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 OJ COMMERCE, LLC'S MOTION FOR EXPEDITED RELIEF AND MEMORANDUM OF LAW RELATED THERETO

REQUEST FOR EXPEDITED BRIEFING AND CONSIDERATION

As with their vexatious Partial Motion to Dismiss and/or for Summary Judgment, Respondents have generated in just the past few weeks a slew of issues for which they have no valid bases. Instead of cooperating during the final 4-6 weeks of discovery – the deadline is September 16 – Respondents have taken a series of groundless positions done only to waste Complainant OJ Commerce, LLC's ("OJC," "OJ Commerce," or "Complainant") money and its counsel's time, in an effort to run out the clock and prevent OJC from being able to fully develop its case. Respondents' actions are particularly damaging as they are solely in possession of the vital information they are misdesignating and refusing to produce. Accordingly, OJC hereby moves this Court for the following relief on an expedited basis:

1. The de-designation of stale, expired information that is clearly not trade secret or highly

confidential but has nonetheless been so designated "Attorneys' Eyes Only" by Respondents in order to cripple OJC's prosecution of its case;

2. A finding of contempt against Respondents for failing to produce known responsive documents to OJC's RFP 26, despite the fact that this Court ordered the production of such documents and said documents being readily available to Respondents;

3. The in camera review and de-designation of emails which Respondents have wrongfully identified as "work product protected" which are critical and central to OJC's case and Respondents' defenses; and

4. The ordering of Respondents to produce their employees Søren Skou and Patrick Jany for deposition, as they have personal knowledge of facts highly relevant to OJC's claims, including for damages.

If these matters are not set right quickly, OJC will not have the time to address these issues in forthcoming depositions or have time to take depositions on them at all. Accordingly, OJC respectfully requests that Respondents be required to file their response to this Motion by Wednesday, August 17, 2022, and the Court rule on this Motion as soon as possible, but at least by August 24, 2022.

I. De-designation of materials wrongfully marked as "Attorneys' Eyes Only."

On July 29, 2022, Respondents produced a batch of documents allegedly responsive to OJC RFP 26 in response to this Court's Order to Compel and designated them as "Attorneys' Eyes Only" under the parties' Confidentiality Stipulation dated 06-12-2022 ("Stipulation").[1] The Stipulation defines Attorneys' Eyes Only information as follows:

> Each Producing Party shall have the right to designate information or Proceeding Material it produces as Attorneys' Eyes Only ("Confidential AEO") **when such information or Proceeding Material qualifies as "Confidential" as defined above and whose disclosure to anyone other than counsel of record has a substantial probability of jeopardizing the Producing Party's competitive business interests or the competitive or privacy interests of the Producing Party's suppliers, service providers, customers or clients, or of an individual Party in this Proceeding**.

[1] Declaration of Shlomo Y. Hecht ("Hecht Decl."), ¶ 2 and Ex. 1.

Stipulation at 3, ¶ 2 (emphasis added).[2]

TransPacific Eastbound ("TP EB") historical – and long expired – Spot Market Rate emails from September 20, 2019 - September 14, 2020 were part of what has been marked as "Attorneys' Eyes Only" by Respondents. (Hecht Decl., Ex. 1 at 1-189 of 219.) As can be readily seen from the face of the emails/rate charts, the rates were only valid for a period of about a week to 10 days. (*Id.* at 1-2 of 219.) Then they expired and new rates were then valid for another week to 10 days, and so on. (*See, e.g., id.* at 1-7 of 219.) **Importantly, the most recent documents that were produced expired almost two years ago**. (*Id.* at 188-89 of 219.) Nonetheless, Respondents' counsel still maintain, as they did during a recent deposition, that the records are properly labeled "Attorneys' Eyes Only," which effectively precluded OJC from hearing testimony on them at that same deposition.

The Court notes that "[g]enerally a court will protect materials containing 'trade secret[s] or other confidential research, development, or commercial information' to prevent harm to a [party's] competitive standing in the marketplace." *Faulman v. Sec. Mut. Fin. Life Ins. Co.*, No. 04–5083, 2006 WL 1541059, at *1 (D.N.J. June 2, 2006) (citation omitted). A mere allegation that a document contains a trade secret or "highly confidential" information does not sufficiently

[2] The definition of Confidential Information is "such information or Proceeding Material [that] reveals or reflects":

> a. unpublished business, financial, research, or marketing data, methods or plans, internal emails, memos, trade secrets, customer information, customer negotiations or operational or technical information;
> b. private or confidential personal information;
> c. other information of a nonpublic nature that the Producing Party reasonably and in good faith believes to be commercially, competitively, or personally sensitive, proprietary in nature, or otherwise entitled to protection under 46 C.F.R. § 502.141(j)(1) of the Commission's Rules of Practice and Procedure, or
> d. information that is not publicly known, that is not in the public domain, or that was previously disclosed to the Receiving Party in violation of a known obligation to maintain confidentiality or restrict disclosure. (Stipulation at 2-3, ¶ 1).

demonstrate that a trade secret exists within the content of the document. *Nelson v. Nissan North America, Inc.*, No. 11-5712, 2014 WL 12617593, at *4 (D.N.J. Dec. 22, 2014).

