

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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OJ COMMERCE, LLC,

Complainant,

**DOCKET NO. 21-11**

v.

HAMBURG SÜDAMERIKANISCHE  
DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO KG

and

HAMBURG SUD NORTH AMERICA, INC.,

Respondents.

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**COMPLAINANT’S MOTION FOR CLARIFICATION  
OF THE PRESIDING OFFICER’S AUGUST 31, 2022 ORDER**

OJC respectfully requests the Presiding Officer clarify one aspect of her August 31, 2022 Order as it relates to OJC RFP 26, wherein the Court placed a timeframe limitation on the required responses:

Although the timeframe was limited for other requests, the timeframe for OJC RFP 26 was not limited in the prior order. **For consistency, the timeframe for responses to OJC RFP 26 is hereby limited to documents prior to January 1, 2021.**

(Order at 9 (emphasis added).) But OJC RFP 26 was not limited to documents prior to January 1, 2021. OJC RFP 26 requested “documents, communications and/or information from on or after January 1, 2020.”<sup>1</sup> (Hecht Decl. from Expedited Motion, Ex. 2 at 4, ¶ 1 and at 8, RFP 26.) And

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<sup>1</sup> Responsive documents from January 1, 2020 – January 1, 2021 would simply be historical data, not the information most relevant to OJC’s damages related to Respondents’ violations of the Shipping Act (retaliation, refusal to deal, and unreasonable practices).

importantly, the vast majority of OJC's damages in this case were caused *after* Respondents' retaliation and refusal to deal that occurred on or about May 4, 2021. (Verified Amended Complaint at 15, ¶¶ 42-43.) Therefore, documents on the spot market and contract rates after May 4, 2021 are the most relevant for purposes of damages, and the Court should clarify its order and remove its timeframe limitation from OJC RFP 26.

After meeting and conferring with Respondents' counsel about this issue, **Respondents agreed to produce documents responsive to OJC RFP 26 from after January 1, 2021.** But the pricing documents Respondents have produced – from both before and after January 1, 2021 – on their face clearly do not reflect the prices that Respondents really charged shippers. The documents themselves state that the listed prices do not include “Origin Charges, BAF, ISPS, and ECA.” (See, e.g., Complainant's Motion for Expedited Relief Filing, p. 205 of 336 (HS013466).) And although the pricing charts contain entries for BAF and ECA charges, the Origin Charges and ISPS charges are not included. Without this other information, OJC still does not have the full spot market rate pricing information for Respondents.

To further confuse the issue of what Respondents really charged shippers on the spot market, Respondents have repeatedly directed OJC, both in responses to requests for production and during meet and confers, to Respondents' public tariff website: “Respondent states that all non-contract rates can be found in its public tariff, available at <https://www.hamburgsud.com/en/ecommerce/tariffs-and-surcharges/ocean-tariff-overview/>”.

Respondents have represented that the website contains “exactly what is charged by HSDG to spot market shippers” and that “the website must do so by law.” But when the public tariff website is cross-checked against the documents that Respondents have produced, the two do not match up. Not even close. Indeed, to show the absurdity of the public tariff website, the rates for China to

Long Beach listed during September **2021** – the period of the highest spot market rates ever – are between **\$4000 - \$5000**, as compared to that same lane’s spot rates for **this week**, in September **2022**, they are are nearly **\$25,000**. As OJC knows from its own experience, spot market rates have been falling dramatically in the past several months. Respondents’ assertion that the website shows “exactly what is charged by HSDG to spot market shippers” is clearly not true.

As for service contract pricing, which was also responsive to OJC RFP 26, Respondents **still** have provided no service contract pricing at all. This information is also critical to calculating OJC’s damages concerning its claim that Respondents refused to deal and renew their service contract in May 2021.

It has now been **85 days** since this Court’s Order dated June 29, 2022 compelling HSDG to produce all documents responsive to OJC RFP 26. Respondents have failed to do so. Nor does the public tariff website contain the information. Respondents’ contempt has greatly prejudiced OJC because it has been unable to complete its damage analysis, take the remaining depositions with the documents on pricing and damage related subjects, and otherwise complete discovery. As a result, it would be entirely unfair and prejudicial if OJC was still required to file its brief, findings of fact, and appendix on October 10, 2022, as the schedule currently dictates.

OJC’s counsel has repeatedly conferred with opposing counsel over the past several months in an attempt to avoid raising this issue with the Court. Unfortunately, the pattern has been Respondents agree to produce documents at a later date, OJC finally gets and reviews the documents, they are insufficient and raise more questions than provide answers, and the process starts again, effectively running out the clock on discovery. Respondents have made a mockery of the Court’s Order and serial meet and confers with no resulting resolution only further prolongs the problem.

OJC therefore respectfully requests:

- the Court clarify its prior order to remove the timeframe limitation on OJC RFP 26 (which Respondents have already agreed to in principle),
- sanction Respondents by prohibiting them from challenging OJC's damages for Respondents' continued failure to produce all responsive documents on service contract and spot market rate pricing,
- if the Court does not sanction Respondents as requested, extend the discovery period at least 28 days from the date of the Court's Order so that OJC can complete its discovery, and
- extend the initial briefing deadline at least 28 days after the close of discovery so that OJC has time to prepare its filing with the FMC.

Dated: September 22, 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: September 22, 2022

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