

**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.)	
)	

**RESPONDENTS’ MOTION TO COMPEL
AND COMPLAINANT’S COUNTERSTATEMENTS AND OPPOSITION TO
RESPONDENTS’ MOTION TO COMPEL¹**

Pursuant to 46 C.F.R. § 502.150, Respondents Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft A/S & Co. KG (“HSDG”) and Hamburg Süd North America, Inc. (“HSNA”) (collectively, “Respondents”) move to compel Complainant OJ Commerce, LLC (“OJC”) to produce documents in response to eight requests for the production of documents (*see* Exhibits #1 and #2 hereto). Respondents repeatedly conferred with OJC’s counsel in good faith to obviate the necessity of this motion but, despite representations to the contrary by OJC’s counsel, OJC refuses to provide the requested discovery that is directly relevant to the parties’ claims and defenses. The discovery requested in this motion was specifically requested by Respondents’

¹ As directed in paragraph 11 of the Initial Order, the non-moving party, Complainant, has inserted its counter-summaries and arguments into the original motion. For ease of reference, each counterstatement or other addition is highlighted in tan to signal that it is material by Complainant.

damages expert in the report he served on August 5, 2022 and is necessary to allow the expert to assess OJC's damages claim. OJC did not serve an expert report to support its damages claim and refuses to produce the discovery required to assess that claim.

COUNTERSTATEMENT TO INTRODUCTION

Respondents' motion should have never been filed. All the information that Respondents demand with their motion they already possess, or OJC has already told Respondents during prior deposition that the requested documents do not exist. Indeed, OJC provided the information demanded herein on July 14, 2022, when it produced a preliminary assessment of OJC's damages – without the benefit of Respondents' critical spot market rate information that they continue to withhold to this very day – that contained multiple spreadsheets full of the relevant data, including but not limited to the number, price paid, and contents of all containers shipped by OJC since June 1, 2020. By their own admission, Respondents did not serve their alleged expert's report until August 5, 2022. As Respondents received comprehensive data from OJC three weeks before, any failure by Respondents to provide that information to their expert was of their own making.

Ironically, Respondents contended just yesterday in their response filing that OJC's request for an extension of the expert deadline is "moot" because OJC produced an expert report on September 2, while contending in this motion that Respondents' expert needs the documents demanded in this motion "to assess OJC's damage claims." The difference is that OJC has produced the relevant information, as shown below, and Respondents have not.

Respondents in fact admitted in an email earlier today that they **still** have not produced all documents responsive to OJC RFP 26 on pricing (*see* Ex. A, highlighted paragraph), despite this Court ordering Respondents "to provide complete responses to OJC RFP 26 and all responsive documents must be provided within seven calendar days of the date of this order [September 7]." Order dated August 31, 2022, at 9. Respondents have even been "warned that failure to do so may

result in sanctions, including directing facts to be established, prohibiting claims or defenses, striking pleadings, or dismissing claims or defenses. 46 C.F.R. § 502.150(b).” *Id.*

But instead of doing as ordered, Respondents make promises about some spot market rate information coming in the next day or two, and other information “as soon as it is available,” whenever that is. (*See* Ex. A, highlighted paragraph). Incredibly, Respondents have produced **no service contract rate information at all**, which was also ordered produced, Order dated August 31, 2022, at 9, and they have provided no time frame when, if ever, that information will be produced. Respondents’ attitude of “you’ll get the information when it’s ready, if ever” makes a mockery of the Court’s Orders and provides yet more substantiation for why OJC needs additional time to complete its expert report and discovery in general. Depositions cannot move forward, and expert reports cannot be completed without this critical, outstanding information. Nonetheless, it appears that Respondents have made the calculated decision to run out of the clock (as the discovery deadline is currently still September 16, a week from tomorrow) and risk sanctions rather than produce the pricing information that is evidently even more damaging to their case.

