

OJ Commerce, LLC,

v.

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

Docket No. 21-11

Respondents' Brief

Confidential – Restricted

**BEFORE THE
FEDERAL MARITIME COMMISSION**

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

RESPONDENTS' BRIEF

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Respondents Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft A/S & Co. KG (“HSDG”) and Hamburg Sud North America, Inc. (“HSNA”) (collectively, “Respondents”)¹ hereby respond to the brief of Complainant OJ Commerce, LLC (“OJC”).

I. INTRODUCTION

OJC omits from its brief the critical fact that proves Respondents did not refuse to deal or retaliate: HSDG continued to transport significant amounts of cargo for OJC *after* OJC threatened to sue for breach of contract. OJC’s *own* data establishes this dispositive fact.

In June 2020, HSDG and OJC entered a service contract effective June 23, 2020 to May 31, 2021 (the “Service Contract”). OJC agreed to tender, and HSDG agreed to transport, a minimum of 200 forty-foot equivalent units (“FFE”) from Asia to California at specified rates. The parties agreed that any disputes relating to the contract would be resolved by arbitration. OJC had service contracts with other carriers in 2020-21 but refused to produce them. Based on the limited data produced, the other carriers handled █% of OJC’s volume in 2020-21; the remaining █% was handled by HSDG. OJC’s CEO, Jacob Weiss, testified that the other carriers fully performed under their service contracts.

In 2020 and 2021, consumers spent more time at home due to the pandemic, resulting in increased spending on consumer goods. Increased demand for consumer goods led to increased imports from Asia, where many goods are manufactured. This increase in cargo volume, combined with sanitary measures, social distancing, and a shortage of workers due to illness or resignation, resulted in supply chain congestion. Warehouses and distribution centers struggled to handle cargo volume, and a shortage of truck drivers caused delays transporting to inland destinations. As a

¹ OJC refers to “Respondents” as “Maersk.” OJC Brief at 4, n.1. This is inaccurate because OJC negotiated and contracted with HSDG, not Maersk. While Maersk acquired HSDG and HSNA, which became wholly owned subsidiaries of Maersk A/S, HSDG did not cease to exist as a separate legal entity until late 2021. RX1120, ¶ 4. Maersk continues to operate the “Hamburg Sud” brand, which offers different services than Maersk A/S. *Id.*

result, congestion increased at marine terminals. With vessels anchored offshore waiting to unload, carriers were unable to provide the fixed-day, weekly sailings that are characteristic of most shipping services. Less frequent sailings meant lower overall container shipping capacity.

As a result of these factors, HSDG substantially complied with its obligations, but was unable to provide all of the space it committed under the Service Contract, moving 185 of the 200 FFEs from June 23, 2020 to May 31, 2021. OJC was not the only service contract customer impacted by the pandemic in this manner. Nevertheless, OJC repeatedly threatened to sue HSDG for breach of the minimum volume commitment (“MVC”). These threats ignored the ongoing operational discussions of the parties, were hostile, and disregarded specific provisions of the Service Contract. OJC’s threats to sue HSDG for breach of contract—even before the end of the contract term—were not surprising given the litigious nature of the company; OJC has filed at least 12 lawsuits in the past few years.

In April 2021, Mr. Weiss and Andrea Casanova, an HSDG sales representative, had discussions about a possible service contract for 2021-22. Contrary to the statements in OJC’s brief, however, there was never a meeting of the minds on the material contract terms.

- MVC. There was no agreement on the MVC for 2021-22. While Mr. Weiss shared a projection of OJC’s *total* volume for 2021-22, the projection was [REDACTED] more than its actual volume in 2020-21. Mr. Weiss was unwilling to commit to a specified MVC for a new service contract.
- Trade Lanes. There was no agreement on trade lanes for 2021-22. While Mr. Weiss renewed a repeated request from 2020 to add Asia to Kentucky trade lanes—which he said accounted for 70% of OJC’s volume—HSDG declined due to increased inland transport costs.
- Rates. There was no agreement on rates for 2021-22, which would depend, in large part, on the MVC and trade lanes of any new contract. Considering that OJC proposed 70% of its volume on a trade lane HSDG declined, it cannot be said with any reasonable certainty that the parties would have agreed on rates.

The parties never exchanged a draft contract for 2021-22; there was no communication between the parties setting forth contract terms; neither party provided a verbal or written offer; and no

contract was concluded for 2021-22. It is not the FMC's role to speculate about the terms of a hypothetical service contract. This is consistent with long-standing FMC precedent that the Shipping Act of 1984, as amended (the "Act") does not guarantee a service contract for any customer. Rather, the FMC has consistently interpreted the Act to impose a common carriage obligation on carriers, which HSDG provided OJC after the Service Contract ended.

HSDG's decision not to enter a new contract in 2021-22 was reasonable for many reasons. *First*, the pandemic continued to cause supply chain congestion—especially at U.S. West Coast ports—resulting in less frequent sailings and decreased shipping capacity. *Second*, as noted, HSDG failed to meet the MVC for 2020-21. HSDG was understandably hesitant to enter a new contract in 2021-22—***with a MVC 2,250% more than 2020-21***—particularly after OJC repeatedly threatened to sue in 2020-21, a year when HSDG missed the MVC by just 15 FFEs. *Third*, OJC wanted the same rates. This was unreasonable given that rates had increased in 2021-22 due to the imbalance of supply and demand. *Fourth*, 70% of OJC's shipping needs were on Asia to Kentucky trade lanes, which HSDG was reducing for all customers due to increased costs. *Fifth*, OJC's disputatious manner of doing business—with daily demands for additional space—contributed to the decision. It would be irresponsible not to consider how a party handles disputes in deciding whether to enter a contract, or whether to simply allow that party to book on terms available to all shippers in accordance with common carrier responsibilities. Just as a party would not be expected to enter a new contract with a party that had not paid its bills (even with a dispute pending), a party should not be required to contract with a party threatening litigation.

Given the overall constraints on space in 2021, HSDG was forced to make sometimes difficult choices about which customers would be offered service contracts and which customers would be offered opportunities to book on a spot basis (and customers always retain the option to book cargo with NVOCCs, shippers' associations or other carriers). On May 4, 2022, Ms.

Casanova told Mr. Weiss that HSDG would not enter a contract for 2021-22 due to “the lack of space and equipment in Asia and the shortage of truck power in the US that we and the entire industry are facing.” Although the parties did not have a contract in 2021-22, per its obligations under the Act, HSDG offered to continue transporting from Asia to California on a case-by-case basis using space available for all customers pursuant to its common carriage responsibilities.

OJC claims “Maersk willfully retaliated against OJC by immediately and abruptly cutting off . . . all shipping under the Parties’ existing service contract. OJC Brief at 7. This statement is demonstrably false based on OJC’s *own* data. From April 28, 2021 (the date of OJC’s second litigation threat) to May 31, 2021 (the date the Service Contract ended), HSDG and Maersk transported **20 FFEs** for OJC (or **11%** of the total volume HSDG shipped for OJC in 2020-21). HSDG transported another **13 FFEs** the week immediately after the Service Contract ended. In total HSDG and Maersk transported **33 FFEs** from April 28, 2021 to June 6, 2021:

2	id	po_number	waybill	received	origin	destination	shipping	shipper	shipped
525	5186582	8868140507	PONU7338720	6/7/2021	Brazil	Louisville	\$	Hamburg Sud	5/1/2021
526	5233050	8804116078	MSKU0595352	6/16/2021	Brazil	Louisville	\$	Hamburg Sud	5/2/2021
527	5135865	8873347470	MSKU8403163	7/13/2021	Brazil	LA/LB	\$	Hamburg Sud	5/4/2021
528	5186572	8820986398	MRKU5379400	6/16/2021	Fuzhou	Louisville	\$	Maersk	5/6/2021
529	5186568	8858892989	MRKU3484031	6/22/2021	Yantian	LA/LB	\$	Hamburg Sud	5/6/2021
530	4751505	8892778580	TCNU1120496	6/25/2021	Yantian	LA/LB	\$	Hamburg Sud	5/6/2021
531	5135866	8848454094	MRKU5425172	9/14/2021	Brazil	Louisville	\$	Hamburg Sud	5/8/2021
532	5135863	8841863295	MSKU1070456	6/15/2021	Brazil	Louisville	\$	Hamburg Sud	5/8/2021
533	5186567	8804071237	HASU4880662	6/15/2021	Yantian	LA/LB	\$	Hamburg Sud	5/10/2021
534	4702902	8827447346	MRSU3487706	6/10/2021	Yantian	LA/LB	\$	Hamburg Sud	5/10/2021
535	4702900	8835977640	MRKU4164201	7/1/2021	Yantian	Louisville	\$	Maersk	5/13/2021
536	4702903	8862657671	MSKU1975845	7/1/2021	Yantian	Louisville	\$	Maersk	5/13/2021
537	4862459	8877560152	SUDU8646980	7/14/2021	Ho Chi Minh	LA/LB	\$	Hamburg Sud	5/14/2021
538	4618351	8892360470	MSKU8436260	6/22/2021	Xiamen	LA/LB	\$	Hamburg Sud	5/15/2021
539	4750048	8856697514	MRKU6191696	6/10/2021	Xiamen	LA/LB	\$	Hamburg Sud	5/15/2021
540	5135861	8807190156	MRSU3824366	9/14/2021	Brazil	Louisville	\$	Hamburg Sud	5/16/2021
541	5233052	8870241086	TGHU7917494	6/21/2021	Brazil	Louisville	\$	Hamburg Sud	5/20/2021
542	4676559	8805260758	TRLU8271006	7/28/2021	Ho Chi Minh	LA/LB	\$	Hamburg Sud	5/20/2021
543	5186549	8853206452	MRSU3009116	6/25/2021	Brazil	Louisville	\$	Hamburg Sud	5/22/2021
544	5093093	8847658835	MRSU3300327	7/19/2021	Shanghai	LA/LB	\$	Hamburg Sud	5/31/2021
545	4990763	8859766432	GXU5721300	7/20/2021	Yantian	LA/LB	\$	Hamburg Sud	6/1/2021
546	4990762	8863146434	MRKU3142506	7/20/2021	Yantian	LA/LB	\$	Hamburg Sud	6/1/2021
547	5294619	8877253240	TLLU6852525	7/13/2021	Yantian	LA/LB	\$	Hamburg Sud	6/1/2021
548	4990764	8822958155	MSKU1597679	7/19/2021	Yantian	LA/LB	\$	Hamburg Sud	6/1/2021
549	5294622	8850148293	GXU5705892	7/13/2021	Yantian	LA/LB	\$	Hamburg Sud	6/1/2021
550	5341390	8803522173	PONU7957303	8/6/2021	Ho Chi Minh	LA/LB	\$	Hamburg Sud	6/2/2021
551	4751519	8837954598	TRHU8489601	7/14/2021	Yantian	LA/LB	\$	Hamburg Sud	6/2/2021
552	4816669	8825174683	MSKU1228177	7/14/2021	Yantian	LA/LB	\$	Hamburg Sud	6/2/2021
553	4816647	8800272092	BMOU4268879	7/19/2021	Shanghai	LA/LB	\$	Hamburg Sud	6/2/2021
554	4844516	8805570562	SUDU6976489	7/16/2021	Shanghai	LA/LB	\$	Hamburg Sud	6/2/2021
555	5186536	8864657741	TRHU8490330	7/13/2021	Ningbo	LA/LB	\$	Hamburg Sud	6/2/2021
556	5186535	8819495957	TRHU8491759	7/14/2021	Ningbo	LA/LB	\$	Hamburg Sud	6/2/2021
557	5233051	8848267457	MSKU8709467	7/16/2021	Brazil	Louisville	\$	Hamburg Sud	6/6/2021

HSDG and Maersk continued to transport significant amounts of OJC’s cargo throughout 2021 and 2022. Indeed, of the [REDACTED] FFEs OJC shipped from June 1, 2021 to July 16, 2022 (the last date

of OJC's data), HSDG and Maersk account for **24%** of OJC's volume. This critical fact—*which OJC omits from its brief*—directly rebuts the claims of retaliation and refusal to deal.

Interestingly, the Complaint that OJC filed with the FMC on November 23, 2021 did not allege retaliation or refusal to deal. Rather, OJC sought to recover approximately \$40,000 in demurrage charges. On February 18, 2022, OJC filed an Amended Complaint adding additional claims. To simplify discovery and without admitting any violation of the Act, HSDG refunded the disputed demurrage during the pendency of this proceeding, rendering that claim moot. On August 31, 2022, the Presiding Officer granted Respondents' motion to dismiss the claims under Sections 41102(b)(2), 41104(a)(5), and 41104(a)(9). The only remaining claims are those under Sections 41104(a)(3) and 41104(a)(10).

OJC alleges that the 15 FFE shortfall under the Service Contract in 2020-21 is attributable to HSDG's decision to make space available to customers moving cargo at higher spot market rates at the expense of service contract customers. This baseless allegation is contradicted by the evidence, which shows that HSDG prioritized contract customers—including OJC—over customers on the spot market. OJC tries to distract from the facts of this case by highlighting the irrelevant profitability of Maersk. The profitability of a regulated entity does not make its actions unlawful, just as a lack of profitability would not make them lawful. In any event, the 15 FFE shortfall in 2020-21 is at most a breach of contract; it is not a violation of the Act.

Respondents did not retaliate by refusing to provide space or refusing to deal or negotiate with OJC. Respondents continued to transport for OJC even after it threatened litigation. Ignoring the statutory language of the Act, OJC argues that declining to enter a service contract is in effect a refusal to provide space and hence retaliation. Not so. If retaliation occurred every time a carrier declined to enter a service contract with a customer threatening litigation (which any reasonable carrier would do), then all any customer would need to do to get a contract is threaten litigation.

