BEFORE THE
FEDERAL MARITIME COMMISSION

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

RESPONDENT HSDG'S EXCEPTIONS TO INITIAL DECISION

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RESPONDENT HSDG'S EXCEPTIONS TO INITIAL DECISION

Pursuant to 46 C.F.R. § 502.227, Respondent Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft A/S & Co. KG ("HSDG")[1] hereby excepts to certain findings of fact and conclusions of law set forth in the Presiding Officer's June 7, 2023 Initial Decision ("ID").

Several findings of material fact contained in the ID are contradicted by evidence in the record. In addition to persistently ignoring credible evidence introduced by HSDG, the ID utterly disregards the testimony of HSDG's expert witness and as a result improperly credits certain evidence and expert testimony proffered by Complainant OJ Commerce ("OJC") with respect to alleged damages. The ID also contains numerous legal conclusions that are contrary to applicable law and/or are unsupported by substantial evidence. As a result, the Commission should reverse

[1] The ID dismisses the claims against Hamburg Sud North America, Inc. ("HSNA"). Accordingly, HSNA is not participating in these exceptions.

the ID and find that HSDG did not violate the Shipping Act and that OJC is not entitled to reparations.

I. INTRODUCTION AND BACKGROUND

This case arises out of a service contract between HSDG and OJC that was effective from 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 ("FFEs") 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 in discovery. Based on the limited data produced, the other carriers handled **66%** of OJC's volume in 2020-21; the remaining **34%** was handled by HSDG. OJC's President and CEO, Jacob Weiss, testified that the other carriers fully performed under their service contracts.

As the result of increased demand for consumer goods in the U.S. during the Covid-19 pandemic, the volume of cargo moving from Asia to the U.S. spiked from mid-2020 to mid-2022. 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 cargo to inland destinations. As a 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 moved only 185 of the 200 FFEs it committed to transport under the Service Contract during the term thereof.[2] OJC was not the only service

[2] The 185 FFE figure dates from late April/early May of 2021. As demonstrated by the record and explained later in this brief, HSDG moved cargo for OJC under the Service Contract after that date. Thus, the 185 FFE figure may understate the volume of cargo actually transported under the Service Contract. However, any such

contract customer of HSDG impacted by the pandemic in this manner. Nevertheless, OJC repeatedly threatened to sue HSDG for breach of the minimum quantity commitment ("MQC"). 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 17 lawsuits in the past few years.

In April 2021, Mr. Weiss, OJC's President and CEO, and Andrea Casanova, an HSDG sales representative, had discussions about a possible service contract for 2021-22. However, there was never a meeting of the minds on the material contract terms, including volume, geographic scope, and rates. The parties never exchanged a draft service 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. HSDG discontinued negotiations for a new service contract but offered to transport cargo for OJC on a non-contract basis. HSDG later provided rate quotes to OJC for that purpose and did in fact transport cargo for OJC between April 29, 2021 and mid-2022.

In November of 2021, OJC filed a complaint with the FMC seeking 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 left were those under Sections 41104(a)(3) and 41104(a)(10).

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understatement is not material to the issue of a refusal to deal or retaliation, and the 185 FFE figure is used for the sake of simplicity.

The ID found that HSDG transported only 185 of the 200 FFEs it had committed to transport under the Service Contract. As explained in footnote 2 above, HSDG does not dispute this finding insofar as the claims at issue are concerned. However, the ID went on to improperly attribute this entire shortfall to HSDG's performance during the last month of the Service Contract. The record shows that HSDG moved cargo for OJC during the last month of the Service Contract and made good faith efforts to make more space available to OJC during that month. Contrary to the weight of this evidence and Commission precedent, the ID held that HSDG "shut out" OJC during the last month of the Service Contract and in so doing engaged in an unreasonable refusal to deal. The ID also incorrectly held that HSDG unreasonably refused to deal with OJC during 2021-22, again contrary to Commission precedent and the weight of the evidence showing that HSDG moved cargo for OJC during 2021-22 and provided OJC rate quotations during that same period. HSDG excepts to these findings.

The ID also held that HSDG's performance during the last month of the Service Contract and its decision not to offer OJC a service contract for 2021-22 constitute retaliation because it followed a threat by OJC to sue HSDG. HSDG excepts to this finding, which is contrary to the weight of the evidence and the plain language of the Shipping Act.

The ID awarded lost profits to OJC, and doubled that award. In so doing, the ID improperly discounted the testimony of HSDG's expert and improperly credited the unsupported testimony of Mr. Weiss and OJC's expert, incorrectly finding that OJC's expert "validated" the purported damages calculations of Mr. Weiss, which are not supported by any documentary evidence whatsoever. The ID's award of damages was also improper because OJC failed to mitigate its damages. Finally, the doubling of the damages was also unwarranted in light of the facts in the record.

As a result, and for the reasons set forth in greater detail below, the Commission should reverse the ID and find that HSDG did not violate the Shipping Act and that OJC is not entitled to reparations.

II. APPLICABLE LEGAL STANDARD

Under the Administrative Procedure Act, the ID must be supported by and in accordance with reliable, probative, and substantive evidence. 5 U.S.C. § 556(d). In reviewing the ID, the Commission has all the powers which it would have in making the initial decision. 46 C.F.R. § 502.227(a)(6).

III. THE ID ERRED IN FINDING HSDG ENGAGED IN AN UNREASONABLE REFUSAL TO DEAL

HSDG did not refuse to deal or negotiate with OJC. Accordingly, the ID's finding that HSDG violated section 41104(a)(10) of the Shipping Act should be reversed.

Section 41104(a)(10), 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 "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).

A. HSDG Did Not Refuse to Deal with Respect to the Service Contract

Because HSDG did not shut out OJC during the term of the Service Contract or any portion thereof, it did not engage in a refusal to deal or negotiate with respect to HSDG's 2020-21 contractual commitment.

As noted above, in order to engage in a refusal to deal, an ocean common carrier must shut out a customer. As long as the carrier refrains from shutting out the customer, there is no unreasonable refusal to deal. There is no dispute that the parties entered into the Service Contract in 2020 and that HSDG transported 185 of the 200 FFEs that OJC committed to ship and that HSDG committed to carry. ID, Findings of Fact ("FOF") ##12, 16, and 73. Thus, with respect to the Service Contract, the sole question is whether HSDG's failure to carry 15 of the 200 FFEs it committed to transport is a refusal to deal.

The ID held that as of April 29, 2021, HSDG stopped dealing or negotiating in good faith regarding its remaining 2020-21 contractual commitment. ID at 31. This holding is contrary to both the weight of evidence in the record and to applicable law. More specifically, this conclusion errs in three significant respects: (i) it incorrectly finds the Commission has jurisdiction over a breach of contract claim; (ii) it disregards HSDG's provision of space to OJC after April 29, 2021; and (iii) it improperly attributes non-performance of the Service Contract solely to the period after April 29, 2021. Each of these three errors is addressed below.

1. The Commission Lacks Jurisdiction Over Claims with Respect to the Service Contract

The ID erred in finding that the Commission has jurisdiction over OJC's claims with respect to the performance of the Service Contract.

On January 18, 2022, HSDG filed a motion to dismiss the complaint in this proceeding due to a lack of jurisdiction on the grounds that OJC's claim with respect to the Service Contract was

a breach of contract claim. That motion was denied. Order On Motion To Amend Complaint and Motion To Dismiss (February 18, 2022), p. 3. The denial of the motion to dismiss constitutes reversible error.

Section 40502(f) of the Shipping Act of 1984, as amended, 46 U.S.C. § 40502(f), states:

> Unless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court. The contract dispute resolution forum may not be controlled by or in any way affiliated with a controlled carrier or by the government that owns or controls the carrier.

In *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1635 (2000), the Commission wrote:

> However, we find it inappropriate and contrary to the intent of the statute that section 8(c) bar any Shipping Act claim which bears some similarity to, overlaps with, or is couched in terms suggesting that the remedy may be available in a breach of contract action. We believe the more appropriate test is whether a complainant's allegations are inherently a breach of contract claim, or whether they also involve elements peculiar to the Shipping Act. We find that as a general matter, allegations essentially comprising contract law claims should be dismissed unless the party alleging the violation successfully rebuts the presumption that the claim is no more than a simple contract breach claim. In contrast, whether the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support such a claim, that the matter is appropriately before the agency.