Instead of working on their own deficient production that was ordered remedied on August 31, Respondents worked on and filed this retaliatory motion to compel on September 1. But as all the pertinent information demanded has already been produced or does not exist, Respondents’ motion should be DENIED and sanctions be levied against Respondents for admittedly continuing to flout this Court’s Orders by precluding Respondents from challenging OJC’s claimed damages. Without sanctions, Respondents will indeed successfully run out of the clock on discovery and continue violating all this Court’s Orders. Furthermore, to move all discovery in this proceeding to completion, OJC respectfully requests under 46 C.F.R. § 502.141(i)(2) a hearing with Your Honor as soon as possible on all outstanding discovery issues so that these issues can be finally decided, and discovery wrapped up.

BACKGROUND

OJC alleges that Respondents violated several provisions of the Shipping Act of 1984, as amended, by allegedly failing to provide vessel space to OJC as contemplated by the service contract between the parties and by not entering into a new service contract with OJC. OJC alleges it suffered substantial damages because of Respondents' purported conduct. Respondents have produced over 13,000 pages of documents in response to discovery requests issued by OJC, including over 700 emails between OJC and Respondents. In contrast, OJC's total document production consists of just 30 documents.

COUNTERSTATEMENT TO BACKGROUND

Respondents' characterization of their production and OJC's production is a blatant misrepresentation to this Honorable Court. OJC has provided documents, which contain the entire string of emails, thereby eliminating duplicates. Respondents, on the other hand, produced literally many hundreds of duplicate emails, including multiple copies of every email from multiple persons copied on emails strings. This dramatically inflated Respondents' production numbers just for show. One example of this tactic is illustrated by the two allegedly "work product" emails that Respondents clawed back and the Court ordered reproduced (as they were not work product). Order dated August 31, 2022, at 9-10. The content of those two emails actually appeared in 25 separate documents, which were simply duplicates from multiple recipients of the same emails in the same string, produced over and over again. Expand that out to Respondents' entire production and the Court can see how for every two unique emails that Respondents produced, they produced 23 duplicates. This strategy padded Respondents' production numbers to no useful end other than to make their "we produced a lot more" argument and to drive up OJC's costs, as it forced OJC to review a dozen duplicate documents for every unique document produced by Respondents.²

² As shown above, despite Respondents' boasting of their production, they **still** have not produced anywhere near all the responsive documents twice ordered by this Court to OJC RFP 26.

By contrast, OJC has produced data in spreadsheets on 737 containers shipped by OJC from June 1, 2020, around when the parties' Service Contract started, until the present day. For each container, OJC provided Respondents with 13 points of data, including but not limited to the exact origin, destination, shipping carrier, ship date, arrival date, container value, and the exact price paid. Despite receiving this information on July 14, 2022, Respondents filed their present motion to compel that information anyway.

OJC also provided Respondents a total of 2,830 records of all the contents in the 737 containers. For each line item, OJC provided 12 points of data, including but not limited to the product descriptions, total units, unit cost, profits, revenue, and pricing.

OJC also provided a total of 366,709 records of sales history on all those products, starting from January 1, 2020, to the present. For each sales transaction, OJC provided 12 points of data, including the order number, order date, order source, price paid, item ordered, qty ordered, cost of shipping, cost of fulfillment, commissions, marketing, discounts, sales, and gross revenue, all from OJC's internal database.

All in all, in addition to the other documents and emails that OJC has produced, OJC has provided to Respondents a total of 370,276 records, with 4,444,049 points of data, encapsulating all shipping containers during the relationship between the parties, and all sales records of products associated with those shipping containers.

On August 15, 2022, OJC's CEO and founder, Jacob Weiss testified in detail for hours on the substance of the spreadsheet data, the meanings and formulas used in the columns, and the information contained therein. Nevertheless, Respondents demand information in this motion that is clearly not relevant, does not exist, or they already possess.

LEGAL STANDARD

The Commission's Rules entitle parties to discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." 46 C.F.R. § 502.141(e)(1). The discovery requests Respondents seek to compel satisfy these criteria.

