

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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

**RESPONDENT HSDG'S REPLY TO  
COMPLAINANT'S EXCEPTIONS TO INITIAL DECISION**

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**TABLE OF CONTENTS**

INTRODUCTION AND SUMMARY ..... 1

ARGUMENT ..... 3

I. OJC’S ASSERTION THAT REPARATIONS FOR 2021-22 SHOULD HAVE BEEN BASED ON 4,700 FFEs IS NOT SUPPORTED BY THE EVIDENCE..... 3

    A. There Is No Evidence OJC Had Sufficient Customer Demand to Warrant 4,700 FFEs in 2021-22 ..... 5

    B. The ID Correctly Determined There Was Insufficient Evidence to Find that HSDG Could Have Moved 4,700 FFEs for OJC in 2021-22 ..... 9

    C. There Was Insufficient Evidence to Find that the Parties Would Have Agreed to a Service Contract with a MQC of 4,700 FFEs in 2021-22 ..... 11

II. OJC’S THREE ALTERNATIVE DAMAGES AMOUNTS WERE ALSO NOT PROVED WITH REASONABLE CERTAINTY ..... 14

    A. OJC Fails to Demonstrate It Had Greater Cargo Volumes to Ship in 2021-22 ..... 14

    B. OJC Fails to Establish that HSDG Would Have Contracted for 1,410 FFEs, 542 FFEs, or 400 FFEs in 2021-22 ..... 16

III. THERE ARE NO UNCERTAINTIES TO BE CONSTRUED AGAINST HSDG ..... 17

    A. There Are No Uncertainties Created by HSDG’s Alleged Conduct ..... 17

    B. *Bigelow* Is Distinguishable ..... 20

IV. OJC’s ARGUMENTS ABOUT DISCOVERY VIOLATIONS ARE SPECIOUS ..... 22

    A. The Blank Sailing Issue Is a Red Herring..... 22

    B. HSDG Complied with Its Deposition Obligations ..... 23

CONCLUSION..... 24

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Adair v. Pennnordic Lines, Inc.</i> , No. 1695(F), 1991 WL 383091 (F.M.C. Sept. 24, 1991) .....	6
<i>Bigelow v. RKO Radio Pictures</i> , 327 U.S. 251 (1946) .....	17, 20, 21
<i>California Shipping Line, Inc. v. Yangming Marine Transport Corp.</i> , Docket No. 88-15, 25 S.R.R. 1213 (FMC Oct. 19, 1990) .....	3, 6
<i>Eden Mining Co. v. Bluefield Fruit &amp; S.S. Co.</i> , 1 U.S.S.B. 41 (1922).....	3
<i>Muzorori v. Canada States Africa Lines Inc. (csal)</i> , No. 1949(F), 2015 WL 9582593 (F.M.C. Dec. 23, 2015) .....	6
<i>Samsung Electronics America, Inc. v. ZIM Integrated Shipping Services Ltd.</i> , FMC Docket No. 22-30 (ALJ June 9, 2023) .....	11, 23
<i>Tractors &amp; Farm Equipment Ltd. v. Cosmos Shipping Co.</i> , Docket No. 81-57, 26 S.R.R. 788 (ALJ Nov. 23, 1992) .....	15
<i>Waterman v. Stockholms Rederiaktiebolag Svea et al.</i> , 3 F.M.B. 248, 253 (1950) .....	3, 4
<b>Other Authorities</b>	
46 C.F.R. § 502.227 .....	1
Final Report in Fact Finding Investigation No. 29 .....	22

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Pursuant to 46 C.F.R. § 502.227, Respondent Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft A/S & Co. KG (“HSDG”) <sup>1</sup> replies to the exceptions of Complainant OJ Commerce, LLC (“OJC”) to the June 7, 2023 Initial Decision (“ID”).

**INTRODUCTION AND SUMMARY**

OJC’s exceptions, distilled to their essence, are that it should receive more reparations than the ID awarded. OJC argues that it proved—with reasonable certainty—no fewer than four different amounts of damages—each greater than the damages awarded by the ID. Merely stating the argument refutes it—it is not possible to prove multiple amounts of damages with the requisite certainty. As explained in detail below, none of the higher amounts of damages requested by OJC

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<sup>1</sup> The ID dismissed the claims against Respondent Hamburg Sud North America, Inc. (“HSNA”), finding that “OJC has not established that HSNA is an entity regulated by section 41104(a)(10).” ID at 27. OJC did not take exception to this portion of the ID. Accordingly, HSNA is not participating in this reply to OJC’s exceptions.

are supported by the record. Indeed, the limited contemporaneous documents OJC produced undermine its four alternative damages calculations.

Recognizing its failure of proof, OJC shifts gears and argues—for the first time in its exceptions—that any uncertainty must be construed against HSDG because HSDG’s conduct prevented OJC from proving its damages. Not so. HSDG’s conduct did not impact OJC’s ability to establish with reasonable certainty (i) sufficient customer demand to warrant a **767% increase** in volume from 542 FFEs in 2020-21 to 4,700 FFEs in 2021-22; or (ii) OJC’s average profits per container. All information about OJC’s cargo volumes and profits for 2020, 2021 and 2022 were within OJC’s possession, custody and control.

HSDG served OJC with a Request for Production of Documents seeking all documents that support or undermine OJC’s ability to fulfill a 4,700 container minimum volume commitment in 2021-22, which included documents such as financial statements, sales records, forecasts and budgets, purchase orders, inventory records and policies, contracts with other shipping lines, contracts with warehouses, communications with vendors, truckers, customs brokers, and furniture suppliers, and evidence of negotiations for increased warehouse capacity. OJC refused to produce any supporting documentation, relying instead on a single Excel spreadsheet produced by its CEO, Jacob Weiss, for purposes of this proceeding. HSDG also specifically requested the documentation supporting Mr. Weiss’ Excel spreadsheet. OJC refused to produce anything. It is not credible that a party claiming a dramatic increase in volume year-over-year does not have or would not produce a single contemporaneous document to support its position.

