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 TO COMPEL DISCOVERY AND FOR REIMBURSEMENT OF ATTORNEYS' FEES AND COSTS AND MEMORANDUM OF LAW RELATED THERETO

Complainant OJ Commerce, LLC ("OJC" or "Complainant"), by and through its undersigned counsel, hereby moves, pursuant to 46 C.F.R. § 502.150, to compel HAMBURG SÜDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO KG ("HSDG") (1) the production of documents in response to Requests for Production (the "OJC RFPs"); (2) answers to Interrogatories (the "OJC INTs" and together with the OJC RFPs, the "OJC Discovery Requests"); and (3) reimbursement for a deposition that was a complete waste, due to HSDG's misleading disclosures. Complainant repeatedly conferred in good faith in an attempt to obviate the necessity of this Motion, to no avail.

Instead, HSDG has refused to produce documents and information directly relevant to Complainant's causes of action against Respondents and to their own affirmative defenses based

almost entirely on HSDG's unsupported "undue burden" objections.

Additionally, Respondents deceptively disclosed witnesses without any knowledge about the case, thereby wasting OJC's time in conducting an irrelevant deposition. Yet, despite HSDG admitting to the issue after that initial deposition and agreeing to "correct" their disclosure, HSDG still refused to reimburse Complainant for its expenses related to the wasted deposition. To make matters worse, Respondents lack of candor in producing relevant witnesses is evidenced even further by their complete failure even now to include several critical witnesses – found by Complainant in its initial review of Respondents' document production to date – **in either its initial or revised** witness disclosures, thus calling into question the veracity of both lists. In order to move the discovery of **relevant** information forward in this case, Complainant respectfully moves the Presiding Officer for an order compelling HSDG to produce documents and information responsive to OJC RFPs 9, 13, and 26, and OJC INT 9 and to reimburse Complainant for its expenses related to the aforementioned deposition.

BACKGROUND

This case is about Respondents' repeated and systematic violations of several sections of the Shipping Act. The Parties' relationship began on or about June 23, 2020, when OJC entered into a service agreement with Respondents for the shipment of goods by sea and delivery to warehouse facilities within the United States via truck. (Verified Amended Complaint (the "Complaint"), ¶ 25 and Ex. A.) The Agreement governed the parties' relationship between June 23, 2020 to May 31, 2021 (the "Active Term"). (Complaint, ¶ 27 and Ex. A.) During 2020 and 2021, Respondents engaged in a variety of unjust and unreasonable practices with respect to Complainant's cargo. (Complaint, ¶ 18.) Instead of honoring the commitments in its service contracts with Complainant, Respondent began a practice of methodically failing to meet its

quantity and price commitments to Complainant. (*Id.*) As a result, Complainant was forced to obtain space on the spot market at enormous expense or forgo making shipments of goods to the United States altogether. (*Id.*)

Respondents' unreasonable practices coincided with an extraordinary increase in spot market pricing for ocean freight. (Complaint, ¶ 19.) Respondents sought to take advantage of unprecedented high pricing by forcing shippers with service contracts, like Complainant, to resort to spot market purchases to secure needed freight carriage. (*Id.*) 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 Complainant, and others. (*Id.*) Indeed, Complainant knows that *because Respondents' own emails say so*:

> **(Declaration of Aaron W. Davis ("Davis Decl."), Ex. 9 (emphasis added)): blank sailing can be managed and explained however because vessels are full unfortunately does not matter. 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.**
>
> Do I believe this customer is taking advantage of the situation? yes!! **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.**

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 on extracting additional, "premium" payments from Complainant, 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. (Complaint, ¶ 20.) This is just one example of Respondents' willful violations of the Shipping Act.

Overall, Complainant's Complaint alleges seven causes of actions against Respondents

under the Shipping Act, including:

- Respondents violations of 46 U.S.C. § 41102(b)(2) due to their continuous and systematic operation under the parties' agreement not in accordance with that agreement. (Complaint, ¶ 8.)

- Respondents' actions and omissions constituted failures by each Respondent to establish, observe, and enforce just and reasonable practices relating to receiving, handling, storing, and delivering the property of OJC, in violation of 46 U.S.C. § 41102(c) and 46 C.F.R. §§ 545.4 and 545.5. (Complaint, ¶ 9.)

- 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. (Complaint, ¶ 10.)

- 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. (Complaint, ¶ 11.)