ARGUMENT

Pursuant to 46 C.F.R. § 502.150(a)(2) and Paragraph 11 of the Initial Order in this proceeding, the text of each discovery request at issue, OJC's response, and Respondents' arguments as to why compelling a response is appropriate are set forth below.

A. REQUESTS FOR PRODUCTION OF DOCUMENTS

1. First Requests for Production #1 through #4

Respondents seek an order compelling OJC to produce documents in response to First Requests for Production of Documents #1, #2, #3 and #4.³

1. All service contracts, including amendments, with ocean common carriers other than HSDG.

RESPONSE: OJC objects to this Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. OJC also objects to the term "service contract" as a vague, undefined term.

SUPPLEMENTAL RESPONSE: OJC further objects to this Request to the extent it seeks documents relating to service contracts from before May 31, 2021, as that information is not reasonably calculated to lead to the discovery of admissible evidence. As to after May 31, 2021, OJC states that there are no such responsive documents.

2. All NVOCC Service Arrangements and/or Negotiated Rate Agreements, including amendments, with any non-vessel operating common carrier.

³ Information similar to that sought in these requests for production was sought in an interrogatory. Respondents do not seek to compel a response to the interrogatory because production of the documents would be sufficient.

RESPONSE: OJC objects to this Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. OJC also objects to the terms “NVOCC,” “Service Arrangements and/or Negotiated Rate Agreements, and “non-vessel operating common carrier” as vague, undefined terms.

SUPPLEMENTAL RESPONSE: OJC further objects to this Request to the extent it seeks documents relating to “NVOCC Service Arrangements and/or Negotiated Rate Agreements” from before May 31, 2021, as that information is not reasonably calculated to lead to the discovery of admissible evidence. As to after May 31, 2021, OJC states that there are no such responsive documents.

3. Documents relating to and sufficient to show the volumes shipped under each service contract with an ocean common carrier other than HSDG.

RESPONSE: OJC objects to this Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. OJC also objects to the term “service contract” as a vague, undefined term.

SUPPLEMENTAL RESPONSE: OJC further objects to this Request to the extent it seeks documents relating to service contracts from before May 31, 2021, as that information is not reasonably calculated to lead to the discovery of admissible evidence. As to after May 31, 2021, OJC states that there are no such responsive documents.

4. Documents relating to and sufficient to show the volumes shipped under each NVOCC Service Arrangement and each Negotiated Rate Agreement with any non-vessel operating common carrier.

RESPONSE: OJC objects to this Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. OJC also objects to the terms “NVOCC,” “Service Arrangements and/or Negotiated Rate Agreements, and “non-vessel operating common carrier” as vague, undefined terms.

SUPPLEMENTAL RESPONSE: OJC further objects to this Request to the extent it seeks documents relating to “NVOCC Service Arrangements and/or Negotiated Rate Agreements” from before May 31, 2021, as that information is not reasonably calculated to lead to the discovery of admissible evidence. As to after May 31, 2021, OJC states that there are no such responsive documents.

Respondents’ counsel held at least three “meet and confers” with OJC’s counsel, on June 23, 30, and July 13, 2022. During these “meet and confers,” Respondents’ counsel clarified the meaning of the term “service contract” as used in the Requests (a term OJC itself used throughout its Verified Amended Complaint). Respondents’ counsel understood, based on statements made by OJC’s counsel during the meet and confers, that OJC would be providing “pretty much” everything

Respondents had requested. Respondents' counsel also addressed the status of OJC's response to its discovery requests (including these Requests for Production) in an email to OJC's counsel dated July 21, 2022. OJC's counsel responded to that inquiry as follows:

OJ Commerce will supplement its responses and produce its documents by July 29, 2022, with the exception of RFP 10 (audited financials) which is irrelevant and harassing. Respondents already possess the data related to OJC's damage calculations and claims. If you have cases that require the production of audited financials in all instances when a party claims damages and in addition to all the detailed information already provided, please provide for our review.

While OJC did indeed supplement its discovery responses on July 29, 2022, the supplemental responses merely asserted additional, untimely objections. OJC did not produce any further documents or information as promised during the "meet and confers."