Instead of producing supporting documentation, OJC incorrectly states that its dramatic increase in volume was “corroborated in an internal email of Hamburg on April 27, 2021, which stated that OJC ‘plans to move between 4,200 to 4,700 FFE in 2021.’” OJC Exceptions at 16. But OJC quotes only a portion of a sentence from the email. The full sentence is: “**According to the**

*customer*, they moved 3500x40HC in 2020 and plans to move between 4200 and 4700 FFE in 2021.” ID at 12 ¶ 46 (quoting CX203) (emphasis added). Thus, this email does not “corroborate” OJC’s projection; it merely re-states it. More importantly, this email proves that OJC’s 4,700 FFE projection for 2021-22 cannot possibly be accepted without supporting documentation. Mr. Weiss’ statement that OJC “moved 3500x40HC in 2020,” CX203, is nowhere close to accurate. OJC admitted in these proceedings that it moved just 542 FFEs with all carriers in 2020. OJC Exceptions at 10. In other words, the only document OJC cites to support its 4,700 FFE *projection* for 2021-22 proves that Mr. Weiss overstated OJC’s *actual* volume in 2020-21 by **546%**. As discussed below, Mr. Weiss’ 4,700 FFE projection for 2021-22 was also widely exaggerated and appropriately rejected by the Presiding Officer as “overly speculative.” ID at 54.

Accordingly, OJC’s exceptions concerning reparations should be rejected in their entirety.<sup>2</sup> Similarly, OJC’s arguments regarding purported discovery violations are without merit and should be rejected.

## **ARGUMENT**

### **I. OJC’S ASSERTION THAT REPARATIONS FOR 2021-22 SHOULD HAVE BEEN BASED ON 4,700 FFEs IS NOT SUPPORTED BY THE EVIDENCE**

It is well established that a complainant has the burden 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) (holding that complainant’s “proof is so speculative and conjectural that it lacks the requisite degree of certainty”); *Eden Mining Co. v. Bluefield Fruit & 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*

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<sup>2</sup> Nothing in this Reply should be construed as acceptance by HSDG of the damages awarded in the ID. HSDG’s own exceptions address why the damages awarded in the ID were improper.

*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.”).

The ID correctly found that “OJC’s request for damages based on up to 4,700 FFEs is overly speculative.” ID at 54. The ID explained that “a 2021-22 container volume assumption of either 4,200 or 4,700 has not been demonstrated with reasonable certainty. This would have constituted a markedly different scale of relationship between OJC and HSDG, equating to more than a 21-fold increase over the MQC established by the 2020-21 contract.” ID at 52. OJC takes exception to this portion of the ID, arguing “there is ample evidence from which the ALJ should have reasonably inferred that Hamburg would have shipped up to 4,700 FFEs for OJC in 2021-22 . . . .” OJC Exceptions at 11. OJC’s exception is without merit for three reasons.

First, OJC focuses *solely* on whether there was sufficient evidence to infer that “Hamburg would have shipped up to 4,700 FFEs for OJC in 2021-22 . . . .” *Id.* (emphasis added). In doing so, OJC ignores entirely the *absence of any evidence that OJC had sufficient customer demand to warrant 4,700 FFEs in 2021-22*. Without such evidence, it does not matter whether HSDG could have transported 4,700 FFEs for OJC in 2021-22. OJC’s container volume assumption of 4,700 FFEs for 2021-22 was not “demonstrated with reasonable certainty,” ID at 52, and its exception to the ID fails for this reason alone.

Second, contrary to OJC’s position, the ID correctly determined that there was not sufficient evidence to “*infer*” that HSDG could have transported 4,700 FFEs for OJC in 2021-22. As the ID noted, this would have equated to more than a *21-fold increase* over the 200 FFE MQC established by the parties’ 2020-21 contract. ID at 52. It was undisputed that HSDG failed to meet the MQC in 2020-21, and the contemporaneous documents showed that HSDG was

concerned it would not have sufficient capacity to even double that MQC for OJC in 2021-22. There was no evidence that HSDG had the capacity to transport 4,700 FFEs for OJC in 2021-22.

Third, there was insufficient evidence to find that either HSDG or OJC would have agreed to a service contract with a MQC of 4,700 FFEs in 2021-22. The ID correctly determined that “[t]he evidence does not support a finding that Hamburg would have agreed to a 2021-22 contract at that volume.” ID at 54. Having failed to meet the 200 FFE MQC for 2020-21, it is unreasonable to assume that HSDG would have committed itself to a 21-fold increase of that MQC, particularly given OJC’s threats to sue HSDG for the 15 FFE shortfall in 2020-21. Similarly, the evidence did not support a finding that OJC would have agreed to a MQC of 4,700 for 2021-22. Despite multiple requests from HSDG, OJC was not willing to commit to any MQC for 2021-22.

Accordingly, OJC’s 4,700 FFEs projection for 2021-22 was speculative, unreliable, and not proved with reasonable certainty, as required by FMC precedent. OJC’s exception to the ID should therefore be rejected.

**A. There Is No Evidence OJC Had Sufficient Customer Demand to Warrant 4,700 FFEs in 2021-22**

OJC offered no evidence that it had sufficient customer demand to warrant 4,700 FFEs in 2021-22. That projection is inconsistent with the only document OJC cited to support it, which “concluded that 4,598 FFE would be required for 2021-22 . . . .” OJC Exceptions at 16 (citing CX 219. OJC’s claim that it could have shipped 4,598 FFEs or 4,700 FFEs in 2021-22 is undermined by two undisputed facts: (i) OJC shipped just 542 FFEs with all carriers in 2020-21 (OJC Exceptions at 10); and (ii) OJC shipped just 143 FFEs with all carriers in 2021-22—during the period when it was obligated to mitigate any damages. ID at 20 ¶ 86. OJC offered no evidence that it had sufficient customer demand to increase its volume nearly 10-fold—from 542 FFEs in 2020-21 to 4,700 FFEs in 2021-22.