This would be true even where, as here, the threatened claim, breach of contract, is outside of the FMC's jurisdiction and of dubious merit. This absurd result would be contrary to FMC precedent that carriers are under no obligation to give service contracts to every customer who requests one.

OJC claims it was damaged by HSDG's decision not to enter a service contract for 2021-22 because (i) it was unable to obtain space, despite now being in the class of spot rate customers HSDG allegedly preferred; and (ii) spot rates were too high for it to ship cargo profitably, a claim contradicted by its own damage analysis. OJC's damage claims are based solely on a summary prepared by its CEO for purposes of this proceeding; OJC refused to produce (or did not have) any supporting documentation. A damage summary that is "entirely the work of [Complainant's] president and . . . based on his estimates of the amounts and types of cargoes he could have generated," is "an unconvincing basis upon which to award damages." *California Shipping Line, Inc. v. Yangming Marine Trans. Corp.*, No. 88-15, 1990 WL 427466, at *24 (FMC Oct. 19, 1990).

Any increased shipping costs OJC may have paid in 2021-22 were the result of Mr. Weiss' dubious decision not to renew OJC's service contracts with the other carriers it had been using in 2020-21—carriers who met their MVCs—or enter transportation arrangements with other providers. OJC refused to produce (or did not have) any documents showing it made any effort to secure space or transport cargo with any other carrier, NVOCC or forwarder. Mr. Weiss claims he decided instead to seek a *single* service contract with a *single* carrier for 2021-22. According to Mr. Weiss, the carrier he chose, HSDG, was the *only* carrier that failed to meet its MVC for OJC in 2020-21 and the *only* carrier OJC repeatedly threatened to sue. Incredibly, Mr. Weiss also made this decision to break off negotiations with the other carriers *before* he had even started to negotiate with HSDG. Mr. Weiss conceded his mistake: "[REDACTED]." Mr. Weiss' claims are not credible; his assumptions are unreasonable; and his damage calculations are unsupported and astronomical solely to attract headlines for settlement leverage.

OJC’s allegations of retaliation and refusal to deal or negotiate are without merit for the simple reason that *HSDG continued to transport cargo for OJC even after OJC repeatedly threatened litigation*. Despite the current environment, and the FMC’s interest in rooting out violations of the Act, based on the *actual* facts—not what OJC wants the facts to be—this is not the hallmark case OJC claims. There was no retaliation and no refusal to deal or negotiate. Accordingly, OJC’s claims should be dismissed in their entirety.

II. FACTUAL BACKGROUND

Per the Presiding Officer’s September 30, 2022 Order, Respondents submit separate documents with their proposed findings of fact and response to OJC’s proposed findings of fact.

III. ARGUMENT²

A. OJC Has the Burden of Proof

In proceedings before the FMC, the complainant has the burden of proving that the respondent violated the Act by a preponderance of the evidence. 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); 46 C.F.R. § 502.203. The complainant must provide “an amount of information that would persuade a reasonable person that the necessary premise is more likely to be true than to be not true.” *AHL Shipping Co. v. Kinder Morgan Liquids Terminals, LLC*, FMC No. 04-05 (ALJ June 13, 2005).

B. Respondents Did Not Refuse to Deal or Negotiate with OJC

Respondents did not refuse to deal or negotiate with OJC, unreasonably or otherwise. Section 41104(a)(10) of the Act, as in effect at the time of the conduct at issue, made it unlawful for a common carrier, either alone or conjunction with another person, directly or indirectly, to

² HSNA should be dismissed. In two verified complaints, OJC alleged that HSNA is either a marine terminal operator (Complaint, ¶ 3) or an ocean transportation intermediary (Amended Complaint, ¶ 3). OJC offers no evidence to support either categorization. Instead, it offers an argument—unsupported by facts or precedent—that HSNA is subject to regulation without falling into one of the categories of persons subject to regulation under the Act. OJC Brief at 10, n.17. OJC fails to meet its burden of proof with respect to the existence of FMC jurisdiction over HSNA.

“unreasonably refuse to deal or negotiate.” 46 U.S.C. § 41104(a)(10) (effective Dec. 4, 2018 to June 15, 2022). In interpreting this prohibition as it relates to a refusal to deal, the FMC has stated:

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

New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans, 29 S.R.R. 345, 351 (ALJ 2001), *aff’d* 29 S.R.R. 1066 (FMC 2002), *aff’d* *New Orleans Stevedoring Company v. Federal Maritime Commission*, 30 S.R.R. 1066 (D.C. Cir. 2002) (emphasis added).

1. Respondents Did Not Refuse to Deal

Respondents did not refuse to deal because they did not “shut out” OJC. On the contrary, HSDG transported 185 of the 200 FFEs it committed to transport during the term of the Service Contract from June 23, 2020 to May 31, 2021.³ Amended Complaint, ¶ 32. It would be an inexplicable departure from FMC precedent to find that fulfilling **92.5%** of the MVC under a service contract is an unreasonable refusal to deal. This is especially true here where the parties agreed that any performance issues would be resolved by arbitration. CX123, § 9(b). Such a finding would also render 46 U.S.C. § 40502(f) meaningless since any failure to perform under a service contract would automatically be a violation of the Act. As the FMC has recognized, Congress did not intend for every breach of a service contract to be a violation of the Act. *See, e.g., Cargo One, Inc. v. COSCO Container Lines Company, Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000) (holding that allegations essentially comprising a contract claim should be dismissed by the FMC unless complainant rebuts presumption that claim is no more than breach of contract claim).

³ Respondents also did not refuse to deal by demanding a premium for additional space. The premium would have been charged only for space in excess of OJC’s contractual entitlement. RX989, 171:1-15. Moreover, Ms. Casanova confirmed that OJC was never charged a premium for any additional capacity it received in any event. RX961, 211:2-6. Despite OJC’s complaints about premiums, there is no evidence that HSDG demanded any premium for space it was contractually obligated to provide or that OJC paid any premiums.

HSDG did not refuse to deal with OJC by declining to enter a new service contract for 2021-22. As noted above, FMC precedent confirms that Section 41104(a)(10) does not require a common carrier to enter a service contract with every customer that requests one. The FMC recently reaffirmed that a carrier does not engage in an unreasonable refusal to deal when it declines to enter a service contract with a customer: “The Commission further recognizes that an ocean common carrier does not have a duty to grant a contract to every potential party.” 87 Fed Reg. 57674, 57677 (September 21, 2022); see also *Global Link Logistics, Inc. v. Hapag-Lloyd AG*, 33 S.R.R. 512, 527 (ALJ 2014) (“The Act does not guarantee the right to enter into a contract, much less a contract with any specific terms.”). Thus, the mere fact of not entering a service contract does not constitute a refusal to deal, unreasonably or otherwise.

Finally—and most importantly—there was no refusal to deal in 2021-22. OJC claims “Maersk willfully retaliated against OJC by immediately and abruptly cutting off . . . all shipping under the Parties’ existing service contract. OJC Brief at 7. This statement is demonstrably false based on OJC’s own data. From April 28, 2021 (OJC’s second litigation threat) to June 6, 2021, HSDG and Maersk transported **33 FFEs** (or **18%** HSDG’s total volume for OJC in 2020-21):

id	po_number	waybill	received	origin	destination	shipping	shipper	shipped	
525	5186582	8868140507	PONU7338720	6/7/2021	Brazil	Louisville	\$	Hamburg Sud	5/1/2021
526	5233050	8804116078	MSKU0595352	6/16/2021	Brazil	Louisville	\$	Hamburg Sud	5/2/2021
527	5135865	8873347470	MSKU8403163	7/13/2021	Brazil	LA/LB	\$	Hamburg Sud	5/4/2021
528	5186572	8820986398	MRKU5379400	6/16/2021	Fuzhou	Louisville	\$	Maersk	5/6/2021
529	5186568	8858892989	MRKU3484031	6/22/2021	Yantian	LA/LB	\$	Hamburg Sud	5/6/2021
530	4751505	8892778580	TCNU1120496	6/25/2021	Yantian	LA/LB	\$	Hamburg Sud	5/6/2021
531	5135866	8848454094	MRKU5425172	9/14/2021	Brazil	Louisville	\$	Hamburg Sud	5/8/2021
532	5135863	8841863295	MSKU1070456	6/15/2021	Brazil	Louisville	\$	Hamburg Sud	5/8/2021
533	5186567	8804071237	HASU4880662	6/15/2021	Yantian	LA/LB	\$	Hamburg Sud	5/10/2021
534	4702902	8827447346	MRSU3487706	6/10/2021	Yantian	LA/LB	\$	Hamburg Sud	5/10/2021
535	4702900	8835977640	MRKU4164201	7/1/2021	Yantian	Louisville	\$	Maersk	5/13/2021
536	4702903	8862657671	MSKU1975845	7/1/2021	Yantian	Louisville	\$	Maersk	5/13/2021
537	4862459	8877560152	SUDU8646980	7/14/2021	Ho Chi Minh	LA/LB	\$	Hamburg Sud	5/14/2021
538	4618351	8892360470	MSKU8436260	6/22/2021	Xiamen	LA/LB	\$	Hamburg Sud	5/15/2021
539	4750048	8856697514	MRKU6191696	6/10/2021	Xiamen	LA/LB	\$	Hamburg Sud	5/15/2021
540	5135861	8807190156	MRSU3824366	9/14/2021	Brazil	Louisville	\$	Hamburg Sud	5/16/2021
541	5233052	8870241086	TGHU7917494	6/21/2021	Brazil	Louisville	\$	Hamburg Sud	5/20/2021
542	4675559	8805260758	TRLU8271006	7/28/2021	Ho Chi Minh	LA/LB	\$	Hamburg Sud	5/20/2021
543	5186549	8853206452	MRSU3009116	6/25/2021	Brazil	Louisville	\$	Hamburg Sud	5/22/2021
544	5093093	8847658835	MRSU3300327	7/19/2021	Shanghai	LA/LB	\$	Hamburg Sud	5/31/2021
545	4990763	8859766432	GCXU5721300	7/20/2021	Yantian	LA/LB	\$	Hamburg Sud	6/1/2021
546	4990762	8863146434	MRKU3142506	7/20/2021	Yantian	LA/LB	\$	Hamburg Sud	6/1/2021
547	5294619	8877253240	TLLU6852525	7/13/2021	Yantian	LA/LB	\$	Hamburg Sud	6/1/2021
548	4990764	8822958155	MSKU1597679	7/19/2021	Yantian	LA/LB	\$	Hamburg Sud	6/1/2021
549	5294622	8850148293	GCXU5705892	7/13/2021	Yantian	LA/LB	\$	Hamburg Sud	6/1/2021
550	5341390	8803522173	PONU7957303	8/6/2021	Ho Chi Minh	LA/LB	\$	Hamburg Sud	6/2/2021
551	4751519	8837954598	TRHU8489601	7/14/2021	Yantian	LA/LB	\$	Hamburg Sud	6/2/2021
552	4816669	8825174683	MSKU1228177	7/14/2021	Yantian	LA/LB	\$	Hamburg Sud	6/2/2021
553	4816647	8800272092	BMOU4268879	7/19/2021	Shanghai	LA/LB	\$	Hamburg Sud	6/2/2021
554	4844516	8805570562	SUDU6976489	7/16/2021	Shanghai	LA/LB	\$	Hamburg Sud	6/2/2021
555	5186536	8864657741	TRHU8490330	7/13/2021	Ningbo	LA/LB	\$	Hamburg Sud	6/2/2021
556	5186535	8819495957	TRHU8491759	7/14/2021	Ningbo	LA/LB	\$	Hamburg Sud	6/2/2021
557	5233051	8848267457	MSKU8709467	7/16/2021	Brazil	Louisville	\$	Hamburg Sud	6/6/2021

Weiss Ex. 101 (containers tab, sorted by shipper and shipped date). In other words, OJC’s own data proves that HSDG continued to transport for OJC (i) *after* receiving OJC’s October 16, 2020 and April 28, 2021 litigation threats; (ii) *after* Ms. Casanova told Mr. Weiss on May 4, 2021 that HSDG would not enter a contract for 2021-22; and (iii) *after* the Service Contract ended on May 31, 2021. *Id.* Moreover, HSDG and Maersk continued to transport significant amounts of OJC’s cargo throughout 2021 and 2022. Indeed, based on the limited information OJC produced, of the 195 FFEs that OJC shipped from June 1, 2021 to July 16, 2022 (the last date for which OJC provided data), HSDG and Maersk accounted for █ FFEs or 24% of OJC’s total shipments.⁴ *Id.* This critical fact—*which OJC omits from its brief*—directly rebuts OJC’s allegations of refusal to deal and retaliation. OJC was not “shut out” by HSDG or Maersk.

2. Respondents Did Not Refuse to Negotiate

Just as Respondents did not refuse to deal with OJC, they did not refuse to negotiate with OJC, and HSDG’s actions during the parties’ negotiations were certainly reasonable. Communications between parties constitute “negotiation” even if no agreement is reached. *Global Link*, 33 S.R.R. at 527 (holding that repeated emails between the parties show a “course of negotiation” even where no agreement is reached). Consistent with the discussion in *Global Link*, the FMC recently proposed that the prohibition against an unreasonable refusal to negotiate be interpreted to mean that a person alleging a refusal to negotiate must prove an actual refusal to even entertain a proposal or to engage in good faith negotiations. 87 *Fed Reg.* 57674, 57676 (September 21, 2022). OJC has not, and cannot, meet its burden to prove a refusal to negotiate.