28 S.R.R. at 1645 (internal footnotes omitted). In the very next paragraph, the Commission clarified further, saying:

> Of the violations alleged in the instant Complaint, we find that the alleged violations of sections 10(b)(1) and (3) are substantially contract law claims. Sections 10(b)(1) and (3) are premised on the obligation to meet one's contract commitments, and are therefore essentially breach of contract actions which section 8(c) renders not properly before the Commission in the absence of evidence offered by complainant (as the party bearing the burden of proof) that some extraordinary aspects of the allegation distinguish it substantially for a breach claim.

Id. The denial of HSDG's motion to dismiss and the ID each fail to adhere to the *Cargo One* analysis. First, instead of requiring OJC to rebut the presumption that its claim with respect to the Service Contract is no more than a simple breach of contract claim (a fact supported by OJC's demand letters threating legal action for breach, *see* CX159 and CX209), the Administrative Law Judge merely accepted at face value the allegations in the Amended Complaint and asserted jurisdiction on that basis alone. Second, they fail to recognize that a claim of an unreasonable refusal to deal is premised on the obligation to meet the contract commitments, and that failure to perform the Service Contract is thus a simple breach of contract claim over which the Commission lacks jurisdiction. The ID thus fails to adhere to both the statute and the Commission's established interpretation of same. It should be reversed.

Moreover, a finding that a carrier's failure to provide the space committed under a service contract is a Shipping Act issue rather than a breach of contract effectively renders Section 40502(f) of the Shipping Act a nullity, since virtually every breach now becomes actionable under the Shipping Act, contrary to Congressional intent, applicable tenets of statutory interpretation that require giving meaning to all statutory provisions, and the Commission's own *Cargo One* decision.[3] Accordingly, the Commission should reverse the denial of the motion to dismiss and dismiss OJC's unreasonable refusal to deal claims as nothing more than breach of contract claims poorly disguised as Shipping Act allegations.

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[3] A finding that failure to perform a service contract is a Shipping Act violation also appears to be contrary to other Commission precedent. The Commission has held that when a carrier lacks sufficient space to serve all customers, it must allocate available space among its customers. *See Banana Distributors, Inc. v. Grace Line Inc.*, 5 F.M.B. 278, 284 (FMB 1957). Under the reasoning of the ID, if a carrier were to adhere to this Commission precedent and in so doing fail to provide the full amount of space it contracted to provide, the carrier would nonetheless be guilty of a Shipping Act violation.

2. *HSDG Provided Space Under the Service Contract After April 29, 2021*

The ID improperly discounts record evidence showing that HSDG provided space to OJC under the Service Contract after April 29, 2021. Finding of Fact #63 cites internal HSDG correspondence dated between May 4, 2021 through May 7, 2021 (RX726-RX728) and acknowledges that the correspondence shows that HSDG was attempting to find space for OJC in order to fulfill the Service Contract. ID at 16, FOF #63. The ID makes no attempt to reconcile this factual finding with its holding that HSDG refused to deal with OJC as from April 29. It appears this anomaly is attributed to HSDG's failure to move the full 200 FFE commitment (FOF #63) and/or the fact that the cargo moved after April 29 was already scheduled, obtained via third parties, or moved under spot quotes. FOF#77. However, neither of these explanations can reconcile the anomaly.

Insofar as the attempts to furnish additional space are concerned, the first key point is that Mr. Li's April 29, 2021 email left the ultimate decision about the provision of space to OJC in the hands of HSDG personnel in Asia ("we will leave it up to APAROM's decision to handle the remaining 18 FFE"). FOF #61. This indicates that Mr. Pump's April 29 "executive decision" was not a directive to shut out OJC. The internal HSDG correspondence of May 4-7 confirms that HSDG personnel were using the leeway afforded by Mr. Pump and Mr. Li to try and fulfill the Service Contract.

Moreover, documentary record evidence shows that HSDG moved OJC cargo on the vessels identified in the May 4-7 correspondence. A May 5, 2021 email from Ivan Cheung to several others at HSDG identifies the MAERSK EINDHOVEN and MSC ARIES as vessels on which space could be provided. RX727. OJC cargo moved on both vessels later in May, under the terms of the Service Contract. *See* RX22-23, RX33-34, RX 36, RX 43-44 (all showing Service Contract shipments to Naomi Home, the affiliate of OJC in May). There are also a significant

number of additional shipments on other vessels in late May and early June of 2021. *See* RX-24-25, RX 26, RX 27-28, RX 29, RX 35, RX39-40, RX 41-42 (all of which identify Naomi Home or OJC on the bill of lading and all of which contain the number of the Service Contract). Thus, HSDG indisputably continued to provide space to OJC under the Service Contract after April 29, 2021 and did not shut out OJC.

The argument that these May shipments had already been scheduled and/or were booked through third parties does not withstand even cursory scrutiny. The only evidence supporting this claim is Mr. Weiss' declaration. *See* SCX 509, ¶ 3. Mr. Weiss claims that "a few" of the 66 FFEs transported from Asia after April 29 were scheduled prior to that date and that the remainder were booked through freight forwarders or a shippers' association. FOF #77 errs in overstating the degree to which shipments were already scheduled, and conflates freight forwarders with a shippers' association. Moreover, Mr. Weiss's self-serving statement is not supported by any documentation (similar to his unsupported damages calculations, discussed below), whereas the documents introduced by HSDG clearly contradict and disprove Mr. Weiss's claim. The contemporaneous documentation in the record stands in stark contrast to Mr. Weiss's unsupported declaration in that all of the bills of lading identified in the preceding paragraph clearly identify Naomi Home/OJC and contain the number of the Service Contract, meaning that all parties clearly understood these to be OJC shipments under the Service Contract with HSDG.

In light of the foregoing, the weight of the evidence cannot support a finding that HSDG refused to deal with OJC under the Service Contract after April 29, 2021. That finding should be reversed.

3. Non-Performance of the Service Contract Was Not a Refusal to Deal

HSDG's failure to fulfill its obligations under the Service Contract was not a refusal to deal.

There is no dispute that HSDG transported only 185 of 200 FFEs it committed to transport during the term of the Service Contract. This, in and of itself, is a breach of contract and not a violation of the Shipping Act.[4] In order to convert this garden-variety contract claim into a violation of the Shipping Act, the ID incorrectly concludes, contrary to the weight of the evidence, that OJC was shut out from April 29, 2021 to May 31, 2021. The ID then compounds this error by improperly attributing HSDG's failure to fulfill the Service Contract solely to the period after April 29, 2021, during which OJC was purportedly shut out (FOF #75). In other words, with no legal or factual basis for doing so, the ID implicitly concludes that the purported shut out caused the non-performance. This flawed reasoning cannot stand.

Attributing the shortfall of 15 containers to the last month of the one-year Service Contract is unsupported by the record and thus entirely arbitrary. The record clearly shows that OJC was alleging a failure to provide sufficient space as early as October of 2020. FOF ##21 and 26. There were similar complaints about a lack of space in March of 2021. FOF ##34-40. There is no legitimate legal or factual basis to conclude that the entire 15 FFE shortfall is attributable to the period of April 29, 2021 to May 31, 2021, when the record clearly reflects space issues much earlier in the term of the Service Contract. Indeed, assuming a space allocation of 8 TEUs per week (FOF#19), a failure by HSDG to provide space during any four weeks during the term of the

[4] The Shipping Act designates "liquidated damages for nonperformance, if any" as one of the essential terms of a service contract. 46 U.S.C. § 40502(c)(8). If a carrier's failure to fulfill its service commitment constitutes a refusal to deal for which reparations may be payable, then this statutory provision would be a nullity in every instance in which the Commission determines the breach to be unreasonable. Given the Commission's lack of jurisdiction over breach of contract claims, this produces the absurd result of Commission jurisdiction and the application of liquidated damages being dependent on the Commission's subjective determination of whether or not a breach was "reasonable." Except as it may relate to a defense against a breach of contract claim, however, the reason a contract is breached is not relevant to the issue of breach and damages.