The FMC has consistently required sufficient documentation to establish reparations, not just unsupported statements from a complainant.<sup>3</sup> OJC’s projected volume of 4,700 FFEs was unsubstantiated by any contemporaneous records that OJC maintained in the ordinary course of business. OJC refused to produce the sales records, purchase orders, inventory records, financial statements, and other documentation to support this substantial increase in customer demand for 2021-22. RX1121, ¶¶ 12-16; RX1033, 16:19-17:4. The ID noted 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*, 1990 WL 427266, at \*23). Applying this standard, the ID could not possibly have concluded that OJC would have experienced a **767% increase** in shipments from 2020-21 to 2021-22 without any evidence from OJC to support that assertion.

Instead of producing supporting documentation, OJC incorrectly states that this dramatic increase in volume was “corroborated in an internal email of Hamburg on April 27, 2021, which stated that OJC ‘plans to move between 4,200 to 4,700 FFE in 2021.’” OJC Exceptions at 16 (quoting CX203) (emphasis added). It would obviously be impossible for **HSDG’s** internal email to corroborate OJC’s projections. OJC omitted part of the sentence from the email. The full sentence is: “**According to the customer**, they moved 3500x40HC in 2020 and plans to move between 4200 and 4700 FFE in 2021.” ID at 12 ¶ 46 (quoting CX203) (emphasis added). This is significant in two respects. First, it shows that Ms. Casanova was not “corroborating” OJC’s

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<sup>3</sup> 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).

projection, she was merely relaying information from Mr. Weiss. Second, and most importantly, the email shows why OJC’s 4,700 FFE projection for 2021-22 cannot possibly be accepted without supporting documentation. Mr. Weiss’ statement that OJC “moved 3500x40HC in 2020,” is nowhere close to accurate. OJC admitted in these proceedings that it moved just 542 FFEs with all carriers in 2020. OJC Exceptions at 10. In other words, the only document OJC cites to support its 4,700 FFE *projection* for 2021-22 proves that Mr. Weiss overstated OJC’s *actual* volume in 2020-21 by **546%**. The ID was thus understandably skeptical of OJC’s unsupported 4,700 FFE projection.<sup>4</sup>

The 4,700 FFE projection for 2021-22 is further undermined by OJC’s actual shipments during that same period, which totaled just 143 FFEs. ID at 20 ¶ 86. OJC tries to explain this inconsistency by stating that “Hamburg crippled OJC’s business” in 2021-22, forcing OJC “into the expensive, limited spot market where the carriers price-gouged shippers like OJC by raising their prices to their highest levels ever.” OJC Exceptions at 7. As noted in HSDG’s Exceptions, however, the higher spot market rates for 2021-22 did not “cripple” OJC. HSDG Br. 24, 37-28. On the contrary, Mr. Weiss’ own Excel spreadsheet 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	<b>\$66,302.56</b>	<b>\$26,351.14</b>
Grand Total	737	\$60,250.30	\$22,892.48

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<sup>4</sup> OJC also cites an internal HSDG email to support its claim that “OJ Commerce grew nearly 400% in sales compared to the initial year’s forecast and the trend is estimated to continue.” OJC Brief at 14 (citing RX622 & RX638); 17-18. This is another email in which Ms. Casanova was merely relaying what Mr. Weiss told her. RX622 (“*According to the customer . . . OJ Commerce grew nearly 400% in sales compared to the initial year’s forecast and the trend is estimated to continue.*”) (emphasis added). OJC refused to produce any documents to support a 400% increase in OJC’s sales or the 767% increase it claims to have projected for 2021-22

Weiss Ex. 101. HSDG's expert, Ricardo Zayas, observed that OJC voluntarily elected to forgo shipments in 2021-22, even though its own Excel spreadsheet confirmed that OJC would have profited on those shipments despite the higher shipping costs. RX1172. Given that OJC was obligated to mitigate any damages during this period, the only explanation for OJC's failure to ship more than 143 FFEs in 2021-22 was that OJC did not have the customer demand to warrant the higher volume. OJC's 4,700 FFE projection for 2021-22 is thus unreliable and cannot serve as a basis for awarding reparations. See HSDG Br. 25.

The 4,700 FFE projection for 2021-22 was also undermined by the only contemporaneous documents OJC produced. As HSDG explained in its Exceptions, OJC engaged BTIG and Nomura to assist with facilitating a potential sale of the company. See HSDG Br. 33; RX1149. In connection with that engagement, OJC gave BTIG and Nomura sales and revenue projections for 2021 and 2022—prepared by OJC's management—that were *less than 50%* of the projections Mr. Weiss prepared for this proceeding. RX1149. These contemporaneous documents further undermine OJC's assertion that it would have experienced a *767% increase* in shipments from 2020-21 to 2021-22.

Finally, OJC's ignores a critical piece of evidence that undercuts its claim for damages based of 4,700 FFEs, as well as its alternative damages claims. By February 9, 2021, OJC had run out of space at its City of Industry, California warehouse. RX747-51. This is significant for several reasons. First, establishes that OJC's sales were decreasing—not increasing—in early 2021. OJC's inventory system was “almost just-in-time.” RX1027. Mr. Weiss testified “we don't buy to stock for multiple months. We keep bringing goods to sell and turn the goods right away and then bring more to sell more.” RX1027. Second, if OJC truly expected a 10-fold increase in sales, it should have had a significant increase in orders in the pipeline by May 4, 2021 when

HSDG declined to enter a service contract for 2021-22. OJC produced no such evidence.<sup>5</sup> Third, the fact that OJC was out of space at its California warehouse meant increased shipments to OJC's only other significant U.S. warehouse in Louisville, Kentucky. RX1000. As noted below, HSDG repeatedly declined OJC's requests to transport from Asia to Kentucky and the ID correctly found that this trade lane would not have been part of any service contract for 2021-22. ID at 54.

Accordingly, there is no evidence that OJC had sufficient customer demand to warrant 4,700 FFEs in 2021-22. Without such evidence, it does not matter whether HSDG could have transported 4,700 FFEs for OJC in 2021-22.

