FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

OJ COMMERCE, LLC, *Complainant* v. HAMBURG SÜDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO. KG AND HAMBURG SUD NORTH AMERICA, INC., *Respondents.*	**DOCKET NO. 21-11**

Served: August 31, 2022

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

ORDER ON RESPONDENTS' MOTIONS TO PARTIALLY DISMISS AND FOR A PROTECTIVE ORDER AND COMPLAINANT'S MOTION FOR EXPEDITED RELIEF

I. Introduction and Procedural Background

On July 26, 2022, Respondents Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft A/S & Co. KG ("HSDG") and Hamburg Sud North America, Inc. ("HSNA"), collectively "Hamburg," filed a motion to partially dismiss and/or for summary judgment ("Motion"). On August 10, 2022, Complainant OJ Commerce, LLC ("OJC") filed a memorandum of law in opposition to Respondents' motion ("Opposition"). On August 17, 2022, Respondents filed a reply to Complainant's opposition ("Reply").

On August 15, 2022, Complainant filed a request for expedited relief of discovery and confidentiality designation issues ("Expedited Motion"). On August 22, 2022, Respondents filed an opposition to Complainant's expedited motion ("Expedited Opposition").

On August 22, 2022, Respondents filed a motion requesting a protective order ("Protective Order Motion"). On August 24, 2022, Complainant filed a response and memorandum of law opposing Respondents' protective order motion ("Protective Order Opposition").

This proceeding began on December 13, 2021, when the Commission issued a notice of filing of complaint and assignment, indicating that OJC had filed a complaint against Hamburg. An amended complaint, filed on February 18, 2022, alleges that Hamburg violated 46 U.S.C. §§ 41102(c), 41102(b)(2), 41104(a)(3), 41104(a)(5), 41104(a)(9), and 41104(a)(10).[1] In their motion, Hamburg does not seek to dismiss the allegations in Sections 41102(c) and 41104(a)(3).

[1] The Amended Complaint was filed prior to the June 16, 2022, changes to the Shipping Act.

For the reasons set forth below, both Respondents' motion to dismiss and/or for summary decision and OJC's expedited motion are granted in part and denied in part. Respondents' motion for a protective order is denied. Each motion is addressed separately.

II. Motion to Dismiss or for Summary Decision

A. Arguments of the Parties

Respondents argue that OJC's claim under Section 41102(b)(2) is invalid; OJC's claims under Sections 41104(5) and 41104(9) are without merit; OJC's Section 41104(10) claim should be dismissed or, alternatively, summary judgment granted in favor of Respondents; and, HSNA should be dismissed as a respondent due to the lack of jurisdiction. Motion at 3-7.

Complainant contends that Respondents' argument for dismissal and/or summary judgment of OJC's Section 41104(10) claim entirely ignores known material facts that illustrate that Respondents unreasonably refused to deal with and retaliated against OJC and must be rejected; Respondents' motion should also be denied as the parties are still engaged in discovery during which more evidence in support of OJC's claims are likely to come to light; Respondents' repetitive motion regarding HSNA has already been denied by this Court and should be rejected again; and, the remainder of Respondents' motion should be denied as well. Opposition at 10-20.

B. Motion to Dismiss and Summary Decision Standards

Although the Commission's Rules do not explicitly provide for motions to dismiss, Commission Rule 12 states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules, to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. The "Commission looks to Federal Rule of Civil Procedure 12(b)(1) when considering dismissals based on lack of subject matter jurisdiction, and to Rule 12(b)(6) when considering dismissals based on failure to state a claim." *MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, Docket No. 16-16, 2020 FMC LEXIS 216, at *6 (FMC Oct. 29, 2020).

"When, as here, jurisdictional facts are intertwined with facts central to the merits of a claim, the Rule 12(b)(6) standard applies." *MAVL Capital*, 2020 FMC LEXIS 216, at *6 (citing *Kerns v. United States*, 585 F.3d 187, 192-93 (4th Cir. 2009)). "Under Fed. R. Civ. P. 12 (b)(6), the facts alleged are taken as true and all reasonable inferences are drawn in the complainant's favor." *MAVL Capital*, 2020 FMC LEXIS 216, at *6 (citing *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, Docket No. 12-02, 34 S.R.R. 35, 54, 2015 FMC LEXIS 43, at *36 (FMC Dec. 18, 2015)).