Service Contract would account for the entire shortfall. Consistent with the evidence showing space issues during the term of the Service Contract, OJC alleged a cumulative shortfall of 105 containers as compared to the weekly space allocation. ID at 51. While the ID correctly found that there was no weekly commitment and awarded no reparations for this "shortfall," OJC's own allegation shows that any shortfall in the amount of space provided is attributable to a lack of performance over the course of the Service Contract, rather than to the final month of the Service Contract.

Given that non-performance cannot be assigned solely to the final month of the Service Contract, FOF #75 is incorrect, as is the finding that HSDG refused to deal with OJC during the period from April 29, 2021 to May 31, 2021.

B. The Non-Tender of a Service Contract for 2021-22 Was Not a Refusal to Deal

HSDG's decision not to offer OJC a service contract for 2021-22 was not a refusal to deal.

The ID correctly acknowledges that under the Shipping Act an ocean common carrier does not have a duty to grant a service contract to every potential party. ID at 31-32. The ID also correctly acknowledges that an ocean common carrier does not engage in an unreasonable refusal to deal unless it shuts out a customer. ID at 2. Reading these two precepts together, an ocean common carrier does not engage in a refusal to deal when it declines to enter into a service contract, as long as it does not shut out the customer. Under this precedent, HSDG did not engage in a refusal to deal when it declined to offer OJC a service contract for 2021-22.[5]

In no fewer than three separate respects, the record indisputably supports the conclusion that HSDG was willing to deal with OJC during 2021-22:

[5] The ID also correctly notes that the Commission's proposed rulemaking to define what constitutes an unreasonable refusal to deal is inapplicable to this proceeding. ID at 23. To the extent the ID relies on the proposed rulemaking in assessing the reasonableness of HSDG's conduct (ID at 32-33), it does so in error.

First, the May 4, 2021 email from Andrea Casanova of HSDG to Jacob Weiss of OJC is the communication which first advised OJC that HSDG would not be offering a service contract for 2021-22. In that email, Ms. Casanova states:

> This situation does not allow us to commit with space for another period, however, we can work case by case.

RX808. Thus, even in the communication advising OJC that there would be no service contract offer, HSDG is confirming that it is willing to carry cargo for OJC on a non-contract basis. *See also* RX958 (Casanova Transcript, p. 198 L. 23 through p. 199 L. 2).

Second, HSDG provided OJC with a rate quote to transport cargo from Asia to California for OJC in July 2021. RX 608-618. This July 2021 rate quote was provided after the expiration of the Service Contract on May 31, 2021 but before the Complaint in this proceeding was filed in November of 2021.

Third, OJC's *own* data shows that 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). OJC Ex. 101 (containers tab). That same data establishes that HSDG and Maersk transported **30 FFEs** for OJC on the Brazil to U.S. trade lanes in 2021-22. *Id.*

For the foregoing reasons, the record does not support a conclusion that HSDG shut out OJC in 2021-22. Because OJC was not shut out, HSDG did not refuse to deal with OJC.

C. <u>The ID's Finding That a Refusal to Deal Was Unreasonable Is Contrary to Law</u>

Even assuming *arguendo* that HSDG refused to deal with OJC under the Service Contract and/or by refusing to offer OJC a service contract for 2021-22, the ID's finding that such refusal was unreasonable is contrary to both the evidence and the law.

With respect to the purported refusal to deal under the Service Contract, the ID finds that "refusing service" based on these facts was not related to legitimate business decisions or

transportation factors. ID at 34. With respect to the non-tender of a 2021-22 service contract, the ID finds this was based on potential litigation rather than legitimate transportation factors and therefore unreasonable. ID at 33.

First, as explained at length above, HSDG did not "refuse service" under the Service Contract – it moved 185 of the 200 containers it committed to move, moved cargo after the April 29, 2021 "executive decision," and made legitimate efforts evidenced by contemporaneous documents to fulfill the Service Contract. Similarly, HSDG did not shut out OJC in 2021-22, having offered to transport cargo from Asia to California on a non-contract basis and having moved cargo from Brazil to the United States.

Second, given the supply chain congestion and its impact on operations during the term of the Service Contract (vessel delays, terminal congestion, increased depend, equipment shortages), it is clear that HSDG's failure to perform was due to legitimate transportation factors.[6] *See* RX348.

Third, the ID acknowledges Commission and court precedent which upheld the dismissal of an unreasonable refusal to deal claim against a common carrier when the refusal to deal was a response to what appeared to be a baseless claim. ID at 34. Here, OJC made threats that were baseless, threatening to sue over breach of contract in court (when the Service Contract provides for arbitration of disputes) and/or at the FMC (which lacks jurisdiction over breach of contract claims, the only claim asserted in OJC's threats). *See* CX 159 and CX209 (OJC threats) and CX 121 and CX 123 (service contract provisions). Mr. Pump's April 29, 2021 email also indicates HSDG's view that OJC would be compensated for any breach of the Service Contract through the payment of liquidated damages. CX220; CX 121. In light of these facts, it was a reasonable

[6] HSDG could assert force majeure with respect to any claim that it breached the Service Contract. It has not done so, willingly accepting responsibility for its failure to perform. However, that failure to perform does not constitute a Shipping Act violation.

exercise of business discretion for HSDG not to offer OJC a service contract for 2021-22, but to offer to do business with OJC on a non-contract basis.

IV. THE ID ERRED IN FINDING HSDG RETALIATED AGAINST OJC

HSDG did not retaliate against OJC under the Service Contract or with respect to the decision not to tender a service contract for 2021-22.

Section 41104(a)(3), 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:

> 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). The ID found that HSDG retaliated against OJC by not performing the Service Contract and by not offering OJC a service contract for 2021-22. Both findings are based on a refusal to provide space, are in error, and should be reversed.

A. HSDG Did Not Refuse to Provide Cargo Space Accommodations

With respect to the Service Contract, the sole basis for the retaliation holding is the failure of HSDG to provide the full amount of space HSDG committed to provide. ID at 38. Thus, the finding of both an unreasonable refusal to deal and retaliation with respect to the Service Contract is predicated on the non-provision of space under the Service Contract between April 29, 2021 and May 31, 2021. For the same reasons that the record does not support a finding of a refusal to deal with respect to that time period, it does not support a finding of retaliation. More specifically:

- Mr. Li's April 29, 2021 email (FOF #61) ("we will leave it up to APAROM's decision to handle the remaining 18 FFE") demonstrates that Mr. Pump's April 29 "executive decision" was not a directive to shut out OJC. Internal HSDG correspondence of May 4-7 confirms that HSDG personnel are using the leeway afforded by Mr. Pump and Mr. Li to try and fulfill the Service Contract.

- A May 5, 2021 email from Ivan Cheung to several others at HSDG identifies the MAERSK EINDHOVEN and MSC ARIES as vessels on which space could be provided. RX727. OJC cargo moved on both of these vessels later in May, under the terms of the Service Contract. *See* RX22-23, RX33-34, RX 36, RX 43-44 (all showing Service Contract shipments to Naomi Home, the affiliate of OJC in May). There are also a significant number of additional shipments on other vessels in late May and early June of 2021. *See* RX-24-25, RX 26, RX 27-28, RX 29, RX 35, RX39-40, RX 41-42, all of which identify Naomi Home or OJC on the bill of lading and all of which contain the number of the Service Contract. Thus, HSDG indisputably continued to provide space to OJC under the Service Contract after April 29, 2021 and did not shut out OJC.

- The documents contradict the declaration of Mr. Weiss and FOF #77, which hold that only a few of the 66 FFEs transported from Asia after April 29 were booked before that date and that they were moved via freight forwarders or shippers' associations. The documents show that the shipments evidenced in the documents were more voluminous than suggested and that they moved under the Service Contract, not through a freight forwarder or shippers' association.