⁴ While OJC refused to produce bills of lading or other documentation of the shipments in Mr. Weiss’ Excel spreadsheet (Weiss Ex. 101), Respondents produced bills of lading for every container HSDG and Maersk transported for OJC after the Service Contract ended on May 31, 2021. These bills of lading show that HSDG and Maersk actually shipped █ FFEs for OJC after May 31, 2021, 4 FFEs more than the unsupported figures in OJC’s spreadsheet. *Compare* RX002-324 (bills of lading) *with* Weiss Ex. 101 (containers tab, sorted by shipper and shipped date).

It is undisputed that the parties negotiated and executed the Service Contract for 2020-21. CX119-135. Thus, there was no refusal to negotiate with respect to that contract. There also was no refusal to negotiate during the contract term, as HSDG responded promptly to the numerous communications from OJC during the contract term. RX1135, ¶ 24; RX488-515; RX488-904. There is no evidence that HSDG refused to communicate with OJC during the contract term. *See* 87 *Fed. Reg.* 57674, 57677 (repeated refusal to respond to emails or telephone requests for negotiations over an extended period may be viewed as unreasonable).

Additionally, there was no refusal to negotiate with respect to a new service contract for 2021-22. Indeed, OJC concedes that the parties negotiated in April 2021 about a possible new contract for 2021-22. Amended Complaint, ¶ 41 (“During April 2021, the parties were engaged in discussions about renewing the parties’ service contract.”); OJC Brief at 13 (“the Parties began negotiating in early 2021 about a service contract renewal for the 2021-2022 season”). Although the parties had discussions about a possible contract for 2021-22, there was never a meeting of the minds on the material terms of a new contract. RX1138, ¶ 40.

MVC. There was no agreement on the MVC for 2021-22. While Mr. Weiss shared a projection of OJC’s total volume for 2021-22, his projection of 4,200 to 4,700 FFEs—up to [REDACTED]% more than the [REDACTED] FFEs OJC shipped in 2020-21—was unreasonable. *Compare* CX203 with Weiss Ex. 101 (containers tab, sorted by shipped date). Given that HSDG failed to meet its MVC of 200 FFEs in 2020-21, it is illogical to assume—as OJC does—that HSDG would have agreed to a **2,250%** increase for 2021-22, particularly where OJC repeatedly threatened to sue in 2020-21. In any event, Mr. Weiss was never willing to commit to a specified MVC for the new service contract. RX1138, ¶ 38; CX217 (“the client did not mention a specific MQC target”).

Trade Lanes. There was no agreement on trade lanes for 2021-22. While Mr. Weiss renewed a repeated request from 2020 that HSDG ship containers from Asia to Kentucky—which

he said accounted for 70% of OJC’s anticipated volume (CX203)—HSDG declined as it was reducing those trade lanes for all customers due to increased inland transport costs as well as operational issues such as trucker and chassis shortages. *See* RX1138, ¶ 39; RX812 (“At this time, please consider this commitment for the place of delivery City of Industry CA only.”); *see also* RX963, 218:6-19. Throughout 2020 and 2021, HSDG consistently declined OJC’s repeated requests to include the Asia to Kentucky trade lanes for this reason. *See, e.g.*, RX963, 218:6-220:6; CX247-48 (stating “IPI to inland Louisville, KY” has been declined); RX802-03 (HS-11187-88) (declining OJC’s October 9, 2020 request for a 6-month contract for Asia to Kentucky due to concerns with interior point intermodal shipments).⁵

Rates. There was no agreement on rates for 2021-22, which would depend, in large part, on the MVC and trade lanes of any new contract. RX953, 171:10-23; RX963, 220:7-20. Considering that OJC proposed 70% of its volumes on a trade lane HSDG declined and was reducing for all customers, it cannot be said with any reasonable certainty that the parties would have agreed on rates. OJC incorrectly states that “it was **Maersk who proposed a ‘new contract [with] the same . . . rates . . . of the [then-]current contract.’**” OJC Brief at 24. Neither Maersk nor HSDG ever “proposed” a new contract to OJC with the same rates as 2020-21. RX1139, ¶ 43. As explained below, the document OJC cites is not a contract; it is an email Ms. Casanova circulated *internally* within HSDG to gauge interest in a new contract and determine the new rates. CX203; RX1139, ¶¶ 44-45. OJC’s argument is illogical given its admission that rates were substantially higher in 2021-22. *See* OJC Brief at 41-46; RX377; CX435; RX326-27.

⁵ HSDG did transport cargo to inland destinations—including Kentucky—from Brazil and other South American ports, as these trade lanes were part of HSDG’s core business. RX1132, ¶ 6. On the other hand, HSDG did not have substantial business on trans-Pacific trade lanes. *Id.* HSDG’s share in the transPacific trade was less than 1%. RX988A, 163:6. Rodrigo Pestana, HSDG’s former Transpacific Manager, stated that transporting cargo from Asia to Kentucky would have had a “negative impact in our PnL.” CX242; RX1132, ¶ 6.

OJC cannot show Respondents failed to entertain a proposal or engage in good faith negotiations toward a new contract. Aware of this, OJC changes its story. It now claims—*for the first time*—that “OJC and Maersk agreed to the 4200-4700 container MQC for 2021-2022. . . .” CX468 ¶ 11. OJC made no mention of this purported agreement in the Complaint or the Amended Complaint. It is based solely on the self-serving and uncorroborated declaration of Mr. Weiss and is not credible. *First*, the MVC in service contracts is typically a fixed number, not a range. *See* RX1137-38, ¶ 37; CX217 (Kevin Li of HSDG stating “We will need a clear [MVC] target to put [OJC] on the target list.”). *Second*, the MVC of 4,200-4,700 FFE is inconsistent with OJC’s contention elsewhere in its brief that “Casanova promised that Maersk would provide an initial contract of 400 FFE MQC . . .” OJC Brief at 22. *Third*, contrary to OJC’s argument, HSDG never even gave OJC a “contract of 400 FFE MQC.” Ms. Casanova merely asked her HSDG colleagues if a MVC of 400 FFE would be possible. *See* RX1139, ¶ 46; CX215 (“I want to ask *if it is possible* to Increase MQC by 200 FFE giving a total of [400 FFE]”). *Fourth*, it is simply not logical that HSDG would have agreed to increase the MVC by **2,250%** when HSDG missed the MVC in 2020-21 by 15 FFEs and OJC repeatedly threatened to sue in 2020-21. OJC has not and cannot provide any contemporaneous communication or document to support its litigation-created argument that the parties agreed to a service contract with a MVC of 4,200 to 4,700 FFEs. There was no such agreement. RX1139, ¶ 47.

Finally, the claim that Respondents refused to negotiate in 2021-22 is without merit for the additional reason that HSDG provided short-term rates to OJC in 2021-22 for cargo moving from Asia to the U.S., RX603-18, and from Brazil to the U.S. *See, e.g.*, RX768-74 (quotation valid from March 3, 2021 to April 30, 2021) RX673-78 (quotation valid May 1, 2021 to June 31, 2021); RX596-618 (quotation valid July 1, 2021 to Sept. 30, 2021); RX741-45 (quotation valid Oct. 28, 2021 to Dec. 31, 2021). The parties communicated about the Brazil to U.S. trade lanes throughout

2021 and 2022. *See, e.g.*, RX529-41; RX593-95; RX661-72; RX737-40; RX764-67; RX1141, ¶ 58. Moreover, OJC’s own data—Weiss Ex. 101 (containers tab)—establishes that HSDG and Maersk transported **30 FFEs** for OJC on the Brazil to U.S. trade lanes in 2021-22:

2	id	po_number	waybill	received	origin	destination	shipping	shipper	shipped
525	5186582	8868140507	PONU7338720	6/7/2021	Brazil	Louisville	\$	Hamburg Sud	5/1/2021
526	5233050	8804116078	MSKU0595352	6/16/2021	Brazil	Louisville	\$	Hamburg Sud	5/2/2021
527	5135865	8873347470	MSKU8403163	7/13/2021	Brazil	LA/LB	\$	Hamburg Sud	5/4/2021
531	5135866	8848454094	MRKU5425172	9/14/2021	Brazil	Louisville	\$	Hamburg Sud	5/8/2021
532	5135863	8841863295	MSKU1070456	6/15/2021	Brazil	Louisville	\$	Hamburg Sud	5/8/2021
540	5135861	8807190156	MRSU3824366	9/14/2021	Brazil	Louisville	\$	Hamburg Sud	5/16/2021
541	5233052	8870241086	TGHU7917494	6/21/2021	Brazil	Louisville	\$	Hamburg Sud	5/20/2021
543	5186549	8853206452	MRSU3009116	6/25/2021	Brazil	Louisville	\$	Hamburg Sud	5/22/2021
557	5233051	8848267457	MSKU8709467	7/16/2021	Brazil	Louisville	\$	Hamburg Sud	6/6/2021
565	5418106	8885207516	MRSU3702748	10/1/2021	Brazil	Louisville	\$	Hamburg Sud	8/6/2021
566	5135858	8802893116	MRKU4101570	10/11/2021	Brazil	Louisville	\$	Hamburg Sud	8/6/2021
567	5245310	8873629594	TCNU8678725	10/15/2021	Brazil	Louisville	\$	Hamburg Sud	8/27/2021
568	5245311	8858934493	TCLU5518290	10/13/2021	Brazil	Louisville	\$	Hamburg Sud	8/27/2021
569	5245312	8851613894	HASU4222548	10/8/2021	Brazil	Louisville	\$	Hamburg Sud	8/27/2021
570	5418108	8873322440	MRKU2322355	10/11/2021	Brazil	Louisville	\$	Hamburg Sud	8/27/2021
571	5245313	8842951644	MSKU9538883	10/14/2021	Brazil	Louisville	\$	Hamburg Sud	9/8/2021
572	5418107	8803043320	MRKU2425775	11/15/2021	Brazil	Louisville	\$	Hamburg Sud	9/30/2021
616	5454301	8881930426	APMU8072659	7/1/2022	Brazil	Louisville	\$ 1	Maersk	2/7/2022
617	5245315	8856442361	UETU5494320	7/1/2022	Brazil	Louisville	\$ 1	Maersk	2/10/2022
618	5418112	8841876534	TRHU8316925	6/28/2022	Brazil	Louisville	\$ 1	Maersk	2/14/2022
619	5454303	8874973986	TLLU5260136	6/2/2022	Brazil	Louisville	\$	Maersk	2/18/2022
627	5245316	8818818050	TCNU8212906	4/25/2022	Brazil	Louisville	\$	Maersk	3/1/2022
628	5454302	8893715131	UESU4667290	4/22/2022	Brazil	Louisville	\$	Maersk	3/1/2022
639	5454312	8894172173	CAXU8023259	5/18/2022	Brazil	Louisville	\$	Maersk	3/17/2022
640	5454309	8843295142	MSKU1034850	5/24/2022	Brazil	Louisville	\$	Maersk	3/17/2022
641	5454311	8802908123	MSKU0822482	5/24/2022	Brazil	Louisville	\$	Maersk	3/17/2022
642	5454304	8859136850	MSKU8689360	6/15/2022	Brazil	Louisville	\$	Maersk	3/17/2022
643	5454305	8859074810	MRSU3120201	5/13/2022	Brazil	Louisville	\$	Maersk	3/17/2022
644	5418113	8815257922	MRSU3274681	6/15/2022	Brazil	Louisville	\$	Maersk	3/17/2022
646	5454310	8817484447	TCLU9343966	5/27/2022	Brazil	Louisville	\$	Maersk	3/17/2022

Contrary to OJC’s claims, the parties agreed on rates and HSDG transported OJC’s cargo from Asia and Brazil in 2021-22 *after* OJC threatened to sue. OJC appears to have concocted a business strategy to ship all its cargo in 2021-22 with HSDG—the carrier that handled just **34%** of its volume in 2020-21, the *only* carrier that failed to meet its MVC in 2020-21, and the *only* carrier OJC repeatedly threatened to sue. OJC refused to produce (or did not have) any emails or documentation showing that it made any effort to secure space or transport cargo with any other carrier, NVOCC, or forwarder. This is not plausible or credible. OJC fails to meet its burden to prove that Respondents refused to deal or negotiate with OJC, unreasonably or otherwise.

C. Respondents Did Not Retaliate Against OJC

Section 41104(a)(3), as in effect at the time, made it unlawful for a common carrier, either alone or conjunction with another person, directly or indirectly, to:

Retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly

discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason.

46 U.S.C. § 41104(a)(3) (effective Dec. 4, 2018 to June 15, 2022). OJC alleges that “Maersk retaliated against OJC by (1) unreasonably refusing to renew or even negotiate a service contract with OJC, and (2) by refusing to fulfill Maersk’s existing contractual obligations.” OJC Brief at 16. OJC makes these conclusory allegations without examining the relevant language of the statute. When one considers what the statute requires to prove retaliation, it is clear OJC has not, and cannot, meet its burden of proof with respect to this claim.

1. Respondents Did Not Refuse, or Threaten to Refuse, Cargo Space Accommodations When Available

Section 41104(a)(3), as in effect at the time, prohibited retaliation in the form of “refusing, or threatening to refuse, cargo space accommodations when available . . .” 46 U.S.C. § 41104(a)(3) (effective Dec. 4, 2018 to June 15, 2022). OJC contends that Respondents “willfully denied OJC available cargo space mandated by the parties’ then existing Contract.” OJC Brief at 19. But OJC offers no evidence Respondents refused, or threatened to refuse,⁶ cargo space accommodations when available during the contract term. The evidence establishes just the opposite.

