BEFORE THE
FEDERAL MARITIME COMMISSION

OJ COMMERCE, LLC,

Complainant, **DOCKET NO. 21-11**

v.

HAMBURG SÜDAMERIKANISCHE
DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO KG

and

HAMBURG SUD NORTH AMERICA, INC.,

Respondents.

COMPLAINANT'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' PARTIAL MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

Complainant OJ Commerce, LLC ("OJC," "OJ Commerce," or "Complainant"), by and through its undersigned counsel, hereby opposes, pursuant to 46 C.F.R. § 502.70, Respondents' Partial Motion to Dismiss and/or for Summary Judgment ("Motion").

Respondents' Motion should never have been brought and is nothing more than Respondents' frivolous attempt to overwhelm OJC with make work in the middle of an intensive period of the parties' fact discovery. Indeed, the Court twice strongly cautioned Respondents against the filing of dispositive motions in this case. When Respondents filed such a motion at the outset of the case, the Court stated that "summary judgment is not appropriate when issues of material fact are disputed by the parties … [and] it is apparent that material facts in this case are disputed by the parties," and therefore "a motion for summary judgment is not appropriate at this stage in the proceedings." (Order 02/18/2022 at 5.) The Court later reiterated its caution against

dispositive motions, stating that "summary disposition motions after discovery are disfavored as it is more efficient to move directly to briefing." (Order 03/10/2022 at 1.) To that end, the Court did not include a dispositive motion briefing schedule in either of its Scheduling Orders. (*Id.*; Order 06/29/2022 at 4.) Nonetheless, despite all those warnings, Respondents ignored the Court and filed their Motion anyway, even while the parties are in the middle of discovery. Indeed, the parties have a half dozen depositions already scheduled to be taken in the coming weeks with more to be scheduled. (Declaration of Shlomo Y. Hecht ("Hecht Decl."), ¶ 9.)

To further illustrate the baseless nature of Respondents' Motion, Respondents seek the granting of summary judgment against OJC's refusal to deal claim when only days before Hamburg's senior executive testified at length on the unreasonable nature of Respondents' refusal to deal and retaliation against OJC. Incredibly, Respondents made no mention of – nor attempted to address – that damaging testimony in their Motion. Nor did Respondents address or even mention *their own emails* wherein Hamburg admits that it knowingly retaliated against OJC based on its threat to complain to the FMC about Respondents' violations of the Shipping Act. Instead, Respondents make a one-page throw-away argument for summary judgment without addressing ***any*** of the known facts in dispute.

Respondents even re-moved for dismissal of Hamburg Sud North America, Inc. ("HSNA") after this Court had already previously denied that exact same motion. (Order 02/18/2022 at 3-4.) Respondents clearly did not have a reasonable belief that they would prevail on their Motion when they filed it. But they brought their Motion anyway to drive up costs and waste OJC's and the Court's time during a critical period in this case. Respondents' vexatious multiplication of these proceedings should not be condoned and is sanctionable.

But no one should be surprised by Respondents' course of conduct because this is exactly

the same strategy they have used in their flouting of the Shipping Act for the past two years. Respondents have made record profits, all the while causing historic inflation and driving the entire world into a recession and supply chain chaos, which is further outlined below.

At the very least, Respondents' Motion should be denied, as there is conclusively no basis on which to grant any of it and significant discovery remains to be completed. Respondents should also be sanctioned for bringing a motion for no other reason than harass OJC and drive-up litigation costs.

BACKGROUND

This section provides additional context for OJC's opposition. OJC is a Delaware limited liability company with its principal place of business in Broward County, Florida. HSNA was, until November 1, 2021, a wholly-owned subsidiary of one of the largest ocean carriers in the world, HAMBURG SÜDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO KG ("HSDG") (collectively, "Respondents"). Both HSNA and HSDG are now owned by Maersk A/S, the second largest ocean carrier container company in the world.[1] Maersk's profits for 2021 exceeded its profits for the **past nine years combined**. *See* https://www.usfunds.com/resource/bad-news-is-good-news-for-container-shipping-investors/. The timely shipment of containers by carriers such as HSDG is the life blood of the United States', even the world's, economy, and is absolutely critical to the business of OJC, an e-commerce retailer

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[1] In its Answer in this very proceeding, HSDG stated that "**HSDG no longer exists. HSDG was merged into its former parent company Maersk A/S on November 1, 2021**." (HSDG's Answer to Amended Complaint at 1, n.1 (emphasis added).) Additionally, Juergen Pump – a former top executive for Hamburg – testified that [REDACTED] " (Hecht Decl., Ex. 1, Pump Depo 109:23 - 112:5.) As for HSNA, in the Affidavit of Michael W. Gast, Jr. filed by Respondents on January 18, 2022 in this proceeding, Hamburg represented that on November 1, 2021, "HSNA became a wholly-owned, indirect subsidiary of Maersk A/S. On January 1, 2022, HSNA was merged into Maersk Agencies USA, Inc., the U.S. subsidiary and general agent of Maersk A/S." (Affidavit at 1, ¶ 2.)

of home furnishings and related goods, as well as virtually all other major retailers, manufacturers, and every other industry that relies on imports and exports. Maersk enjoys special protections such as federal court antitrust immunity because of its special responsibility to the world economy and is subject to strict oversight from the FMC. For at least the past two years, Hamburg/Maersk have abused their privileges to no end.