- 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). (Complaint, ¶ 12.)

- 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). (Complaint, ¶ 13.)

- 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. (Complaint, ¶ 14.)

As to the last allegation above, in their own documents and pleading responses, Respondents have repeatedly admitted that they refused to renew Complainant's service contract – and not fulfill Respondents' then-existing obligations – because Complainant had threatened to file a complaint against Respondents for their repeated and systematic violations of the Shipping

Act:

> **(Davis Decl., Ex. 6 (emphasis added) (April 29, 2021 email))**: As you mentioned, I was completely unaware of their legal action against us since I left the TPEB team. I consulted with Juergen 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.**
> …
> But just to express our position on this, **we should also consider not to provide them with space under existing contract.**
>
> **(Davis Decl., Ex. 7 (emphasis added) (April 29, 2021 email)): 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.**
>
> **It also seems we are considering signing another contract with this customer with an increased capacity. I understand sales needs to meet certain quotas and more business is always great but personally I would not want to do business with someone who repeatedly jumps to threat of lawsuit such as this.** Should such a lawsuit occur I can easily imagine the cost would easily wipe out any profits gained from the commercial relationship due to potential breach of contract judgements against us and the cost of our own legal representation.
>
> **(Davis Decl., Ex. 8 (February 23, 2022 email):** Reference is made to the subject customer who was denied a renewal contract back in May 2021 and the attached email wherein Kevin Li advises that he consulted with you on this potential renewal agreement and reported that it was [your] ultimate decision that we should cease any such discussions.
>
> **(Davis Decl., Ex. 4, p. 5 (emphasis added)): OJC INT 7.** Identify and describe in detail the reasons, policies, and considerations concerning Your unwillingness or refusal to renew or enter into a Service Contract with OJC.
>
> Response: The decision not to renew or enter into a service contract with OJC was based in part on some of the factors cited in the response to Interrogatory #6 above. … **Respondent's decision was also based in part on OJC's disputatious manner of doing business and its repeated and excessive threats to pursue litigation against Respondent….**

As admitted by Respondents, Complainant was refused a service contract and was retaliated against by Respondents because Complainant had the audacity to complain about

Respondents' business practices, the very actions prohibited by the Shipping Act.

Moreover, in their Answers to the Complaint, Respondents also admit that Complainant 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:**
> 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.**

Following up on Respondents' known illegal actions during the Parties' relationship, on March 7, 2022, Complainant served its First Set of RFPs and INTs on HSDG in order to discover additional information related to its claims, including evidence solely in the possession of Respondents. (Davis Decl., ¶¶ 2-3 and Exs. 1 and 2.) Unless otherwise specified, the OJC Discovery Requests were limited to the time period of January 1, 2020 to the present. (*Id.*) In those requests, Complainant requested information and documents about:

- Sailings concerning OJC vessel bookings that were canceled, blanked, or otherwise did not actually sail;
- Respondents' scheduling, allocation of space, and pricing on relevant sailings of its vessels from the ports covered by the Service Contract during the Active Term, and thus how Complainant and its bookings were discriminated against by HSDG;

- Respondents’ financial performance during the Active Term, and how, if at all, that performance was affected by the COVID-19 pandemic, which related to Complainant’s allegations that Respondents’ rates and charges were unreasonable and systematically in violation of the Shipping Act;

- HSDG’s business practices concerning how it determined and discriminated as to who would receive a service contract and who would not, how HSDG determined pricing under service contracts versus on the spot market, and how HSDG consistently violated or failed to comply with the terms of its service contracts with shippers, including Respondents’ refusal to deal with and retaliation against Complainant; and

- What communications HSDG had with other common carriers concerning about pricing, vessel capacity, space allocation, space sharing, priority of space, shipping empty containers, profitability per container, overall profitability, the granting of Service Contracts, the spot market, shipping alliances, any agreements, or about shipping issues during the pandemic, which could impact HSDG’s policies and its actions and omissions towards Complainant and other shippers.

Respondents had also asserted affirmative defenses that (a) “Complainant lacks standing to recover reparations for the demurrage charges herein at issue,” (b) “[d]elays in delivering cargo were due in whole or in part by acts and/or omissions of Complainant and/or its agents,” and (c) “[Respondents’] conduct was reasonable in light of the totality of the circumstances.” (Respondents’ Affirmative Defenses in Their Answers.) As such,. Complainant sought discovery on those defenses as well. Regardless of the OJC Discovery Requests being relevant to Complainant’s claims and Respondents’ defenses, Respondents entirely refused to respond to a great number of the OJC Discovery Requests. (Davis Decl., Exs. 3 and 4.)