> 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).

Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., Docket No. 09-01, 32 S.R.R. 126, 136, 2011 FMC LEXIS 12, at *25-26 (FMC Aug. 1, 2011). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. The focus at this stage is not with whether a complainant can prevail on its claim, but whether it has adequately pled the claim. *Negron v. USAA Casualty Ins. Co.*, 2014 U.S. Dist. LEXIS 125179, at *5 (M.D. Tenn. 2014).

Summary decision, or summary judgment, is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FRCP 56(a). The Commission has emphasized that at the summary decision stage, "the role of the judge '. . . 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.'" *EuroUSA Shipping, Inc., Tober Group, Inc., & Container Innovations, Inc.*, Docket No. 06-06, 31 S.R.R. 540, 545 (FMC Dec. 18, 2008) (citation omitted). Even if summary judgment is technically proper, sound judicial policy and the proper exercise of judicial discretion permit denial of such a motion for the case to be developed fully at trial. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979); *In re Korean Air Lines Disaster*, 597 F. Supp. 613, 618 (D.D.C. 1984).

C. Discussion

1. Section 41102(b)(2)

Respondents assert that the "contract at issue in this case is a service contract between an ocean common carrier and a shipper, which is required to be filed under Section 40502 of the Shipping Act" and that because "the service contract is not required to be filed under Sections 40302 or 40305, the prohibition contained in Section 41102(b)(2) is not applicable to the service contract between OJC and HSDG, and thus no relief may be granted for any alleged violation of Section 41102(b)(2)." Motion at 4.

Complainant asserts that its "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." Opposition at 20.

Section 41102(b), titled "Operating Contrary to Agreement," states: "A person may not operate under an agreement required to be filed under section 40302 or 40305 of this title if . . . (2) the operation is not in accordance with the terms of the agreement or any modifications to the agreement made by the Federal Maritime Commission." 46 U.S.C. § 41102(b).

Previous proceedings have found that Section 41102(b) does not apply to contracts between shippers and ocean transportation intermediaries.

> Section 41102(b) provides that a "person may not operate under an agreement required to be filed under section 40302 or 40305." 46 U.S.C. § 41102(b). Sections 40302 and 40305 govern agreements "between or among ocean common carriers," "between or among marine terminal operators, or between or among

> one or more marine terminal operators and one or more ocean common carriers," and assessment agreements. *See* 46 U.S.C. § 40301. Neither Complainant nor Respondent is an ocean common carrier (vessel-operating-common carrier) or marine terminal operator. *See* 46 U.S.C. § 40102(18). The service contract referred to in this section is not the contract between individual consumers and NVOCC for a specific shipment but rather the contract between common carriers. Therefore, the provisions of section 41102(b) do not apply to the parties. Complainant's section 41102(b) allegation thus does not state a plausible claim for relief.

Dukart v. Ocean Star Int'l Inc., Docket No. 20-03, 2020 FMC LEXIS 149, at *25 (ALJ July 10, 2020) (Notice Not to Review, 8/11/20); *see also Muzorori v. Canada State Africa Lines Inc.*, Docket No. 1949(F), 2015 FMC LEXIS 46, at *13-15 (ALJ Dec. 23, 2015), *aff'd* Order Affirming Initial Decision (FMC July 14, 2016).

According to the amended complaint, this proceeding involves service contracts of a shipper with a common carrier and ocean transportation intermediary, not a contract between or among ocean common carriers. Amended complaint at 1-2. This type of service contract is not required to be filed under sections 40302 or 40305. Therefore, Respondents have established that, as a matter of law, Section 41102(b)(2) does not apply to the service contract at issue. Accordingly, OJC's claims under Section 41102(b)(2) are dismissed.