- It is improper to attribute HSDG's failure to fulfill the Service Contract solely to the period after April 29, 2021, during which OJC was purportedly shut out (FOF #75). The record clearly shows that OJC alleged a failure to provide sufficient space as early as October of 2020. FOF ##21 and 26. There were similar complaints about lack of space in March of 2021. FOF ##34-40. There is no legitimate legal or factual basis to conclude that the entire 15 FFE shortfall is attributable to the period of April 29, 2021 to May 31, 2021, when one could just as easily say that the 15 FFE shortfall is attributable in whole or in part to the non-provision of space in October of 2020 and/or March-April of 2021. Indeed, assuming a space allocation of 8 TEUs per week (FOF#19), a failure by HSDG to provide space during any four weeks during the term of the Service Contract would account for the entire shortfall. Indeed, OJC alleged a cumulative shortfall of 105 containers as compared to the weekly space allocation. ID at 51. While the ID correctly found that there was no weekly commitment and awarded no reparations for this shortfall, this allegation shows that any shortfall is attributable to a lack of performance over the course of the Service Contract, rather than to the final month of the Service Contract.

In light of the foregoing, a conclusion that HSDG retaliated against OJC by refusing to provide space after April 29, 2021 is unsupported by the record and should be reversed.

With respect to the decision not to offer OJC a service contract for 2021-22, the ID concludes this constituted retaliation because it was a refusal to provide space. ID at 40. There are three flaws in the reasoning supporting this conclusion that require its reversal.

First and foremost, the ID improperly conflates the provision of space and the provision of a service contract. The statute prohibits retaliation in the form of refusing to provide space when

available, not refusal to provide a service contract. Indeed, it is well-established, undisputed, and acknowledged by the ID that an ocean common carrier is under no obligation to grant a service contract to every potential customer. ID at 39. Thus, HSDG was under no legal obligation to contract with OJC for 2021-22. Its only obligation was to provide space as a common carrier.[7] It fulfilled this obligation, as evidenced by Ms. Casanova's May 4 email to Mr. Weiss of OJC expressing a willingness to carry cargo for OJC on a non-contract basis (RX 808) and by the July 20, 2021 rate quotation for the carriage of cargo from Asia to California. RX608-618. Thus, there was no refusal to provide space and no retaliation.

Second, to the extent the ID suggests a decision to decline a service contract must be based on legitimate transportation factors, it is inconsistent with applicable law. As support for this suggestion, the ID relies on the FMC's NPRM Refusal to Deal, which the ID itself notes is not binding and has not been adopted. ID at 23. The ID also relies on *Ceres Marine Terminals v. Maryland Port Administration*, 29 SRR 356, 370 (FMC 2001). However, Ceres involved preference/disadvantage claims, and did not involve any allegation of an unreasonable refusal to deal or retaliation. *Ceres Marine Terminals v. Maryland Port Administration*, 27 S.R.R. 1251 (FMC 1997). Thus, this decision is inapposite.[8]

Third and finally, the finding of retaliation is based on part of FOF #76, in which the ID finds that HSDG entered into service contracts with other shippers for more space that OJC was requesting. This finding is based on CX283 through CX286, which is a list of service contracts

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[7] 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).

[8] *Ceres* dealt with a port authority's obligation to provide similar treatment to two marine terminal operators, one of which was affiliated with an ocean carrier and the other of which was not. Thus, it is distinguishable from a case involving provision of a service contract to a customer by a carrier that does not involve any allegation of preference, disadvantage, or discrimination.

produced by HSDG and HSDG responses to OJC's Requests for Admissions. However, the list of service contracts found at CX259 through CX284 identifies contracts based on their effective date, not the date on which they were concluded. Neither this list nor any other information in the record reflects how long before the effective date (if at all) these contracts were signed, when they were being negotiated (i.e., were sufficiently close to conclusion for HSDG to reasonably conclude the space was committed), or any other information regarding the contracts other than their effective date and MQC. Without this information, a conclusion that space was available is unsupportable. Similarly, since OJC Requests for Admissions 1-7 are not limited to any geographic trade, the fact that HSDG admits entering into service contracts with certain MQCs on or after certain dates provides no support for a conclusion that HSDG could have provided space to OJC in the trans-Pacific trade.

B. The ID Erred in Finding That a Threat to File a Complaint Is Protected By the Prohibition Against Retaliation

Section 41104(a)(3) prohibits retaliation because "the shipper has patronized another carrier, the shipper has filed a complaint, or for any other reason." The ID erred in finding that a threat to sue for a breach of contract constitutes "any other reason" within the meaning of the statute. ID at 42.

The ID acknowledges that the issue of whether a threat to sue for breach of contract constitutes "any other reason" within the meaning of the statue is a novel issue. ID at 41. After a convoluted analysis, the ID relies solely on the Commission's statement that "any other reason" should be read "broadly" to find that a threat of litigation constitutes "any other reason" for purposes of the prohibition on retaliation. However, as explained below, threatening to file a complaint with the FMC is not covered by the statute.

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. This is the scope of the "broad" statement on which the ID improperly relies – sufficiently broad to effectuate Congressional intent that shippers feel free to air their grievances to the Commission. Statement on Retaliation at 1.

Nowhere in the Statement on Retaliation does the FMC state that the mere threat of legal action constitutes "any other reason." Moreover, the threat of litigation by a customer addressed to an ocean common carrier does nothing whatsoever to air any grievance to the Commission. It is a threat, nothing more and nothing less. Thus, the ID errs in finding that the Statement on Retaliation supports the conclusion that a threat of litigation constitutes "any other reason" for purposes of the prohibition on retaliation.

A finding of retaliation in this case would be contrary to both law and fact and would establish a dangerous and unworkable precedent. The prohibition contained in 46 U.S.C. § 41104(a)(3) 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 argued that declining to enter a service contract is in effect a refusal to provide cargo space and hence retaliation. Not so.

If the ID's finding with respect to retaliation is permitted to stand, then all a shipper would need to do to obtain a service contract is threaten to initiate litigation against the ocean common carrier during contract negotiations. If the carrier breaks off negotiations or the negotiations are not successful, the shipper would have a potential claim for retaliation. This creates a massive potential for abuse by shippers.[9]

The FMC would be required to scrutinize the negotiations and determine whether adherence to a negotiating position, or a decision to end negotiations, was reasonable. 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. OJC's threats 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 to HSDG 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, any more than a threat to bring a legal action against a carrier for the violation of a statute not administered by the Commission. 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 MQC.

[9] The abuse of Commission procedures by shippers can be seen in the charge complaint procedure. During a public meeting of the FMC in May of 2023, the Managing Director reported the FMC had received 287 charge complaints, only 115 of which met the threshold for investigation. This means approximately 60% of all charge complaints received do not meet the threshold for investigation.

CX121, ¶ 3(c). 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 conduct the FMC has indicated that the prohibition against retaliation is intended to protect, and the ID erred in concluding that threats to bring legal action for breach of contract constitute "any other reason" within the meaning of the Shipping Act.

Finally, the ID's suggestion that protecting the ability of customers to make threats will avoid Shipping Act violations is at best optimistic. Certainly, the threats made by OJC in this case did not raise any specific Shipping Act claims. It would have been incumbent on HSDG to identify what provisions of the Shipping Act (if any) were implicated by the demand letters from OJC, explain those statutory provisions to OJC, and then discuss them. This is not something that the law requires a common carrier to do, and the prohibition on retaliation should not be read in this fashion.

The Commission should hold that a threat of legal action, especially one that sounds in contract and does not make any specific allegation of a Shipping Act violation, does not constitute "any other reason" within the meaning of the Shipping Act and should reverse the ID's holding that HSDG unlawfully retaliated against OJC.

V. THE INITIAL DECISION AWARDED REPARATIONS THAT DO NOT REFLECT OJC'S ACTUAL INJURY AND ARE NOT REASONABLY CERTAIN

Section 41305(b) of the Shipping Act states 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.

The ID acknowledged that OJC was required to establish reparations "to a reasonable degree of certainty." ID at 43; *see California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, Docket No. 88-15, 25 S.R.R. 1213, 1230 (FMC Oct. 19, 1990). As explained below, however, the ID failed to correctly apply this standard in awarding reparations based on OJC's estimated "average lost profits per container" of $22,892.48 multiplied by 215 containers. ID at 2. The ID awarded reparations for two time periods: (1) $343,387.20 in lost profits for HSDG's failure to meet the MQC of 200 FFEs in the Service Contract from June 23, 2020 to May 31, 2021 (15 FFE multiplied by $22,892.48); and (2) $4,578,496 in lost profits for a hypothetical renewal of the Service Contract with an MQC of 200 FFEs from June 1, 2021 to May 31, 2022 (200 FFE multiplied by $22,892.48). ID at 2, 57.