MEET AND CONFER CERTIFICATION

Pursuant to § 502.71(a), Complainant’s counsel met and conferred with Respondents’ counsel on April 20, and May 2, 9, 12, and 16, 2022 via teleconference about the OJC Discovery Requests at issue, including HSDG’s failure to produce documents and information responsive to OJC RFPs 7, 9, 10, 13, 14, 15, 16, 17, 18, 24, 25, and 26, and OJC INTs 4, 6, 9, 10, and 12. After conferring about Complainant’s justification for the OJC Discovery Requests, Respondents’

counsel agreed to discuss with HSDG its objections to the OJC Discovery Requests. Subsequently, HSDG agreed to produce documents and information responsive to all the above requests, except HSDG continued to refuse to produce documents or information responsive to OJC RFPs 9, 13, and 26, and OJC INT 9. HSDG's reasons for its continued refusal to produce the requested information and documents are included in the "Reason for Impasse" sections below following the categories of requests. (Davis Decl., ¶ 13.) Respondents have yet to produce any responsive documents or information responsive to those requests they agreed to withdraw their objections from – OJC RFPs 7, 10, 14, 15, 16, 17, 18, 24, and 25, and OJC INTs 4, 6, 10, and 12 – so the sufficiency of Respondents' supplementation and completeness is currently unknown. (*Id.*)

Counsel for the Parties also met and conferred on May 4 and 9, 2022 regarding the expenses related to the deposition of Michael Urso, who was included as a relevant witness in Respondents' Initial Disclosures. Only after the deposition was noticed, prepared for, and taken by Complainant did it come to light that Mr. Urso had – by his own admission – absolutely no knowledge of any information related to the Parties' claims or defenses. Nonetheless, Respondents refused to reimburse Complainant for its expenses related to that wasted deposition. However, Respondents did agree to provide an amended witness list to its initial disclosures, removing the names of persons that had no information relevant to the claims or defenses in this case and adding the names of persons who actually have information about the claims and defenses. Today, Respondents served an amended witness list/initial disclosures but it still was missing critical, central witnesses concerning the Parties' claims and defenses, which are discussed in more detail below. (Davis Decl., ¶ 14.)

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). In responding to interrogatories, the responding party may answer by producing business records but must "specify[] the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could." 46 C.F.R. § 502.145(d)(1). When a party from whom discovery is sought raises undue burden or cost of discovery as an objection, they "must show that the information is not reasonably accessible because of undue burden or cost." 46 C.F.R. § 502.141(e)(2)(i); *see also Manning v. General Motors*, 247 F.R.D. 646, 654 (D. Kan. 2007) ("Defendant has the burden to support this objection and to show not only 'undue burden or expense,' but also to show that the burden or expense is unreasonable in light of the benefits to be secured from the discovery."). Even when the producing party makes such a showing, "the presiding officer may nonetheless order discovery from such sources if the requesting party shows good cause." *Id.*

"In proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice." 46 C.F.R. § 502.12. "A litigant cannot limit its discovery so as to ascribe unto itself the role of judge and jury." *Novelty, Inc. v. Mountain View Mktg.*, 265 F.R.D. 370, 378 (S.D. Ind. 2009); *see also, Johnson v. Kraft Foods N. Am., Inc.*, 236 F.R.D. 535, 541 (D. Kan. 2006) ("a party may not unilaterally withhold information or documents that are responsive to a discovery request" based on that party's own interpretation of relevance).

ARGUMENT

Complainant sets forth below, in accordance with Paragraph 11 of the Initial Order in this proceeding, the text of each OJC Discovery Request at issue, HSDG's response, the attempts to secure a sufficient response, and why the response is insufficient. For efficiency's sake, and in light of the substantial overlap between the OJC RFPs and the OJC INTs, the OJC Discovery Requests are grouped together by general topic and HSDG's response thereto, with supporting arguments applicable to each group. Complete copies of the OJC Discovery Requests, including all instructions and definitions, and HSDG's responses and objections thereto, are attached to the accompanying Declaration of Aaron W. Davis. (Davis Decl., Exs. 1 – 4.)