2. Sections 41104(a)(5) and 41104(a)(9)

Respondents assert that sections 41104(a)(5) and (9) apply to rates charged to different localities or ports and not to shippers within ports, so that these sections are inapplicable to this claim. Motion at 4-5. Complainant asserts that these sections are applicable to this proceeding and properly allege a violation of the Shipping Act. Opposition at 19-20.

Section 41104, titled "Common carriers," states that "(a) In General. A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not . . . (5) for service pursuant to a service contract, engage in any unfair or unjustly discriminatory practice against any commodity group or type of shipment or in the matter of rates or charges with respect to any port; [or] . . . (9) for service pursuant to a service contract, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any port." 46 U.S.C. § 41104(a).

Complainant points to *MCS Industries,* in which an Administrative Law Judge denied a motion to dismiss these sections. Opposition at 19-20 (citing *MCS Industries, Inc. v. MSC Mediterranean Shipping Co., SA,* Docket No. 21-05, Order on Motion to Amend Complaint and Motion to Dismiss (ALJ Feb 4, 2022)). The *MCS Industries* decision addressed a motion to dismiss filed prior to discovery which did not clearly articulate the objections to these sections. It is not binding on this proceeding.

The parties do not cite to any cases other than *MCS Industries* addressing this issue. The Senate Report accompanying the Ocean Shipping Reform Act of 1997 states:

New sections 10(b)(5) and (9) substantially increase the discretion given to common carriers to provide different service contract terms to similarly situated shippers. In addition to eliminating the current requirement in section 8(c) of the 1984 Act that ocean common carriers provide the same service contract terms to similarly situated shippers, the bill narrows the application of the prohibited acts with respect to service pursuant to common carrier service contracts. Sections 10(b)(5) and (9) of the 1984 Act, as amended by the bill, would restrict common carrier service contracting flexibility in only three, narrow, ways.

First, sections 10(b)(5) and (9) of the 1984 Act, as amended by the bill, would protect localities from unjust discrimination and undue or unreasonable preference, advantage, prejudice, or disadvantage as a result of common carrier service contracts. **The Committee intends the application of these prohibitions to a locality to be limited to circumstances in which the prohibited actions are clearly targeted at the locality, not to circumstances where the actions are targeted at a particular shipper or ocean transportation intermediary which happens to be associated with that locality**. An example of this would include a clear pattern of service contracting by a common carrier that imposes an unreasonable disadvantage on all shipments from a specific nation or region of a nation, including the United States. Second, the amendments made by this section would retain similar protections for ports from unjust discrimination and undue or unreasonable preference, advantage, prejudice, or disadvantage as a result of common carrier service contracts as currently exist under the 1984 Act through references to ports and localities. Third, the amendments made by this section would protect shippers and ocean transportation intermediaries from unjust discrimination and undue or unreasonable preference, advantage, prejudice, or disadvantage as a result of common carrier service contracts due to their status as shippers' associations or ocean transportation intermediaries.

The Committee intends the application of sections 10(b)(5) and (9) of the 1984 Act, as amended by the bill, with respect to protection for shippers' associations and ocean transportation intermediaries to be limited to circumstances in which the prohibited actions are clearly targeted at shippers' associations and ocean transportation intermediaries in general, not to circumstances where the actions are targeted at a particular shippers' association or ocean transportation intermediary. An example of such prohibited activity would include a clear pattern of unjustly discriminatory practices by a common carrier with respect to all shippers' association service contracts. The Committee expects the amendments to the 1984 Act by the bill will result in a much more competitive environment for ocean transportation rates and services. This environment should provide shippers' associations and ocean transportation intermediaries with more options when shopping for ocean transportation services and free common carriers to compete with each other to obtain shippers' associations and ocean transportation intermediaries as customers. Therefore, the Committee believes that shippers' associations and ocean transportation intermediaries require less protection as individuals in this more competitive marketplace. The Committee intends that common carriers be afforded the maximum flexibility to differentiate

> their service contract terms and conditions with respect to individual shippers and ocean transportation intermediaries in this more competitive environment. The Committee directs the FMC, and its successor, to focus the efforts of its limited enforcement resources, with respect to common carrier service contracts, on the most egregious examples of unjust discrimination and undue or unreasonable preference, advantage, prejudice, or disadvantage as a result of common carrier service contracting.