**B. The ID Correctly Determined There Was Insufficient Evidence to Find that HSDG Could Have Moved 4,700 FFEs for OJC in 2021-22**

OJC takes exception to the ID's finding that "it was not clear that . . . Hamburg had sufficient capacity to meet [OJC's] higher volume request." OJC Exceptions at 17 (citing ID at 54). OJC claims "there is *not one contemporaneous email in the record* . . . that Hamburg lacked the space to fulfill OJC's requested container increase for 2021-22." OJC Exceptions at 11 (emphasis in original). That is simply not true, as the ID itself made clear.

The ID specifically referenced Ms. Casanova's April 29, 2021 email, which expressed uncertainty as to whether HSDG could commit to 400 FFEs (let alone 4,700) for 2021-22. ID at 53-54 (citing CX215) ("based on the above and since we are working to renew the contract, I want to ask *if it is possible* to Increase MQC by 200 FFE giving a total of \$400 [sic] FFE") (emphasis added). Unable to rebut this email, OJC simply dismisses it as "trivial." OJC Exceptions at 19.

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<sup>5</sup> If the 4,700 FFE estimate were real, there would have been substantial additional evidence to support it. OJC would have had negotiations with vendors to manufacture goods long before booking under a service contract was needed. In order to purchase 10 times the amount of goods, OJC would presumably need significant additional capital. OJC would be increasing its staff, its sell-rate to third party providers, its call-centers, and its entire operation to handle 10 times the volume. Any reasonable business would have done this in advance and would have documentation to confirm it. OJC produced nothing. Moreover, OJC never sought to recover any termination fees, contract breakage fees, severance costs, etc.

As the ID correctly found, however, this contemporaneous email was consistent with, and corroborated, the deposition testimony of Mr. Pump:

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

ID at 54 (quoting RX 993).

Contrary to OJC's assertions (OJC Exceptions at 19 & n.67), both Ms. Casanova's email and Mr. Pump's testimony are also consistent with months of communications about HSDG's struggles to meet its 200 FFE commitment for OJC in 2020-21. RX 647 (October 15, 2020 email from Ms. Casanova stating "we were unable to accommodate additional space to cover the rejected and canceled spaces from the previous weeks"); RX 653 (October 13, 2020 email from Mr. Pestana stating "pls note customer complaint about SPL not being honored. any particular issue resulting on bookings being cancelled/rejected?"); RX 685; RX 688; RX 687; RX 787; RX 695; RX 693; RX 817.<sup>6</sup> It was undisputed that HSDG failed to meet the MQC in 2020-21, and the contemporaneous documents showed that HSDG was concerned it would not have sufficient capacity to even double that MQC for OJC in 2021-22. There was no evidence that HSDG had the capacity to transport 4,700 FFEs for OJC in 2021-22.

OJC also argues that HSDG could have transported 4,700 FFEs for OJC in 2021-22 because it "entered into service contracts with other shippers for a significantly higher amount of space than OJC was requesting." OJC Exceptions at 20. As HSDG noted in its Exceptions, however, this argument is based on: (i) a list of service contracts produced by HSDG; and (ii)

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<sup>6</sup> OJC contrasts the absence of emails stating that HSDG lacked space in 2021-22 with the dozens of such emails in 2020-21. OJC Brief at 11-12. This argument is nonsensical as the parties did not have a service contract in 2021-22.

HSDG’s responses to OJC’s Requests for Admissions. The service contracts were identified based on their effective date, not the date on which they were concluded. The record does not reflect when the contracts were executed, when they were being negotiated (i.e., were they 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 additional information, it is impossible to conclude that HSDG had space available to handle 4,700 FFEs for OJC. Similarly, OJC’s Requests for Admissions were not limited to any geographic trade. Thus, the fact that HSDG admitted entering service contracts with certain MQCs on or after certain dates provides no support for a conclusion that HSDG could have provided 4,700 FFEs to OJC in the trans-Pacific trade in 2021-22.<sup>7</sup>

**C. There Was Insufficient Evidence to Find that the Parties Would Have Agreed to a Service Contract with a MQC of 4,700 FFEs in 2021-22**

The ID correctly determined that there was insufficient evidence to find that HSDG would have agreed to a service contract for 2021-22 with a MQC of 4,700 FFEs. *See* ID at 54. Similarly, there was insufficient evidence to find that OJC would have committed to a MQC of 4,700 FFEs for 2021-22. Absent such evidence, the ID correctly determined that “OJC’s request for damages based on up to 4,700 FFEs is overly speculative.” ID at 54. OJC’s exceptions to the ID’s findings in this respect are without merit for several reasons.

First, OJC argues that “Hamburg was *literally hours* from offering OJC a *bridge service contract*, in addition to the 4,700 FFE contract, for 400 FFE to cover the deficit from the 2020-21 contract . . . .” OJC Exceptions at 13 (citing CX215). There is no support for this new argument. The email OJC cites is Ms. Casanova’s internal email to HSDG’s management on April 29, 2021—

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<sup>7</sup> OJC’s statement that HSDG “reaped unprecedented revenue of \$61.8 billion in 2021 and \$81.5 billion in 2022” (OJC Exceptions at 1) is likewise irrelevant. As noted in a recent decision, “[m]aking a profit or increasing income, without more, would not violate the Shipping Act.” *Samsung Elec. Am., Inc. v. ZIM Integrated Shipping Servs. Ltd.*, No. 22-30, Dkt. No. 27, p. 2 (June 9, 2023).

the same email OJC labelled “trivial” elsewhere in its brief. OJC Exceptions at 19 (“the ALJ also cited a trivial email from Ms. Casanova . . .”). In the email, Ms. Casanova asked management “*if it is possible* to Increase MQC by 200 FFE giving a total of \$400 [sic] FFE.” CX215 (emphasis added). This email does not (i) mention a “bridge service contract,” (ii) offer any indication that the parties were *hours away* from agreeing to any contract, or (iii) suggest in any way that HSDG was going to offer OJC 5,100 FFEs for 2021-22. OJC Exceptions at 13 (“a bridge service contract, in addition to the 4,700 FFE contract, for 400 FFE”). This new argument was not presented to the Presiding Officer and is inconsistent with OJC’s own unsupported arguments with respect to damages.