The information requested in First Requests for Production #1 through #4 is reasonably calculated to lead to the discovery of admissible evidence with respect to OJC's damages claims. Evidence of past performance with other ocean carriers is relevant to assess the reasonableness of OJC's assumptions regarding future cargo volumes. In addition, OJC also appears to claim that it was unable to ship with other ocean carriers cargo for which it could not obtain space from Respondents. This allegedly resulted in OJC foregoing shipments, resulting in lost profits rather than merely higher shipping costs. OJC's performance under past contracts is relevant to this claim, and the extent to which OJC did or did not seek to mitigate any damages OJC claims to have suffered as a result of HSDG's alleged conduct. Thus, information about OJC's performance under service contracts with other ocean carriers is relevant to two different aspects of OJC's damages claims.

Additionally, Jacob Weiss, the founder, owner and CEO of OJC, testified at deposition that he was "fairly certain" that OJC's service contracts with other ocean carriers followed a plan and that the contracts "definitely" had "a consistent system of some method..." with respect to the carrier's obligation to provide space. Weiss Deposition, pp. 192-193. Respondents are highly

skeptical as to the accuracy of Mr. Weiss’s testimony regarding the content of OJC’s service contracts with other ocean carriers and, in addition to the foregoing reasons, seek the service contracts to test the credibility of Mr. Weiss’s testimony.

COUNTERSTATEMENT ON RFP 1-4

With these requests, Respondents seek information that it already has had for nearly two months. The “[e]vidence of past performance with other ocean carriers is relevant to assess the reasonableness of OJC’s assumptions regarding future cargo volumes”/“information about OJC’s performance under service contracts with other ocean carriers is relevant to two different aspects of OJC’s damages claims” was produced to Respondents on July 15, 2022 (from June 1, 2020 through March 24, 2022) and was supplemented on September 2 for additional shipments made since then. Specifically, as stated above, the spreadsheets contained comprehensive data on the 737 containers shipped by OJC from June 1, 2020, around when the parties’ Service Contract started, until the present day.

Mr. Weiss testified during his August 15th deposition that he could not get extra space from other carriers during the time Respondents were failing to meet their contractual requirements, stating that “we couldn’t get extra space [from other carriers] beyond the contract at the contract rates,” in order to make up for Respondents’ shortfalls. (Weiss Deposition, 206:1-24.) As to what shipments OJC did make, Respondents have that information already. Respondents’ motion to compel on RFP 1-4 should be denied.

2. First Request for Production #9

Respondents seek an order compelling a response to First Request for Production #9:

9. Documents relating to and sufficient to show total volumes imported and/or shipped by You by year since 2018.

RESPONSE: OJC objects to this Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

SUPPLEMENTAL RESPONSE: OJC further objects to this Request to the extent it seeks documents from before May 31, 2021, as that information is not reasonably calculated to lead to the discovery of admissible evidence. As to after May 31, 2021, OJC states that information has already been produced.

This document request addresses issues similar to First Requests for Production #1 through #4, and was covered by the written exchange between counsels described on page 4 above. In this regard, as noted above, OJC's damages calculations are based in large part on projected cargo volumes that it alleges would have been shipped under a 2021-22 service contract. Respondents are entitled to information about OJC's shipping history to evaluate the reliability of those projections and the damages claims the projections allegedly support.

This document request is slightly broader than Requests for Production #1 through #4, as it seeks total import volumes. Information about OJC's total import volumes would be compared with the information about OJC's ocean shipments to determine if OJC may have used alternative means of transport (e.g., air cargo) to move cargo, and whether the use of such alternative means of transport might have been a way for OJC to mitigate the damages it claims to have suffered.