It is undisputed that HSDG transported 185 of the 200 FFEs it committed to transport during the term of the Service Contract from June 23, 2020 to May 31, 2021. Amended Complaint, ¶ 32. Contrary to OJC’s claim, HSDG and Maersk continued to transport OJC’s cargo *after* OJC threatened litigation on October 16, 2020 and again on April 28, 2021. *Supra* at 4-5, 13-14. In total, HSDG and Maersk transported ■■■ FFEs *after* OJC threatened litigation on April 28, 2021. Weiss Ex. 101 (containers tab, sorted by shipper and shipped date). There is no evidence that

⁶ There is no evidence that Respondents ever threatened OJC. While OJC cites internal emails within HSDG in which certain employees discussed the possibility of declining space, OJC Brief at 17, there was never a communication to OJC in which HSDG threatened to decline space. On the contrary, the communications between the parties were about HSDG’s efforts to secure space for OJC whenever possible. RX1134, ¶ 16; RX1135, ¶ 24; RX488-515; RX889-904.

Respondents ever refused to ship containers for OJC when they had available space. OJC fails to meet its burden of proof on this necessary element of its retaliation claim. Based on this alone, OJC’s claim of retaliation under Section 41104(a)(3) should be dismissed.

2. *HSDG’s Decision Not to Enter a Service Contract in 2021-22 Is Not Retaliation Under the Statute and Was Reasonable*

Ignoring the statutory language, OJC argues that declining to enter a service contract is in effect a refusal to provide cargo space and hence retaliation. Not so. Declining to enter a service contract is not a form of retaliation recognized under the Act. Section 41104(a)(3), as in effect at the time, referred only to retaliation “by refusing, or threatening to refuse, cargo space accommodations when available, or resort[ing] to other unfair or unjustly discriminatory methods. . . .”⁷ 46 U.S.C. § 41104(a)(3) (effective Dec. 4, 2018 to June 15, 2022). The Act did not require carriers to enter service contracts with customers or guarantee a customer’s right to a renewal contract. *Global Link*, 33 S.R.R. at 527. Rather, the FMC has consistently interpreted the Act as imposing a common carriage obligation on carriers.⁸ OJC cites no precedent—and Respondents are not aware of any—holding that a carrier retaliates by declining to enter a service contract with a customer. Moreover, HSDG’s decision not to enter a service contract with OJC in 2021-22 was reasonable for numerous reasons.

First, the pandemic continued to cause supply chain congestion—especially at U.S. West Coast ports—resulting in less frequent sailings and decreased shipping capacity. The FMC is

⁷ OJC has never asserted that Respondents resorted to “other unfair or unjustly discriminatory methods” under Section 41104(a)(3), nor is there any evidence in the record to support such an assertion. Respondents are not aware of any authority that would support an argument that a carrier unjustly discriminates against a shipper by declining to enter a service contract. Such a finding would be particularly improper here where OJC was one of many customers that did not receive a service contract from HSDG in 2021-22. See RX957, 187:3-188:25 (“I would say more than █% of the accounts [Ms. Casanova managed] we did not renew the contract.”).

⁸ The obligations of a common carrier are those of a common carrier at common law. *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 62 (FMC 1965). The most frequently mentioned characteristic of a common carrier is that it holds itself out to accept goods from whomever offered to the extent of its ability to carry. *Id.* (citations omitted).

aware of the decreased shipping capacity caused by the pandemic. *See* RX346-48. OJC knew about it too. On February 9, 2021, Ms. Casanova declined Mr. Weiss’ request to re-route OJC’s cargo because OJC had run out of space in its City of Industry, California warehouse. RX747-51.

Ms. Casanova stated:

Due to the current situation in Asia with lack of equipment and space and the shortage of truck power and port Congestion in Los Angeles/Long Beach terminals, we are not negotiating new lanes in the trade since we cannot guarantee service due to the reasons mentioned above.

RX747. Three months later, she communicated a similar message, stating that HSDG would not enter a contract for 2021-22 due to “the lack of space and equipment in Asia and the shortage of truck power in the US that we and the entire industry are facing.” RX812.

Second, HSDG was understandably hesitant to enter a new contract in 2021-22—***with a MVC 2,250% more than 2020-21***—particularly after HSDG missed the 2020-21 MVC by just 15 FFE, and OJC repeatedly threatened to sue for failure to provide space in 2020-21. *Supra* at 11, 13. As Ms. Casanova explained: “if we cannot perform service to a customer, it is better to be honest and tell the customer the truth before committing to something that we might not be able to perform and fulfill for another period.” RX959, 201:8-17.

Third, OJC apparently wanted the new contract to have the same rates as 2020-21. OJC Brief at 39 (“expected contract rates used for [2021-22] were those contained in the Contract”). This was unreasonable given OJC’s admission that rates were substantially higher in 2021-22 due to the imbalance of supply and demand. OJC Brief at 41-46 (discussing “vast differences” between OJC’s contract rates in 2020-21 and the spot rates in 2021-22). This is also well known to OJC and the FMC. *See* RX377; CX435; RX326-27.

Fourth, the bulk of OJC’s anticipated shipping needs—70% according to Mr. Weiss—were on Asia to Kentucky trade lanes. CX203. As noted above, these trade lanes were not part of the

Service Contract and HSDG declined them for OJC as it was reducing those trade lanes for all customers due to increased inland transport costs as well as operational issues such as trucker and chassis shortages. *Supra* at 11-12.

Fifth, OJC's disputatious manner of doing business—including almost daily demands for additional container space—also contributed to HSDG's decision. RX1140, ¶ 50; CX236. Although OJC tries to weave a David versus Goliath narrative, the facts establish that OJC is an unreasonable business partner and a serial litigant. OJC has filed at least 12 lawsuits in the past few years. RX1120, ¶ 5. It would be irresponsible not to consider how a party handles disputes in deciding whether to enter a contract, or whether to simply allow that party to book on terms available to all shippers in accordance with common carrier responsibilities. Just as a party would not be expected to enter a new contract with a party that had not paid its bills (even with a pending dispute), a party should not be required to contract with a party threatening litigation. *See StarVest Partners II, L.P. v. Emportal, Inc.*, 957 N.Y.S.2d 93, 95 (N.Y. App. Div. 1st Dept. 2012) (“We think it preferable to allow sophisticated parties operating in the business world to decide when and how they wish to enter into legally enforceable contracts.”).

The facts do not support OJC's argument that HSDG's decision not to enter a new contract was motivated solely by OJC's threats to sue for breach of contract. Given OJC's behavior, expectations, and assertions, it was reasonable for HSDG to decline a new contract for 2021-22.

3. HSDG's Internal Emails Do Not Establish that Respondents Retaliated Against OJC

HSDG's internal emails—including Mr. Pump's email of April 29, 2021 (CX220)—do not establish that Respondents retaliated against OJC. As noted above, it is undisputed based on OJC's own data, that HSDG and Maersk continued to transport OJC's cargo *after* OJC threatened

litigation. *Supra* at 4-5, 13-14. Thus, regardless of what HSDG employees discussed in emails, Respondents did not refuse, or threaten to refuse, cargo space accommodations when available.

On April 29, 2021, Ms. Casanova asked her colleagues “*if it is possible*” to increase OJC’s MVC to 400 FFEs to offset the anticipated deficit in 2020-21 and show an interest in handling more of OJC’s volume. *See* RX1139, ¶ 46; CX215; CX222. If, as Mr. Weiss now claims, he and Ms. Casanova had agreed on a contract for 4,200-4,700 FFEs, CX468 ¶ 13, why would she suggest a contract for 400 FFEs? She would not. Ms. Casanova created a contract template in HSDG’s computer system with a 400 FFE MVC to gauge HSDG’s interest in such a contract and to determine the new rates. RX1139, ¶ 44. This template contained the same rates as 2020-21 because those were the rates in the system from the prior contract, and the trade team was the division within HSDG that would provide the rates for any new contract. RX1139, ¶ 45; RX963, 220:17-20. After receiving Ms. Casanova’s email, Kevin Li sought guidance from Juergen Pump regarding OJC’s account. CX220-221.

While OJC focuses on Mr. Pump’s response—the so called “smoking gun”—it is important to consider the information he received from Mr. Li before providing his response. Mr. Li noted that OJC was “threatening us on liquidated damage against the space that we couldn’t provide.” CX220. Mr. Pump had not seen the threats that OJC’s counsel sent HSDG. RX994, 248:25-249:6. The primary focus of these threats was a breach of contract claim, which is precisely what Mr. Li described in his email. CX220. Thus, on April 29, 2021, Mr. Pump had no indication that OJC was threatening action before the FMC. Moreover, the April 29, 2021 email from Mr. Li to Mr. Pump reflects Mr. Li’s mistaken understanding that what Ms. Casanova sent him was a *proposal from OJC*: “they are proposing a renewal contract with 400 FFE MQC but all rates remain the same from last year contract.” CX 220; *see also* RX981, 147:9-17.

As a result, Mr. Pump was being asked if HSDG should enter a 400 FFE contract at the same rates as 2020-21 with a customer that was threatening legal action for breach of contract. It is highly unlikely that any carrier would have agreed to a 400 FFE service contract for 2021-22 at the same rates as a 200 FFE service contract for 2020-21. As OJC itself acknowledges, the market rates increased substantially from June 2020 to May 2021. OJC Brief at 41-46; CX435.⁹ It is perfectly predictable and reasonable that Mr. Pump, when presented with what Mr. Li portrayed as a proposal from OJC for such a contract, combined with a threat of litigation, would decline to offer a service contract based on reasonable business considerations. The fact that Mr. Li and Mr. Pump misunderstood the source and nature of the proposal they were evaluating does not detract from the reasonableness of their actions based on their subjective understanding. Indeed, the FMC has historically deferred to a party's reasonable business decisions in the context of an unreasonable refusal to deal. 87 *Fed. Reg.* 57674, 57677 (September 21, 2022) (citations omitted). Finally, the record clarifies that Mr. Pump's suggestion that HSDG decline to provide space under the Service Contract was not adopted by HSDG in any event. *See* RX726-28. As noted above, after Mr. Pump sent his email, HSDG and Maersk continued to transport cargo for OJC, accounting for 24% of OJC's volume after May 31, 2021. *Supra* at 4-5, 13-14.

4. *The Alleged Retaliation Is Not Actionable Because It Occurred Before OJC Filed its Complaint with the FMC*

Section 41104(a)(3), as in effect at the time, prohibited retaliation "because the shipper has patronized another carrier, or has filed a complaint, or for any other reason." 46 U.S.C. § 41104(a)(3) (effective Dec. 4, 2018 to June 15, 2022). OJC does not allege that HSDG retaliated

⁹ Mr. Weiss' contention that spot market rates did not "go through the roof" until after negotiations for the 2021-22 contract had ended is flatly contradicted by OJC's own evidence. *See* CX435 (chart showing Maersk's rates increased significantly beginning in the third quarter of 2020). It is further contradicted by Mr. Pump's testimony that rates increased substantially in 2021, and that a request for a 2021-22 contract at 2020-21 rates would be completely detached for the market realities. RX991, 228:5-6; RX993, 235:15-18; *see also* RX326-27 (June 12, 2020 Journal of Commerce article stating that spot rates were increasing almost a full year earlier than Mr. Weiss claims.)

because OJC “patronized another carrier.” OJC cannot allege retaliation because OJC “filed a complaint,” because the alleged retaliation—the decision not to enter a service contract for 2021-22—occurred in May 2021, *seven months before* OJC filed its Complaint on December 13, 2021. Aware of this, OJC argues that Respondents retaliated by refusing to enter a service contract for 2021-22 “because OJC threatened to file a complaint” with the FMC. OJC Brief at 16. However, *threatening* to file a complaint with the FMC is not covered by the statute.¹⁰

Even if threats to file a complaint before the FMC were covered by the statute, OJC’s threats would not be as they related to alleged breaches of the Service Contract—not violations of the Act. The subject of the October 16, 2020 and April 28, 2021 letters from OJC’s counsel is “NOTICE OF BREACH OF SERVICE AGREEMENT.” CX159-160; CX 209-211. The FMC does not have jurisdiction over breach of contract claims. *See* 46 U.S.C. § 40502(f). Therefore, an action for breach of the Service Contract, such as the one OJC threatened to file, would not bring any “unlawful activity” to the FMC’s attention. The Service Contract also contains a provision requiring that disputes be resolved in arbitration. CX123, ¶ 9(b). And, as both parties were aware, the contract contains a liquidated damages provision, that limits both parties’ liability for failing to meet the MVC. CX121, ¶ 3(c); RX822-28.¹¹ Thus, OJC’s threat to file a breach of contract action was misguided at best. On these facts, the threats made by OJC are not the type of

¹⁰ According to the FMC’s Statement on Retaliation dated December 28, 2021, designated Docket No. 21-15 (the “Statement on Retaliation”), the FMC “interprets ‘any other reason’ to mean that protected activity under 46 U.S.C. §41104(a)(3) includes other ways that shippers may bring allegations of unlawful activity to the Commission, such as participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or using CADRS’ dispute resolution procedures.” Statement on Retaliation at 7. OJC did not file a complaint before the FMC or commence any other FMC activities covered by the statute before the alleged retaliation. OJC fails to cite any precedent—and Respondents are not aware of any—that threatening to file a complaint before the FMC is covered by Section 41104(a)(3), as in effect at the time of the conduct at issue.