HSDG takes exception to five aspects of the reparations award: (1) the ID's failure to consider the opinions of HSDG's damages expert, Ricardo Zayas, whose expert report was timely served on August 5, 2022; (2) the ID's reliance on OJC's damages expert, Richard Berning, who was unqualified and merely adopted the damages analysis prepared by OJC for purposes of litigation; (3) the ID's adoption of OJC's estimated average lost profit per container of $22,892.48 without adequate supporting documentation; (4) the ID's assumption that OJC would have moved 200 FFEs with HSDG in 2021-22 had the parties renewed the Service Contract even though OJC's actual moves with all carriers during that time period were just 143 FFEs; and (5) the ID's

conclusion that OJC "was reasonable in mitigating its losses," when OJC offered no evidence of any mitigation efforts and the limited data OJC produced shows it would have profited had it moved more than 143 FFEs in 2021-22. These errors resulted in a reparations award that does not reflect OJC's actual injury and was not established to a reasonable degree of certainty.

A. The ID Failed to Consider Mr. Zayas' Expert Opinions

After the August 5, 2022 deadline for expert reports, OJC served two expert reports from Mr. Berning, one on September 2, 2022, and a supplemental report on October 17, 2022. 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. The ID correctly noted that Mr. Berning's reports were thus untimely. ID at 45. Nevertheless, the ID considered Mr. Berning's untimely reports in the interest of deciding the issues on the merits. ID at 45. The ID relied extensively on Mr. Berning's opinions, citing his reports over 30 times.

HSDG's expert, Mr. Zayas, submitted a timely initial report on August 5, 2022. The declaration Mr. Zayas submitted with Respondents' brief was also timely because it was his first opportunity to respond to Mr. Berning's two untimely reports. The ID failed to note that Mr. Zayas's expert report was timely submitted on August 5, 2022, and incorrectly concluded that his declaration was untimely. ID at 45. Without explanation, the ID then failed to consider either Mr. Zayas's report or his declaration. Other than mentioning that they exist, ID 44 & 45, the ID did not reference Mr. Zayas's report or his declaration. The ID did not assess Mr. Zayas's qualifications as it did for Mr. Berning. It was error for the ID to rely on Mr. Berning's untimely expert opinions while failing to give any consideration to the timely expert opinions of Mr. Zayas. Mr. Zayas addressed numerous flaws in the damages calculations of OJC and Mr. Berning.

First, Mr. Zayas concluded that OJC did not produce sufficient reliable information from which he could determine OJC's "average lost profits per container" from 2020-22. OJC's profit

calculations were based solely on an Excel file prepared by Mr. Weiss for purposes of this proceeding. OJC refused to produce contemporaneously prepared business records, such as shipping records, sales records, bills of lading, and financial statements.[10] RX1155-59.

Second, Mr. Zayas identified several unsubstantiated and speculative assumptions underlying OJC's calculations. For example, OJC and Mr. Berning assumed that any service contract for 2021-22 would be at the same rates as the contract for 2020-21, despite the changing marketplace dynamics. RX1163-64. Additionally, OJC and Mr. Berning assumed that OJC was immune from other economic factors, as evidenced by Mr. Berning's failure to consider declining demand for OJC's retail consumer products after the fall of 2020. RX1171.

Third, Mr. Zayas observed that OJC voluntarily failed to mitigate its damages, electing to forgo product shipments despite its own damages analysis confirming that OJC would still have been profitable despite higher shipping costs. RX1172. This observation further questions the reasonableness of the ID's finding that OJC had sufficient product in inventory, and demand from consumers, to fill 200 FFEs in *addition* to the 143 FFEs that OJC actually shipped during the 2021-2022 contract year.

The ID appeared to acknowledge these shortfalls—stating that "Hamburg's other arguments regarding Mr. Berning's data, assumptions, and the sufficiency of his opinions are not a reason to disqualify Mr. Berning, but these will be considered in the evaluation of OJC's damages calculations below." ID at 44. The ID then failed to give these issues any weight, accepting OJC's

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[10] OJC also markets and sells products manufactured by Naomi Home, Inc. ("Naomi Home"), a related company owned by Mr. Weiss. Naomi Home products are manufactured primarily in Asia and Brazil and imported into the United States by ocean carriers. These Naomi Home products are the foundation of the "import business" upon which OJC based its loss claims in this proceeding. OJC's Proposed Findings of Fact, ¶¶ 17-19. OJC did not provide any financial statements or other documents that allow the experts or the Administrative Law Judge to understand the relationship between the two separate legal entities, and Mr. Weiss was unable to explain the relationship. RX1002, 24:2-6 (JW) ("Q. And what is the relationship between the two; is Naomi Home a wholly owned subsidiary of OJ Commerce? A. I don't recall the legalities of how they're structured.")

calculation of average lost profits per container without modification. Had Mr. Zayas' opinions been given due weight, the ID would have concluded that OJC failed to establish reparations to a reasonable degree of certainty.

B. The ID Erred by Relying on Mr. Berning's Opinions

The ID should not have relied on Mr. Berning's reports because he is unqualified and his opinions merely rubber-stamped Mr. Weiss's questionable and unsubstantiated analysis. As the ID acknowledges, the FMC follows the standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) to assess admissibility of expert opinions. ID at 44. 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).

1. Mr. Berning Was Not Qualified

The ID incorrectly found that Mr. Berning was qualified. ID at 44. Mr. Berning had no prior experience assessing reparations from violations of the Act. RX1045, 63:22-64:25. He had no prior experience with any cases involving breach of a contractual MQC within the shipping industry or any other segment of the transportation sector. RX1045, 65:10-25. Mr. Berning was a business valuation expert. RX1045, 62:6-9. He had 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 had in the field of business valuation is moot because OJC withdrew its claim for damages based on the company's alleged loss of market value. OJC

Brief at 33, n.121. Although the ID appeared to acknowledge these issues—stating that "criticisms offered will be considered in the weight given to his opinion," ID at 44—the ID then accepted several of Mr. Berning's unsubstantiated opinions.

2. Mr. Berning's "Methodology" Was Flawed

In addition to his lack of experience and expertise assessing reparations under the Act, Mr. Berning's methodology was flawed. Mr. Berning acknowledged that he was 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. Mr. Berning acknowledged that an expert may not blindly rely on assumptions from a client without determining if they are reasonable. RX1077, 193:12-24.

As Mr. Zayas explained, 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 validation. RX1155-59. Mr. Berning 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 had 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 Mr. Berning put it, "***My job isn't really to verify all of these assumptions that we're talking about.***" RX1080, 202:17-18 (emphasis added). As a result, Mr. Berning was both unqualified and unable to address whether

the damages he calculated were "compensation for the actual loss or injuries [OJC] sustained by reason of the wrongdoing." ID at 43 (quoting *MAVL Capital*, 2022 WL 2209421, at *3).

It was no accident that Mr. Berning's calculations matched ***exactly*** the data and calculations prepared by Mr. Weiss and produced on September 2, 2022. 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 of business or for litigation purposes—all factors that could influence his opinions—Mr. Berning adopted 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. "So did I go in and verify each of these? No, of course not . . . . We are not doing a forensic analysis here." RX1061, 129:3-4.