Second, 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 because OJC refused to commit to any particular MQC for 2021-22. Indeed, OJC would not even commit to same 200 FFE MQC from the 2020-21 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 correctly 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.

Third, OJC’s repeated claims—eight times in its Exceptions—that HSDG promised to make OJC a “priority customer” is without merit. *See* OJC Exceptions at 5, 10, 12, 20, 25, 26, 27. There is not a single contemporaneous document to that effect. Rather, the “priority customer” quote comes from the ID, which found that OJC “*interpreted*” HSDG’s communications to mean

that HSDG “would make OJC a priority customer . . . .” ID at 10 ¶ 29. OJC’s interpretation of the parties’ communications are meaningless given that it is undisputed there was no agreement on the critical deal terms for a service contract for 2021-22.

Fourth, in a further mischaracterization of the negotiations, OJC claims that HSDG “verbally *agreed* to enter into a service contract with OJC for up to 4,700 FFE shortly before its illegal conduct, with the only pending question being ‘an exact minimum quantity commitment (MQC)’ that OJC wanted.” OJC Exceptions 16 (quoting SCX481) (emphasis in original); *see also* OJC Exceptions at 13. The quoted email, from Ms. Casanova to Mr. Weiss on April 28, 2021, does not support OJC’s assertion that there was a “verbal” agreement. On the contrary, the email states “we are working on your contract renewal so we would like to know an exact minimum quantity commitment (MQC) you are willing to sign to continue with process renewal.” SCX481. It is undisputed that OJC never provided HSDG with a proposed MQC. Moreover, as Ms. Casanova made clear in her email, the MQC would simply allow HSDG “to continue with process renewal.” SCX481. The parties would still need to agree on the MQC, rates, routes, and other terms of the service contract. There was no “agreement” whatsoever for 2021-22.

Finally, the ID correctly found that “it is not reasonably certain that the route to Kentucky would have been included in the 2021-22 contract between the parties.” ID at 54. This had major implications because OJC admitted that **70%** of its 4,700 FFE projection would have gone to Kentucky. OJC Exceptions at 20. OJC’s claim that HSDG could have shipped containers to Kentucky because it handled shipments from Brazil to Kentucky misses the point. The service contract at issue was directed solely at cargo originating from Asia, not Brazil. The ID correctly found that HSDG declined to bid for the Kentucky business because it was in the process of reducing the Asia to Kentucky trade lanes for all customers due to increased inland transport costs as well as operational issues such as trucker and chassis shortages. ID at 54; RX1131-32, ¶ 4; *see*



CX248 (“This is mainly IPI to inland Louisville, KY that we are trying to reduce. Please decline.”). Relying solely on Mr. Weiss’s declaration, OJC states that “the evidence shows Hamburg knew that if shipments to Kentucky were an issue, OJC could ship all its containers through California, where OJC had a warehouse to accommodate all the additional space.” OJC Exceptions at 20-21 (citing CX 475 ¶ 35). The contemporaneous documents establish that by February 2021, OJC’s California warehouse was filled to capacity. RX747. In other words, OJC’s sales were decreasing—not increasing—and its inventory was piling up at the warehouse. Mr. Weiss’s self-serving declaration is not supported by inventory records or other relevant documents for OJC’s warehouses. Accordingly, OJC’s exceptions to the ID should be rejected.

**II. OJC’S THREE ALTERNATIVE DAMAGES AMOUNTS WERE ALSO NOT PROVED WITH REASONABLE CERTAINTY**

Like the 4,700 FFE volume projection discussed above, the other volumes OJC urges the Commission to adopt—1,410 FFEs, 542 FFEs, or 400 FFEs—as a basis for higher reparations are not supported by the evidence in the record. Specifically, there is no evidence that (a) OJC had sufficient customer demand to warrant those volumes; or (b) HSDG would have contracted for the volumes.

**A. OJC Fails to Demonstrate It Had Greater Cargo Volumes to Ship in 2021-22**

OJC shipped 542 FFEs in 2020-21. It shipped 143 FFEs in 2021-22, even though it remained profitable during this period despite higher spot rates. *Supra* at 7-8. Since shipments at spot rates remained profitable for OJC in 2021-22, the only logical conclusion is that OJC’s customer demand in 2021-22 did not warrant additional cargo shipments or that its profits per

container are overstated. Given OJC's actual cargo volumes in 2021-22, there is no basis upon which to conclude it would have shipped 400 FFEs, 542 FFEs, or 1,410 FFEs in 2021-22.<sup>8</sup>

OJC appears to offer 1,410 FFEs as a basis for reparations because this represents 30% of the 4,700 FFEs OJC was purportedly prepared to ship in 2021-22 that would not be moving to Kentucky. CX203. This calculation lacks merit, however, because as demonstrated above, 4,700 FFEs was never a realistic volume projection. Thus, there is no support in the record for the proposition that OJC could have shipped 1,410 FFEs to non-Kentucky destinations. Moreover, OJC makes no effort whatsoever to establish 1,410 FFEs with reasonable certainty, conceding that the estimate might allow for a claim for damages based on 720 FFEs, 1,260 FFEs, or as high as 1,410 FFEs. OJC Exceptions at 22-23. By definition, this is not "reasonable certainty."

The 542 FFE volume also lacks any support in the record. Although damages can be based on something less than precision, they must be based on a reasonable approximation supported by evidence and by reasonable inferences. *Tractors & Farm Equipment Ltd. v. Cosmos Shipping Co.*, Docket No. 81-57, 26 S.R.R. 788, 798-99 (ALJ Nov. 23, 1992), admin. final, Dec. 31, 1992. OJC's argument that damages should be calculated based on 542 FFEs does not meet this standard. Just because OJC shipped 542 FFE in 2020-21 does not mean it would have done so in 2021-22. In fact, the declaration of Mr. Zayas, HSDG's expert witness, provided evidence that companies with businesses similar to OJC's experienced a decline in demand/sales in 2021-22 as compared to 2020-21. RX1171. As noted above, this was corroborated by a contemporaneous email from OJC noting that by February 2021, OJC's California warehouse was filled to capacity. RX747. OJC's

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<sup>8</sup> OJC's ability to ship any given volume in 2021-22 is also suspect because although OJC was allegedly (and inexplicably) consolidating all of its cargo with HSDG—the one carrier that had failed to fulfill its 2020-21 contract with OJC—OJC was unwilling or unable to provide HSDG with a MQC for 2021-22 despite pressure from HSDG to do so. *See* ID at 13 ¶ 51 (citing RX 808-809) ("Ms. Casanova reached out to OJC on April 28, 2021, at 6:04 PM, to confirm an exact MQC OJC was willing to sign to continue with process renewal, considering place of delivery as City of Industry CA only."); CX217.

sales were decreasing—not increasing—and its inventory was piling up at the warehouse. Thus, the record fails to support a finding that OJC could have shipped 542 FFE in 2021-22.