¹¹ OJC argues that Michael Gast’s emails prove that Maersk “was in the wrong.” OJC Brief at 12-13. Internal communications by Mr. Gast, a non-lawyer, purporting to analyze OJC’s breach of contract claim are not evidence of the truth of those statements, just as communications proclaiming the opposite would not be evidence of the truth of those statements. RX975, 9:23-24.

conduct the FMC has indicated that the prohibition against retaliation is intended to protect, and OJC has not met its burden of proof to establish retaliation.

5. Finding Retaliation Here Would Create Unworkable Precedent

A finding of retaliation in this case would be contrary to both law and fact and would establish a dangerous and unworkable precedent. 46 U.S.C. § 41104(a)(3) prohibits carriers from retaliating by refusing, or threatening to refuse, cargo space accommodations when available based on certain customer conduct. This prohibition was first codified in Section 14 Third of the Shipping Act, 1916. The 1916 Act did not provide for service contracts between carriers and their customers. Thus, under the 1916 Act, all space was made available under the terms of the carriers' tariff and the refusal of space accommodations would not have been an unduly complicated issue.

This changed with the adoption of the Act in 1984. In providing for service contracts, the Act made it possible for carriers to provide space under either the tariff or a service contract. However, Section 14 Third of the 1916 Act was carried forward into the Act with no substantive change. Statement on Retaliation at 3. In other words, the prohibition against retaliation was not revised or clarified to account for the operation of service contracts. Seeking to take advantage of this—and ignoring the statutory language—OJC argues that declining to enter a service contract is in effect a refusal to provide cargo space and hence retaliation. Not so.

Aside from the fact that OJC's argument is factually incorrect (since Respondents transported OJC's cargo *after* OJC threatened litigation, *supra* at 4-5, 13-14), OJC seeks to create dangerous precedent. If retaliation were found under these circumstances, every shipper would file, or threaten to file, claims with the FMC against ocean carriers during contract negotiations. The FMC would be required to scrutinize and determine the negotiated result and whether adherence to a negotiating position, or decision to end negotiations, was unreasonable or motivated by improper reasons. This would be true even where, as here, the threatened claim, breach of

contract, is outside of the FMC’s jurisdiction and/or of dubious merit. This absurd result would be contrary to the FMC’s position that common carriers are under no obligation to give a service contract to every customer who requests one. *See, e.g., Global Link*, 33 S.R.R. at 527; 87 Fed Reg. 57674, 57677 (September 21, 2022). The FMC should not disturb its long-standing precedent to “make an example of carriers”—as OJC requests—where HSDG made a reasonable business decision not to enter a new service contract in 2021-22 *and* HSDG continued to transport OJC’s cargo thereafter on common carriage terms.

OJC has not met its burden of proof with respect to retaliation and the claim under 46 U.S.C. §41104(a)(3) should be dismissed.

D. OJC Fails to Prove Damages with Reasonable Certainty

Even if OJC could establish a violation of the Act (it cannot), it fails to meet its burden with respect to establishing damages and should not be awarded any reparations. Section 41305(b) of the Act provides that the FMC “shall direct the payment of reparations to the complainant for *actual injury* caused by a violation” of the Act. 46 U.S.C. § 41305(b) (emphasis added). A complainant bears the burden of proving that it is entitled to reparations. *Mavl Capital Inc. v. Marine Transport Logistics, Inc.*, No. 16-16, 2022 WL 2209421, at *3 (FMC June 10, 2022). As the FMC has explained, “(a) damages must be the proximate result of violations of the statute; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.” *Id.* (quoting *James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist.*, No. 94-32, 2003 WL 22067203, at *7-8 (FMC Aug. 26, 2003)). “Establishing a Shipping Act violation alone does not justify reparations—complainants must also show that they sustained a pecuniary loss as a result of the unlawful act.” *Mavl Capital*, 2022 WL 2209421, at *3.

In the landmark case of *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, the FMC held that a complainant must prove damages with reasonable certainty:

Actual damages may not be presumed, however, but ***must be proved by the party seeking them***. To warrant recovery, the actual detriment must be shown by ***competent evidence and with reasonable certainty***.

California Shipping Line, 1990 WL 427466, at *23 (emphasis added); *Mavl Capital*, 2022 WL 2209421, at *3. As the FMC explained, this standard is consistent with widely accepted principles of contract law. *Hangzhou Qianwang Dress Co., Ltd. v. Rdd Freight International Inc.*, No. 17-02, 2018 WL 4191529, at *12, 1 F.M.C.2d 158, 170–71 (FMC Aug. 29, 2018).

One hundred years of case law demonstrates the high threshold required to establish damages with the requisite “reasonable certainty.” In *Eden Mining Co. v. Bluefield Fruit & S.S. Co.*, the Shipping Board (a predecessor to the FMC) found that an exclusive patronage arrangement violated the 1916 Act. 1 U.S.S.B. 41 (1922). Although the shippers established the amounts they had paid for carriage and the discount they could have obtained under the loyalty arrangement, the Shipping Board declined to award reparations. The Board rejected complainant’s contention that “mere proof of the amount by which the rates charged them exceeds those charged contract shippers for identical transportation service *ipso facto* establishes the fact of their injury and the amount of their damage.” *Id.* Rather, the Act contemplated reparations only for “actual damage incurred.”¹² *Id.*

Waterman v. Stockholms Rederiaktiebolag Svea et al., 3 F.M.B. 248 (1950) discussed the exacting standard for proving lost profits. The Board found that respondents had violated the 1916

¹² Cases analyzing Section 41305 have relied on *Eden Mining*, even though it concerned a statutory antecedent to Section 41305. See *California Shipping Line*, 1990 WL 427466, at *23. The provision at issue in *Eden Mining*, Section 22 of the 1916 Act, is similar to Section 41305 and provided that a complainant may seek “reparation for the injury if any caused.” See *Eden Mining*, 1 U.S.S.B. at 47.

Act but reversed the damage award because lost profits were speculative, uncertain, and conjectural. *Id.* at 250. The complainant had estimated lost profit on hypothetical shipments:

The record is barren of evidence pertaining to damages on pears and grapes that complainants presumably would have shipped on the Freja had reefer space been made available to them. ***Questions of their availability in time for shipment on said vessel, cost, outturn, and selling price are left unanswered.*** Here again the burden of proof has not been met.

Id. at 251 (emphasis added). Although the record in the case included letters from the fruit suppliers that they had adequate supply, the Board found such evidence insufficient. *Id.* In addition, there was no evidence regarding the hypothetical selling price and prospective purchasers. *Id.* Accordingly, the Board concluded that “the record is completely lacking in details from which a finding might be made whether reparation is due” and the “evidence is far too ***vague, general in character, and indefinite.***” *Id.* at 253 (emphasis added).

In *California Shipping Line*, the FMC acknowledged the foregoing precedent and held the complainant had “not established its actual injury with a reasonable degree of certainty. Its proof is so speculative and conjectural that it lacks the requisite degree of certainty.” 1990 WL 427466, at *24. The complainant relied on a single exhibit, a damage summary, which “was entirely the work of CSL’s president and was based on his estimates of the amounts and types of cargoes he could have generated.” *Id.* While noting that “some of these estimates are supported by additional evidence in an attempt to establish their reasonableness,” the FMC ultimately found “the basic damage summary to be an unconvincing basis upon which to award damages.” *Id.*

1. OJC’s Expert Is Unqualified to Offer Opinions on Damages

After the August 5, 2022 deadline for expert reports, OJC served two expert reports from Richard C. Berning, one on September 2, 2022, and a supplemental report on October 17, 2022.¹³

¹³ Mr. Berning was not retained until August 24, 2022—***19 days after*** the deadline for initial expert reports, and after OJC produced its damages calculations. RX930. His reports are thus untimely.

The FMC follows the standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) to assess admissibility of expert opinions. In *Fiat Chrysler Automobiles NV. v. Wallenius Wilhelmsen Logistics*, the FMC explained that “[w]hen ruling on the admissibility of expert opinions, courts consider whether the expert is qualified in the relevant field and examine the methodology the expert used in reaching the conclusions at issue.” No. 17-09, 2019 WL 4734341, at *2 (FMC May 8, 2019) (Wirth, J.) (citing *Daubert*). The FMC is also guided by Rule 702 of the Federal Rules of Evidence. See *Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake, LLC*, No. 11-11, 2013 WL 9808672, at *24 (FMC Jan. 10, 2013). Mr. Berning fails to meet the applicable standard because he is not qualified to render opinions on damages, and his methodology consisted of nothing more than endorsing the damage calculations prepared by OJC’s CEO for purposes of this proceeding.

Mr. Berning has no prior experience with damages arising from alleged violations of the Act. RX1045, 63:22-64:25. He has no prior experience with any cases involving breach of a contractual MVC within the shipping industry or any other segment of the transportation sector. RX1045, 65:10-25. Mr. Berning is a business valuation expert, and while he testified that is his “greatest” core competency, RX1045, 62:6-9, it actually appears to be his only core competency. He 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.” OJC Brief at 33, n.121.

In addition to his lack of experience and expertise in assessing the types of damages, Mr. Berning’s methodology is flawed. Mr. Berning acknowledges that he is bound to follow professional standards promulgated by the Association of International Certified Professional Accountants (“AICPA”) and the National Association of Certified Valuators and Analysts

(“NACVA”). RX1042, 51:7-10. Under these standards Mr. Berning was required to “obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed.” RX1043, 54:3-9. Additionally, the assumptions underlying Mr. Berning’s opinions must be reasonable. RX1077, 193:12-24. While Mr. Berning acknowledged that he is bound by these professional standards, he failed to carry out his assignment in accordance with the standards and blindly accepted the damages calculations prepared by Mr. Weiss, without any verification.

(a) Mr. Berning Did Not Obtain “Sufficient Relevant Data” or Verify the Data Mr. Weiss Gave Him

Mr. Berning’s opinions of OJC’s damages match *exactly* the damages calculations prepared by Mr. Weiss for purposes of this proceeding. That was not by accident. Within days of his retention, OJC’s counsel gave Mr. Berning the Excel spreadsheet containing the updated damages calculations prepared by Mr. Weiss. RX1059, 118:15-119:6. Although Mr. Berning did not know who created the Excel, when it was created, how it was created, the source of the data, or whether it was created in the ordinary course business or for litigation purposes—all factors that could influence his opinions—Mr. Berning endorsed Mr. Weiss’ calculations in their entirety without a single modification. RX1059, 118:1-119:25. He did so without requesting, receiving, or reviewing sufficient relevant data to verify any of the data or calculations. RX1059, 120:11-RX1061, 129:4. “[REDACTED]” RX1061, 129:3-4.

Mr. Berning failed to verify OJC’s data and calculations using source documents that would have been readily available had he requested them. OJC also refused to produce supporting documentation in response to Respondents’ discovery requests. *See* RX1120-21, ¶¶ 6-16. Mr. Weiss was thus able to avoid any cross-examination at deposition regarding inconsistencies

between his calculations and the source documents. This was not an oversight. On August 5, 2022—*one month before* Mr. Berning’s report—Respondents’ damages expert, Ricardo Zayas, served an expert report identifying the specific documents needed to confirm Mr. Weiss’ calculations. RX1181-91. OJC’s refusal to provide anything even after the *specific* documents were requested in discovery and identified by Respondents’ expert casts significant doubt on Mr. Weiss’ estimates. *California Shipping Line*, 1990 WL 427466, at *24 (rejecting damages supported solely by summary exhibit that “was entirely the work of [complainant’s] president”). The lack of sufficient relevant data is obvious in eight significant respects.

Average Gross Revenue Per Container. OJC’s damage theories are all premised on its assertion that its “Average Gross Revenue Per Container” in 2020-21 was \$[REDACTED]. OJC Brief at 35. Yet, Mr. Berning did not do anything to substantiate this. *See* RX1033, 16:11-17.¹⁴ He did not review—and OJC refused to produce—the shipping records, sales records, financial statements, and other documentation from which the calculation might be verified. RX1121, ¶¶ 12-16; RX1033, 16:19-17:4. Shipping records could have confirmed the number of containers OJC shipped in 2020-21 and the container contents. Sales records could have confirmed whether OJC sold all products it imported in 2020-21, and the prices for each sale. Financial statements could have verified whether the revenue OJC calculated was consistent with its calculations in the ordinary course of business. OJC’s use of the purported “Average Gross Revenue Per Container” for 2020-21 to assess damages for the following year is also without evidentiary support. Supporting documentation for the revenue calculation is particularly important given that the earlier spreadsheet Mr. Weiss prepared claimed the “Average Gross Revenue Per Container” was

¹⁴ During his deposition, Mr. Weiss was unable to provide anything other than estimates of OJC’s revenues for 2019-2022. RX1002, 24:14-25:1. Mr. Weiss testified that the revenues are contained in financial reports and tax returns, RX1003, 26:13-20, but OJC refused to produce such documents. RX1121, ¶ 12.

\$ [REDACTED]. Rohde Ex. 1; RX1149-50, ¶¶ 15. Mr. Berning was not aware of this, and OJC has not explained why the calculation changed substantially. RX1064, 140:10-19.