I. OJC INT 9 and RFPs 9: HSDG's refusal to produce documents and information concerning Respondents' scheduling, allocation of space, and pricing on relevant sailings of its vessels from the ports covered by the Service Contract during the Active Term, and thus how Complainant and its bookings were discriminated against by HSDG.

<u>OJC INT 9</u>: Between January 1, 2020 through the present, for each Sailing from Fuzhou, Ningbo, Shanghai, Xiamen, Yantian, Qingdao, People's Republic of China, or Ho Chi Minh City, Vietnam to Los Angeles or Long Beach, California, United States of America, identify the vessel that made such Sailing and provide the following information in the format provided in the Appendix hereto:

- **a. State the date of departure from the respective loading port (i.e., Fuzhou, Ningbo, Shanghai, Xiamen, Yantian, Qingdao, or Ho Chi Minh City) for such Sailing;**
- **b. State the date of arrival at the discharge port (i.e., Los Angeles or Long Beach) for such Sailing;**
- **c. State the total cargo capacity (in TEUs and FEUs) of the vessel that made such Sailing;**
- **d. State the total cargo capacity (in TEUs and FEUs) of the vessel that made such Sailing as of the actual departure date;**
- **e. State the total cargo capacity (in TEUs and FEUs) on such vessel that remained unbooked or available as of that vessel's actual Sailing date;**
- **f. State the total cargo capacity (in TEUs and FEUs) on such vessel that remained unbooked or available as of that vessel's arrival at the first port in the United States;**
- **g. Identify each Shipper whose cargo or shipment was carried on such Sailing;**

h. For each Shipper so identified, state the total volume of that Shipper's cargo (in TEUs and FEUs) carried on such Sailing;

i. For each Shipper so identified, state the date(s) on which such Shipper booked the space for its cargo carried on such Sailing;

j. For each Shipper so identified, state that Shipper's total contractual minimum quantity commitment with You, if any;

k. For each Shipper so identified, state the total volume of that Shipper's cargo (in TEUs and FEUs) carried on such Sailing not pursuant to any Service Contract; and

l. For each Shipper so identified, state the price(s) charged for transportation by You of that Shipper's cargo or shipment on such Sailing.

Response: Respondent objects to the foregoing Interrogatory on the grounds that the information sought is not reasonably accessible because of undue burden and undue cost. (Davis Decl., Ex. 4, pp. 5-7.)

<u>OJC RFP 9:</u> All documents concerning Your response to OJC's Interrogatory No. 9.

Response: Respondent objects to this request on the grounds that the documents sought are not reasonably accessible due to undue burden and undue cost. (Davis Decl., Ex. 3, p. 3.)

Complainant's Argument:

1. Reasons for Impasse

Despite conceding that these requests are relevant as they did not object on that basis, Respondents have completely refused to produce any of the information or documents requested by OJC INT 9 and OJC RFP 9. All Respondents have said is they "can't do it." Complainant has requested detail about how the alleged undue burden and cost would be to Respondents to produce the admitted-relevant information. Respondents have failed to provide any such support, despite multiple meet and confers on the subject, let alone proof that the alleged hardship would be disproportionate to the benefit Complainant would gain from the production. (Davis Decl., ¶ 15.) That was Respondents' sole burden to do:

> Defendant has the burden to support this objection and to show not only "undue burden or expense," but also to show that the burden or expense is unreasonable in

> light of the benefits to be secured from the discovery. Thus, even if the production of documents would cause great labor and expense or even considerable hardship and the possibility of injury to its business, Defendant would still be required to establish that the hardship would be undue and disproportionate to the benefits Plaintiff would gain from the document production. Moreover, Defendant, as the party objecting to the discovery as unduly burdensome "cannot rely on some generalized objections, but must show specifically how each request is burdensome ... by submitting affidavits or some detailed explanation as to the nature of the claimed burden."

Manning, 247 F.R.D. at 654. Respondents have clearly not met their burden to resist discovery on these requests.

