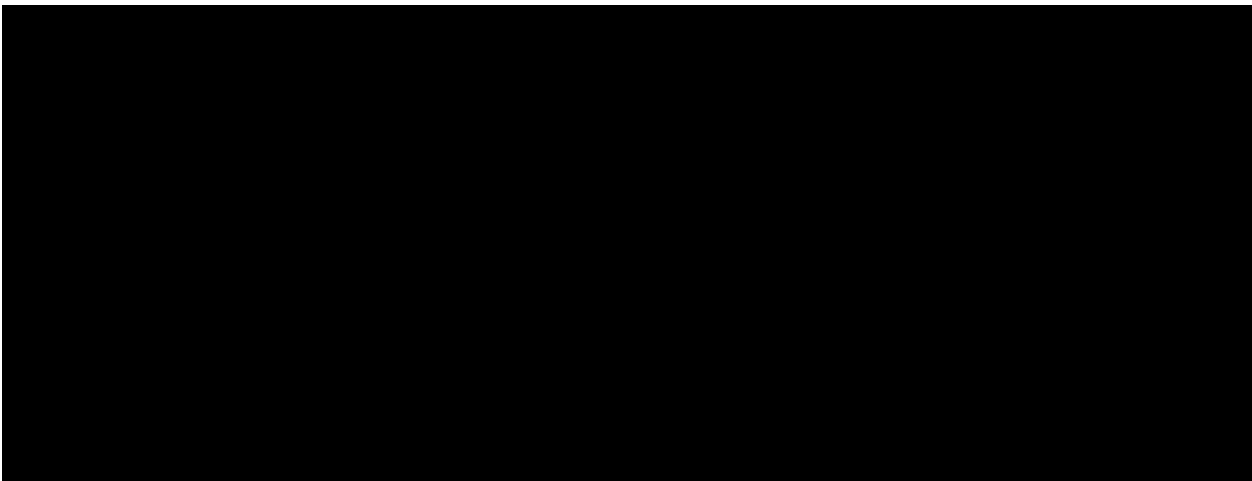
205. OJC then computed the average of the monthly rates for each of the sources to be:

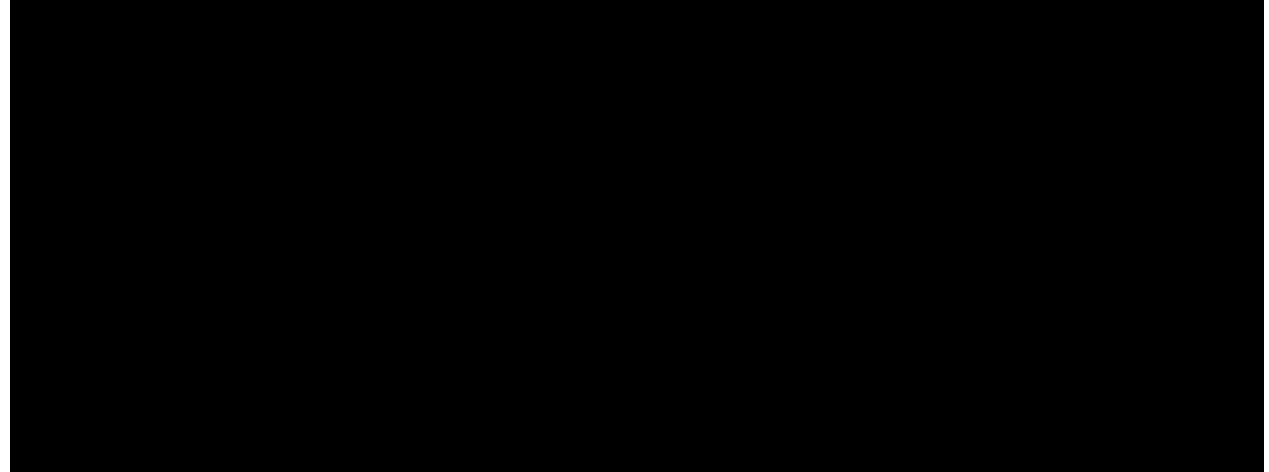


CX 427-428; CX 474 ¶ 29.