Average Gross Profit Per Container. OJC’s damage theories are similarly all premised on its assertion that its “Average Gross Profit Per Container” in 2020-21 was \$ [REDACTED]. OJC Brief at 35. This calculation has also changed substantially over time without explanation. On January 25, 2022, OJC claimed its “Average Gross Profit Per Container” was \$ [REDACTED]. RX409. On July 14, 2022, the calculation decreased to \$ [REDACTED]. Rohde Ex. 1 (summary tab). Again, Mr. Berning did nothing to substantiate it. He did not review—and OJC refused to produce—the shipping records, sales records, financial statements, and other documentation from which these calculations might be verified. RX1121, ¶¶ 12-16; RX1033, 17:6-RX1034, 18:8. Mr. Berning did not review any documentation concerning the variable costs Mr. Weiss included in his calculation of profits per container. RX1082, 213:16-214:8 (“ [REDACTED] [REDACTED]”). Mr. Berning’s report does not address whether certain costs OJC characterized as “fixed” were, under applicable accounting standards, actually “variable.” As Mr. Zayas, Respondents’ expert, explains, OJC’s profit calculation cannot be blindly accepted, particularly where OJC and Mr. Berning both conceded that “Average Gross Profit Per Container” may not have included all variable costs: “[REDACTED] [REDACTED].” OJC Brief at 35; CX423; RX1156, ¶ 35(a).¹⁵

Containers OJC Shipped in 2020-21. Mr. Berning did not review—and OJC refused to produce—any documentation such as bills of lading and purchase orders to verify the total containers OJC shipped during the Contract Term from June 23, 2020 to May 31, 2021, and the contents of those containers. RX1120, ¶¶ 6-9; RX1092, 252:11-22. The Excel spreadsheet that

¹⁵ OJC’s use of “Average *Gross* Profit Per Container” and “Average *Net* Profit Per Container” interchangeably make this unsupported calculation even more suspect. Compare OJC Brief at 35 (defining “Average *Gross* Profit Per Container” as \$ [REDACTED]) with OJC Brief at 38-39 (referring to \$ [REDACTED] as “Average *Net* Profit Per Container”).

Mr. Weiss prepared summarizing OJC's container moves from 2020-21 is insufficient without supporting documentation. *See California Shipping Line*, 1990 WL 427466, at *24. Additionally, OJC refused to produce its service contracts with any carriers other than HSDG. RX1120, ¶¶ 6-8.

Containers OJC Would Have Shipped in 2021-22. Mr. Berning did not review—and OJC refused to produce—container volume data to assess the reasonableness of Mr. Weiss' projection that OJC would have shipped up to 4,700 FFEs in 2021-22 had HSDG entered a new contract. RX1067, 151:14-153:15. While OJC produced an Excel spreadsheet showing a [REDACTED] FFE projection, Weiss Ex. 100, as discussed below, there are number of issues with the spreadsheet. Except for the 2020-21 season (during which OJC shipped just [REDACTED] FFEs), OJC did not provide any historical container volumes to gauge the reasonableness of the 2021-22 projection. RX1120-21 ¶¶ 9-11. OJC also failed to provide any container data—even in summary fashion—after July 16, 2022. RX1121, ¶ 11. Container volumes are especially important given OJC's substantially increased projection for 2021-22 and the numerous discrepancies with OJC's data. For example, Mr. Weiss claims that "OJC had the demand during the 2020-21 season to move 3500 High Cube ('HC') FFEs," yet OJC's data shows that it moved only [REDACTED] FFEs in 2020-21—an [REDACTED]% *decrease* compared to the alleged "demand." *Compare CX468 with Weiss Ex. 101* (containers tab, sorted by shipped date).

Products OJC Would Have Sold in 2021-22. OJC's calculations assume not only that OJC would have shipped as much as 4,700 FFEs in 2021-22, they assume OJC would have sold all products in those containers. Yet, Mr. Berning failed to review—and OJC refused to produce—any shipping records, sales records, financial statements, or other documents to gauge the reasonableness of this assumption. RX1120-21, ¶¶ 9-16. Such documentation is essential because OJC is arguing it would have experienced an [REDACTED]% *increase* in sales. According to Mr. Zayas, this dramatic increase in sales is inconsistent with market dynamics. RX1164-69, ¶¶ 58-66.

HSDG’s Alleged Refusal to Deal. OJC alleges that Respondents violated the Act by refusing to deal with OJC after the Service Contract ended on May 31, 2021. Yet, as noted, OJC’s own data shows that HSDG and Maersk continued to ship containers for OJC after May 31, 2021. *Supra* at 4-5, 13-14. Mr. Weiss could not explain this during his deposition and suggested that he would need to look at the *actual container data* “and look at who we paid the bill to, who we bought the space from, but this is not in this spreadsheet.” RX1023, 224:21-RX1024, 226:3. Notwithstanding this testimony, Mr. Berning failed to review—and OJC refused to produce—the necessary supporting documentation. RX1120-21, ¶¶ 9-16.

OJC’s Alleged Lost Profits. Mr. Berning failed to review—and OJC refused to produce—any financial statements, such as balance sheets, income statements, cash flow statements, and profit and loss statements. RX1121, ¶¶ 12-13; RX1062, 131:5-12. As Mr. Zayas explained in his expert report of August 5, 2022, these routine financial records are essential when attempting to calculate lost profits or assess the value of a business. RX1148, ¶ 9; RX1149, ¶ 15;RX1155, ¶ 32.

OJC’s Failure to Mitigate. Although Mr. Weiss acknowledged that OJC had service contracts with other carriers in 2020-21, RX1010, 79:12-22; RX1011, 85:13-22; RX1016, 127:16-21, OJC refused to produce (or did not have) any documents showing it made any effort to secure space or transport cargo with any other carrier, NVOCC or forwarder. RX1090, 244:9-1091, 248:23. RX1121, ¶ 14. Mr. Berning did not review any rate proposals. RX1060, 124:3-8, 124.

* * *

Mr. Berning’s failure to adhere to applicable professional standards is particularly significant because the calculations he blindly accepted were prepared by Mr. Weiss for litigation (not in the ordinary course of business), and they changed substantially over time. The chart below

highlights the differences between the information OJC produced on July 14, 2022 and the “updated” information it produced, with Mr. Berning’s report, on September 2, 2022:

	OJC Damage Calculations July 14, 2022 Rohde Ex. 1	OJC Updated Calculations Sept. 2, 2022 Weiss Ex. 101	Berning Report Sept. 2, 2022 CX415-59
FY20 Average Gross Revenue Per Container	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
FY20 Average Gross Profit Per Container	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
FFEs shipped by HS in FY20	185	185	185
FY20 Damages for Failure to Meet Minimum TEU	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
FY20 Weekly Shortfalls	74	105	105
FY20 Weekly Shortfall Damages	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
Containers shipped FY21 at Spot Rates	95	143	143
Damages for actual FY21 Shipments	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
Refusal to Renew Minimum Containers	500	4,200	4,200
Damages (minimum)	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
Refusal to Renew Maximum Containers	4,500	4,700	4,700
Damages (maximum)	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]

RX939. OJC has not explained the reason for these significant changes. As noted, Mr. Berning’s calculations match *exactly* the data and calculations prepared by Mr. Weiss and produced on September 2, 2022. Mr. Berning had no understanding why OJC’s calculations changed in different versions of Weiss’s damages analysis. RX1086, 227:13-229:24.

(b) The Assumptions Underlying Mr. Berning’s Opinions Are Not Reasonable

Despite acknowledging that an expert may not blindly rely on assumptions from a client without determining if they are reasonable, RX1077, 193:12-24, Mr. Berning did so repeatedly. For example, he assumed, upon instruction from OJC’s counsel, that OJC suffered compensable damages under the Act. RX1043, 57:1-12. But Mr. Berning testified that he has no idea *how* OJC’s alleged damages relate to any alleged violations of the Act, or any experience assessing damages under the Act. RX1051, 86:19-RX1052, 91:15. As Berning put it, “[REDACTED]” RX1080, 202:17-18. Mr. Berning’s

opinions, and the damages calculations prepared by Mr. Weiss that he parrots, depend on no fewer than six unreasonable assumptions.

First Unreasonable Assumption. Mr. Berning and OJC assume that HSDG was required to enter a Service Contract for 2021-22. RX1048, 75:14-76:21. The Service Contract did not, however, contain an automatic renewal provision or impose an obligation on either OJC or HSDG to renew the agreement after May 31, 2021. OJC ignores FMC precedent that parties have a fundamental right not to enter service contracts, and nothing in the Act compels HSDG to enter a service agreement with OJC under any circumstances. *Supra* at 8, 10-11, 22-23.

Second Unreasonable Assumption. Mr. Berning and OJC assume that the hypothetical service contract for 2021-22 would have had the same rates as 2020-21. RX1076, 186:22-187:10. Mr. Berning did not review any documents or data to assess the reasonableness of this assumption. RX1077, 190:5-21. The assumption makes no sense, however, given OJC's admission that carriers were able to charge substantially higher rates in 2021-22 due to the imbalance of supply and demand. OJC Brief at 41-46. Mr. Berning had no explanation for this fallacy with his assumption. RX1081, 206:7-207:6. As Mr. Zayas notes in his declaration, the rates in 2021-22 would certainly have exceeded the rates in 2020-21 given the marketplace dynamics in the beginning of 2021. RX1164, ¶¶ 55-56; RX338-402. OJC's assumption is also contradicted by Mr. Pump's testimony, RX993, 235:11-20, and Mr. Berning's own rate trends chart. CX435.

Third Unreasonable Assumption. Mr. Berning and OJC assume that HSDG would have agreed to increase the MVC from 200 FFEs in 2020-21 to 4,700 FFEs in 2021-22—an increase of **2,250%**. Mr. Berning admitted that he did nothing to assess the reasonableness of this assumption; he merely accepted what Mr. Weiss said. RX1094, 258:11-260:12. The single document Mr. Berning says “corroborates” a MVC up to 4,700 FFEs is an internal HSDG email in which Ms. Casanova refers to ***OJC's projection*** of up to 4,700 containers. RX1068, 156:18-22 (citing

CX203). Setting aside—for the moment—the reasonableness of this container projection, there is no indication in any document that HSDG would have agreed to increase the MVC by **2,250%**. HSDG handled just 185 FFEs or █% of the █ FFEs that OJC shipped in 2020-21. Weiss Ex. 101 (containers tab, sorted by shipped date). It is unreasonable to assume that HSDG would have agreed—or could have agreed—to singlehandedly transport in 2021-22 all of OJC’s volume from 2020-21, *plus another* █ FFEs. *Supra* at 11, 13, 17; RX1164, ¶ 57.

Fourth Unreasonable Assumption. In addition to assuming that HSDG would have increased the MVC up to 4,700 FFEs, Mr. Berning and OJC assume that OJC would have been able to *fill* 4,700 containers with products and *sell* all those products in 2021-22. This represents an █% *increase* over OJC’s █ FFE volume in 2020-21. OJC produced no evidence that it sold everything in the █ containers it imported in 2020-21, let alone that it would sell everything in the 4,200 to 4,700 containers OJC says it projected to import in 2021-22. Mr. Berning admitted he does not know if OJC had the *ability* to move this substantially increased volume in 2021-22, and he acknowledged that OJC’s actual volume in 2021-22 was just █ FFEs or █% of the 2021-22 projection. RX1097, 270:7-271:11.

OJC offers a single Excel spreadsheet titled “Container Projections 2021” to support its projected substantial increase in volume in 2021-22. Weiss Ex. 100. There are numerous problems with this spreadsheet that render the 2021-22 projection unreasonable and fundamentally flawed. *First*, the projection purports to include actual shipping data for periods including May 2021 suggesting that it was prepared after May 2021. RX1164-65, ¶ 59. *Second*, Mr. Weiss claims OJC had the demand to have moved 3,500 FFEs in 2020-21, but OJC actually shipped just █ FFEs in 2020-21, an █% *decrease*. *Compare* Weiss Decl. ¶ 10 *with* Weiss Ex. 101 (containers tab). *Third*, although the spreadsheet reflects that every Naomi Home product was “unavailable” at various times during the █, OJC assumes—without explanation—that

the lack of “availability” would have been resolved [REDACTED] had HSDG entered into a new contract. RX1165, ¶ 59(c). When asked about this at deposition, Mr. Weiss testified, “I’m sure we have the data, but there’s no way for me to tell you this today off of memory.” RX1027, 293:17-22. Again, OJC refused to produce the data. *Fourth*, the 2021-22 projection is inconsistent with contemporaneous data and communications. In April 2021, OJC acknowledged that there were 40 containers awaiting shipment. CX210. Neither OJC nor Mr. Berning explain how a 40-container backlog in April 2021 correlates to a claimed need for more than 390 containers per month beginning in June 2021. RX1165-66, ¶ 59(d). The data suggests OJC did not have sufficient demand and/or manufacturing capabilities to meet the 4,700 FFE projection on which its damages claims are based. *Id.*; RX749 (OJC’s warehouse at full capacity in February 2021).

Fifth Unreasonable Assumption. Mr. Berning and OJC assume that HSDG would have agreed in the hypothetical 2021-22 contract to transport containers from Asia to OJC’s warehouse in Kentucky. This assumption is unreasonable because HSDG expressly excluded Asia to Kentucky trade lanes (i) from the 2020-21 Service Contract; and (ii) during the negotiations toward a possible contract for 2021-22. *Supra* at 11-12. Mr. Berning was not aware of this, and he did not review the emails in which HSDG consistently informed OJC that they had no interest in the Kentucky business. RX1089, 238:4-RX1090, 243:18. By including the Asia to Kentucky business in their calculations, OJC and Mr. Berning overstate—*potentially by as much as 70%*—any alleged damages for HSDG’s failure to enter a service contract in 2021-22.