Mr. Berning's blind acceptance of Mr. Weiss' calculations was particularly inappropriate because Mr. Weiss prepared those calculations for litigation (not in the ordinary course of business), and they changed substantially over time. RX939. Indeed, the damages OJC sought in this proceeding varied from approximately $20 million to $189 million. RX1183. The ID incorrectly stated that "[d]ifferences in the total damages calculations before and after Mr. Berning's involvement which Hamburg has highlighted, support the impact of Mr. Berning's participation." ID at 45 (citing Opposition at 31-32). Mr. Berning testified, however, that he was not provided with OJC's earlier damages calculations. RX1064, 140:10-19. Thus, contrary to the ID, Mr. Berning's participation had zero impact on OJC's damages calculations—Mr. Berning merely parroted Mr. Weiss' calculations. Mr. Berning readily admitted this under oath: "***we did the same thing***." RX1086, 229:9-RX1087, 230:13 (emphasis added). Mr. Berning's opinions

were nothing more than Mr. Weiss' calculations in the guise of "expert" analysis.[11] Although the ID stated that the "source of the calculations will be taken into account in terms of weight," ID at 44-45, and "any possible bias considered, in light of their being offered by OJC's President," ID at 48, the ID then adopted OJC's calculation of average lost profit per container without modification.[12]

Given that Mr. Berning's opinions are based entirely on Mr. Weiss's work, they are insufficient under FMC precedent. In *California Shipping*, 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." 25 S.R.R. at 1230. The ID erroneously tried to distinguish *California Shipping* on the basis that "the underlying data in *California Shipping* was vastly different than OJC's data." ID at 50. Any differences in the underlying categories of data were immaterial. The primary deficiency the FMC identified was that *California Shipping* relied entirely on a damage estimate prepared by its president and rubber-stamped by an "expert." 25 S.R.R. at 1230. The FMC's concern was not that the damages sought were inherently speculative, but rather that they were not supported with ***underlying documentation***. *Id.*; *see Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, 29 S.R.R. 119, 189 (FMC 2001) (damages analysis by Rose International's president deemed unreliable because "[w]ithout any objective analysis of the otherwise unconvincing evidence presented by Rose, the conclusions drawn from that evidence provide a thoroughly inadequate basis upon which to award damages"). The same was true of OJC's alleged damages.

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[11] In its brief, OJC tried to bolster Mr. Weiss's purported accounting credentials. OJC Brief at 34. Mr. Weiss is not an accountant, and he received no education in economics or accounting. RX1004, 40:23-RX1005, 40:23-44:13.

[12] The ID also quoted the September 30, 2022 Order denying Respondents' motion to compel supporting documentation relating to OJC's damages claims. The ID omitted with an ellipsis, however, the portion of that Order stating "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." September 30, 2022 Order at 4.

The FMC's analysis in *California Shipping* specifically contrasted the outcome of an earlier case, *Consolo v. Flota Mercante Grancolombia*, 6 F.M.B. 262 (1961), in a way that emphasizes the need for sufficient documentation of damages. In *Consolo*, the complainant offered detailed proof of damages to support reparations for refusal to carry shipments of bananas. Specifically, the complainant presented underlying documentation, including "loading sheets" showing actual purchases, "outturn sheets" showing actual sales, "liquidation sheets" showing expenses and net proceeds from merchants, and records of freight charges. 6 F.M.B. at 266-267. In contrast, Mr. Weiss' damages analysis consists of one Excel file with no underlying documentation. There is no evidence in the record to corroborate any of the data in Mr. Weiss's Excel file. The Excel file is not even a contemporaneous business record, but rather one that Mr. Weiss created (and repeatedly revised, without explanation) during this proceeding.

The FMC has consistently required sufficient documentation to establish damages, not just unsupported statements from a complainant. For example, in *Muzorori v. Canada States Africa Lines Inc. (csal)*, the FMC awarded damages for expenses documented by receipts but declined to award damages for undocumented expenses. No. 1949(F), 2015 WL 9582593, at *11 (F.M.C. Dec. 23, 2015) ("The other amounts sought by Mr. Muzorori include $2,000 for fuel from the Namibian border to Walvis Bay, $2,200 in drivers' wages at $1,100 each, and $1,500 in miscellaneous charges such as hotels, meals, tolls, etc. There are no receipts in the record for these charges. Because they are not documented, there is not sufficient evidence in the record to award them."). Likewise, in *Adair v. Pennnordic Lines, Inc.*, the FMC awarded damages supported by documentation such as a bill of sale, invoice, or receipt, but did not award undocumented categories of damages. No. 1695(F), 1991 WL 383091, at *24 (F.M.C. Sept. 24, 1991). Accordingly, the ID erred by relying on Mr. Berning's flawed methodology which merely rubber-stamped Mr. Weiss' damages calculations without any verification.

C. <u>The ID Erred by Adopting OJC's Calculation of Average Lost Profits Per Container</u>

The ID erred in concluding that OJC's average lost profit per container from 2020-2022 was $22,892.48. ID at 2; FOF ## 88-90. As detailed above, OJC refused to produce supporting documentation—such as balance sheets, income statements, cash flow statements, and profit and loss statements—in response to HSDG's 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. The ID stated that HSDG failed to "identify specific problems with the detailed information provided in the spreadsheet." ID at 49. Not so. On August 5, 2022—***one month before*** Mr. Berning's initial report—Mr. Zayas, served a timely expert report identifying why these routine financial records were needed to calculate lost profits and verify Mr. Weiss' calculations. RX1148, ¶ 9; RX1149, ¶ 15; RX1155, ¶ 32; RX1181-91.

Instead of providing supporting documentation, OJC revised its damages calculations, reducing its purported "average gross revenue per container" by **29%** from $84,874 to $60,250 and reducing its purported "average gross profit per container" by **44%** from $40,226 to $22,892. RX1159. OJC's gross profit from its operations should have been objectively discernable from contemporaneous business records and summary financial statements. OJC's refusal to provide supporting documentation for any of its damage calculations even after the ***specific*** documents were requested in discovery and identified by HSDG's expert cast significant doubt on Mr. Weiss' estimates. As noted above, OJC never gave Mr. Berning the original damage calculations or the supporting documentation requested by HSDG's expert.

The ID's adoption of OJC's average lost profit per container calculation was error because inputs used in the calculation—average gross revenue per container and average gross profit per container—were both unsubstantiated by contemporaneous records that OJC maintained in the

ordinary course of business. The calculations also conflicted with the only contemporaneous financial records OJC produced which indicated contribution margins ranging from 4.3% (2017) to 10.1% (2022) of revenues. *Infra* at 32. Accordingly, OJC's actual margins were materially below the 38% margin proffered by Mr. Weiss and Mr. Berning and adopted by the ID without any supporting documentation.

The ID concluded that "Mr. Weiss computed, and Mr. Berning ***validated***, average gross revenue per container of $60,250.30 … for the time period of June 1, 2020, through July 16, 2022." ID at 20 (emphasis added) (citing CX 423; CX 470; RX 1033-1034). However, as noted above, the record shows that Mr. Berning did not "validate" anything. *See* RX1033, 16:11-17.[13] Mr. Berning did not review—and OJC refused to produce—the shipping records, sales records, financial statements, and other documentation from which one could verify a revenue calculation contained in Mr. Weiss' Excel file. 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. 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 $84,874. Rohde Ex. 1; RX1149-50, ¶¶ 15. Mr. Berning was not aware of this, and OJC never explained why the calculation changed substantially. RX1064, 140:10-19.

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[13] 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.

The ID's reparations award is similarly premised on its overly deferential acceptance OJC's assertion that its "Average Gross Profit Per Container" in 2020-2022 was $22,892. ID at 20; FOF ## 88-90. This calculation also changed substantially over time without explanation. On January 25, 2022, OJC claimed its "Average Gross Profit Per Container" was $54,361. RX409. On July 14, 2022, the calculation decreased to $40,226. Rohde Ex. 1 (summary tab). Again—contrary to the ID's Finding of Fact # 88—Mr. Berning did nothing to validate the figure. 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. The ID not only adopts Mr. Berning's calculation of average gross profits per container, it accepts his unsupported statement that "net profit per container" is the same as "gross profit per container." ID at 46; FOF # 90.