Response: Deny knowledge or information concerning how OJC performed the calculations because OJC refused to produce backup data. Deny that the calculations are appropriate for the reasons stated in the response to Proposed Finding of Fact #204.

206. OJC then computed the total spot shipping costs for both sources (Xenta and Drewry) and both volumes of containers (4,200 and 4,700) as follows:





CX 463-464; CX 474 ¶ 30.

Response: Deny knowledge or information concerning how OJC performed the calculations because OJC refused to produce backup data. Deny that OJC could have shipped 4200 to 4700 FFE in 2021-22 for the reasons stated in the response to Proposed Findings of Fact #165 and #169.

207. Finally, the difference between the contract cost and the spot market cost is computed for damages:



CX 464; CX 474 ¶ 30.

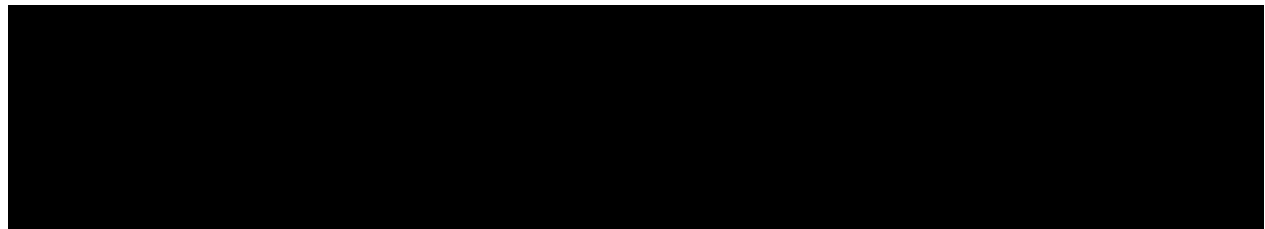
Response: Deny knowledge or information concerning how OJC performed the calculations because OJC refused to produce backup data. Deny the calculations are properly calculated for the reasons set forth in the responses to Proposed Findings of Fact

#188, #204, and #206.

208. Had Maersk not retaliated and had it renewed its contract with OJC as promised, OJC would not have incurred these losses. CX 475 ¶ 32.

Response: Deny that Respondents or Maersk retaliated against OJC. Deny that the losses are properly calculated for the reasons set forth in the responses to Proposed Findings of Fact #204 and #206.

209. OJC provided two alternative methods to compute its damages, with the totals for each summarized below:



CX 464; CX 475 ¶ 33. For a summary of OJC's damages that includes the spot rates calculations without the surcharges, *see* CX 436.

Response: Denied for the reasons set forth in the responses to Proposed Findings of Fact #188, #204, and #206.

210. As can be seen from the vast difference between the contract rates and spot rates during the relevant time, Maersk greatly benefitted from retaliating and unreasonably refusing to deal with OJC. CX 464; CX 475 ¶ 33.

Response: Denied. Neither Maersk nor Respondents retaliated against or refused to deal with OJC. None of the cited evidence supports the conclusion that Maersk benefitted from not entering into a 2021-22 service contract with OJC. Moreover, for OJC to have suffered the alleged losses, it would have had to ship the projected volume at the spot rates, which it did not. Ex. 101.

211. Maersk was perfectly capable of shipping OJC's 4200-4700 containers, and Maersk

knew it. 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).

Response: Denied. The cited evidence does not support the allegation that Maersk, or Respondents, had the capability to carry additional cargo. It indicates only that HSDG entered into service contracts covering certain routings and/or certain volumes on or after certain dates. CX 285-286. Contemporaneous evidence indicates that HSDG was concerned about its ability to fulfill a 400 FFE service contract with OJC, thereby undermining any allegation that HSDG knew it could carry 4200 to 4700 FFE for OJC. CX215.

212. Maersk had entered into service contracts for at least 25,402 TEUs after Maersk made the "executive decision" to retaliate against OJC, and that's not including the space that Maersk sold on the spot market. 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).

Response: Deny that Maersk or Respondents retaliated against OJC. Admit to the extent that HSDG entered into service contracts with other customers following its decision not to enter into a new 2021-22 services contract with OJC.