"Courts have generally held that **trade secret law does not protect 'information that is merely momentary or ephemeral' because it quickly becomes stale**." *Murray Energy Holdings Co. v. Bloomberg, L.P.*, No. 2:15- CV-2845, 2016 WL 3355456, at *7 (S.D. Ohio June 17, 2016) (emphasis added). Indeed, "[t]o the extent that the information [a party] seeks to protect constitutes trade secrets, **such information is only valuable for a limited period of time: strategy and marketing plans grow stale; pricing changes; and customer demands shift**." *DeVere Co. v. McColley*, No. 14-CV-534-WMC, 2014 WL 6473513, at *8 (W.D. Wis. Nov. 18, 2014) (emphasis added).

Here, the materials that Respondents have designated as "Attorneys' Eyes Only" and therefore as trade secrets have expired[3] and became stale on a weekly/bi-weekly basis ***years ago***. Indeed, Kevin Li, one of the recipients and senders of the designated emails [redacted]. (Hecht Decl., ¶ 3.)

As a result, the spot market rate emails should not even be considered confidential. At the very least, they certainly should not be considered trade secrets or highly confidential information worthy of "Attorneys' Eyes Only" protection. This request for de-designation is of critical importance, because OJC's non-attorney personnel have no ability to review and analyze materials designated as "Attorneys' Eyes Only," which greatly prejudices OJC from fully calculating its

[3] "Expired" is defined as "no longer valid : having exceeded its period of validity." *See* https://www.merriam-webster.com/dictionary/expired.

damages which include the difference between (a) the service contract rates OJC should have had but for Respondents' retaliation and (b) the spot market rates that were OJC's only other option. Additionally, Respondents and OJC are in no way competitors (Respondents being an ocean carrier, OJC being an e-commerce retailer), thus there is no reason to hide the historical spot market rate from OJC other than to hamper the prosecution of its case. There was no basis for Respondents to designate the spot market rate emails as "Attorneys' Eyes Only" in the first place, and the Court should de-designate them now and award OJC its attorney's fees as required under the Stipulation, ¶ 25.

II. Finding Respondents in contempt for failing to produce documents previously ordered compelled.

In this Court's Order to Compel dated June 29, 2022, Respondents were required to produce "any policies, procedures, guidance, training, or instructions regarding pricing for shipping or determining prices charged for shipments under service contracts and on the spot market," including "email[s] with information about pricing on a specific route must be disclosed." (Order 06/29/22 at 4.) As noted above, on July 29, 2022 – ***a full month*** after they were ordered to do so – Respondents produced a single document entitled OJC "RFP 26" in response to the Court's Order. (*Compare id. with* Hecht Decl., ¶ 4.) That one document included the spot market rate emails identified in the previous section. (*See* Hecht Decl., Ex. 1.) And inexplicitly, Respondents limited their production to emails between September 20, 2019 – September 14, 2020. (Hecht Decl., Ex. 1 at 1-189 of 219.) OJC RFP 26 requested "documents, communications and/or information from on or after January 1, 2020." (Hecht Decl., Ex. 2 at 4, ¶ 1 and at 8, RFP 26.) Respondents were obligated to produce **all responsive documents** pursuant to the Order, not just a small subset or those from outside the requested time frame and nothing about contract rates.

Pricing documents from January 1, 2020 to the present, including those like the emails

produced, are critical to OJC's damage claims against Respondents, as identified in the previous section. But regardless, the Court ordered Respondents to produce them. Respondents cannot now withhold or fail to produce documents about pricing, including contract pricing – which Respondents did not provide at all – or spot market rates from September 20, 2020 through the present. And incredibly, from the testimony during the deposition of Matthew Hill on August 8, 2022 – a witness that Respondents offered up for deposition as the head of their TransPacific shipping – [redacted] (Hecht Decl., ¶ 5.) [redacted]. (*Id.*)

It's now been 45 days since the Court's Order, Respondents ***still*** have not produced anywhere near all the documents responsive to this Court's Order on Motion to Compel. Accordingly, Respondents should be (i) again ordered to produce all documents responsive to OJC RFP 26 as limited by the Court's Order, this time within three (3) days, and (ii) held in contempt for violating the Court's Order, striking any challenge to OJC's damage claims. *See* Fed. R. Civ. P. 37(b)(2)(A)(i) – (ii).

