

**BEFORE THE
FEDERAL MARITIME COMMISSION**

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

RESPONDENTS' MOTION FOR PROTECTIVE ORDER

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August 22, 2022

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REV Group, Inc. v. Scheuler,
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Scott v. Chipotle Mexican Grill, Inc.,
306 F.R.D. 120 (S.D.N.Y. 2015)3

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A.P. Moller-Maersk A/S. <https://www.maersk.com/about/executive-board>1

<https://ml-eu.globenewswire.com/Resource/Download/9135269a-6909-4fac-a06f-11fc0b222a97>, p. 1211, 2

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

RESPONDENTS' MOTION FOR PROTECTIVE ORDER

Pursuant to 46 C.F.R. §§502.141(j), Respondents Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft A/S (“HSDG”) and Hamburg Sud North America, Inc. (“HSNA”), through counsel, hereby move for a protective order prohibiting Complainant OJ Commerce, LLC (“OJC”) from taking the depositions of Soren Skou and Patrick Jany pursuant to the Notices of Deposition purportedly served on August 18, 2022, as well as pursuant to any subpoenas that may be sought in the future. The reasons supporting this motion are set forth below.

I. Background

Messrs. Skou and Jany are the Chief Executive Officer and Chief Financial Officer, respectively, of A.P. Moller-Maersk A/S. <https://www.maersk.com/about/executive-board>. As noted in the 2021 Annual Report of A.P. Moller-Maersk, that entity comprises more than 790 companies. <https://ml-eu.globenewswire.com/Resource/Download/9135269a-6909-4fac-a06f->

[11fc0b222a97](#), p. 121. Maersk A/S, which operates as an ocean common carrier, is but one of those 790 companies. *Id.* Neither Mr. Skou nor Mr. Jany are employees of Maersk A/S, HSDG, or HSNA. Even if Mr. Skou or Mr. Jany were employees of Maersk A/S (which they are not), then because of the level at which they operate, neither of these individuals will have any information relevant to the claims in this proceeding, as Respondents' counsel have repeatedly told OJC's counsel.

II. Argument

A. The Notices of Deposition Are Invalid

Because A.P. Moller-Maersk A/S is not a party to this proceeding, the notices of deposition are invalid.

OJC elected to file its Complaint against Respondents, not A.P. Moller-Maersk A/S (which is not an ocean common carrier and is not subject to Commission jurisdiction). Given that Maersk A/S (an ocean common carrier subsidiary of A.P. Moller-Maersk A/S) acquired Respondents, however, Respondents' counsel has cooperated with OJC's counsel and produced relevant documents from Maersk A/S and has made relevant employees of Maersk A/S' subsidiaries available for deposition – without the necessity of third-party subpoenas.

A.P. Moller-Maersk A/S is not a party to these proceedings and any attempt to depose employees of A.P. Moller-Maersk A/S would necessitate third-party subpoenas. Any such subpoenas would need to be served in Denmark in accordance with applicable law.

On August 18, 2022 – while their Motion for Emergency Relief was pending – OJC's counsel purported to notice the depositions of Messrs. Skou and Jany. These notices are invalid and improper for the reasons set forth above, and Respondents respectfully request an order precluding OJC from deposing Messrs. Skou and/or Jany pursuant to the notices or otherwise.

B. Senior Executives Are Protected From Depositions

In addition to being protected against the invalid notices of deposition, Messrs. Skou and Jany are protected against deposition generally.

Requests to depose high level corporate officers are commonly referred to as ‘apex’ depositions. *Chick-Fil-A, Inc. v. CFT Dev., LLC*, Case No. 5:07-cv-501-OC-10GRJ, 2009 WL 928226, at *1 (M.D. Fla. Apr. 3, 2009). Courts generally restrict parties from deposing high-ranking officials because (by virtue of their position) they are vulnerable to numerous, repetitive, harassing, and abusive depositions, and therefore need some measure of protection from the courts.” *REV Group, Inc. v. Scheuler*, 8:19-CV-2411-T-36AAS, 2020 WL 7426180, at *1 (M.D. Fla. Jan. 15, 2020) (internal quotations omitted); *Harapeti v. CBS Television Stations Inc.*, 2021 WL 3932424, *2 (S.D. N.Y. 2021) (“unless the executive has unique evidence, personal knowledge of the claims at issue, and other witnesses are incapable of providing testimony about the conduct alleged, executives are safeguarded from depositions.”); *Iowa Pub. Employees’ Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 17 CIV. 6221 (KPF), 2020 WL 6273396, at *1 (S.D.N.Y. Aug. 28, 2020) (“Even if Plaintiffs demonstrated that [CEO]’s testimony would be relevant, they have failed to establish that it is warranted under the apex doctrine, pursuant to which doctrine ‘[c]ourts have recognized an additional layer of protection for senior corporate executives subject to depositions.’” (quoting *Scott v. Chipotle Mexican Grill, Inc.*, 306 F.R.D. 120, 122 (S.D.N.Y. 2015))).