213. Because Respondents retaliated against OJC so late in the contract season, OJC could not obtain a shipping contract with any other carrier. Nonetheless, Weiss tried to do so, to no avail. CX 468-469 ¶ 14.

Response: Denied. Aside from Jacob Weiss's own declaration, OJC has produced no evidence that OJC attempted to obtain a shipping contract with any other carrier or forwarder or that any other carrier declined to enter into a service contract with OJC.

214. During the negotiations for the 2020-2021 Contract, OJC originally proposed a

minimum volume of “1266x40hc per year” (approximately 2500TEU) that included a Kentucky line. CX 242-243.

Response: Denied. The evidence cited is unclear with regard to whether OJC actually offered 1,266 FFEs of volume to Respondents or whether OJC represented that it signed contracts for that volume with OOCL and/or Hyundai. CX242. In the same email chain, HSDG clearly declined business to Louisville, Kentucky because HSDG was “trying to reduce” service to Louisville. CX248. See also response to Proposed Finding of Fact #89.

215. According to Maersk, however, OJC had to sign a contract with a different carrier because Maersk “rejected it initially.” CX 242-243.

Response: Denied. HSDG rejected the Kentucky business offered by OJC twice in the evidence cited. CX242-243. OJC was not forced to sign a contract with a different carrier as a result but may have elected to do so when HSDG was only will to agree to carry OJC cargo from Asia to the U.S. West Coast. OJC has not provided any documents, negotiations, contract or shipping documents with any different carrier or other evidence of rates or volumes moved with any party.

216. At that time, Maersk admittedly regretted its decision to reject OJC’s 2020-2021 volume based on the Kentucky issue, formulated possible solutions, and bemoaned that “[e]specially for this kind of volume, I would have love[d] to take a look [at solutions] before we declined 2500TEU.” CX 242.

Response: Denied as stated. Notwithstanding that this is nearly identical to Proposed Finding of Fact #90, Mr. Seeraj at HSDG suggested that he would have appreciated an opportunity to consider the volume described. In response to Mr. Seeraj’s email, Mr. Pestana, the Transpacific Manager for HSDG, provided an explanation of why the business

was refused and that was because HSDG was operating at full capacity and even rolling cargo and also because service to Louisville had a “negative impact in our PnL.” CX242. Mr. Pestana then went on to clarify that any offer of space to OJC into Louisville would require HSDG to address the space shortages by borrowing space protection from other accounts. CX242. HSDG was clearly disinterested in this business as it was an undesirable service for HSDG to provide.

217. Casanova had communicated to Weiss that Maersk wanted to ship to Kentucky in 2021-2022 to make up for its failure to previously secure OJC’s Kentucky business for the year prior. CX 468 ¶ 13; *see also* CX 203, 214-215.

Response: Denied. Ms. Casanova stated in her contemporaneous email that OJC – not HSDG – wanted to add the route to Louisville, KY. CX203. The evidence cited in CX214-215 does not mention Kentucky at all and indicates that Ms. Casanova did not take Kentucky service into consideration or add to her entry into HSDG’s internal system any additional lanes from the prior service contract which did not include Kentucky. CX214-215 (having no mention of Kentucky and stating that her proposal had the “same lanes” as the previous contract”). Moreover, HSDG repeatedly affirmed that service to Kentucky as requested by OJC was undesirable. CX242 (stating that the service was done at a loss to HSDG); RX986, 135:6-12 (stating it was undesirable to ship to inland locations without correspondence export agreements).

218. Maersk confirmed that shipments from Asia to Charleston, SC or Savannah, GA (which connect to Kentucky) would make OJC “more attractive” than if it only imported to California. CX 92-93, 137:13 - 139:20, 142:3-21.

Response: Denied. “Kentucky” does not appear in the cited testimony (or in Mr.