III. In camera review and de-designation of emails which Respondents have wrongfully marked as "work product."

On or around May 3, 2022, Respondents produced numerous emails to OJC in response to its discovery requests. (Hecht Decl., ¶ 6.) Over three months later, on August 5, 2022, Respondents requested to claw-back 25 emails that it had produced, proclaiming that the emails were "work protect," supplying a so-called privilege log. (Hecht Decl., ¶¶ 6-7, Ex. 3 at 6-7 and

Ex. 4.) After OJC challenged the work product claim and the insufficiency of the log, Respondents supplied another, also deficient log. (Hecht Decl., Exs. 3 and 5.) Upon a review of the emails and their context, they are clearly not work product.

The party who asserts the work product protection bears the burden of establishing that the doctrine applies. *Auto Owners Ins. Co. v. Totaltape, Inc.*, 135 F.R.D. 199, 201 (M.D. Fla. 1990) (citing *Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 656 (10th Cir. 1984)). Respondents' work product claims at issue primarily concern two emails: (1) from Michael Gast to Rodrigo Pestana dated October 21, 2020; and (2) from Rodrigo Pestana to Kelvin Wong and others dated October 22, 2020. (Hecht Decl., ¶ 10 & Exs. 6 and 7.)[4] Neither of these emails are eligible for work product protection, because the communications appear to be between non-attorneys made in the ordinary course of business about an upset customer, namely OJC. *Gucci America, Inc. v. Guess?, Inc*., 271 F.R.D. 58, 75-76 (S.D.N.Y. 2010) (communications between non-attorneys non-privileged "unless they make reference to confidential communications with counsel"); *Fann v. Giant Food, Inc*., 115 F.R.D. 593, 596 (D.D.C. 1987) (work product doctrine does not protect documents prepared in the ordinary course of business of a party). Respondents' basis for "privilege description" only states that "Confidential communication among **representatives of Respondent** … containing mental impressions, conclusions, legal theories and opinions of **Respondent's representatives** about the threatened litigation." (Hecht Decl., Ex. 9 at 1, Far Right Column (emphasis added).) Tellingly, Respondents have not identified an attorney who authored the emails, nor do the emails or privilege log contain any references to any "confidential communications with counsel" or attorney opinion. (*Id.*) Respondents' employees' opinions –

[4] OJC's counsel submits these two exhibits in camera for the Judge's review for purposes of determining whether work product protection applies. All other copies have been destroyed. (Hecht Decl., ¶ 10.)

which make no reference to "confidential communications with counsel" – are not work product. *Gucci*, 271 F.R.D. at 75-76.

Respondents have also waived any potential work product protection, because Respondents have denied retaliating against and unreasonably refusing to deal or negotiate with OJC and have specifically claimed that their basis for refusing to deal with OJC was not "unreasonable." (*See, e.g.*, HSDG's Answer at 18, Affirmative Defense No. 5 ("HSDG's conduct was reasonable in light of the totality of the circumstances"); *see also* Respondents' Partial Motion to Dismiss at 5-6 ("HSDG did not refuse to deal or negotiate with OJC, unreasonably or otherwise.").) Respondents have thus put the alleged "reasonableness" of their actions at issue in this dispute. Respondents are not allowed "to wield the work-product protection as a sword to cut out the heart of an opposing party's case while simultaneously brandishing it as a shield from disclosure of any Achilles heels." *Stern v. O'Quinn*, 253 F.R.D. 663, 676-77 (S.D. Fla. 2008) (collecting cases). In the parties' pre-Motion correspondence, Respondents contended that they "have not impeded Complainant's ability to argue its claims of retaliation or unreasonable refusal to deal." (Hecht Decl., Ex. 3 at 4.) But Respondents do not get to pick and choose what evidence OJC may use in its case against them. Just because OJC has other evidence to support its claim cannot justify the wrongful withholding of material as "privileged" so long as Respondents continue with the facade that their actions were "reasonable."

And even if work product protection applies (it doesn't), OJC has substantial need for the materials to prepare its case and it cannot, without undue hardship, obtain their substantial equivalent by other means because, as shown above, the withheld as "work product" communications go to the heart of OJC's claim and Respondents' defenses. Fed. R. Civ. P. 26(b)(3)(A)(ii); *Stern*, 253 F.R.D. at 676-77. Respondents knew that they did not have a

"reasonable" position against OJC's claim, but yet retaliated and refused to deal with OJC anyway because OJC had threatened to complain to the FMC. OJC requests that the Judge review Exs. 6 and 7 in camera, find that the communications are not work product protected or such a claim is otherwise waived, order Respondents to de-designate the emails and re-produce them to OJC and represent to the Court that no other documents are being withheld on the basis of an alleged privilege (as no other documents have been listed on a privilege log).