Indeed, this case is about Respondents' repeated and systematic violations of several sections of the Shipping Act of 1984. The Parties' relationship began on or about June 23, 2020, when OJC entered into a service agreement (in the Shipping Act called a "Service Contract") with Respondents for the shipment of goods by sea from foreign countries to the United States and for the delivery to warehouse facilities within the United States via truck. The Agreement governed the parties' relationship between June 23, 2020 to May 31, 2021 (the "Active Term"). During 2020 and 2021, Respondents engaged in a variety of unjust and unreasonable practices with respect to OJC's cargo. For example, instead of honoring the commitments in their Service Contract with OJC, Respondents began a practice of methodically failing to meet its quantity and price commitments to OJC and by refusing to deal with OJC. As a result, OJC was forced to obtain space on the spot market – the open (and much more expensive) market for shipping when a Service Contract with an ocean carrier is unavailable – at enormous expense or forgo making shipments of goods to the United States altogether. (*See, generally,* Verified Amended Complaint.)

Respondents' unreasonable practices coincided with an extraordinary increase in spot market pricing for ocean freight. Respondents sought to take advantage of unprecedented high pricing by forcing shippers with Service Contracts, like OJC, to resort to spot market purchases to secure needed freight carriage. Respondents benefitted from being able to sell previously

contracted capacity on the spot market, or to shippers willing to pay a premium, rather than honoring its service contract commitments with OJC, and others. Indeed, OJC knows that *because Respondents' own internal emails say so*:

> This customer has threatened to take legal actions against Hamburg Sud **and now because allocation was not honored, we'll need to increase their SPL to compensate the units not loaded**.
> …
> **They have pushed several times for additional space which we informed only by *premium rate*** but from what I was told, this is a low paying cargo and they can't afford so they found a way to get their additional space. In my almost 5 years with this trade I've never seen such action (and we had space issues every year) but legally is their right.

(Hecht Decl., Ex. 2 (Email dated October 22, 2020) (emphasis added).) As can be seen from just this one email, Respondents engaged in a deliberate practice of seeking to condition their compliance with its contractual service commitments to OJC – which Respondents admittedly failed to meet – on extracting additional, "premium" payments from OJC, above and beyond the pricing set forth in the parties' Service Contract, despite the fact that the contract does not permit Respondents to assess such surcharges unilaterally. This is just one example of Respondents' willful violations of the Shipping Act.

Overall, OJ Commerce's Verified Amended Complaint alleges six causes of actions against Respondents under the Shipping Act, including:

- Respondents violated 46 U.S.C. § 41102(b)(2) due to their **continuous and systematic operation under the parties' agreement not in accordance with that agreement**.

- Respondents' actions and omissions constituted their **retaliating against Complainant, in violation of 46 U.S.C. § 41104(a)(3), by refusing, and threatening to refuse, cargo space accommodations when available because Complainant threatened to file a complaint with the FMC over Respondents violations of the Shipping Act**.

- Respondents' actions and omissions constituted, in violation of 46 U.S.C. § 41104(a)(10), their unreasonable **refusal to deal or negotiate a renewal of their service contract with Complainant because Complainant had threatened to file a complaint with the FMC over Respondents' violations of the Shipping Act**.

- Respondents' actions and omissions constituted, in violation of 46 U.S.C. § 41104(a)(3), their resorting to unfair and unjustly discriminatory methods against Complainant because Complainant threatened to file a complaint with the FMC over Respondents violations of the Shipping Act.

- Respondents' conduct during the course of providing service to Complainant pursuant to the parties' service contract, which was continuous and ongoing until expiration of the service contract, constituted an unfair and unjustly discriminatory practice against Complainant in the matter of rates or charges with respect to the ports identified in the service contracts, in violation of 46 U.S.C. Section 41104(a)(5).

- Respondents' conduct the course of providing service to Complainant pursuant to the parties' service contract, which was continuous and ongoing until the contract expired on May 31, 2021, gave undue and unreasonable preference and advantage to shippers other than Complainant and imposed an undue and unreasonable prejudice and disadvantage to Complainant with respect to the ports identified in the parties' service contract, in violation of 46 U.S.C. Section 41104(a)(9).