Similarly, the record does not support a finding that OJC could have shipped 400 FFEs in 2021-22, even if the parties had agreed on a service contract for that volume. As noted, OJC shipped just 143 FFEs in 2021-22, even though it remained profitable during this period despite higher spot rates. *Supra* at 7-8. Furthermore, these 143 FFEs included 43 FFEs that originated in Brazil and which were not contemplated during negotiations between Hamburg and OJC. Weiss Ex. 101. Considering that those shipments occurred during the time period when OJC was required to mitigate any damages, it would not have been proper for the ID to assume that OJC would have shipped more than 143 FFEs in 2021-22.<sup>9</sup>

**B. OJC Fails to Establish that HSDG Would Have Contracted for 1,410 FFEs, 542 FFEs, or 400 FFEs in 2021-22**

The lowest alternative volume tier that OJC argues would be an appropriate measure of damages is 400 FFEs. However, OJC failed to meet its burden to prove with reasonable certainty that HSDG would have contracted to transport 400 FFEs or more in 2021-22. OJC’s argument that 400 FFEs is an appropriate measure of damages is premised solely on a “draft” contract HSDG prepared with this number. OJC Exceptions at 24. Contrary to the statement in OJC’s Exceptions, HSDG did not “dangle” this “carrot” to OJC. *Id.* at 6. OJC never even saw this draft contract. As the ID correctly found, the only consideration of a 400 FFE service contract for 2021-22 was an

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<sup>9</sup> OJC’s claims are also undermined by the wild variations in its estimated damages. In its first damages chart, OJC provided damages estimations prepared by Mr. Weiss in a tab called “Expected Containers” where it detailed calculations for “500, 1,000, 1,500, 2,000 all the way up to 4,500 containers.” *See* RX1022 Weiss Tr. P218, L8 – P220, L6. Later, OJC confined its estimations to only figures for 4,200 and 4,700 containers. *See* Weiss Ex. 101. OJC’s expert analysis further obfuscates these calculations by including shipments between Brazil and California and Brazil and Kentucky in the 4,200 and 4,700 figures despite the fact that these routes were not contemplated in negotiations and where Hamburg provided service to OJC from Brazil during 2021-22. *See* CX426-30 (including as many as 450 containers originating in Brazil in the analysis of damages). These discrepancies cannot be reconciled with one another and demonstrate OJC’s continued efforts to grasp at straws in its damages calculations.

*internal* HSDG email asking if such a contract would even be possible. ID at 14, ¶ 54 (citing RX1139) (“This template existed only within HSDG’s computer system, *was not provided to OJC contemporaneously*, and contained the same rates as 2020-21 because those were the rates in the system from the prior contract.”) (emphasis added).

Given that there is no support in the record for a finding that HSDG would have contracted to transport 400 FFEs, there is certainly no support for a finding that HSDG would have contracted to move 542 FFE (the volume OJC purportedly shipped with all carriers in 2020-21) or 1,410 FFE (OJC’s other purported measure of damages).<sup>10</sup>

### **III. THERE ARE NO UNCERTAINTIES TO BE CONSTRUED AGAINST HSDG**

OJC argues that *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946) requires that uncertainties caused by HSDG’s allegedly unlawful conduct be construed against HSDG. This argument fails because (a) there are no uncertainties caused by HSDG’s alleged conduct and (b) *Bigelow* is distinguishable from the present case.

#### **A. There Are No Uncertainties Created by HSDG’s Alleged Conduct**

The ID correctly held that reparations for 2021-22 should not be based on a contract volume of 4,700 FFEs for a variety of reasons, all of which are explained in detail in Section I of this Reply. OJC nonetheless argues that it is entitled to damages based on 4,700 FFE because “[a]ny uncertainty regarding OJC’s damages for 2021-22 should have been construed against Hamburg—not OJC—because Hamburg’s conduct prevented the precise computation of OJC’s damages.” OJC Exceptions at 14. This argument is flawed for two reasons.

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<sup>10</sup> Even if HSDG had been willing to enter a contract for a higher volume in 2021-22, it is not clear it could have fulfilled that contract. HSDG failed to perform the 2020-21 Service Contract and, throughout the term of that contract regularly communicated to OJC about its limitations due to capacity constraints, equipment shortages, trucker shortages, and intermodal challenges. RX747; RX585. More importantly, these constraints were regularly communicated during the period in which Mr. Weiss alleges negotiations with HSDG were ongoing. *Id.*

First, the issue of whether HSDG had the space to transport 4,700 FFEs for OJC only becomes relevant if OJC can first establish that it would have been capable of tendering that volume. OJC's ability to prove with reasonable certainty sufficient customer demand for its goods is in no way dependent upon HSDG's conduct—this information is in the exclusive possession, custody and control of OJC. Yet, OJC produced no documentary evidence *whatsoever* that would support a conclusion that it could have tendered that volume. As noted above, the only attempt at offering evidence to this effect is Mr. Weiss's self-serving declaration (CX468) and a citation to an internal HSDG email in which Ms. Casanova relayed what Mr. Weiss told her (CX203).