IV. Ordering the production of Søren Skou and Patrick Jany for deposition.

As part of their obstructionist strategy, Respondents have also erected roadblocks to the depositions of witnesses with pertinent information. On August 4, 2022, OJC requested from Respondents deposition dates for Søren Skou and Patrick Jany of Maersk. (Hecht Decl., Ex. 10 at 3.) On August 6, Respondents' responded by refusing to produce them, stating that "they are not employees of Hamburg Sud." (*Id.* at 2.) In reply, OJC reminded Respondents that:

> There is absolutely no basis to obstruct OJC and say that Søren Skou and Patrick Jany "need to be subpoenaed as third-parties in order to appear for depositions" because "they are not employees of Hamburg Sud," as you contend. 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.)
>
> Additionally, [redacted] (Pump Depo, 109-112.) [redacted] (*See, e.g.,* Pump Depo. 110.) [redacted] (Pump Depo 119-125, 159-160, 183).
>
> Therefore, according to HSDG/Maersk itself and the witnesses you have already produced (which included Mr. Hill of Maersk), HSDG **is** Maersk, Skou and Jany are not "third parties" and they must be produced for depositions.

(Hecht Decl., Ex. 10 at 1-2 (first emphasis added and citing Pump Deposition (Ex. 11).)

Respondents answered – not by contesting OJC's points or providing additional information – but instead just reiterated their prior refusal. (*Id.* at 1.)

First off, Respondents have readily admitted as shown above that Hamburg ***is*** Maersk, with Hamburg only remaining as a [redacted]." Moreover, Messrs. Skou and Jany personally possess a treasure trove of information directly relevant to OJC's claims for damages, Respondents' defense that their "conduct was reasonable in light of the totality of the circumstances," and the price gouging of OJC and other shippers and alleged space shortage policies and actions of Maersk/Respondents during the past two years to generate the record profits they have.[5] Here is just a small sample of quotes from the requested witnesses from Q1 and Q2 2022 Results – Earnings Call Transcripts that relate to the claims and defenses:

CEO Søren Skou

> "**Q2 has again hit to record across all performance metrics, starting with revenue growth of 52% to $21.7 billion**. Similar to the previous quarter, **high freight rates in Ocean**" **[inflation has been great for Respondents' business]**
>
> "Certainly going forward will also be our philosophy in, how we operate the network that we will provide the capacity that our customers need but we will not sell all the capacity that we have" **[limiting their capacity so as to maintain their inflated shipping prices]**
>
> "I mean pretty much everybody have bought the new couch, the new set of lounge furniture, the new TV screen, whatever, all the things that we were all spending our money on during the pandemic" **[speaks directly to OJC's contention that the sales it lost due to Respondents' retaliation and refusal to deal cannot be made up today, *after* the pandemic peak during which the very goods sold by OJC were in peak demand]**
>
> "we experienced significant success in signing contracts at higher rates. We have now signed 80% of this year's expected contracts at a rate which is on average, $1400 higher than in 2021" **[taking advantage of shippers' desperation for space by drastically raising the contract prices]**

[5] *See* Complainant's Opposition to Respondents' Partial Motion to Dismiss and/or for Summary Judgment, at 3, 6-7 (news links).

CFO Patrick Jany

> "this led to a **71% higher freight rates**, but also a volume decline of 6.7%." **[despite less volume, Respondents' freight rates continue to increase at historic rates]**

(Hecht Decl., Exs. 12 and 13 (emphasis added) [comments added].) So, according to Messrs. Skou and Jany, while the rest of the world, including OJC, was suffering under the demands of the pandemic, Maersk/Hamburg was reducing shipping space, drastically raising shipping prices, and otherwise manipulating the market to record the highest profits in the company's history, several times over. All of Messrs. Skou and Jany's quotes, as well as others, are directly relevant to OJC's contentions and Respondents' defenses in this case, and therefore Respondents should be ordered to produce Messrs. Skou and Jany for depositions within 10 days.