Respondents' illegal practices as an ocean carrier were not limited to Respondents and did not just affect OJC. Indeed, Maersk's abuse of the Shipping Act has been a matter of great public and political interest over the past two years and has sparked Congressional hearings, a recent Executive Order from the President, and new Congressional legislation. This is because, once the COVID-19 pandemic began, global ocean carriers, including Respondents, began taking actions to exploit ocean carriage pricing and engage in unprecedented profiteering at the expense of shippers, including OJ Commerce, and the public. This has led to record profits for Maersk, and has caused rapid inflation and a global supply chain crisis that has plagued the world for the past two years. The negative effects on the United States' (and the world's) economy – along with the outrageous profits that Maersk has logged in that time – have been widely covered by the media: *See, e.g.*:

- https://www.dailymail.co.uk/news/article-11075831/Shipping-firms-acting-like-cartels-Maersk-predicts-25bn-profits.html ("Shipping firms are 'acting like cartels': Experts warn industry bosses hiked price of moving goods by 1,000% in Covid - as **freight giant Maersk posts £25bn profit forecasts amid supply chain crisis**");

- https://thehill.com/business-a-lobbying/592397-shipping-giants-under-fire-for-record-profits-fees-as-pandemic-continues ("Many highly-profitable industries are using the pandemic as an excuse to gouge consumers or tack on sky-high fees, and the shipping industry is no exception" … "Despite shattering previous profit records last year, big shippers are trying to convince Congress that their abusively high fees are essential even as they fan the flames of inflation." … "**Denmark-based carrier Maersk expects to report $24 billion in 2021 earnings before taxes and depreciation, triple its 2020 haul**." … "The Biden administration, meanwhile, has emboldened the FMC to go after anticompetitive shipping practices through executive action. The White House in November said that the agency can challenge antitrust agreements if they 'produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost or ... substantially lessen competition.'");

- https://www.randomlengthsnews.com/archives/2022/01/12/profiteering-shiping-companies/37537?v=7516fd43adaa ("The multi-billion-dollar foreign container shipping industry has profited mightily during the pandemic and the ensuing supply chain crisis. Those of us who work in the U.S. supply chain have seen up close how they have secured a vice grip on the national economy — impacting businesses, consumers, and workers for the sake of overseas profits. … **Industry leader Maersk, for example, is set to make Danish history as it matches its combined earnings from the past nine years with earnings of $16.2 billion for 2021 (up from a projected $3 billion at the start of the year**.");

- https://www.cnn.com/2021/11/02/business/maersk-record-profit-supply-chain-chaos/index.html ("Maersk, the world's largest container shipping company, predicts that global supply chain chaos will continue into next year. That could benefit the company, which just reported its best quarter in 117 years.");

- https://www.freightwaves.com/news/fmc-onboard-for-bidens-ocean-carrier-crackdown ("[T]hree global ocean carrier alliances now control more than 80% of the container market. 'That concentration has contributed to a spike in shipping costs and fees during the pandemic. The executive order calls on the Federal Maritime Commission to crack down on unjust and unreasonable fees and work with the Justice Department to investigate and punish anticompetitive conduct.'").

In fact, during mid-2020-mid-2022, when most of the world was in turmoil due to COVID, the ocean carriers **profited $500 Billion**, https://www.bloomberg.com/opinion/articles/2022-05-23/shipping-s-500-billion-profit-can-take-on-amazon, which equated to more profit in those two years than the ocean carriers had amassed in over the previous decade **combined**. Maersk had extorted these exorbitant profits by doing exactly what Respondents did to OJC: by systematically demanding that shippers pay premium prices well above service contract rates, refusing to provide

service contracts to those who objected to the carrier's illegal practices, retaliating against shippers who would not comply with the their demands or who would even threaten to complain about the carrier's illegal actions, and forcing shippers into using the exorbitant rates on the spot market. OJC brought its Verified Amended Complaint against Respondents to combat the numerous violations of the Shipping Act committed by Respondents/Maersk that have caused enormous damage to OJC's business. As further outlined below, Respondents' wrongfully-filed Motion is baseless and should be rejected and sanctions applied.

LEGAL STANDARD

I. Motion to Dismiss.

To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). This standard does not . . . require "heightened fact pleadings of specifics" or detailed factual allegations. *Twombly*, 550 U.S. at 555, 570. … Further, Rule 12(b)(6) does not require "the pleading of specific evidence or extra facts beyond what is needed to make the claim plausible." *Arista Records LLC v. Doe 3*, 604 F.3d 110, 120–21 (2d Cir. 2010); *Maher Terminals, LLC v. Port Auth. of N.Y & N.J.*, 34 S.R.R. 35, 58 (FMC 2015). "Instead, 'the complaint's factual allegations [simply] must be enough to raise a right to relief above the speculative level and must nudge claims across the line from conceivable to plausible." *Marine Transp. Logistics, Inc. v. CMA-CGM (America) LLC*, Dkt. No. 18-07, 2019 WL 5206007, at *3 (FMC ALJ Oct. 8, 2019) (quoting *Maher Terminals, LLC*, 34 S.R.R. at 57–58) (internal quotations omitted). All well-pleaded factual

allegations in the complaint must be assumed to be true and construed in the light most favorable to the non-moving party (here, Complainant). *See, e.g., Marine Transp. Logistics, Inc.*, 2019 WL 5206007, at *2–3; accord *Maher Terminals, LLC*, 34 S.R.R. at 58.