Sixth Unreasonable Assumption. Mr. Berning and OJC assume that the hypothetical 2021-22 contract would have included trade lanes from Brazil to the U.S., even though the Service Contract for 2020-21 covered only Asia to California trade lanes. RX1098, 277:23-RX1099, 278:15. While HSDG did handle some shipments for OJC from Brazil to the U.S., as noted above, it did so on a case-by-case basis through rate quotations that were typically valid only for 60 days.

Supra at 13-14. Mr. Berning and OJC claim there was a separate contract for the Brazil to U.S., but the document they cite is actually a rate quotation valid from March 3, 2021 to April 30, 2021. OJC Brief at 40 (citing CX425). By including the Brazil to U.S. business in their damage calculations, OJC and Mr. Berning overstate any alleged damages.

(c) Mr. Berning’s Opinions Are Insufficient as a Matter of Law

In addition to failing to comply with applicable professional standards by failing to verify information and by relying upon unreasonable assumptions, Mr. Berning’s opinions are insufficient as a matter of law because they merely parrot Mr. Weiss’ calculations. Mr. Berning readily admitted under oath that he did nothing to verify Mr. Weiss’ calculations: “██████████.██████████.” RX1086, 229:9-RX1087, 230:13 (emphasis added). Mr. Berning’s opinions are nothing more than Mr. Weiss’ calculations in the guise of “expert” analysis. Clearly anticipating this problem, OJC belatedly attempts to bolster Mr. Weiss’s purported credentials. OJC Brief at 34. Mr. Weiss is not an accountant, and he did not receive any education in economics or accounting. RX1004, 40:23-RX1005, 40:23-44:13.

Given that Mr. Berning’s opinions are based entirely on Mr. Weiss’s work, they are insufficient under FMC precedent. In *California Shipping Line*, the FMC declined to award any damages where the complainant relied solely on a damage summary that “was entirely the work of [its] president and was based on his estimates of the amounts and types of cargoes he could have generated.” 1990 WL 427466, at *24. As detailed *supra* 27-32, Mr. Weiss’ damage analysis (and by extension, Mr. Berning’s reports) lack essential supporting data. Given that he merely duplicated Mr. Weiss’ calculations, Mr. Berning’s opinions are not properly the subject of expert testimony. *See Choi v. Tower Rsch. Cap. LLC*, 2 F.4th 10, 20 (2d Cir. 2021) (excluding expert report that “functions as little more than a legal brief that parrots plaintiffs’ arguments”);

Primavera Familienstiftung v. Askin, 130 F.Supp.2d 450, 530 (S.D.N.Y. 2001) (excluding expert who did “no more than counsel [for plaintiff] w[ould] do in argument”).

2. OJC’s Alleged Lost Profits

OJC seeks four categories of lost profit damages, all of which depend on Mr. Weiss’ unsupported calculations of Average Gross Revenue Per Container and Average Gross Profit Per Container, both of which are addressed above.

(a) Failure to Meet MVC in 2020-21

OJC seeks \$ [REDACTED] in lost profits for HSDG’s failure to meet the MVC of 200 FFEs in the Service Contract from June 23, 2020 to May 31, 2021. OJC Brief at 37. OJC calculates its damages for this category of lost profits by multiplying the 15 FFE deficit by the “anticipated average net profit per container of \$ [REDACTED].” *Id.* at 38.

Section 3(c) of the Service Contract provides for liquidated damages of \$250 per TEU “[i]n the event that the Minimum Volume Commitment of this Contract is reduced by 10% or more as a result of carrier’s failure to provide space.” CX121, § 3(c). Such provisions are valid and can negate claims for damages under the Act. *California Shipping Line*, 1990 WL 427466, at *25. Section 3(c) obviates any claim for damages arising from HSDG’s failure to meet the 200 FFE minimum from June 23, 2000 to May 31, 2021 because the actual containers shipped by Hamburg Sud (185 FFEs) were within 10% of the MVC (200 FFEs). RX1160, ¶ 42. Even setting aside the 10% threshold, the maximum damages that OJC could receive under the Service Contract for a 15-container shortfall would be \$7,500 (30 TEUs multiplied by \$250 per TEU).

(b) Failure to Provide Regular Weekly Shipments

In addition to seeking damages for HSDG missing the 200 FFE MVC in 2020-21, OJC seeks \$ [REDACTED] of damages for HSDG’s failure to provide “regular weekly shipments” in 2021-21. OJC Brief at 38-39. According to OJC, HSDG was “required to provide a minimum

number of weekly shipments during Fiscal Year 2020,” and HSDG “repeatedly missed the weekly minimum and by the end of the year the weekly shortfalls totaled 105 containers.” *Id.* at 38. To compute damages for this category of lost profits, OJC multiplies the 105 containers “by the anticipated average net profit per container of \$ [REDACTED].” *Id.* at 39.

This damage claim is also inconsistent with the terms of the Service Contract. There is no contractual requirement that HSDG provide “regular weekly shipments” to OJC during the “Contract Term,” defined as June 23, 2020 to May 31, 2021. RX1133, ¶¶ 12-13. The Service Contract merely imposes a 200 FFE MVC during the Contract Term. RX960, 206:1-22. In arguing that it was entitled to 8 TEUs or 10 TEUs per week, OJC refers not to the terms of the Service Contract, but to emails between Mr. Weiss and Ms. Casanova or internal emails within HSDG. These communications—including the one reproduced in OJC’s Brief at page 38—refer to “SP” or “space protection” that HSDG allocated *internally* in an effort to (i) meet OJC’s weekly container requests; and (ii) stay on track to meet the 200 FFE MVC for the contract term. RX1134, ¶ 14. These communications did not amend the Service Contract to require “regular weekly shipments as OJC contends.”¹⁶ RX1134, ¶¶ 15 & 18.

Moreover, in seeking damages for a “weekly shortfall” of 105 FFEs in addition to damages for failing to meet the 200 FFE MVC, OJC argues that HSDG was contractually required to ship **305 FFEs** from June 23, 2020 to May 31, 2021. This is inconsistent with Section 3(a) of the Service Contract, which states that HSDG has the “option”—*not the contractual requirement*—to ship additional cargo beyond the MVC of **200 FFE**:

¹⁶ Section 17 of the Service Contract states that any “Amendments to this Contract must be executed by both parties” and it allows “amendments in an electronic mail format (e-mail), transmitted via the Internet and executed by the parties with an electronic signature.” CX124 § 17. However, the term “electronic signature means an exchange of emails between the parties to which the parties attach the amendments to the Agreement and in which the parties state that they agree to terms and conditions of such amendment.” *Id.* OJC has not offered any amendments to the Service Contract that meet this definition.

(a) Carrier agrees to make available to Shipper during the term of this Contract vessel capacity adequate to carry (1) the Minimum Volume Commitment of cargo and (2) *at Carrier's option*, any additional cargo tendered by Shipper during the term of this Contract.

CX120, § 3(a). Mr. Weiss testified that he understood this provision did not require HSDG to ship more than 200 FFEs from June 23, 2020 to May 31, 2021:

[REDACTED]

RX1015, 123:9-124:3 (attorney objections omitted). Mr. Berning admitted that he had no basis for assuming “regular weekly shipments” under the Service Contract. RX1073, 177:6-RX1074, 179-:14. Mr. Berning acknowledged that if Respondents were required to provide 10 TEUs per week for the 49-week Contract Term, then the total volume of 490 TEUs would have exceeded the MVC in the Service Contract by 90 TEUs. RX1098, 277:3-11. Accordingly, OJC’s claim for \$ [REDACTED] of damages for a 105-container “weekly shortfall” is inconsistent with both the terms of the Service Contract and Mr. Weiss’ sworn testimony as to the meaning of the Service Contract.

(c) Freight Charges Above Contract Rates for 2021-22

OJC seeks \$ [REDACTED] in lost profits—the difference between the spot rates it purportedly paid to ship [REDACTED] FFEs in 2021-22 and the contract rates it would have paid had HSDG entered a new contract in 2021-22. OJC Brief at 39-40. This damage claim is flawed in several respects.

First, OJC did not provide any documents to verify the [REDACTED] FFEs it claims to have shipped in 2021-22, or the spot rates it allegedly paid.¹⁷ RX1120-21, ¶¶ 6-15. OJC also refused to produce service contracts with other carriers to show the rates paid. RX1120, ¶¶ 6-8.

Second, as addressed above, OJC’s assumption that HSDG would have agreed to the same rates in 2021-22 is unsupported and unreasonable. *Supra* at 12, 17, 19-20. OJC cites a single document: “the renewal contract proposed by Maersk—NOAC10000728 Effective June 1, 2021, until May 31, 2022.” OJC Brief at 39; CX214. That document is not a “renewal contract;” it is the email addressed above that Ms. Casanova circulated internally to her HSDG colleagues to gauge HSDG’s interest in a new contract and inquire about contract rates. *Supra* at 12-13, 19.

Third, OJC incorrectly includes shipments from Brazil to the U.S. even though these trade lanes were not part of the 2020-21 Service Contract. *Supra* at 13-14, 35-36. By including the Brazil to U.S. business in their damage calculations, OJC and Mr. Berning overstate any alleged damages for HSDG’s failure to enter a new contract in 2021-22.

Fourth, OJC incorrectly includes shipments from Asia to Kentucky even though these trade lanes were not part of the 2020-21 Service Contract. As noted above, the assumption that HSDG would have handled this business is unreasonable because HSDG expressly excluded the Asia to Kentucky trade lanes (i) from the 2020-21 Service Contract; and (ii) during the negotiations toward a possible 2021-22 contract. *Supra* at 11-12, 18, 35. By including the Asia to Kentucky business, OJC and Mr. Berning overstate—***potentially by as much as 70%***—any alleged damages. *See* CX203.¹⁸

¹⁷ The container information Mr. Weiss purportedly pulled from OJC’s database has changed over time. Mr. Weiss’ July 14, 2022 spreadsheet states that OJC shipped [REDACTED] FFEs from June 1, 2021 to March 24, 2022, whereas the updated spreadsheet produced on September 2, 2022 states that OJC shipped [REDACTED] FFEs during this same period. *Compare* Rohde Ex. 1 with Weiss Ex. 101 (containers tab). OJC has never explained this.

¹⁸ Additionally, OJC fails to identify the “source” of the rates it claims it would have paid for shipments from Asia to Kentucky in 2021-22. OJC’s table references a “Proposal” without further explanation. OJC Brief at 40.

(d) Lost Profits from “Refusal to Renew Service Contract”

The final category of lost profits OJC seeks relates to the 4,200 to 4,700 FFEs that OJC projects it would have shipped in 2021-22 had HSDG entered a new contract. OJC Brief at 40-41. OJC calculates lost profits by multiplying these projections by the unsupported “Average Gross Profit Per Container” of \$ [REDACTED]. *Id.* OJC’s projection of 4,200 to 4,700 FFEs in 2021-22—a [REDACTED] % increase over its container volume in 2020-21—is unsupported and unreasonable for all the reasons discussed above. *Supra* at 11, 13, 17, 33-34. OJC’s claim for \$ [REDACTED] or \$ [REDACTED] in lost profits in 2021-22 is pure speculation and must be rejected.

3. OJC’s “Shipping Rate Differentials” Method

OJC offers a second method to calculate its alleged damages—the shipping rate differential method. This method calculates the difference between (i) the contract rates OJC would have paid in 2021-22 had HSDG entered a new contract; and (ii) the “spot market cost to ship the same containers” in 2021-22. OJC Brief at 41-46. There are multiple problems with this method, most of which have been discussed in preceding sections above. *First*, OJC relies on the unreasonable and unsupported assumption that HSDG would have agreed to a new contract in 2021-22 with the same rates as 2020-21. *Second*, OJC assumes that the new contract would have included the Asia to Kentucky trade lanes even though HSDG expressly excluded these trade lanes. *Third*, the contract rates OJC uses for the Asia to Kentucky trade lanes are not sourced and are inapplicable in any event as HSDG declined to handle that business. *Fourth*, OJC improperly includes the Brazil to U.S. trade lanes even though those trade lanes were not part of the Service Contract. *Fifth*, OJC’s projection that it would have shipped 4,200 to 4,700 FFEs in 2021-22 is unreasonable and unsupported. *Sixth*, OJC incorrectly uses spot market rates for 2021-22 from third party sources such as Xeneta and Drewry. There is no reason to use third-party sources when OJC knows the precise rates that it paid to ship [REDACTED] FFEs in 2021-22.

4. OJC Offers No Evidence of Causation

As the FMC has explained, “damages must be the proximate result of violations of the statute in question.” *Mavl Capital Inc.*, WL 2209421, at *3. OJC offers no evidence of causation; Mr. Berning simply assumed it. RX1043, 56:11-19. His assumption is unreasonable given Mr. Weiss’ testimony that “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.” CX467. In other words, Mr. Weiss decided to seek a *single* service contract with a *single* carrier for 2021-22, but the carrier he chose—HSDG—was the only carrier that failed to meet its MVC in 2020-21 and the only carrier OJC repeatedly threatened to sue. RX1013, 115:2-25, 116:10-13; RX1012, 104:13-18. Mr. Weiss also made his decision to break off negotiations with other carriers *before* he had even started to negotiate in earnest with HSDG. *See* RX1010, 81:11-RX1011, 82:9 (OOCL contract ended March 2021; COSCO contract ended “month or two” before HSDG contract); Amended Complaint, ¶ 41 (negotiations with HSDG started in April 2021). Any damages OJC suffered in 2021-22 were caused by this decision, and Mr. Weiss appeared to concede as much during his deposition: “you know in hindsight, I felt, wow, what a big mistake to put all my eggs in one basket.” RX1024, 229:13-15. He added: “it made absolutely no sense what I did.” RX1026, 245:19.