COUNTERSTATEMENT ON RFP 9

Again, on July 14, 2022, OJC produced data in spreadsheets on the 737 containers shipped by OJC from June 1, 2020, around when the parties' Service Contract started, until the present day. For each container, OJC provided Respondents with 13 points of data, including the exact origin, destination, shipping carrier, ship date, arrival date, container value, and the exact price paid. Thus, Respondents already has the information it seeks. Moreover, Respondents has no legitimate basis for OJC's shipping volumes from before June 1, 2020, as what was shipped by OJC in 2018 or 2019 has nothing to do with what OJC did and could have shipped during the 2021 and 2022, the years where the demand for household goods skyrocketed due to the global pandemic.

As to Respondents' rationale that "[i]nformation about OJC's total import volumes would be compared with the information about OJC's ocean shipments to determine if OJC may have used alternative means of transport (e.g., air cargo) to move cargo, and whether the use of such alternative means of transport might have been a way for OJC to mitigate the damages it claims to have suffered," Respondents already knew before filing their motion, from the deposition of Jacob Weiss, taken on August 15, that OJC has never imported its products into the U.S. by airplane, or any other transportation method. Indeed, Respondents' counsel had the following exchange during Mr. Weiss deposition last month:

Q. Okay. So for the last four to five years, you have been importing product under the Naomi brand, Homestock brand, and other brands, and that product has always been imported via ocean carrier, fair – or freight forwarder?

A. As opposed to – I'm not exactly following the question.

Q. Well, have you ever brought product in by air, for example; by plane?

A. No.

Q. Okay. It's always been done by ships over the sea?

A. Yes.

(Weiss Deposition, 77:23 – 78:10.) Despite having clear and unambiguous testimony under oath that OJC has not used any "alternative means to transport (e.g., air cargo) to move cargo," Respondents nevertheless brought this motion. Accordingly, Respondents' baseless motion on RFP 9 should be denied as moot.

3. First Request for Production #10; Second Requests for Production #20 and #21

Respondents seek an order compelling a response to RFP #10:

10. All of Your audited financial statements for the period January 1, 2018 to the present.

RESPONSE: OJC objects to this Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

SUPPLEMENTAL RESPONSE: OJC has already produced its documents and data relating to its claims for damages against Respondents, including a 40 MB spreadsheet of extensive sales and shipping data.

Respondents' counsel also raised a question regarding the status of OJC's response to its discovery requests (including RFP #10) in an email to OJC's counsel dated July 21, 2022. OJC's counsel responded to that question by writing:

OJ Commerce will supplement its responses and produce its documents by July 29, 2022, with the exception of RFP 10 (audited financials) which is irrelevant and harassing. Respondents already possess the data related to OJC's damage calculations and claims. If you have cases that require the production of audited financials in all instances when a party claims damages and in addition to all the detailed information already provided, please provide for our review.

On July 29, 2022, Respondents' counsel sent the following message to OJC's counsel:

In response to OJC's claim that the request for audited financial statements is "harassing," HSDG notes that production of financial statements is commonly compelled in cases where damages include or are based on lost profit. Cases in support of this proposition are legion, and include *Fin. Bus. Equip. Sols., Inc. v. Quality Data Sys., Inc.*, No. 08-60769-CIV, 2008 WL 4663277, at *1 (S.D. Fla. Oct. 21, 2008) (profit and loss statements, balance sheets, cash flow statements, and federal tax returns relevant to alleged damages, including claim for lost profits); *Linea Pelle, Inc. v. Omega Fashions Ltd.*, No. 95 CIV. 0138 (LMM), 1997 WL 13267, at *1 (S.D.N.Y. Jan. 15, 1997) (financial statements order produced in case involving lost profits damage theory); *Unverferth Mfg. Co. v. Meridian Mfg., Inc.*, No. 19-CV-4005-LTS-KEM, 2020 WL 13015558, at *1 (N.D. Iowa Nov. 12, 2020) (audited financial statements relevant to expert's calculation of damages). We urge OJC to reconsider its position with respect to the production of audited financial statements, the request for which is relevant and not burdensome or harassing.

To date, OJC has not provided any financial statements (audited or unaudited).