OJC's analysis made no reference to basic accounting concepts like fixed and variable costs, the latter of which are saved costs that do not factor into a lost profit calculation because OJC would not incur them. 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 ("***So did we look at specific invoices? Of course not***."). Mr. Berning's report does not address whether certain costs OJC characterized as fixed were, under applicable accounting standards, actually variable. The ID should not have blindly accepted OJC's profit calculations, particularly where OJC and Mr. Berning both conceded that the average profit figure may not have included all variable costs—stating that "OJC has captured ***the vast majority, if not all***, of the costs relating to the sale of products." OJC Brief at 35; CX423; RX1156, ¶ 35(a) (emphasis added). In other words, OJC's surface-level damages analysis almost certainly inflated lost profits by failing to exclude variable costs that OJC would not have incurred. Mr. Zayas identified and explained these flaws, but the ID failed to consider them. RX1156. Indeed, the FMC has held that a calculation

of damages like OJC's that is based on gross profits – as opposed to net profits – is unreliable and speculative because gross profits do not differentiate between fixed and variable costs.[14] *See Rose Int'l,* 29 S.R.R. at 188. ("Overhead costs typically encompass both fixed and variable costs; however, *Rose* fails to differentiate between any of its fixed and variable costs in determining its lost profits.").

Mr. Berning also disregarded information that was inconsistent with the damage calculation prepared by Mr. Weiss (and ultimately adopted by Mr. Berning). For example, Mr. Berning disregarded sales and revenue projections for 2021 and 2022 prepared by OJC's management and provided to BTIG and Nomura. RX1149. These entities were both engaged in some capacity by OJC to assist with facilitating a potential sale of all or a portion of OJC. RX1149. The revenue projections OJC provided to BTIG and Nomura were <u>**less than 50%**</u> of the revenue projection Mr. Weiss used for his damage calculations in this proceeding. RX1149. Mr. Berning also disregarded other information in the BTIG report suggesting that OJC's historical contribution margin ranged from 4.3% (2017) to 5.7% (2022) of revenue, not the 37.9% gross profit asserted by Mr. Weiss. *See* RX1149. In other words, the only contemporaneous documents OJC produced completely undermine Mr. Weiss' damage calculations. The absence of supporting documentation coupled with unexplained changes in the per-container revenues and profit calculations raise significant concerns that the calculations Mr. Weiss presented—and that the ID adopted—were not based on contemporaneous OJC business records.

For these reasons, OJC's average lost profits per container was unreliable and not proved with reasonable certainty, as required by FMC case law. *Eden Mining Co. v. Bluefield Fruit &*

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[14] OJC's use of "Average ***Gross*** Profit Per Container" and "Average ***Net*** Profit Per Container" interchangeably made Mr. Berning's unsupported calculation even more suspect. *Compare* OJC Brief at 35 (defining "Average ***Gross*** Profit Per Container" as $22,892.48) *with* OJC Brief at 38-39 (referring to $22,892.48 as "Average ***Net*** Profit Per Container").

S.S. Co., 1 U.S.S.B. 41 (1922) (declining to award reparations because shipper's failure to obtain preferred rates does not "*ipso facto* establish[] the fact of their injury and the amount of their damage"); *Waterman v. Stockholms Rederiaktiebolag Svea et al.*, 3 F.M.B. 248, 253 (1950) ("[T]he 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."); *California Shipping*, 25 S.R.R. at 1230 (holding that damages summary created by shipper's president 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."). The ID's finding regarding lost profits runs against decades of FMC precedent that places the burden on a complainant to establish damages with reasonable certainty. The ID improperly shifted the burden to HSDG to disprove damages, rather than holding OJC to its burden of proving damages.[15]

D. The ID Erred by Awarding Reparations for 200 FFEs in 2021-2022

The ID awarded reparations for 2021-22 based on the assumption that HSDG and OJC would have entered a renewal Service Contract for 200 FFEs. The ID reiterated that "[a]ctual damages must be proved by the party seeking them and to 'warrant recovery, the actual detriment must be shown by competent evidence and with reasonable certainty.'" ID at 52 (quoting *California Shipping*, 25 S.R.R. at 1230. The ID determined that OJC was harmed because negotiations had occurred for a potential renewal and "[t]hroughout those discussions, there were conversations about the MQC of the renewal, but never about there being no renewal at all." ID

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[15] The ID's use of OJC's average lost profits per container of $22,892.48 to calculate reparations for the 15 FFE shortfall in 2020-21 was also incorrect because the Service Contract contains a bargained-for liquidated damages provision. 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); ID at 7. Such provisions are enforceable, even in cases brought under the Shipping Act. *See California Shipping Line*, 25 S.R.R. at 1230-31. According to Section 3(C), OJC was not damaged by HSDG's failure to meet the 200 FFE MQC as the actual TEUs shipped by HSDG were within 10% of the Minimum Quantity Commitment in the contract (*i.e.*, 370 ÷ 400 = 92.5%).

at 53. The ID then found that "the most reasonable estimate, backed by solid evidence and reasonable certainty," is that the parties would have entered into a renewal contract for 200 FFEs, the same MQC of the original Service Contract. ID at 54. There are multiple problems with this assumption.

First, the ID's finding that OJC had the ability and interest to move 200 FFEs with HSDG in 2021-22 is pure speculation, unsupported by the record. The ID stated that "[i]t is ***reasonably certain*** that OJC would have shipped at least that same 200 FFE in 2021-22, given OJC's actual performance in 2020-21, OJC's constant requests for even higher volumes throughout 2020-21, OJC's internal projection of and request for a significantly higher 2021-22 volume, and the increased demand for consumer goods that even Hamburg recognized." ID at 53 (emphasis added). It is simply not possible to make this determination without supporting documentation including sales records, purchase orders and financial statements. The ID incorrectly assumed that OJC was immune from other economic factors, as evidenced by the failure to consider declining demand for OJC's retail consumer products after the fall of 2020. RX746. Moreover, the fact that OJC only moved 143 FFEs with all carriers in 2021-22—at the same time it was obligated to mitigate its alleged damages—undercuts the ID's finding that there was sufficient customer demand to warrant another 200 FFEs in 2021-22.[16]

Second, the record does not support the ID's assumption that HSDG would have agreed to a renewal Service Contract with the same 200 FFE MQC. The ID stated:

> the evidence supports a finding that until April 29, 2021, Hamburg was interested in contracting with OJC for 2021-22 for at least the same contract volume, 200 FFE, if not more. The evidence shows that on the morning of April 29, 2021, Ms. Casanova asked whether Hamburg could "[i]ncrease MQC by 200 FFE giving a total of $400

[16] The ID stated that "it is reasonably certain that had OJC shipped 200 FFE with Hamburg in 2021-22, it nevertheless would also have sought out the spot markets to try to accommodate additional shipments." ID at 57. Again, it is not possible to reach this conclusion without examining OJC's sales records, purchase orders and financial statements to determine if there was sufficient customer demand to warrant additional shipments of products.

> FFE, that will not only cover the deficit by also show our interest to participate more of their volume" if Hamburg could achieve that. CX 214; CX 213.

ID at 53-54. The fact that Ms. Casanova asked HSDG's management about a possible renewal contract with 400 FFEs is not evidence that "Hamburg was interested in contracting with OJC for 2021-22 for at least the same contract volume, 200 FFE, if not more." Indeed, there is no evidence that anyone in HSDG's management was interested in renewing the Service Contract with OJC at any MQC.

Third, the parties never reached agreement of critical deal terms. As the ID acknowledged, "[t]he parties did not reach the point of exchanging 2021-22 contract rates before Hamburg disengaged from negotiations" and "[t]he evidence does not show precisely what 2021-22 contract rates would have been between the parties." ID at 55. There was also no agreement on the MQC for any renewal contract. OJC was never willing to commit to a specified MQC for the new service contract. RX1138, ¶ 38; CX217. Finally, there was no agreement on trade lanes for 2021-22. Mr. Weiss repeatedly requested that HSDG ship containers from Asia to Kentucky—which he said accounted for 70% of OJC's anticipated volume. CX203. As the ID found, "it is not reasonably certain that the route to Kentucky would have been included in a 2021-22 contract between the parties." ID at 54. Yet, the ID failed to consider how much of the 143 FFEs OJC moved in 2021-22 went to Kentucky and whether there was sufficient additional inventory to warrant an additional 200 FFEs to California. Without agreement on the key contract terms, it was error for the ID to base damages on a hypothetical renewal for 200 FFEs.

Finally, the ID failed to consider that according to OJC's own data, HSDG and Maersk continued to ship containers for OJC after May 31, 2021. Weiss Ex. 101. 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. HSDG requested this data, but OJC refused to produce it. Although Mr. Zayas pointed out these flaws in his expert opinions, the ID adopted Mr. Berning's opinions without giving these flaws any consideration.