The reliance on these two pieces of evidence highlights the lack of merit and credibility in OJC's argument. Virtually all of OJC's case is premised on what Mr. Weiss claims he said, what he claims he was told, or what he says happened. However, Mr. Weiss's version of events is frequently inconsistent with contemporaneous documents. For example, Mr. Weiss purportedly told Ms. Casanova that OJC had moved 3,500 FFE in 2020-21 (CX203) – the actual figure was 542 FFE (RX1024). Mr. Weiss claims the parties verbally agreed on an MQC of 4200-4700 containers for 2021-2022 (CX468, ¶ 11)—there is no contemporaneous evidence that any such verbal contract existed, which is incredible on its face. Moreover, the alleged verbal contract for 4200-4700 FFEs is nonsensical since service contracts must contain a single MQC.

OJC's position defies all common sense. Why would OJC, which had trouble getting space from HSDG in 2020-21 and which claims it was expecting nearly a 10-fold increase in volume in 2021-22, not tell HSDG what its minimum volume requirements were (SCX418)? How did OJC, which was having warehouse capacity issues on the West Coast (RX746), expect to handle this increase in volume? Why would OJC, served with an expert witness report that identifies the records necessary to support its projections and damages calculations (RX1184 and RX1188) not produce such records? Why would OJC's expert not review any records to verify OJC's

calculations? Why was OJC unwilling, or unable, to produce correspondence with vendors, customers, banks and financing companies, customs brokers, or other contemporaneous documents reflecting the preparations being made for this unprecedented surge in volume that it was allegedly expecting?<sup>11</sup> Given the total absence of documents supporting OJC's claim that it could have shipped 4,700 FFEs in 2021-22, the Excel spreadsheet Mr. Weiss created for purposes of this proceeding lacks any credibility.

The second flaw in OJC's argument is that there is considerable evidence in the record which demonstrates that the 4,700 FFE projection was not credible. This evidence includes:

- As of April 28, 2021, OJC had yet to commit to a MQC for a 2021-22 service contract, despite multiple requests from Ms. Casanova (SCX481).
- 70% of OJC's shipments from Asia went to Kentucky, and HSDG had repeatedly indicated it was not interested in moving Asia origin cargo to Kentucky. Indeed, as late as April 28, 2021, HSDG was telling OJC it was not interested in moving cargo to Kentucky (SCX481).
- OJC moved only 542 FFEs in 2020-21 (RX1024), despite having a service contract with HSDG and contracts with other carriers, all of whom fulfilled the terms of those contracts.
- OJC moved only 143 FFEs in 2021-22, even though (i) it remained profitable for OJC to ship at then-prevailing spot market rates; and (ii) OJC had a duty to mitigate any alleged damages in that time period.
- OJC did not raise any allegation that the parties had agreed to a 4,700 FFE arrangement until discovery had commenced and the email chain on which OJC bases its entire argument had been produced by HSDG.

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<sup>11</sup> OJC clearly entered into an agreement with United Shippers Association during the period in question despite attempting to characterize the association as a third-party reseller. OJC Exceptions at 21. OJC refused to produce any evidence of this relationship which might support (or further undermine) its damages claims.

OJC failed to prove with reasonable certainty sufficient customer demand to warrant 4,700 FFEs of shipments in 2021-22. OJC's ability to do so was in no way dependent upon HSDG's conduct—this information was in the exclusive possession, custody and control of OJC. Accordingly, there is no uncertainty concerning OJC's alleged reparations that should be construed against HSDG.<sup>12</sup>

### **B. *Bigelow* Is Distinguishable**

The Supreme Court's decision in *Bigelow* is distinguishable from this case. In *Bigelow*, a theater owner sued a group of theater owners and movie companies for damages the owner allegedly suffered as the result of an antitrust conspiracy among the defendants which prevented the owner from being able to show first-run films. Before the U.S. District Court, the jury awarded damages based on the difference in receipts for a period of time after the conspiracy went into effect as compared to a similar period of time prior to the conspiracy. On appeal, defendants argued that this measure of damages was not reasonably certain because the plaintiff had not proven what its receipts would have been had there been no conspiracy. The Court of Appeals agreed and reversed the District Court's decision. The Supreme Court reversed the Court of Appeals and reinstated the District Court decision, finding that damages had been proved with reasonable certainty. While the Supreme Court made statements regarding construing uncertainty against the party whose conduct caused the uncertainty, it did so for purposes of rejecting defendants' argument, and did not rely on it for the calculation of damages. OJC's reliance on *Bigelow* is inappropriate for several reasons.

First and foremost, under *Bigelow*, any uncertainty in proving damages is construed against a defendant *only* where the defendant's conduct prevented the plaintiff from proving its damages. As noted above, HSDG's conduct did not impact OJC's ability to establish with reasonable

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<sup>12</sup> For the reasons set forth in Section II of this Reply, the same is true of the other volumes that OJC claims to have proved with reasonable certainty.

certainty (i) sufficient customer demand to warrant a 767% increase in volume; or (ii) OJC's average profits per container. All information about OJC's cargo volumes and profits for 2020, 2021 and 2022 were within the possession, custody and control of OJC. HSDG's expert, Mr. Zayas, identified the necessary documentation, but OJC refused to produce it, relying instead on an Excel spreadsheet produced by Mr. Weiss for purposes of this proceeding. If Mr. Weiss' Excel spreadsheet was credible, OJC would have produced the documentation to support it, and its alleged damages would not be speculative.

Second, as also noted above, in *Bigelow* the plaintiff proved damages with reasonable certainty by means of comparing its revenues pre- and post-conspiracy. Here, for the reasons HSDG has explained in its own Exceptions and in this Reply, OJC failed to prove its damages with reasonable certainty. It is not credible that a party claiming a 10-fold increase in volume year-over-year would not have a single contemporaneous document to support its position. No financial statements. No sales records, purchase orders, or inventory records. No contracts with other shipping lines. No communications with vendors, truckers, warehouses, customs brokers, or furniture suppliers. No evidence of increased website traffic. No communications with banks or investors for financing. No evidence of any negotiations for increased warehouse capacity.

Third, the decision in *Bigelow* did not establish a rule that ambiguities must be construed against the defendant for purposes of calculating damages. At most, this 75-year-old decision stands for the proposition that defendants cannot use their own conduct as a basis upon which to challenge the sufficiency of the proof of damages. HSDG's arguments are completely consistent with that proposition, because it challenges the sufficiency of OJC's proof of damages based on the lack of supporting information from OJC, which had nothing to do with HSDG's alleged conduct.