II. Motion for Summary Judgment.

When deciding a motion for summary judgment, "[i]t is not part of the court's function ... to decide issues of material fact, but rather determine whether such issues exist to be tried ..." and "[t]he court must avoid weighing conflicting evidence or making credibility determinations." *Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 919 (11th Cir. 1993) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The only determination for the court in a summary judgment proceeding is whether there exists genuine and material issues of fact to be tried. *Hairston*, 9 F.3d at 921; *see also Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 959 (11th Cir. 1997). All the evidence and inferences from the underlying facts must be viewed in the light most favorable to the nonmoving party, here OJC. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1526 (11th Cir. 1997). "[A]t the summary judgment stage[,] the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Jackson v. VHS Detroit Receiving Hospital, Inc.*, 814 F.3d 769, 775 (6th Cir. 2016) (quoting *Anderson*, 477 U.S. at 249).

"Cases involving allegations of 'undue' or 'unreasonable' preferences and prejudices and the like have required a proper development of the facts and are usually not decided summarily", and "courts are careful not to deny complainants a reasonable opportunity to prove their allegations and will construe doubts in the non-moving complainants' favor." *S.C. Mar. Servs., Inc. v. S.C. State Ports Auth.*, Dkt. No. 99-21, 1999 WL 1294895, at *2 (FMC ALJ Dec. 9, 1999). As stated in *Blumel v. Mylander*, 919 F. Supp. 423, 428 (M.D. Fla. 1996), Rule 56 "implies [that] district

courts should not grant summary judgment until the non-movant has had an adequate opportunity for discovery." Furthermore, "summary judgment may only be decided upon an adequate record." *Snook v. Trust Co. of Ga. Bank*, 859 F.2d 865, 870 (11th Cir. 1988).

ARGUMENT

I. Respondents' argument for dismissal and/or summary judgment of OJC's Section 41104(10) entirely ignores known material facts that illustrate that Respondents unreasonably refused to deal with and retaliated against OJC and must be rejected.

Respondents argue that OJC's Section 41104(10) claim should be "dismissed, or alternatively, summary judgment granted in favor of Respondents." (Motion at 5-6.) Telling, Respondents make no argument for a Rule 12(b)(6) dismissal. Instead, Respondents' entire dismissal argument is based on a single piece of "evidence," an email dated May 5, 2021 wherein HSDG allegedly offered to OJC to "work case by case." (Motion, Ex. 1.) Based on that one phrase in one sentence in one email, Respondents conclude that "under Commission precedent, HSDG did not refuse to deal or negotiate with OJC." Motion at 6. Nothing could be further from the truth.

As an initial matter, based on Respondents' own internal emails, documents and pleading responses, Respondents have **repeatedly admitted** that they refused to renew OJC's Service Contract – and not fulfill Respondents' then-existing obligations under the parties' Service Contract – based on a reason explicitly prohibited by the Shipping Act: **Because OJC had threatened to file a complaint against Respondents for their violations of the Shipping Act**. Respondents' own emails admit that material fact. On April 29, 2021 – ***the day after*** receiving a threat from OJC to file a complaint with the FMC about Respondents' violations of the Shipping Act (*see* Hecht Decl., Ex. 3 at 2 ("Failure to cure the breach by May 3, 2021, may result in legal action against you and your affiliates, as well as the filing of a petition to the Federal Maritime

Commission to seek relief.")) – Kevin Li of Hamburg, sent an email entitled "OJ Commerce (Naomi Home Brand) Contract Renewal / AECC0000291 Expire May 31, 2021" to Juergen Pump, the then-top executive of Hamburg. Mr. Li informed Mr. Pump that Hamburg had not provided the agreed-upon space in the parties' Service Contract and OJC had threatened litigation, with Mr. Pump responding to Mr. Li's question as to whether Hamburg "still want[ed] to engage this account with contract renewal" by stating:

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

(Hecht Decl., Ex. 4 (Email dated April 29, 2021 1:13 PM) (emphasis added).) Subsequently, Mr. Li informed the service contract negotiating team of Mr. Pump's "executive decision" to "not engage in any renewal discussion with [OJC] in light of potential litigation":

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

(Hecht Decl., Ex. 5 (emphasis added) (April 29, 2021 email)). Mr. Li also relayed Mr. Pump's decision to cut off OJC from any further available space under the parties' then-existing Service Contract:

> But just to express our position on this, **we should also consider not to provide them with space under existing contract.**

(*Id.*) The decision to cut off OJC in retaliation for sending its threat of an FMC complaint spread throughout Hamburg within hours:

> **As it stands I believe we are unlikely to meet our duties under these contract terms.** I have raised this issue to both commercial teams here and colleagues at

> origin responsible for accepting these bookings. The first time this occurred I stressed the financial impact such a lawsuit could carry and I have done so again. **It appears our local sales colleagues had tried to address the capacity issue with origin but were advised that no additional space would be granted for this customer.**

(Hecht Decl., Ex. 6 (April 29, 2021 email) (emphasis added), in a chain with OJC's email dated April 28, 2021 (*see* Ex. 2)). Therefore, as ***admitted*** by Respondents, OJC was refused a renewed Service Contract and was retaliated against by Respondents because OJC had the audacity to complain about Respondents' business practices, *the very actions prohibited by the Shipping Act*:

> A common carrier, either alone or in conjunction with any other person, directly or indirectly, **may not . . . 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**.

Section 41104(a)(3) (emphasis added); Section 41102(d). Here, Respondents had retaliated against OJC due to its threat of a complaint to the FMC, willfully denied OJC available cargo space mandated by the parties' then-existing Service Contract, and thereby unreasonably refused to deal or negotiate with OJC.

In their Motion, Respondents base their dismissal argument on the irrelevant point that "[t]here is some room for negotiation between parties attempting to enter into contracts and if negotiations fail, a party is not thereby automatically found to have violated antitrust law." Motion at 6. But the inability of the parties to come to a renewal contract was not about Respondents "refus[ing] to accede to every demand of [OJC]." *Id.* As repeatedly admitted by Respondents, the refusal to deal or negotiate was a direct result of Respondents retaliating against OJC for threatening to file a FMC complaint – *a decision made by Respondents within 24 hours of receiving OJC's threat* – a reaction that was explicitly prohibited by the Shipping Act.

Moreover, in their Answers to OJC's Verified Amended Complaint, Respondents admitted

that OJC was blindsided by Respondents' refusal to deal and renew the Parties' Service Contract, which was under active negotiation for several weeks:

> **Respondents' Answers to the Complaint (emphasis added):**
> 41. During April 2021, the parties were engaged in discussions about renewing the parties' service contract. Throughout those discussions, there were conversations about the MQC of the renewal, but never about there being no renewal at all.
>
> **Admitted.**
>
> 42. Out of the blue and with no prior notice, on May 4, 2021, Respondents unilaterally notified Complainant that there would be no service contract renewal **under any terms,** but instead that Respondents would "work case by case" with Complainant using spot market rates. Thereafter, Complainant attempted to negotiate a contract with an even more limited scope – such as a port-to-port only contract – but Respondents rejected Complainant's proposal out of hand within hours, leaving Complainant entirely without a shipping service contract of any sort past May 31, 2021.
>
> **Admitted.**

All the above emails and pleading responses were well known to Respondents before the filing of their Motion – which were not only within Respondents' possession but were also outlined in OJC's Motion to Compel filed on May 16, 2022 – yet Respondents made no mention of or any effort to address the material facts contained therein that more than suggests that Respondents had acted unlawfully under the Shipping Act. Such a willful omission of material facts related to the Motion – along with Respondents' complete disregard for the Court's prior warnings against filing further dispositive motions – illustrates that Respondents' Motion was frivolously brought. *See* Statement of the Commission on Attorney's Fees at 4 (Docket No. 21-14, Issued 12-28-2021) ("Commission rules prohibit parties from filing pleadings, discovery requests, motions, or other documents for improper purposes, such as harassing others or causing unnecessary delay." (citing 46 C.F.R. § 502.6(a))); Fed. R. Civ. P. 11(b)(1) (motions should not be "presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation").

But that's not all. On July 19, 2022, well before the filing of Respondents' Motion, OJC took the deposition of Juergen Pump, the then-top executive of Hamburg who made "the executive decision [] that [Hamburg] should not engage in any renewal discussion with customer [OJC] in light of potential litigation." (Hecht Decl., Ex. 5.) In it,[2] Mr. Pump admitted that [REDACTED]

[REDACTED]:

> [REDACTED]
>
> [REDACTED]
>
> [REDACTED]
>
> [REDACTED].

[2] The day before this Opposition was due to be filed, Respondents blanked the transcript of Juergen Pump's deposition with a slew of unjustifiable Confidential and Attorneys' Eyes Only designations, including for the record citations in this brief. (Hecht Decl., ¶ 13.) OJC demanded that Respondents withdraw their designations identified in this brief, but they refused. (*Id.*) Respondents have not filed a motion justifying confidential treatment, nor have they shown "good cause" for their designations "by demonstrating that the information is a trade secret or other confidential research, development, or commercial information," as required by the Initial Order dated 12/14/2021, ¶ 19.