E. OJC Failed to Mitigate its 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*, 25 S.R.R. at 1231 ("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 damages analysis was flawed because counsel instructed him not to assess mitigation. RX1097, 271:12-272:2. Yet, the ID found that OJC "was reasonable in mitigating its losses" because it "exerted efforts both to obtain an alternate 2021-22 contract,[17] and to continue to ship on the spot market as many containers as it could manage to ship profitably in the absence of a service contract." ID at 61; FOF ## 84-85. This finding is not supported by the record.

The ID's error can be illustrated by examining the declaration Mr. Zayas submitted with Respondents' brief. RX1145-RX1173. Mr. Zayas explained that the figures used in one of the 2021-22 models in Mr. Berning's Supplemental Report confirm that OJC profited in 2021-22 ***even when shipping at the increased spot rates***. RX1172. According to the data Mr. Berning adopted from Mr. Weiss, OJC made $7,329 profit per container in 2021-22 even at the increased spot rates ($22,892 - $15,563 = $7,329). If—as the ID determined—OJC was capable of transporting an additional 200 FFEs with HSDG on top of the 143 FFEs it actually transported in 2021-22, then OJC voluntarily elected to forgo more than ***$1.4 million*** of profits ($22,892 - $15,563 x 3,000 =

[17] The ID's finding that "OJC exerted efforts . . . to obtain an alternate 2021-22 contract," ID at 61, is based solely on the testimony of Mr. Weiss. As the ID acknowledges, "there is no contemporaneous evidence of Mr. Weiss's inquiries with other carriers." ID at 60.

$1,465,800). This is also evidenced from the data in the Excel OJC's produced, which shows that OJC's revenue and profit in 2021-22 exceeded its revenue and profit in 2020-21 despite the higher spot rates:

Period	Containers	Average of Revenue	Average of Profits
2020-2021	542	$58,072.82	$21,648.13
2021-2022	195	$66,302.56	$26,351.14
Grand Total	737	$60,250.30	$22,892.48

Weiss Ex. 101. Thus, the ID's finding that OJC would have moved 200 FFEs in 2021-22—in addition to the 143 FFEs that it actually moved—is inconsistent with the ID's finding that OJC was reasonable in mitigating its losses. If there was sufficient customer demand to justify another 200 FFEs moves in 2021-22, and OJC would have made a profit on those moves even at the increased spot rates, OJC failed to mitigate its damages.

VI. THE ADDITIONAL REPARATIONS AWARD TO OJC WAS EXCESSIVE

The Shipping Act provides that where the injury was caused by retaliation, "the Commission ***may*** order the payment of additional amounts, but the total recovery of a complainant may not exceed twice the amount of the actual injury." 46 U.S.C. § 41305(c) (emphasis added). The use of the word "may" indicates that awarding additional reparations is discretionary. *American President Lines, Ltd. v. Cyprus Mines Corp.*, Docket No. 91-27, 1994 WL 33488, at *14 (FMC Jan. 31, 1994) (Order on Review of Summary Judgment). Although there is no guidance regarding when additional amounts are appropriate, the ID states that "a standard of knowing and willful will be used to determine whether or not additional damages are appropriate here." ID at 62. In the absence of any guidance or precedent, the ID imposed the ***maximum*** possible additional reparations, i.e., double damages. This finding is erroneous for several reasons.

A. The ID Relied on Inadmissible Work Product

As an initial matter, the ID's finding is largely based on an internal October 21, 2020 email from Michael Gast of HSDG's risk management department suggesting that HSDG's actions were willful.[18] The quoted portion of Mr. Gast's October 21, 2020 email is protected work product, which Respondents properly clawed back pursuant to paragraphs 13-15 of the Confidentiality Stipulation and Protective Order (Dkt. 29-30). An August 31, 2022 discovery Order incorrectly held that the work produce doctrine does not apply because Mr. Gast is not one of HSDG's "attorneys or legal representatives." Dkt. 42, at 10. This was incorrect. As OJC's own cases acknowledged, it is black letter law that emails are eligible for work product protection even though they "appear to be between non-attorneys." *See Gucci America*, *Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 74 (S.D.N.Y. 2010) ("Unlike the attorney-client privilege, the work product doctrine does not require that the documents be prepared at the behest of counsel, only that they be prepared 'because of' the prospect of litigation."); *see also Stern v. O'Quinn*, 253 F.R.D. 663, 674 (S.D. Fla. 2008) ("the mere fact that some, or even all, of the O'Quinn and Investigation Materials may have been prepared by [non-attorneys] does not mean that such Materials do not enjoy the protections of the work-product doctrine, provided that the Materials otherwise qualify for work-product protection."); *Auto Owners Insur. Co. v. Totaltape, Inc.*, 135 F.R.D. 199, 201 (M.D. Fla. 1990) ("The work product doctrine protects from disclosure materials prepared in anticipation of litigation by or for a party or that party's representative (including its attorney)."). This is equally clear from the Advisory Committee Notes to Fed. R. Civ. P. 26(b)(3), which state that the work product doctrine extends "not merely as to materials prepared by an attorney, but also as to

[18] Mr. Gast is not an attorney, and his assessment of any claim is not determinative of the merits of that claim. If Mr. Gast had sent an internal email stating that OJC's claim was frivolous, presumably the ID would not rely on that email in dismissing the claim.

materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf." Advisory Committee Notes, 1970 Amendment (emphasis added).

B. HSDG Provided Services to OJC Before and After Negotiations for a Renewal Contract Broke Down

The ID focuses solely on what the emails suggested HSDG was going to do and fails to give due consideration to what HSDG ***actually did***. As explained *supra* at 12, OJC's *own* data shows that HSDG continued to provide services to OJC. From April 28, 2021 (OJC's second litigation threat) to June 6, 2021, HSDG and Maersk transported **33 FFEs** (or **18%** of HSDG's total volume for OJC in 2020-21). Weiss Ex. 101 (containers tab, sorted by shipper and shipped date). Specifically, 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 **46 FFEs** or **24%** of OJC's total shipments.[19] *Id.* The ID failed to consider this critical fact in determining the additional damages award.

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,

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[19] 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 **50 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).

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.

HSDG and Maersk continued to transport OJC's cargo ***after*** OJC threatened litigation on October 16, 2020 and again on April 28, 2021. In total, HSDG and Maersk transported **66 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 HSDG ever refused to ship containers for OJC when it had available space. The record does not support the ID's conclusion that HSDG's decision not to enter a new contract was motivated solely by OJC's threats to sue for breach of contract. Accordingly, it was improper to award the maximum additional damages based on the record.

C. Additional Factors Do Not Support the Award of Additional Damages

The award of damages in excess of the actual injury suffered is punitive in nature. When assessing penalties, the Commission is required to consider a number of factors, including nature, circumstance, extent and gravity of the violation committed and the policies for deterrence and future compliance, degree of culpability, history of prior offenses, ability to pay, and such other matters as justice requires. 46 C.F.R. § 502.603.[20] The ID did not consider these factors when assessing punitive damages. Accordingly, the award of punitive damages is improper.

When these factors are considered, they weigh against assessing double damages. HSDG has no history of prior offenses. Since HSDG no longer exists, future compliance and deterring

[20] *See also International Association of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 675, 690 (ALJ 1990)(Commission may consider equities and other mitigating factors when considering possible double damages award).

HSDG from committing future violations are not factors. In addition, the issue of whether a threat of legal action is protected activity is a novel issue – awarding double damages when the alleged violation presents a novel issue is unduly punitive and not appropriate under the circumstances. Further, justice requires that the Commission take into consideration the substantial performance of the Service Contract, the supply chain disruption and operational difficulties caused by the Covid-19 pandemic, and the impact of those difficulties on supply chain participants. In light of all of these factors, assessment of double damages was excessive.

VII. CONCLUSION

In light of the foregoing, the Commission should reverse the ID decision and terminate this proceeding.

Respectfully submitted,

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Dated: June 29, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2023, the foregoing exceptions were served via electronic mail on:

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