In their Second Request for Production of Documents, Respondents sought additional financial information from OJC:

20. Your quarterly and annual profit and loss statements from 2018 until present.

RESPONSE: OJC objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence, is overly broad as to time and scope, and unduly burdensome. OJC also objects because such statements do not break out Naomi Home in them and all Naomi Home sales and data have already been produced.

21. Your unaudited monthly internal financial reports for all months during calendar years 2019, 2020, 2021, and 2022.

RESPONSE: OJC objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

OJC has provided a single Excel spreadsheet that purportedly supports its alleged damages. However, the largest damages calculation is nearly nine times greater than smallest damages calculation. OJC has not provided any of the documentation upon which the spreadsheet is based, nor has it produced a report from a damages expert with respect to its calculations, which include lost profits. (Initial expert reports were due August 5, 2022.) If OJC did indeed lose sales and/or profits, that should be reflected in its financial statements. Such statements are discreet documents that are easily accessible and not burdensome to produce. Moreover, the financial statements are directly relevant to ascertaining the sales/profits of OJC over time. By refusing to provide these responsive and relevant documents, OJC is essentially taking the position that Respondents must accept their unsupported damages calculations as definitive. That is not the law, nor is it a reasonable position in light of the foregoing factors. The case law cited in the above-quoted message to OJC's counsel makes clear that Respondents are legally entitled to the requested financial statements from OJC.

If for some reason OJC does not have audited financial statements, it should at a minimum have some form of financial reports prepared in the ordinary course of business, whether those are unaudited financial statements/reports or periodic profit and loss statements. Respondents are entitled to financial records that OJC maintains in the ordinary course of business in order to test/verify the accuracy of OJC's damages claims.

COUNTERSTATEMENT ON 1st RFP 10 and 2nd RFP 20 and 21

As to 1st RFP 10, “[a]ll of Your audited financial statements for the period January 1, 2018 to the present,” as Respondents well know from the August 15 deposition of Jacob Weiss, OJC, as a private company, does not generate or possess any audited financials, as shown by this exchange:

Q. Okay. And do [OJC’s accounting firm] generate audited financials for you every year?

A. No, they don’t.

Q. Does anyone audit your financials?

A. No.

Q. So there is no audited financials for the company?

A. That’s correct.

(Weiss Deposition, 27:21 – 28:3.) Despite knowing this nearly a month ago, Respondents filed their motion to compel anyway.

As to 2nd RFP 20, “Your quarterly and annual profit and loss statements from 2018 until present” and 2nd RFP 21, “Your unaudited monthly internal financial reports for all months during calendar years 2019, 2020, 2021, and 2022,” Respondents again ignore the deposition testimony of Jacob Weiss, wherein he testified that OJC’s overall company financials in general would be no use to Respondents as the **only** line of business at issue in this proceeding is **OJC’s importing of its house-brand products into the United States**. OJC also sells many hundreds of thousands of other companies’ products, which are then drop shipped by those companies directly to OJC’s customers. OJC’s financials do not break out the house-brand, import line revenues from the revenues generated from the sale of third-party products. (Weiss Deposition, 52:14 – 53:1, 285:24 – 286:287:2.) Therefore, OJC’s financials would not be instructive as to the sales, shipments, or profitability of the house-brand lines at issue.

Regardless, OJC went out of its way and specifically generated the sales history of the house-brand products for Respondents. On July 14, 2022, OJC provided a total of 366,709 records of sales history on all those products, starting from January 1, 2020, to the present. For each sales transaction, OJC provided 12 points of data, including the order number, order date, order source, price paid, item ordered, qty ordered, cost of shipping, cost of fulfillment, commissions, marketing, discounts, sales, and gross revenue, all from OJC's internal database. OJC updated those records in its productions on September 2 and 6, 2022 as well. Respondents therefore have all the pertinent sales and profit information for the house-brand product line at issue.