As the Court can see, there is nothing redacted per Respondents' designations that can overcome the presumption that material attached to or included in a substantive filing "is subject to the public right to access." *See Romero v. Drummond Co.*, 480 F.3d 1234, 1245-46 (11th Cir. 2007). Particularly in a case such as this, where global, public interests are implicated, Respondents' "desire to keep indiscreet communications out of the public eye … is not enough to satisfy [the] standard for good cause [to overcome the presumption of public access]." *Callahan v. United Network for Organ Sharing*, 17 F.4th 1356, 1364 (11th Cir. 2021). The Court should therefore overrule Respondents' confidentiality designations and unseal the record, pursuant to its Initial Order dated 12/14/2021, ¶ 19, and ¶ 25 of the Confidentiality Stipulation and Protective Order, filed June 21, 2022.

(Hecht Decl., Ex. 1 (Pump Depo 208:4-18)). In fact,

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(Hecht Decl., Ex. 1 (Pump Depo 204:24 – 206:19) (emphasis added).) Nevertheless, Mr. Pump and Respondents willfully retaliated against OJC anyway.

By refusing to renew the Service Contract and to allocate available space to comply with the then-existing Service Contract in place, and by retaliating against OJC for complaining about Respondents' violations of the Shipping Act, Respondents virtually put OJC out of business and in the process caused tens of millions of dollars in damages to OJC, as OJC now had no consistent carrier for its goods to the United States from overseas. As shown by the numerous material facts identified above, Respondents had absolutely no good faith basis to file their Motion in the first place – particularly given that all the evidence and inferences from the underlying facts must be viewed in the light most favorable to OJC, *Combs*, 106 F.3d at 1526 – and it should be denied in its entirety and sanctions levied against Respondents. In fact, if any party is entitled to summary judgment, it is OJC, as Respondents have repeatedly **admitted** – and thus there are no material facts in dispute – their illegal retaliation against OJC. Fed. R. Civ. P. 56(f)(1) ("After giving notice and a reasonable time to respond, the court may ... grant summary judgment for a nonmovant."); *see, e.g., Jian Yang Lin v. Shanghai City Corp.*, 950 F.3d 46, 49 (2d Cir. 2020) (affirming sua

sponte entry of summary judgment because the appellate "had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried, and that the party for whom summary judgment is rendered is entitled thereto as a matter of law"). Respondents' Motion should be denied, and summary judgment should be granted in favor of OJC on its claim of refusal to deal based on retaliation and based on Respondents refusing cargo space accommodations to OJC when available.

II. Respondents' Motion should also be denied as the parties are still engaging in discovery during which more evidence in support of OJC's claims are likely to come to light.

Additionally, counsel submits a declaration pursuant to Fed. R. Civ. P. 56(d), as OJC, the nonmovant for summary judgment, stating that OJC cannot present all facts essential to its opposition. Discovery between the parties is currently intensive and ongoing with a half dozen depositions currently scheduled, including that of Kevin Li (author and recipient of the damaging emails with Mr. Pump identified as Exhibits 4 and 5), and Michael Gast, Jr. (who also commented on Respondents' retaliation against OJC (Exhibit 6)). Mr. Li and Mr. Gast's depositions are scheduled for August 12 and 16, 2022, respectively, with additional Maersk deposition dates pending. (Hecht Decl., ¶¶ 8-9.)

Indeed, in "cases [such as this] involving allegations of 'undue' or 'unreasonable' preferences and prejudices and the like have required a proper development of the facts and are usually not decided summarily", and "courts are careful not to deny complainants a reasonable opportunity to prove their allegations and will construe doubts in the non-moving complainants' favor." *S.C. Mar. Servs.*, 1999 WL 1294895, at *2. Having not had the full opportunity to develop the facts and to prove its allegations, OJC respectfully requests that Respondents' **second** premature motion for summary judgment be denied in its entirety on this basis as well.

III. Respondents' repetitive Motion regarding HSNA has already been denied by this Court and should be rejected again.

In their Motion, Respondents repeats their previously argued and rejected contention that "[b]ecause the Commission lacks jurisdiction over HSNA, HSNA must be dismissed as a respondent." *Compare* Motion at 7 *with* Respondents' Memorandum in Support of Motion to Dismiss and/or for Summary Judgment ("Respondents' Memorandum") at 1 ("the complaint must be dismissed in its entirety with respect to Hamburg Sud North America, Inc. ('HSNA') because the Commission lacks personal jurisdiction over HSNA."). Indeed, the Court ruled that "[t]he amended complaint alleges that [HS]NA is an ocean transportation intermediary ("OTI"), an issue which is inextricably intertwined with the merits of the case, as an OTI is a Commission-regulated entity subject to the section 41102(c) prohibitions. The amended complaint thus raises a sufficient basis for the Commission to assert jurisdiction over the complaint, and over [HS]NA." (Order 02-18-2022 at 4.) Nothing has changed since then.