2. Relief Sought

OJC INT 9 and OJC RFP 9 relate directly to Complainant' allegations that Respondents engaged in a practice of failing to provide Complainant shipments at its contracted rates while offering carriage to other shippers at higher contracted or spot market rates, thus profiting from its violations of the Shipping Act. The documents and information requested about Respondents' actual carriage of cargo on the relevant lines and ports of service, as identified in the Parties' Service Contract (Ex. A to the Complaint and Davis Decl., Ex. 11, Appendix, pp. 8-16), and the pricing associated with that carriage, are key to proving Complainant's claims that Respondent's alleged conduct (*see, e.g.,* Complaint, paragraphs):

> 33. Respondents also stated, throughout the 10-month time period from August 2020 - May 2021 that they would ship Complainant's shipments in a timely manner, as mandated by the Agreement, if and only if paid higher rates than those included in the Agreement. When Complainant refused to submit to Respondents' extortion, Respondents pushed off Complainant's shipments for weeks, regularly refusing to operate under the terms of the Agreement and in violation of the Shipping Act.
>
> 34. By doing so, Respondents unfairly and unjustly discriminated against Complainant on a continuous and ongoing basis for 10 months in the matter of rates or changes with respect to ports identified in the Agreement, in violation of section 41104(a)(5).
>
> 35. Respondents also gave, on a continuous and ongoing basis over 10 months, undue and unreasonable preference and advantage to shippers other than

Complainant with respect to the ports identified in the Agreement, as those other shippers were evidently willing to accept Respondents' exorbitant rates that were much higher than those in the Agreement. Respondents' actions constituted a violation of section 41104(a)(9).

…

57. 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).

58. 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).

The information sought by OJC INT 9 and OJC RFP 9 is relevant (as admitted by Respondents), critical, and necessary to the adjudication of Complainant's claims, including in particular its claims of discriminatory and/or preferential treatment that is uniquely in the possession of Respondents. Complainant requests that Respondents be compelled to answer and provide responsive information and documents to OJC INT 9 and OJC RFP 9.

II. OJC RFP 13 and 26: HSDG's refusal to produce documents concerning HSDG's business practices concerning how it determined and discriminated as to who would receive a service contract and who would not, how HSDG determined pricing under service contracts versus on the spot market, and how HSDG consistently violated or failed to comply with the terms of its service contracts with shippers, including Respondents' refusal to deal with and retaliation against Complainant.

OJC RFP 13: **All documents and communications concerning which Shippers were offered a Service Contract with You, and what MQC each of those Shippers received in their Service Contracts as compared to what MQC they requested, and which Shippers were not offered a Service Contract with You despite a request for one, including Your policies, considerations, decisions, or determinations concerning the reasons why each entity was offered or not offered a Service Contract.**

Response: Respondent objects to this request on the grounds that the documents sought are not reasonably accessible due to undue burden and undue cost. (Davis Decl., Ex. 3, pp. 3-4.)

OJC RFP 26: **Documents sufficient to show Your pricing for shipping,**

including how You determine the prices charged for shipments under Service Contracts and for shipments on the spot market, and how and why Your prices may vary between one Shipper and another.

Response: Respondent objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence and on the grounds that the documents sought are not the documents sought are not reasonably accessible due to undue burden and undue cost. (Davis Decl., Ex. 3, pp. 6-7.)

Complainant's Argument:

1. Reasons for Impasse

Respondents did not object to OJC RFP 13 based on relevance, only on the basis of "undue burden and undue cost." Respondents objected to OJC RFP 26 on that basis as well, but also objected based on relevance. Complainant described the relevance of the requests to the Parties' dispute (stated below, including that the requests were pertinent to Respondents' business practices on the issuance of service contracts). Respondents did not push back on those bases, focusing primarily on responding to the requests being allegedly "not really workable" and "difficult to carry out." (Davis Decl., ¶ 16.) Although asked for evidence supporting their objection of "undue burden," Respondents have not provided any. (*Id.*)

2. Relief Sought

OJC RFP 13 and 26 are directly relevant to how HSDG determined and discriminated as to who would receive a service contract and who would not. They are also relevant to how HSDG determined pricing under service contracts versus on the spot market, which directly impacted Complainant, as admitted by Respondents themselves in their emails. (*See* Davis Decl., Ex. 9 ("[Complainant has] 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 other words, Respondents created a situation in

which they refused to ship Complainant's goods as required by the Parties' service contract but then also refused to make up for Complainant's refused shipments because Respondents could obtain a "premium rate" with other shippers on the spot market. Thus, Respondents created their own disincentive to meet the requirements of Complainant's – and surely others' – service contract(s). Respondents should be compelled to respond and produce documents responsive to OJC RFP 13 and 26.