S. Rep. 61, 105th Cong., 1st Sess., p. 28 (1997) (emphasis added).

Section 41104(a)(5) applies to practices "against any commodity group or type of shipment or in the matter of rates or charges with respect to any port." 46 U.S.C. § 41104(a)(5). The complaint does not identify any "commodity group" or any "type of shipment." The complaint does raise issues about practices regarding rates or charges but does not indicate that the practices are targeted to a specific port. Rather, it appears that the alleged conduct was targeted at a particular shipper. It therefore does not appear that the allegations would fit within the requirements of this section.

Section 41104(a)(9) applies to practices "with respect to any port." 46 U.S.C. § 41104(a)(9). The complaint does not indicate that the alleged undue or unreasonable preference or advantage or prejudice or disadvantage were targeted at a specific port. Rather, it appears that the conduct was targeted at a particular shipper. It therefore does not appear that the allegations would fit within the requirements of this section.

Respondents have established that, as a matter of law, Sections 41104(a)(5) and 41104(a)(9) do not apply to the practices alleged in the amended complaint. Accordingly, OJC's claims under Sections 41104(a)(5) and 41104(a)(9) are dismissed. It is noted that OJC's claims under Sections 41102(c) (unreasonable practices) and 41104(a)(3) (retaliation) were not raised in Respondents' motion and remain pending.

3. Section 41104(a)(10): Refusal to Deal

Respondents assert that they did not refuse to deal or negotiate with OJC, and that because "HSDG was willing to do business with OJC other than under a service contract and offered to do so, OJC's claim that there was an unreasonable refusal to deal or negotiate should be dismissed." Motion at 6. Complainant focuses its opposition on defending the refusal to deal claim, raising a number of factual arguments in support of the claim. Opposition at 10-17.

Section 41104, regarding "Common carriers" states that "(a) In General. A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not . . . (10) unreasonably refuse to deal or negotiate, including with respect to vessel space accommodations provided by an ocean common carrier." 46 U.S.C. § 41104(a)(10).

The amended complaint alleges an unreasonable refusal to deal with OJC when Respondents "refused to renew Complainant's service contract and forced Complainant into the spot market for virtually all its shipments." Amended Complaint at 18. To determine whether Hamburg refused to deal with OJC and therefore violated the Shipping Act will require determination of contested facts. The complaint plausibly raises the issue and Respondents have

not established that this claim should be dismissed as a matter of law. The parties are in the process of conducting discovery and may further develop the factual record. Because material facts are disputed, this claim cannot be summarily dismissed.

4. Jurisdiction over HSNA

Respondents argue that HSNA must be dismissed because it was not a common carrier, marine terminal operator, or ocean transportation intermediary, but rather an agent, and therefore the Commission has no jurisdiction over HSNA. Motion at 7. OJC responds that this issue has already been raised and denied, and that they have not completed discovery on this issue. Opposition at 18.

This issue was squarely raised and previously denied in this proceeding. "The amended complaint alleges that Hamburg 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 Hamburg NA." Order on Motion to Amend Complaint and Motion to Dismiss at 4. Respondents' motion is repetitive and is denied. Moreover, the parties contest material facts regarding whether or not HSNA operated as an ocean transportation intermediary. Therefore, summary decision is also not appropriate.

5. Conclusion

For the reasons identified above, the claims of violations of Sections 41102(b)(2), 41104(a)(5), and 41104(a)(9) are dismissed. The claims of violations of Sections 41102(c) (unreasonable practices), 41104(a)(3) (retaliation), and 41104(a)(10) (refusal to deal) remain pending. Therefore, it is necessary to address the other pending motions.

III. Pending Motions

A. Complainant's Motion for Expedited Relief

OJC requests 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.

Expedited Motion at 1-2.