CONCLUSION

OJC respectfully requests that the Court order:

1. The de-designation of the stale, expired, or otherwise historical documents that Respondents that labeled "Attorneys' Eyes Only," including all expired spot market rate emails already produced and those produced in the future;

2. Respondents produce all documents responsive to OJC RFP 26 as limited by the Court's Order within three (3) days, and hold HSDG in contempt for violating the Court's Order, striking any challenge to OJC's damage claims;

3. The de-designation of the 25 documents identified as "work product" and the re-production with three (3) days to OJC and a certification from Respondents that no further documents have been withheld based on an alleged privilege (as no other documents have been listed on a privilege log);

4. Respondents to produce Søren Skou and Patrick Jany for deposition within the next 10 days; and

5. Such further relief that the Commission deems just and proper.

CERTIFICATION OF CONFERRING WITH OPPOSING COUNSEL

As shown in the email correspondence attached to the undersigned counsel's declaration, OJC conferred and made an attempt to confer with Respondents' counsel on these pressing issues prior to filing this Motion in order to avoid the necessity of judicial invention.

Dated: August 15, 2022

Respectfully Submitted,

By: /s/ Shlomo Y. Hecht
Shlomo Y. Hecht
Florida State Bar No.: 127144
Shlomo Y. Hecht, P.A.
4538 NW 85th Ave.
Coral Springs, FL 33065
Phone: (954) 861-0025
Email: sam@hechtlawpa.com
Attorneys for OJ Commerce, LLC

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 15, 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 SUPPORT OF COMPLAINANT'S EXPEDITED MOTION

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 am submitting this Declaration in Support of Complainant's Expedited Motion ("Motion").

2. On July 29, 2022, Respondents produced a batch of documents allegedly responsive to OJC RFP 26 in response to this Court's Order to Compel and designated them as "Attorneys' Eyes Only" under the parties' Confidentiality Stipulation dated 06-12-2022 ("Stipulation"). Attached hereto and incorporated herein as **Exhibit 1** is a true and correct copy of the document produced by Respondents, which was entitled by them "RFP 26."

3. Kevin Li, one of the recipients and senders of the "Attorneys' Eyes Only"-designated emails [redacted]

[redacted].

4. Attached hereto and incorporated herein as **Exhibit 2** is a true and correct copy of OJC's First Set of Requests for Production of Documents to HSDG, served on March 7, 2022.

5. From the testimony during the deposition of Matthew Hill on August 8, 2022 – a witness that Respondents offered up for deposition as the head of their TransPacific shipping – OJC knows that [redacted].

6. On or around May 3, 2022, Respondents produced numerous emails to OJC in response to its discovery requests. Over three months later, on August 5, 2022, Respondents requested to claw-back 25 emails that it had produced, proclaiming that the emails were "work protect protected," supplying a so-called privilege log.

7. Attached hereto and incorporated herein as **Exhibit 3** is a true and correct copy of emails between OJC's counsel and Respondents' counsel regarding Respondents' claim of "work product" protection.

8. Attached hereto and incorporated herein as **Exhibit 4** is a true and correct copy of Respondents' first alleged privilege log.

9. Attached hereto and incorporated herein as **Exhibit 5** is a true and correct copy of Respondents' Amended Privilege Log.

10. Respondents' work product claims at issue primarily concern two emails: (1) from Michael Gast to Rodrigo Pestana dated October 21, 2020 (HS-012926-32, a true and correct copy attached hereto as **Exhibit 6** for in camera review); and (2) from Rodrigo Pestana to Kelvin Wong and others dated October 22, 2020 (HS-012453, a true and correct copy attached hereto as **Exhibit 7** for in camera review). I submit these two exhibits in camera for the Judge's review for purposes of determining whether work product protection applies. All other copies have been destroyed. True and correct copies of Respondents' redacted versions are attached as **Exhibits 8** and **9** for comparison purposes.

11. Attached hereto and incorporated herein as **Exhibit 10** is a true and correct copy of emails between OJC's counsel and Respondents' counsel regarding the depositions of Søren Skou, and Patrick Jany.

12. Attached hereto and incorporated herein as **Exhibit 11** is a true and correct copy of transcript pages from the deposition of Juergen Pump, taken on July 19, 2022.

13. Attached hereto and incorporated herein as **Exhibit 12** is a true and correct copy of A.P. Møller - Mærsk A_S (AMKBY) CEO Soren Skou on Q2 2022 Results - Earnings Call Transcript _ Seeking Alpha.pdf.

14. Attached hereto and incorporated herein as **Exhibit 13** is a true and correct copy of A.P. Møller - Mærsk A_S (AMKBY) CEO Soren Skou on Q1 2022 Results - Earnings Call Transcript _ Seeking Alpha.pdf.

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

Dated: August 15, 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 1-13 upon all of Respondents' counsel of record by emailing a copy to each such person.

Dated: August 15, 2022

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