The requests are also relevant as to how HSDG consistently violated or failed to comply with the terms of its service contracts with shippers, including Respondents' refusal to deal with and retaliation against Complainant, as evidenced in Davis Decl., Exs. 6, 7, and 8. (*See, e.g.,* Ex. 7 ("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**." (emphasis added).) They are also relevant to HSDG's affirmative defense that "[Respondents'] conduct was reasonable in light of the totality of the circumstances."

HSDG has objected, alleging again an "undue burden" but as before it has not supplied any specific, affidavit-sworn information or evidence on that point. *Manning*, 247 F.R.D. at 654 (overruling undue burden objection based on failure to meet its required burdens); *see also In re Urethane Antitrust Litigation*, 261 F.R.D. 570, 575 (D. Kan. 2009). Certainly, HSDG can determine who has requested a service contract or the renewal of a service contract with HSDG and provide information and documents concerning why or why not that service contract was granted or rejected. HSDG's regular and customary business practices as to how it decides who gets a service contract and who does not is probative to how "reasonable" HSDG was in refusing to renew Complainant's service contract, even when it was HSDG – not Complainant – who had admittedly failed to meet its obligations under that agreement. (*See, e.g.,* Davis Decl., Ex. 6 ("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. … But just to express our position on this, we should also consider not to provide them with space under existing contract."). This provides yet another reason to compel HSDG to respond and produce documents responsive to OJC RFP 13 and 26.

III. Expenses related to the deposition of Michael Urso, who was included in Respondents' Initial Disclosures as a person who is "likely to have discoverable information that Respondents may use to support their defenses," but repeatedly admitted during his deposition that he in fact had no knowledge of the claims or defenses in this case, nor any information about the dispute between the Parties.

Complainant's Argument:

1. Reasons for Impasse and Relief Sought Combined

Complainant noticed and took Michael Urso's deposition on May 4, 2022 based on Respondents' identifying him as a person "likely to have discoverable information that Respondents may use to support their defenses." (Davis Decl., Ex. 5, pp. 1-2; Davis Decl., ¶ 17.) 46 C.F.R. § 502.141(b)(1) required that Respondents provide Complainant with "[t]he name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." *See also* Fed. R. Civ. P. 26(a)(1)(A) (same). Committee Note on Rule 26(a)(1)(A) – 2000 Amendment further states that "[t]he disclosure obligation applies to 'claims and defenses,' and therefore requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party."

Mr. Urso admitted repeatedly during his deposition that he did not have any knowledge about the dispute between the parties, Complainant's claims, or Respondents' defenses in this case. Respondent does not contest that point. (Davis Decl., ¶ 18.) Therefore, Mr. Urso should not have

been listed in Respondents' initial disclosures. Complainant would not have taken Mr. Urso's deposition but for Respondents identifying him on their witness list.[1] (Davis Decl., ¶ 18.)

Instead of listing irrelevant persons as witnesses, Respondents should have named, for example, Kevin Li, Wiebke Harke, Juergen Pump, and Rodrigo Pestana, who were authors and recipients of smoking gun emails submitted with this Motion as Davis Decl., Exs. 6 – 9 and who clearly had direct knowledge about Complainant's claims of retaliation and other Shipping Act violations against Respondents.[2] Here is a quote from an email that included two of the missing witnesses, describing Respondents' retaliation against Complainant:

> **(Davis Decl., Ex. 8 (February 23, 2022 email), Michael Gast email to Juergen Pump, referencing Ex. 6, a Kevin Li email:** Reference is made to the subject customer who was denied a renewal contract back in May 2021 and the attached email wherein Kevin Li advises that he consulted with you on this potential renewal agreement and reported that it was [your] ultimate decision that we should cease any such discussions.

Regardless, neither Juergen Pump nor Kevin Li was included on Respondents' initial disclosures. (Davis Decl., Ex. 5.)

Even after Respondents were confronted on May 4 with their deficiency of providing mostly irrelevant names on the witness disclosure – and Respondents promising for nearly two weeks to correct the issue – Respondents **still** did not include Kevin Li, Wiebke Harke, Juergen Pump, or Rodrigo Pestana (and who knows how many others) on its "revised" witness list. (Davis

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[1] Richard Smernoff – who was noticed for a deposition the next day, on May 5, and was also listed in Respondents' Initial Disclosures (Davis Decl., Ex. E, pp. 1-2) – likewise, according to Respondents' counsel, did not have any knowledge about Complainant's claims or Respondents' defenses. (Davis Decl., ¶ 19.) Accordingly, the Parties agreed to adjourn Mr. Smernoff's deposition without prejudice to avoid any further waste of time and expense. (*Id.*)

[2] Complainant is in the process of reviewing the over 13,000 pages of documents produced by Respondents to date and there may be (many) other critical witnesses that Respondents have failed to identify in their witness disclosures. (Davis Decl., ¶ 20.)