Nonetheless, Respondents cite a purported agreement and summarily conclude that "HSNA does not act as a common carrier, marine terminal operator, or ocean transportation intermediary." Motion at 7. But OJC has yet to depose Michael Gast, Jr., who evidently, according to Respondents, has some knowledge about this arrangement (his deposition is currently scheduled for August 16, 2022). (Hecht Decl., ¶¶ 9-11; Affidavit of Michael Gast, Jr., ¶ 2 filed on 01/18/2022.) Therefore, Respondents' Motion is yet again premature and should be denied. (*Id.* at ¶ 12.)

Moreover, as OJC noted in opposition to Respondents' previous motion on the subject, the FMC also has jurisdiction over HSNA because (a) it is a "person" subject to regulation by the FMC based on its acts in conjunction with HSDG in violation of 46 U.S.C. §§ 41104(a)(3), 41104(a)(5), 41104(a)(9), and 41104(a)(10) (for all, (a) "A common carrier, either alone or in

conjunction with any other **person**, directly or indirectly, **shall not**…" (emphasis added)), and (b) HSNA is a party to the Service Contract with OJC and both Respondents, *See* Verified Amended Complaint, ¶¶ 3, 7. Therefore, Respondents' Motion regarding HSNA should be denied, again.

IV. The remainder of Respondents' Motion should be denied as well.

Respondents next throw out a contention that "OJC's claims under Sections 41104(5) and 41104(9) should also be dismissed." Motion at 4-5. This Court denied an almost identical motion in the proceeding *MCS Industries, Inc. v. MSC Mediterranean Shipping Company, SA*, FMC Docket No. 21-05 ("*MCS* case"), Order 02/04/2022 at 8-9. Here, OJC's Section 41104(a)(5) claim alleges that:

> Respondents' conduct during the course of providing service to Complainant pursuant to the parties' service contract, which was continuous and ongoing until expiration of the service contract, constituted an unfair and unjustly discriminatory practice against Complainant in the matter of rates or charges with respect to the ports identified in the service contracts

(Verified Amended Complaint at 4, ¶ 12.) OJC's Section 41104(a)(9) claim similarly asserts that:

> Respondents' conduct the course of providing service to Complainant pursuant to the parties' service contract, which was continuous and ongoing until the contract expired on May 31, 2021, gave undue and unreasonable preference and advantage to shippers other than Complainant and imposed an undue and unreasonable prejudice and disadvantage to Complainant with respect to the ports identified in the parties' service contract

(Verified Amended Complaint at 4, ¶ 13.) To support its allegations, OJC alleged that:

> Respondents' conduct that occurred continuously over the course of 10 months constituted an unfair and unjustly discriminatory practice against Complainant in the matter of rates or charges with respect to the ports identified in the Agreement, in violation of § 41104(a)(5).
>
> Respondents' conduct that occurred continuously over the course of 10 months gave undue and unreasonable preference and advantage to shippers other than Complainant and imposed an undue and unreasonable prejudice and disadvantage to Complainant with respect to the ports identified in the Service Contracts, in violation of § 41104(a)(9).

(Verified Amended Complaint at 18, ¶¶ 57-58.) The ports identified in the parties' Service Contract as clearly identified in that document, which was attached to the Verified Amended Complaint. (Ex. A to the Verified Amended Complaint at Appendix, 8-16 of 16.)

Like the respondent in the *MCS* case did, Respondents argue that "the conduct in question was aimed at OJC rather than at specific localities." *Compare* Motion at 5 *with* FMC Docket No. 21-05, Order 02/04/2022 at 9 ("Respondent asserts that sections 41104(a)(5) and (9) 'protect only ports, and not shippers.'"). But this Court has held that "[u]nder this section, common carriers may offer different rates but they may not do so in a manner that is undue or unreasonable. The amended complaint plausibly alleges that the conduct is 'undue or unreasonable' with respect to the ports at issue." FMC Docket No. 21-05, Order 02/04/2022 at 9. The Court should likewise deny Respondents' Motion on those claims.

The Court should also deny Respondents' Motion as to OJC's Section 41102(b)(2) claim. Respondents only argue in a conclusory manner that the claim does not apply to OJC, summarily contending that "Section 40502(f) expressly states that such cases are not to be decided by the Commission" because they are essentially breach of contract cases. But the Shipping Act requires common carriers to abide by the terms of their published tariffs and service contracts. *Santa Fe Discount Cruise Parking, Inc., v. The Board of Trustees of the Galveston Wharves*, Docket No. 4-06, 2021 FMC LEXIS 56, at *2 (FMC April 16, 2021) ("Order on Initial Decision on Remand"). OJC's Section 41102(b)(2) claim alleges a violation of the Shipping Act and not a breach of contract, and therefore Respondents' Motion should be denied on that claim as well.