Regardless, Mr. Weiss testified – and OJC has subsequently confirmed – that OJC does not generate quarterly or annual profit and loss statements. (Weiss Deposition, 251:16-25.) And while Mr. Weiss testified that he may run profitability reports on the company's computer system from time to time, these reports have been electronic, on the overall business (including the irrelevant sales of third-party products), and not kept in the ordinary course of business, as OJC's business is over 99% paperless. Therefore, not only do 2nd RFPs 20 and 21 seek documents that do not exist, but OJC also does not have to create documents in response to a request for production. *Alexander v. F.B.I.*, 194 F.R.D. 305, 310 (D.D.C. 2000) (Federal Rule of Civil Procedure 34 requires a party to produce documents that already exist and a party does not have to create a document in response to a request for production). Moreover, even if such documents were created, they would not be probative of anything, as the house-brand lines are not broken out in OJC's reports.

OJC is not an international, publicly-traded mega-corporation like Respondents and does not have huge bank credit lines, thousands of shareholders, and the like. Therefore, it should come as no surprise to Respondents that OJC does not need to – and therefore hasn't – generated regular profit and loss statements in the ordinary course of its business. Despite Respondents just calling OJC's production “a single Excel spreadsheet” and baldly asserting that no supporting

documentation has been provided, **millions of pieces of data** about its import shipments, the sales and profitability of its house-brand, and **(despite Respondents still not producing highly relevant documents 71 days after being ordered to do so)** an expert report verifying and calculating that data have been produced. Respondents' motion on 1st RFP 10 and 2nd RFPs 20 and 21 should therefore be denied as moot.

MEET AND CONFER CERTIFICATION

As noted above, Respondents' counsel met and conferred with OJC's counsel on at least three occasions regarding discovery issues, and exchanged emails in addition to the telephonic meet and confers.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that an order be issued compelling OJC to respond to the discovery requests that are the subject of this motion.

COUNTERSTATEMENT TO CONCLUSION

For the foregoing reasons, OJC respectfully requests that Respondents' needless motion to compel be denied in its entirety, sanctions be levied by precluding Respondents from challenging OJC's claimed damages, and a hearing be set on all other outstanding discovery disputes, pursuant to 46 C.F.R. § 502.141(i)(2), in order to move this case's discovery to completion.

Dated: September 8, 2022

Respectfully Submitted,

By: /s/ Shlomo Y. Hecht
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CERTIFICATE OF SERVICE

I hereby certify that OJC's counsel has this day served the foregoing document upon all of Respondents' counsel of record by emailing a copy to each such person.

Dated: September 8, 2022

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

OJ Commerce v. Hamburg Sud

Rohde, Wayne <WRohde@cozen.com>

Thu 9/8/2022 11:48 AM

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Counsel –

We think it makes sense to address all the outstanding issues during a single meet and confer. We are available Friday afternoon, September 9, between 1 pm and 3 pm. Here is a list of issues that we would like addressed during the meet and confer:

1. Deposition dates for Richard C. Berning and Karthik Sridharan;
2. Date we will receive all of the documents OJC identified in its Initial Disclosures on Jan. 5, 2022;
3. Production of Mr. Berning's Engagement Letter and Invoices in response to RFP 2 of our Second Set;
4. Confirmation that we have received all documents responsive to RFPs 3, 4 & 5 of our Second Set;
5. Date we will receive all documents responsive to RFPs 6, 13-19, 25-27, 29, 31, 32 of our Second Set;
6. OJC's objections to RFPs 7-12, 18-24, 28, 30, 33-35 of our Second Set;
7. OJC's objections to ROGs 3-6, 8-11 of our Second Set; and
8. OJC's designation of the entire transcripts of Mr. Hecht and Mr. Glover as Highly Confidential.

With respect to your email of earlier today regarding spot rate information, Respondents did agree to provide that data through May 31, 2022. Emails covering the period June 1, 2021 through December 31, 2021 will be produced late Thursday or early Friday. After December 31, 2021, the information was not distributed via email. We are attempting to assemble this information for the period January 1-May 31, 2022, and will produce it as soon as it is available. The provision of this information does not in any way concede that it is relevant to OJ Commerce's damages or any other issue in this proceeding.

Regards,



Wayne R. Rohde

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Ex. A

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