Decl., Ex. 10.) Incredibly, Respondents removed five names from its initial witness list and only added two to its revised list but wholly and inexplicably failed to include the four names identified above. (*Compare* Davis Decl., Ex. 5 *with* Ex. 10.) Respondents' apparent concealment of pertinent names from its witness list violates the disclosure requirements of the FMC Rules and the Federal Rules of Civil Procedure. *See Sub Zero Franchising, Inc. v. Frank Nye Consulting, LLC*, No. 2:15-cv-00821-BSJ, 2018 WL 1999093, at *3 (D. Utah Apr. 27, 2018) (awarding attorney's fees and expenses due in part to a party listing multiple witnesses as having knowledge of the claims or defenses in the case "when these witnesses had no such knowledge," which led to "unnecessary depositions and discovery").

Indeed, at the time Complainant was contemplating its first depositions, Respondents had included Michael Urso and Richard Smernoff in its Initial Disclosure when in fact they had no knowledge of the Parties' dispute. (Davis Decl., Ex. 5, pp. 1-2.) For that, at the very least, Respondents should reimburse Complainant for the expenses it incurred in preparing for and taking the deposition of Michael Urso, which never would have been incurred had Respondents included only *relevant* witnesses in their disclosures.

During the Parties' meet and confer on the subject, Respondents justified the identification of Mr. Urso on its initial witness list – although he was subsequently withdrawn on its revised list – because "prepping and reviewing documents improves familiarity with the record therefore prep time was not wasted, Mr. Urso had general information about Respondents' business about which he testified, and Mr. Urso was copied on some produced emails." (Davis Decl., ¶ 21.) But conceivably every employee of Respondents could testify about their general business practices. That does not make them an appropriate witness to be disclosed pursuant to 46 C.F.R. § 502.141(b)(1) and Fed. R. Civ. P. 26(a)(1)(A). Witnesses with information related to the claims

and defenses is who is supposed to be disclosed. And as to Respondents' assertions that Mr. Urso was "copied on some emails" and reviewing documents in preparation for his deposition was not wasted time are red herrings. Respondents should have produced names of witnesses that had knowledge *about the Parties' dispute*, not just general information about Respondents' business or appeared on a random email. Regardless, Respondents themselves have not followed their own criteria for identifying relevant witnesses, as shown by their complete failure to include on either of their lists several important and central witnesses who were *authors and recipients of smoking gun emails*. Respondents were duty bound not to dupe Complainant into taking the deposition of a witness who Respondents themselves have removed from their witness list for a lack of pertinent information. The fact that Respondents has still failed to include critical witnesses shows that Respondents have yet to come clean with who is truly knowledgeable about the facts of this case.

As a result of Respondents listing unknowledgeable witnesses about the claims and defenses at issue and thereby causing a needless waste of time and expense to Complainant, Complainant respectfully requests that Respondents be ordered to pay the fees and costs incurred in preparing for and taking the deposition of Michael Urso, which are calculated as follows:

a. Sam Hecht (Prep Time, 12.50 hours + Taking, 6.00 hours = 18.50 hours x $350/hour = $6,475.00)

b. Court reporter appearance fee ($410.00)

c. Total for Urso ($6,885.00). (Davis Decl., ¶¶ 22-23.)

CONCLUSION

Respondent HSDG has willfully refused to produce documents and information relevant to Complainant's causes of action against Respondents and their own affirmative defenses. Based on the foregoing, Complainant respectfully moves the Presiding Officer for an order compelling

HSDG to produce documents and information responsive to OJC RFPs 9, 13, and 26, and OJC INT 9, reimburse Complainant for its expenses related to the deposition of Michael Urso in the amount of $6,885.00, and grant such further relief that the Commission deems just and proper.

Dated: May 16, 2022

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon Respondents' counsel of record, Wayne R. Rohde at wrohde@cozen.com and Kathryn Sobotta at ksobotta@cozen.com, by emailing a copy to each such person.

Dated: May 16, 2022

By: /s/ Aaron W. Davis
Aaron W. Davis