Pump’s deposition transcript as a whole). CX 92-93, 137:13 - 139:20, 142:3-21. Furthermore, Mr. Pump indicated in his deposition that inland business without corresponding export business was undesirable to HSDG. RX986, 135:6-12. Furthermore, HSDG had turned down OJC’s efforts to secure shipping to Kentucky twice during the 2020-2021 contract term and indicated a focus which excluded Kentucky during the discussion of a 2021-2022 contract. RX798-800 (HS-011167-HS-011168) (requesting a review of shipping to KY in January of 2021 and noting that OJC’s business to Kentucky was turned down in 2020); CX217 (Mr. Li stating: “I do suggest we focus on [California] only” and Ms. Casanova stating “In the past, [KY business] was declined since [we] were not pursuing business to this IPI”). Furthermore, Rodrigo Pestana in an email stated that “Louisville is one of the ramps with negative impact in our PnL.” CX242 (indicating service to Louisville by HSDG was at a financial loss to the company).

219. Maersk also confirmed internally that OJC’s warehouse was very close to the railyards needed for the movement of containers, so Maersk could handle that lane. CX 203; CX 410, 125:25 - 127:25.

Response: Denied. None of the evidence cited supports the proposition that Respondents or Maersk could handle volume because of the proximity of OJC’s warehouse to the CSX rail yard. CX 203; CX 410, 125:25 - 127:25. Admit only to the extent that the evidence reflects Ms. Casanova reporting what Jacob Weiss had told her, which was that OJC’s warehouse was very close to the CSX rail yard. CX203.

220. OJC’s plan to “move between 4200 to 4700 FFE” was based on projections that OJC had put together during 2020-early 2021 by analyzing product sales, quantities of product in stock, consumer demand, clicks and queries about products in and out of stock, and calls into the

company about products, with the analysis indicating that 4,598 containers would be needed for fiscal 2021. CX 468, 475 ¶¶ 11, 34; Weiss Decl., Ex. 100.

Response: Denied. The evidence cited does not demonstrate what is alleged as fact. Specifically, analysis of product sales, quantities of product in stock, records of calls into OJC, or other evidence of consumer demand are missing from the record. Furthermore, Ex. 100's metadata indicates that it was created in April of 2020 and could not be relied upon to support the allegations made by OJC here. RX1150-51 (Zayas Decl. ¶ 17).

221. Maersk was told of these projections months before the expiration of the 2020-2021, and it led to Maersk enticing OJC to consolidate all its shipping needs with Maersk. CX 468, 475 ¶¶ 11, 34; Weiss Decl., Ex. 100.

Response: Denied. There is no evidence that these projections were shared with Respondents or Maersk. No evidence has been produced showing these communications except to the extent that OJC conveyed that “they moved 3500x40HC in 2020” which is demonstrably false and that OJC had “plans to move between 4200 and 4700 FFE in 2021.” Ex. 101 (showing that OJC shipped █████ FFEs during 2020); CX203 (the email from Ms. Casanova restating the plans conveyed to her).

222. As a result of Maersk's promises, the Parties agreed to ship 4200-4700 FFE in 2021-2022. CX 468, 475 ¶¶ 11, 34; Weiss Decl., Ex. 100.

Response: Denied. Ex. 100 shows no agreement between the parties nor does the declaration of Jacob Weiss. In fact, the record is devoid of any evidence that either party made a service contract offer to the other for 2021-22, much less agreed on the terms of a service contract. CX213-219.

223. This Court noted that “given changing market conditions, it is not clear that that

past performance would be relevant to the timeframe at issue.” CX 315.

Response: Denied as stated. This statement is unclear as to what it purports to describe. To the extent that OJC attempts to suggest that HSDG would forego the ordinary formalities of contract formation or agree to a contract verbally and without any documentation, this is denied, and OJC has offered no evidence to support this allegation. The Presiding Officer’s statement, in context, speaks for itself. CX315.

224. OJC’s increase from around 2500 TEU – which OJC offered to Maersk for 2020-2021 – to at least 4200 FFE was consistent with the marketwide, historically-high spike in demand for household goods that came from so many sheltering at home during the pandemic. CX 406.

Response: Denied. OJC demonstrably failed to ship 2500 TEUs during 2020-2021 according to its own data. Ex. 101 (showing OJC shipped ■■■ FFEs during this period). Furthermore, OJC fails to provide evidence of OJC’s own increase in demand except to cite to a declaration from Jacob Weiss. Furthermore, other household goods brands suffered during this period due to market factors. RX1171 (Zayas Decl. ¶ 72).

225. It was OJC’s ideal breakdown to ship around 70% of its 4200-4700 FFE volume from Asia to Kentucky, and the remainder to California. CX 475 ¶ 35; CX 203.