1. Confidential Designations

Complainant asserts that Respondents improperly classified as "attorney's eyes only" TransPacific Eastbound ("TP EB") Spot Market Rate emails from September 20, 2019, to September 14, 2020, arguing that the information is no longer highly confidential and that their prosecution of the proceeding is hindered by being unable to share them with their client. Expedited Motion at 3-4.

Respondents contend that documents relating to pricing and pricing strategy are highly confidential and sensitive, even if historic, but that "Respondents are prepared to work with OJC to reach an accommodation that would enable OJC's personnel to use the spot rate information contained in Exhibit #1 to the Motion for purposes of calculated alleged damages." Expedited Motion Opposition at 8.

"Under Fed. R. Civ. P. 26(c)(1)(G), the court may, for good cause, issue a protective order to require that 'a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way,'" and once "the party requesting that its trade secrets only be revealed in a specified way has met its initial burden, the burden then shifts to the party seeking unrestricted disclosure to establish that such disclosure is relevant and necessary to the action" and then finally, "the court must balance the need of the party seeking discovery of the trade secrets and confidential information against the opposing party's claim of injury resulting from the disclosure." *Layne Christensen Co. v. Purolite Co.*, 271 F.R.D. 240, 248-49 (D. Kan. 2010); *see also Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 2012 U.S. Dist. LEXIS 176346, at *6-7 (E.D. Cal. Dec. 11, 2012).

The D.C. Circuit has held that "district courts must evaluate three criteria when considering a request for a protective order seeking to restrict attorney-client consultation: '"the harm posed by [disclosure] must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on attorney-client relations."' *Doe v. District of Columbia*, 697 F.2d 1115, 1120 (D.C. Cir. 1983) (quoting *In re Halkin*, 598 F.2d 176, 191 (D.C. Cir. 1979)); *see also Broidy Capital Mgmt. LLC v. Muzin*, 2022 U.S. Dist. LEXIS 98241, at *13 (D.D.C. June 2, 2022).

Here, the spot market rates reflect pricing and pricing strategy and are the type of information that may be highly confidential. However, this information is also highly relevant to the claims in this proceeding, including to the damages calculation, and the client would benefit from being able to discuss this information with its attorney. Complainant is not a competitor of Respondents and so this does not require releasing competitively sensitive information to a competitor. Moreover, the requested rates typically are updated weekly and the rates at issue are two years old or older. Given the length of time since the rates were in effect and the need

established by Complainant, the TP EB Spot Market Rate emails from September 20, 2019, to September 14, 2020, will not be treated as attorney's eyes only, although they may still be treated as confidential. In addition, any additional spot market rate emails that are provided in discovery and are less than two years old will remain as attorney's eyes only as they are more recent and therefore more competitively sensitive. Complainant's request is therefore granted.

2. Responses to OCJ's RFP 26

Complainant asserts that Respondents have not produced all the documents ordered by the Order on Motion to Compel, issued June 29, 2022, including pricing documents from January 1, 2020, to the present. Expedited Motion at 5-6. OJC requests that Respondents be ordered to provide the documents and held in contempt for violating the order by striking any challenge to OJC's damage claims. Expedited Motion at 6.

Respondents contend that OJC failed to meet and confer regarding this issue; that relevant documents were produced; and that the discovery request may be resolved between the parties. Expedited Opposition at 6-7.

OJC's RFP 26 was previously addressed:

> OJC RFP 26 requests documents showing pricing, including how prices are determined and why prices may vary between shippers. Respondents state that "prices vary among customers based on a number of factors, including the volume committed in a particular trade lane and in other trade lanes." Opposition at 9. This request will be narrowed to 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. Respondents will not be required to review or provide documents regarding pricing for individual shippers. So, for example, the negotiations with individual shippers would not be disclosed but an email with information about pricing on a specific route must be disclosed. Accordingly, OJC RFP 26 is compelled as limited.

Order on Respondents' Motion to Compel and Revised Schedule at 4.

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. The parties are hereby ordered to consult with each other regarding outstanding discovery requests including OJC RFP 26. Respondents are instructed to provide the discovery which has previously been ordered, and warned that failure to do so may result in sanctions, including directing facts to be established, prohibiting claims or defenses, striking pleadings, or dismissing claims or defenses. 46 C.F.R. § 502.150(b). Respondents are again ordered to provide complete responses to OJC RFP 26 and all responsive documents must be provided within seven calendar days of the date of this order.