#### **IV. OJC's ARGUMENTS ABOUT DISCOVERY VIOLATIONS ARE SPECIOUS**

OJC's arguments that HSDG did not comply with its discovery obligations with respect to blank sailings and the depositions of certain individuals are specious.

##### **A. The Blank Sailing Issue Is a Red Herring**

OJC excepts to the ID's finding that "[t]he record does not allow a determination as to whether 400 FFE or more were available in the 2021-22 contract year." ID at 39; OJC Exceptions at 10. OJC argues that it would have had more evidence of the availability of space in 2021-22 had HSDG responded to discovery requests regarding blank sailings. There are several fundamental problems with OJC's argument.

First, the Commission has already investigated the issue of blank sailings and found that they were not being used to manipulate the market. In the Final Report in Fact Finding Investigation No. 29, the Commission found:

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...

RX 380. OJC continues to persist in allegations that have no foundation whatsoever in reality.

Second, as HSDG explained in its discovery responses, HSDG did not operate vessels in the trans-Pacific trade and provided service only via space chartered from other carriers. The space charter arrangement pursuant to which HSDG obtained space can be found at RX 916. Thus, HSDG had no control over the amount of capacity deployed in the trans-Pacific trade, whether by means of blanking sailings or otherwise. Therefore, it would have been impossible for HSDG to manipulate capacity in any way, shape, manner, or form.

Third, HSDG never offered to provide OJC with a service contract with a minimum volume commitment of 400 FFE. The ID correctly found the only discussion of a 2021-22 service contract

for that volume was an internal HSDG email from Andrea Casanova, asking whether a contract for that volume would be possible. ID at 54. The ID correctly concluded that an internal email asking whether such a contract would be possible did not prove with the requisite reasonable certainty that OJC was entitled to damages based on a service contract for 400 FFE.

## **B. HSDG Complied with Its Deposition Obligations**

HSDG complied with the Presiding Officer's order to make available for deposition "Maersk management who would have information regarding pricing decisions." CX312.

OJC sought to depose the Chief Executive Officer and Chief Financial Officer of A.P. Moller-Maersk A/S, the parent company of Maersk A/S, the ocean carrier entity. Maersk A/S is one of approximately 790 subsidiaries of A.P. Moller-Maersk A/S. RX 1127. Those depositions were not intended to solicit information relevant to this proceeding, but rather to harass Maersk and indulge OJC's on-going fascination with ocean carrier profits.<sup>13</sup> The ID correctly held that there was no indication that these individuals had information relevant to this proceeding (CX 311) and instead ordered Respondent to "identify Maersk management who would have information regarding pricing decisions." CX 312.<sup>14</sup>

HSDG complied with this order. It identified Mr. Johan Sigsgaard, Global Head of Ocean Products and Senior Vice President at Maersk A/S. Mr. Sigsgaard had the requisite knowledge regarding pricing decisions. RX 1128. Mr. Sigsgaard was made available for deposition for a total of more than 7 hours over two dates – October 5 and October 7, 2022. RX 1128. OJC refused to take Mr. Sigsgaard's deposition on the grounds that they were entitled to seven consecutive

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<sup>13</sup> It has been established that profitability is not relevant to the issue of Shipping Act violations. See, e.g., *Samsung Electronics America, Inc. v. ZIM Integrated Shipping Services Ltd.*, FMC Docket No. 22-30 (ALJ June 9, 2023), p. 2 ("Making a profit or increasing income, without more, would not violate the Shipping Act.").

<sup>14</sup> Respondent had previously identified Ivan Cheung as the person most knowledgeable about spot rates and identified dates on which Mr. Cheung was available for deposition, but OJC declined to take his deposition without explanation. RX471; RX478; RX485; RX1122.

hours of deposition time on a single date, ignoring the reality of Mr. Sigsgaard's schedule and the fact that Mr. Sigsgaard is based on Copenhagen, which is 6 hours ahead of U.S. East Coast time.

Moreover, OJC has not articulated what further pricing information was necessary for its case. OJC shipped under spot rates in 2021-22, and was able to calculate its alleged damages using those rates and rates obtained from third-party vendors/indices. It remains unclear what additional pricing information OJC might have obtained from a deposition of Mr. Sigsgaard that would have had any impact on this proceeding.<sup>15</sup> As the ID correctly noted, "Hamburg's spot market rates, blank sailings, and other issues raised by OJC were not necessary to a determination of damages and additional discovery would not have impacted the findings." ID at 64.

Based on these facts, the Commission should find that HSDG did not violate its discovery obligations or, at a minimum, affirm the ID's denial of the request for sanctions on the grounds that the discovery disputes did not impact the proceeding.

### **CONCLUSION**

OJC, with no basis in the record to support its position, excepts to the ID and seeks to increase reparations from slightly less than \$10 million to more than \$210 million. If the Commission were to rule as requested by OJC, it would be awarding damages based solely on an Excel spreadsheet (i) prepared by the President of a company that does not have, or cannot produce, financial and sales records, and (ii) supposedly "verified" by an unqualified accountant who admittedly did not review any records upon which the spreadsheet was purportedly based. If the Commission rules as requested by OJC's exceptions, it would mean that any complainant could prove damages with "reasonable certainty" by making up an Excel spreadsheet for purposes of

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<sup>15</sup> For the reasons set forth in its Exceptions, HSDG does not consider OJC's damages calculations to be valid. Those reasons are unrelated to availability (or unavailability) of pricing information.

litigation and paying any accountant to say “Yes, those are the numbers.” The standard of “reasonable certainty” applicable under the Shipping Act requires more.

Accordingly, the Commission should deny OJC’s exceptions, and for the reasons set forth in HSDG’s Exceptions, reverse the ID and award no damages to OJC.

Respectfully submitted,

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Dated: July 21, 2023

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21<sup>st</sup> day of July, 2023, the foregoing was served via electronic mail on:

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