Response: Denied. The contemporaneous evidence cited speaks for itself. CX203.

226. OJC informed Casanova that if Kentucky was again an issue, OJC could ship all the 4200-4700 FFE through California, as OJC’s California had warehouses that could accommodate all the additional space. CX 475 ¶ 35.

Response: Denied. There is no evidence to this effect in the correspondence relayed by Ms. Casanova or in the written communications between OJC and HSDG. Furthermore, OJC’s California warehouses had issues accepting cargo which led to a dispute over rejected

cargo and resulting demurrage charges in early 2021. RX493-15 (HS-002550-HS-002571) (exchange between OJC and HSDG over demurrage charges prompted by warehouse issues); RX516-18 (HS-002595-HS-002596) (OJC's warehouse declining to accept cargo because the warehouse is at "max capacity"). In February of 2021, Jacob Weiss also informed Ms. Casanova of the space issues, stating "we have run out of warehouse space in the City of Industry warehouse so we need for a few weeks divert to another facility in Ontario where we have space." R789-92 (HS-010995-HS-010997).

227. Maersk knew that OJC could be flexible with where its shipments were sent because 100% of its containers were sent to California during the first Contract. CX 119-135; CX 475 ¶ 35.

Response: Denied. At the time HSDG and OJC were discussing a potential new 2021-22 services contract, the California warehouse issue was unresolved, and OJC had refused to pay for demurrage resulting from lack of space at OJC's warehouse. RX493-15 (HS-002550-HS-002571) (exchange between OJC and HSDG over demurrage charges); RX516-18 (HS-002595-HS-002596) (OJC's warehouse declining to accept cargo because the warehouse is at "max capacity"). Furthermore, in February of 2021, in the context of discussing service to California, HSDG had informed OJC that a "shortage of truck power and port Congestion in Los Angeles/ Long Beach terminals" had caused HSDG to refuse to accept new business to or from those areas. RX746-52 (HS-009540-HS-009545). This discussion was prompted because OJC notified HSDG that its warehouse was at "full capacity" and required urgent attention. RX746-52 (HS-009540-HS-009545).

228. Not only has Maersk violated the section against retaliation, but it has also knowingly and willfully done so. CX 220-221, 227; CX 96, 208:4-18; CX 95-96, 204:24 – 206:19.

Response: Denied. Neither Respondents nor Maersk violated the Shipping Act, knowingly or unknowingly. This is a legal conclusion unsupported by the evidence cited.

229. Maersk knew that retaliation was prohibited under the Shipping Act but did so against OJC anyway, literally within hours after OJC threatened to complain to the FMC about Maersk's Shipping Act violations. *Compare CX 209-211 with CX 220* (Email dated April 29, 2021 1:13 PM).

Response: Denied. Neither Respondents nor Maersk violated the Shipping Act, knowingly or unknowingly. The evidence cited does not demonstrate the legal conclusion being made. OJC again points to a letter authored by Sam Hecht which is titled "NOTICE OF BREACH OF SERVICE AGREEMENT" and which makes no mention of the Shipping Act. CX210-211. Furthermore, the threat of a breach of service agreement claim was premature in April of 2021, prior to the expiration of the Service Contract at the end of May 2021. CX119-135; CX210-211. In addition, the threats came at a time when HSDG was, in fact, on schedule to fulfill its obligations to OJC with 18 containers remaining to be shipped during an 11-month contract with 200 FFEs of MQC. The decision not to enter into a new 2021-22 services contract with OJC did not prevent HSDG from undertaking to fulfill its contract obligations and continue in providing service to OJC as promised by Ms. Casanova on a case-by-case basis. RX807-09 (HS-011265-HS-011266) (Ms. Casanova indicating that HSDG would work with OJC on a case by case basis); Ex. 101 (showing OJC shipped ■ containers with HSDG and its affiliates during the 2021-2022 season despite market conditions); showing the typical process by which information such as rates, volumes, and other agreement terms were exchanged; RX602-18 (HS-003661-HS-003676) (showing HSDG providing a quote for Asia to the United States service in July of 2021).

Dated: December 8, 2022

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