3. Attorney Work Product Designations

Complainant asserts that work product privilege should be denied for emails inadvertently disclosed on or around May 3, 2022, arguing that "[n]either 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." Expedited Motion at 7. OJC also contends that Respondents have waived any work product protection and that OJC has a "substantial need" for the material. Expedited Motion at 8.

Respondents allege that the "two emails in question were appropriately redacted to protect information prepared in anticipation of litigation and protected by the work product doctrine" and that emails are eligible for work product protection even if they are between non-attorneys. Expedited Opposition at 3-4. Respondents further contend that there was no waiver and they redacted the two emails to protect only "portions containing the 'mental impressions, conclusions, opinions, or legal theories' of Respondent's representative concerning the anticipated litigation as permitted by Fed. R. Civ. P. 26(b)(3)(B)." Expedited Opposition at 5-6.

The attorney work product doctrine "is designed to balance the need of the adversary system to promote an attorney's preparation against society's general interest in revealing all facts relevant to the resolution of a dispute." *In re Sealed Case*, 856 F.2d 268, 273 (D.C. Cir. 1988). "Opinion work product includes notes, legal memoranda, and other materials that taken from client and witness interviews reveal the mental processes of the attorney." *Alexander v. F.B.I.*, 198 F.R.D. 306, 313 (D.D.C. 2000). "The purpose of the work product doctrine is to protect an attorney's mental processes so that the attorney can analyze and prepare for the client's case without interference from an opponent." 6 Moore's Federal Practice - Civil § 26.70 (2022).

If the attorney work product protection doctrine applies, "the party seeking discovery may obtain the materials only on showing (1) substantial need of the materials in preparation of the party's case, and (2) that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." 6 Moore's Federal Practice - Civil § 26.70 (2022). An "example of materials for which a 'substantial need' often exists are contemporaneous statements taken from, or made by, parties or witnesses. Such statements are unique in that they provide an immediate impression of the facts." *Id.* "'Opinion work product,' i.e., documents containing the attorney's mental impressions, conclusions, opinions, or legal theories, are either absolutely protected, or require a much higher showing before production will be ordered." *Id.*

Here, Respondents have not established that the emails at issue involve attorney work product. Respondents state that the emails involved "Respondent's representative" but does not contend these representatives were attorneys or legal representatives. Rather, the emails appear to demonstrate contemporaneous employee statements. There is no indication that the emails include attorney's mental impressions, conclusions, opinions, or legal theories. Therefore, the emails are not entitled to the attorney work product protections. Complainant's request to remove attorney work product protection from the two emails in question is therefore granted.

4. Skou and Jany Depositions

OJC seeks an order compelling Respondents to produce A.P. Moller-Maersk A/S ("Maersk") CEO Soren Skou and CFO Patrick Jany for depositions. Expedited Motion at 9-11. These depositions are the subject of Respondents' motion seeking a protective order and are addressed below.

B. Respondents' Motion for a Protective Order

Respondents filed a motion seeking a protective order prohibiting OJC from taking the depositions of Maersk CEO Soren Skou and CFO Patrick Jany. Protective Order Motion at 1. Respondents argue that the notices of depositions are invalid as A.P. Moller-Maersk A/S is not a party to this proceeding; senior executives are protected from depositions; OJC cannot satisfy the apex doctrine test; and, the depositions are harassment. Protective Order Motion at 2-6.

Complainant asserts that Respondents' arguments belie the testimony of their witnesses and their own document production, as Skou and Jany have unique information directly relevant to Respondents' defenses; Respondents' allegation that "[t]he depositions are harassment" is pure fiction; and Respondents' have distorted the meet and confer process to run out the clock on discovery. Protective Order Opposition at 2-8.