5. OJC Failed to Mitigate Its Alleged Damages

Any complainant alleging a violation of the Act must take “appropriate measures to mitigate its damages or avoid the consequences of [respondent’s] actions.” *California Shipping Line*, 1990 WL 427466, at *25-26 (“If we had determined that [complainant] was entitled to damages in the first instance, we would be inclined to remand this case for a further hearing to ascertain the exact level of mitigation.”). Mr. Berning’s damage analysis is flawed because counsel instructed him not to assess mitigation. RX1097, 271:12-272:2. That was likely because OJC failed to mitigate its alleged damages. OJC failed to produce any emails or documentation

showing that it made any effort to secure space or transport cargo with any other carrier, NVOCC, or forwarder. RX1121, ¶ 15. The failure to mitigate can be illustrated by multiplying OJC’s “estimated” volume by Mr. Berning’s profit incremental. For example, Mr. Berning assumes 3,000 FFEs of an estimated 4,700 FFEs would be shipped (per Mr. Berning’s Supplemental Report) at a shipping cost of \$ [REDACTED] per container (based on Xeneta data). CX463. Mr. Berning also assumes a \$ [REDACTED] gross profit per container before incurring increased shipping costs. CX426. While the accuracy of these two figures is very much in doubt for the reasons noted above, the figures suggest that OJC elected to forgo nearly \$ [REDACTED] of profits ([REDACTED] [REDACTED]). RX1172, ¶ 77. By comparison, OJC’s purported total profits from both business segments (measured by earnings before taxes) in 2019 were \$ [REDACTED]. RX1172, ¶ 78. Assuming the accuracy of all other inputs and assumptions, OJC’s own lost profits model indicates it elected to voluntarily forego profits that were [REDACTED] % *higher* than OJC ever experienced. *Id.*

E. HSDG Complied with Its Discovery Obligations

OJC argues Respondents failed to comply with their discovery obligations. OJC Brief at 26-33. These allegations are without merit and sanctions are therefore not appropriate. On the other hand, and as noted throughout this brief, OJC refused to produce relevant information in response to Respondents’ discovery requests. RX1120-21, ¶¶ 6-16. Rather than seek sanctions, Respondents explain why the withheld information was necessary, and request that the Presiding Officer consider the total absence of any documents supporting Mr. Weiss’ damage calculations. *See California Shipping Line*, 1990 WL 427466, at *24 (rejecting damages supported solely by a summary exhibit that “was entirely the work of [complainant’s] president”); Sept. 30, 2022 Order at 4 (“Respondents may argue in their brief that the underlying documents used to create the spreadsheet were not provided and therefore that the spreadsheet is less probative.”).

1. Respondents Provided Pricing Information/Witnesses

HSDG provided a fulsome response to OJC’s RFP 26, both in terms of documents and relevant witnesses. RFP 26 requested “Documents sufficient to show Your pricing for shipping, including how You determine the prices charged for shipments under Service Contracts and for shipments on the spot market, and how and why Your prices may vary between one Shipper and another.” CX300. In her June 29, 2022 Order, the Presiding Officer granted OJC’s motion to compel, but narrowed RFP 26 to cover only:

Policies, procedures, guidance, training or instructions regarding pricing for shipping or determining prices charged for shipment under service contracts and on the spot market. ***Respondents will not be required to review or provide documents regarding pricing for individual shippers.***

CX300 (emphasis added). HSDG produced responsive documents, including documents relating to service contract pricing strategy for 2021-22 and internal spot rate guidance issued bi-weekly from the third quarter of 2019 to mid-2022. RX1122, ¶¶ 17-18. HSDG voluntarily produced spot rate data for a longer period than required under the June 29 Order. RX1122, ¶ 18.

OJC now complains that HSDG has not produced “prices that Maersk really charged shippers.” OJC Brief at 28. Under the June 29 Order, however, documents showing actual prices charged to individual shippers were not required. CX300. Even if one concludes that the actual prices charged to shippers were required, OJC has access to this information.¹⁹ As HSDG explained to OJC, common carriers charge rates via a service contract or a public tariff. The Presiding Officer denied OJC’s motion to compel production of individual service contract information sought in RFP 9 and Interrogatory No. 9. CX299. OJC was directed to HSDG’s tariff in response to these requests, and thus has access to the rates actually charged to HSDG’s

¹⁹ To the extent OJC’s argument is based on the fact that the bi-weekly spot rate information produced by HSDG does not include origin charges and the ISPS, HSDG notes that the ISPS is already known to OJC. CX143. It is also available from HSDG’s public tariff, as are origin charges.

customers to the extent required by the June 29 Order. Allegations that the spot rates do not include the rate premium are based on OJC's misunderstanding and mischaracterization of the premium. *Supra* at 8, n.3.²⁰

Finally, even assuming the spot rates HSDG charged are relevant (a dubious assumption for the reasons noted *supra* at 41-42), OJC has spot rate information for 2021-22. OJC moved █████ FFEs at spot rates in the second half of 2021 and in 2022. Accordingly, to the extent spot rates are relevant, it could have used the spot rates it actually paid to perform its flawed damage calculations. *See* Sept. 30, 2022 Order at 6 (“given the degree to which prices vary based on other factors, it is not clear how relevant this information would be”).

Insofar as witnesses are concerned, OJC's arguments also ring hollow. On August 18, 2022, OJC's counsel sent HSDG's counsel notices for the depositions of Soren Skou and Patrick Jany, the CEO and CFO of A.P. Moller-Maersk A/S, respectively. Respondents moved for a protective order to prevent those depositions from going forward. On August 31, 2022, the Presiding Officer issued an Order requiring HSDG to identify “Maersk management who would have information regarding pricing decisions.” The August 31 Order further provided that “[i]f appropriate Maersk witnesses are provided, then the depositions of Maersk CEO Soren Skou and CFO Patrick Jany will not be required.”

On September 7, 2022, Respondents identified: (i) Ivan Cheung, the person most knowledgeable about trans-Pacific eastbound spot rates from November 2020 to the present; (ii) Rodrigo Pestana, the person most knowledgeable about such rates prior to November 2020; (iii)

²⁰ HSDG also offered on at least two occasions to discuss factual stipulations with OJC as suggested by the Presiding Officer. RX1123, ¶ 24. OJC's counsel declined to discuss stipulations, except to the extent HSDG stipulated that it would not pursue certain defenses. *Id.* Simple factual issues such as the ones OJC now raises likely could have been addressed at least to some extent through stipulations. OJC should not be rewarded for its recalcitrance and preference for argument over resolution.

Johan Sigsgaard, the highest ranking person in the Maersk organization with authority over rates from April of 2021 to the present; and (iv) Silvia Ding, Mr. Sigsgaard's predecessor. RX478; RX1122, ¶ 20.

On September 16, 2022, in response to OJC's Interrogatory seeking the identity of persons who set, authorize, or otherwise determine pricing for service contracts, HSDG further identified: (i) Amit Sethi (Global Head of Ocean Contract Product); (ii) Liezel Du Toit (Senior Director, Head of Spot Products); (iii) Lee Michael Sissons (Head of Ocean, Asia Pacific); (iv) Anne-Sophie Zerland Karlsen (Head of Asia Pacific Ocean Customer Logistics); (v) Thiago Guimares Covre (Regional Head of Trade, Sealand Americas); and (vi) Michael Britton (Managing Director, Sealand Americas. RX456-57; RX1123 ¶ 22. The only person OJC sought to depose was Mr. Sigsgaard. RX1123, ¶ 23.

Mr. Sigsgaard is the Global Head of Ocean Products and Senior Vice President at Maersk A/S, located in Copenhagen, Denmark. RX1127; ¶ 1. In that role, Mr. Sigsgaard has overall responsibility for all pricing decisions relating to ocean transportation of cargo by Maersk A/S, but due to the size and global scale of the operations, he carries out his responsibility through intermediate levels of management, including the personnel identified above. *Id.* ¶¶ 3-4. HSDG offered OJC the only blocks of time Mr. Sigsgaard was available, 8 am to 12 noon eastern on October 5, 2022 and 8:45 am to 11:15 eastern on October 7, 2022, which together totaled 6.5 hours. CX329-30; RX1128 ¶ 6. When OJC advised that they could not take the deposition on October 5,²¹ HSDG's counsel offered to extend the time for the deposition on October 7 to run from 8:45 am to 1 pm eastern. CX328. OJC refused to take Mr. Sigsgaard's deposition, insisting that it was entitled to seven hours on a single day. CX327-28.

²¹ The communications regarding Mr. Sigsgaard's deposition occurred with Aaron Davis, counsel for OJC. Upon information and belief, October 5 was not a holiday for Mr. Davis.

OJC misreads the durational limit on depositions. The 2000 Advisory Committee Notes to the Federal Rules on Civil Procedures indicate that this presumptive durational limitation was adopted to avoid overlong depositions that result in undue costs and delays. It is intended to protect the witness and the process, not to guarantee that all witnesses will be available for a minimum of seven hours on a single day. The Committee Notes state:

The limitation is phrased in terms of a single day on the assumption that ordinarily a single day would be preferable to a deposition extending over multiple days; if alternative arrangements would better suit the parties, they may agree to them. It is also assumed that there will be reasonable breaks during the day. Preoccupation with timing is to be avoided.

Mr. Davis could have deposed Mr. Sigsgaard for a period of time on October 5. His client and co-counsel could have reviewed the transcript or video recording of the October 5 session on October 6, and the deposition could have continued on October 7. Rather than take this approach, OJC chose not to depose Mr. Sigsgaard and to claim instead that Respondents did not make him available. That is not accurate.

In addition to Mr. Sigsgaard, Respondents identified Ivan Cheung and Rodrigo Pestana as persons knowledgeable about spot rates. RX1122, ¶ 20. HSDG offered to make Mr. Cheung (who is located in Hong Kong) available on September 12-13 and again on October 12-13. RX471; RX485. OJC declined to depose Mr. Cheung, and never requested dates for Mr. Pestana or noticed his deposition. *See* RX471. OJC noticed the deposition of HSDG's expert witness, Mr. Zayas, for September 8, 2022, RX469-70, but cancelled that deposition on September 6, 2022. RX474.

2. HSDG Complied with Discovery Obligations Concerning Blank Sailings

OJC's allegation that Respondents failed to produce any documents relating to policies, procedures, or plans concerning blank sailings is also misguided. Interrogatory No. 3 of OJC's Third Set of Interrogatories asked HSDG to:

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

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

OJC also sought documents regarding blank sailings in its Fourth Request for Production of Documents. RX467. HSDG objected on various grounds and incorporated by reference its response to the above Interrogatory. RX467. Respondents did not produce documents because there are no responsive documents.

OJC apparently seeks documents on blank sailings on the theory that blank sailings were used by HSDG to manipulate pricing and space. OJC Brief at 31. Given that HSDG did not operate vessels in the trans-Pacific trade and had no ability to use blank sailings, this allegation is baseless.²² The allegation is also contradicted by the findings of the FMC:

During the pandemic, 'blank sailings' were a particular concern because of their potential to be used for anti-competitive purposes. Our monitoring, however, indicated that this reduced service by ocean carriers was driven by port congestion rather than a desire to reduce capacity...

RX380. In addition, FMC Chairman Maffei testified before Congress that "all indications are that the lines are trying to increase their capacities as quickly as possible. According to an Alphaliner report published in May 2021, there are only 60 idle ships representing less than 1% of the world's

²² HSDG served its customers in the trans-Pacific trade using space chartered from Maersk. *See* RX916-29 (Maersk/HSDG Umbrella Slot Charter Agreement).

available container ship fleet.” Testimony of FMC Chairman Daniel Maffei before House T&I Subcommittee on Coast Guard and Maritime Transportation, June 15, 2021, at 5. RX332.

Chairman Maffei also testified that:

The usual answer to high rates would be to incentivize the containership lines to add more vessels to address demand. But they have added more capacity on the water and all it seems to do is contribute to longer lines of ships outside capacity our Nation’s largest ports

Testimony of FMC Chairman Daniel Maffei before Senate Commerce Committee, March 3, 2022, at 2. RX335. OJC’s theory concerning blank sailings is thus refuted by the FMC’s findings.

3. HSDG Has Not Abused Confidentiality Designations

Contrary to OJC’s accusations, Respondents did not abuse the “confidential” or “attorneys’ eyes only” designations. Nothing was hidden from OJC based on any designations. OJC’s counsel and its expert witness have access to all information, and OJC has access to all information that is not designated “attorneys’ eyes only.” Of the more than 15,000 pages of documents Respondents produced, approximately **421 pages** or **2.8%** were designated “confidential,” and approximately **271 pages** or **1.8%** were designated “attorneys’ eyes only. RX1123, ¶ 25. The vast majority of these documents consisted of documents with rate information. This is hardly abusive.

More importantly, OJC’s argument that Respondents made no attempt to overcome the presumption that material included in a substantive filing is subject to public right to access is premature. As noted in paragraph 19 of the Initial Order, the burden to justify confidential treatment attaches when confidential information is filed in a memorandum or as an exhibit to a dispositive motion or as part of briefing on the merits. HSDG has submitted a motion for such treatment contemporaneously with this brief. OJC did not submit a similar motion with its brief. Thus, OJC is actually the party that has failed to meet the presumption.

IV. CONCLUSION

In light of the foregoing, the Presiding Officer should dismiss HSNA as a respondent, and dismiss all claims against HSDG with prejudice.

Respectfully submitted,

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Dated: December 8, 2022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of December, 2022, the foregoing was served via electronic mail on:

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