CONCLUSION

Respondents willfully disregarded the Court's cautions not to file dispositive motions, and nonetheless brought their Motion which had no chance of success. OJC respectfully requests that Respondents' vexatious Motion – which has needlessly multiplied these proceedings – be denied in its entirety, summary judgment be granted to OJC for Respondents' refusal to deal based on retaliation and based on Respondents refusing cargo space accommodations to OJC when available, and that OJC be granted such further relief that the Commission deems just and proper.

Dated: August 10, 2022

Respectfully Submitted,

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

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

Dated: August 10, 2022

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

BEFORE THE
FEDERAL MARITIME COMMISSION

OJ COMMERCE, LLC,

Complainant, **DOCKET NO. 21-11**

v.

HAMBURG SÜDAMERIKANISCHE
DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO KG

and

HAMBURG SUD NORTH AMERICA, INC.,

Respondents.

DECLARATION OF SHLOMO Y. HECHT IN OPPOSITION TO RESPONDENTS' PARTIAL MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

I, Shlomo Y. Hecht, do hereby state and declare as follows:

1. I am an attorney and am one of Complainant OJ Commerce, LLC's ("Complainant," "OJC," or "OJ Commerce") attorneys in this proceeding. I have personal knowledge of the facts described below. I am submitting this Declaration in Opposition to Respondents' Partial Motion to Dismiss and/or for Summary Judgment ("Motion").

2. Attached hereto and incorporated herein as **Exhibit 1** is a true and correct copy of portions of the transcript of the deposition of Juergen Pump of Hamburg, taken on July 19, 2022 in this proceeding.

3. Attached hereto and incorporated herein as **Exhibit 2** is a true and correct copy of an email produced by Respondents as HS-004494.

4. Attached hereto and incorporated herein as **Exhibit 3** is a true and correct copy of an email to Respondents from me dated April 28, 2021, which includes the attached demand letter to Respondents.

5. Attached hereto and incorporated herein as **Exhibit 4** is a true and correct copy of emails produced by Respondents as HS-012567-73.

6. Attached hereto and incorporated herein as **Exhibit 5** is a true and correct copy of emails produced by Respondents as HS-011474-75.

7. Attached hereto and incorporated herein as **Exhibit 6** is a true and correct copy of emails produced by Respondents as HS-011725-27.

8. I am also submitting this declaration pursuant to Fed. R. Civ. P. 56(d), as OJC, the nonmovant for summary judgment, stating that OJC cannot present all facts essential to its opposition.

9. Discovery between the parties is currently intensive and ongoing with a half dozen depositions currently scheduled, including that of Kevin Li (author and recipient of the damaging emails with Mr. Pump identified as Exhibits 4 and 5), and Michael Gast, Jr. (who also commented on Respondents' retaliation against OJC (Exhibit 6). Mr. Li and Mr. Gast's depositions are scheduled for August 12 and 16, 2022, respectively, with additional Maersk deposition dates pending.

10. In their Motion, Respondents repeats their previously argued and rejected contention that "[b]ecause the Commission lacks jurisdiction over HSNA, HSNA must be dismissed as a respondent." *Compare* Motion at 7 *with* Respondents' Memorandum in Support of Motion to Dismiss and/or for Summary Judgment ("Respondents' Memorandum") at 1 ("the

complaint must be dismissed in its entirety with respect to Hamburg Sud North America, Inc. ('HSNA') because the Commission lacks personal jurisdiction over HSNA.").

11. Mr. Gast's affidavit alleges that HSNA is part of a web of corporate entities affiliated with Maersk A/S, see Affidavit of Michael Gast, Jr., ¶ 2 (filed on January 18, 2022), which OJC has not been able to conduct discovery on yet either. As a result, Complainant has not yet had the opportunity to cross-examine Mr. Gast to determine whether Mr. Gast's allegations are true or not.

12. In the meantime, OJC has provided sufficient evidence to outright deny HSNA's dismissal from the proceeding, because (a) HSNA is a party to the Service Contract with OJC and both Respondents, and (b) is subject to other claims included in the Verified Amended Complaint, under sections 41104(a)(3), 41104(a)(5), 41104(a)(9), and 41104(a)(10). See Verified Amended Complaint, ¶¶ 3, 7. OJC respectfully suggests that these facts, as well as OJC request under Rule 56(d), justifies the denial of Respondents' Motion.

13. The day before this Opposition was due to be filed, Respondents blanked the transcript of Juergen Pump's deposition with a slew of unjustifiable Confidential and Attorneys' Eyes Only designations, including for the record citations in this brief. OJC demanded that Respondents withdraw their designations identified in this brief, but they refused. Respondents have not filed a motion justifying confidential treatment for the redacted material, nor have they shown good cause for their Confidentiality designations as required by the Initial Order dated 12/14/2021, ¶ 19.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Dated: August 10, 2022

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

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document with its Exhibits 1-6 upon all of Respondents' counsel of record by emailing a copy to each such person.

Dated: August 10, 2022 By: /s/ Shlomo Y. Hecht
Shlomo Y. Hecht