On September 28, 2012, the Commission issued revised rules of practice and procedure which sought to "modernize and more closely conform them to the current version of the [Federal Rules of Civil Procedure] and to encourage focused and expeditious use and completion of discovery." 77 Fed. Reg. 61519-61535 (FMC Docket 11-05). The 2012 revision of the Commission's Rules imposed limitations on discovery and required initial disclosures and disclosures of expert reports. In Commission proceedings, parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense" and for good cause, "the presiding officer may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at hearing if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." 46 C.F.R. § 502.141(e)(1).

The Commission Rules allow the presiding officer to "limit the frequency or extent of discovery otherwise allowed by these rules." 46 C.F.R. § 502.141(e)(2). "The Commission or presiding officer may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." 46 C.F.R. § 502.141(j)(1). "It is fundamental that the scope of discovery is not limitless and is restricted by the concepts of relevancy." *American President Lines, Ltd. v. Cyprus Mines Corp.*, Docket No. 91-27, 26 S.R.R. 1227, 1234 (FMC Jan. 31, 1994). In addition, pursuant to Commission Rules, "[a]fter making every reasonable effort to resolve discovery disputes, a party may request a conference or rulings from the presiding officer on such disputes." 46 C.F.R. § 502.141(i)(2).

Complainant contends that the depositions of Maersk CEO Soren Skou and CFO Patrick Jany are relevant because of statements made by them such as "record profits" "due to significant increase in container freight rates" during the "exceptional market conditions" and financial documents which list Skou and Janey as contacts for further information. Protective Order Opposition at 1-2. These general statements about the company's financial position do not establish that that Skou or Janey have information relevant to decisions made about OJC or this particular service contract.

OJC presents deposition testimony of Hamburg's Senior VP that "pricing decisions at the end of the day came from Maersk's trade management." Protective Order Opposition at 3. It appears, therefore, that Maersk's trade management have relevant information regarding

financials, pricing, and damages, at least for the period after September of 2020. However, it is not clear who at Maersk would have this information.

The statements by the Maersk CEO Soren Skou and CFO Patrick Jany refer to general trends and not necessarily the Complainant or the particular trade routes at issue here, and therefore will not be required at this time. However, Respondents are hereby ordered to identify Maersk management who would have information regarding pricing decisions. If appropriate Maersk witnesses are provided, then the depositions of Maersk CEO Soren Skou and CFO Patrick Jany will not be required. However, if appropriate witnesses at Maersk are not identified and provided for deposition, then the depositions of Maersk CEO Soren Skou and CFO Patrick Jany will be permitted. Even if Maersk were considered a non-party, if their managers have relevant information then their testimony can be subpoenaed. Respondents must identify appropriate witnesses and within seven calendar days of the date of this order agree on a date and time for their depositions. Respondents' motion for a protective order is therefore denied.

Because this request can be decided on the basis of relevance, the question of whether or not the apex doctrine applies to Commission proceedings does not need to be addressed. The apex doctrine shields certain high-ranking officials from being deposed, however not all circuits have adopted it. For example, the DC Circuit states that it "has recognized that 'high-ranking *government* officials are generally not subject to depositions unless they have *some* personal knowledge about the matter and the party seeking the deposition makes a showing that the information cannot be obtained elsewhere.'" *Zimmerman v. Al Jazeera Am., LLC*, 329 F.R.D. 1, 6-7 (D.D.C. 2018) (citing *Sourgoutsis v. United States Capitol Police*, 323 F.R.D. 100, 114 (D.D.C. 2017)) (emphasis in original).

IV. Order

Upon consideration of the record herein, the arguments of the parties, and the conclusions and findings set forth above, it is hereby

ORDERED that Respondents' motion to dismiss and/or for summary decision be **GRANTED IN PART AND DENIED IN PART** and that OJC's claims under Sections 41102(b)(2), 41104(a)(5), and 41104(a)(9) be **DISMISSED**. It is

FURTHER ORDERED that OJC's motion seeking expedited relief is **GRANTED IN PART AND DENIED IN PART** as outlined above. It is

FURTHER ORDERED that Respondents' motion seeking a protective order be **DENIED**.

Erin M. Wirth
Chief Administrative Law Judge