Courts “have fashioned a test that requires the party seeking the deposition of a CEO to show that the executive has unique or superior knowledge of discoverable information.” *Skytruck Co., LLC v. Sikorsky Aircraft Corp.*, No. 2:09-cv-267-FtM-99SPC, 2011 WL 13141023, at *1 (M.D. Fla. May 11, 2011) (internal quotation marks and citations omitted). A party seeking an apex deposition bears the burden of demonstrating (1) “an executive has unique knowledge of

the issues in the case” or (2) “the information sought has been pursued unsatisfactorily through less intrusive means.” *Goines v. Lee Mem’l Health Sys.*, 2:17-CV-656-FTM-29CM, 2018 WL 3831169, at *4 (M.D. Fla. Aug. 13, 2018); see also *Sun Cap. Partners, Inc. v. Twin City Fire Ins. Co.*, 310 F.R.D. 523, 527 (S.D. Fla. 2015).

“The party seeking the deposition of the high-ranking official has the burden to show that the deposition is necessary.” *Sun Cap. Partners*, 310 F.R.D at 527. To meet this burden, a party first must show it has sought the relevant information through other means and that it cannot be obtained through other depositions or written discovery. *Bradley v. Lorillard Tobacco Corp.*, 8:13-CV-227-T-30AEP, 2014 WL 12628519, at *2 (M.D. Fla. June 25, 2014); *Sher v. Raytheon Co.*, 8:08-CV-889-T-33AEP, 2010 WL 11507786, at *3 (M.D. Fla. Mar. 10, 2010).

C. OJC Does Not And Cannot Satisfy The Apex Doctrine Test

Again, even if Messrs. Skou and Jany were employees of Maersk A/S (which they are not), because of the level at which they operate, Messrs. Skou and Jany do not have any information relevant to the claims in this proceeding, as counsel for Respondents has repeatedly told counsel for OJC.

OJC has not and cannot satisfy the apex doctrine test described above. The sole basis for claiming that these individuals need to be deposed are the dubious assertions that they possess a “treasure trove” of information based on general statements made in quarterly earnings calls. OJC Motion for Emergency Relief (“Emer. Motion”) at 10-11. A closer examination of the alleged relevance of the statements in question shows that they are general statements about trends relating to A.P. Moller-Maersk A/S, the ocean transportation industry, and the global economy. None of the statements support a conclusion that either individual has unique knowledge about the issues in this proceeding, and none of them reflect information that isn’t available from numerous other sources.

For example, of the four statements made by Soren Skou, two relate to corporate revenue (public information) and rate trends (information that is either public or available from other sources). A third statement is forward-looking statement regarding capacity deployment that OJC attempts to twist in a manner that is contradicted by documents produced in this proceeding. *See*, Exhibit #1 to Emer. Motion, page HS013490. The fourth statement relates to consumer spending patterns, is very general, is public information, and is readily available from other sources.

The statement by Mr. Jany relates to freight rates and cargo volumes, again information that is public and/or available from other sources.

Even if OJC's characterizations of the public statements by Messrs. Skou and Jany were accurate (which they are not), the information contained in these statements is not held solely by these two individuals. Information about Respondents' revenues, vessel capacity, market demand, rate levels, and cargo volumes are available through other sources (e.g., public sources, written discovery requests, and depositions of other individuals). Moreover, none of the information is directed related to the issues in this proceeding or held exclusively by these individuals.

OJC has not demonstrated, and cannot demonstrate, that the two senior executives it seeks to depose have a "unique knowledge of the issues in the case" or that "the information sought has been pursued unsatisfactorily through less intrusive means." *Goines v. Lee Mem'l Health Sys.*, *supra*. Likewise, OJC cannot demonstrate that the depositions are necessary. *Sun Cap Partners*, *supra*.

Accordingly, a protective order precluding the depositions of these two individuals pursuant to the notices of deposition or otherwise should be issued.

D. The Depositions Are Harassment

Not only is OJC unable to show the depositions are necessary, the facts demonstrate that OJC's attempts to depose these two individuals are nothing more than "tit for tat" harassment.

Counsel for Respondents served notices of the depositions of two OJC employees, Simon Hecht and Jason Glover, on August 3, 2022, at approximately 5:56 p.m. See Exhibit #1 hereto.¹ Less than three hours later, at 8:52 p.m. on August 3, counsel for OJC requested deposition dates for Torben Svenningsen and James Russell Bruner. See Exhibit #2 hereto. The next day, counsel for Respondents informed OJC counsel that these two individuals were with a company entirely unrelated to this case, but offered to provide (and subsequently did provide) contact information for counsel for that company.² In response, counsel for OJC also requested contact information for Messrs. Skou and Jany. See Exhibit #3. The fact that OJC counsel began seeking the depositions of high-ranking officials immediately after receiving notices for the depositions of two OJC employees shows the true motivation behind the request is harassment.

III. **Meet and Confer**

As demonstrated by Exhibit 10 to OJC's Motion for Emergency Relief, Respondents attempted to confer with OJC's counsel by requesting information about the topics to be covered in the depositions or to Respondents' suggestion that the parties consider stipulating to facts in lieu of depositions. OJC's counsel never responded to Respondents' August 10 email. Respondents received the Notices of Deposition on August 18 and late that day proposed a meet and confer for Friday, August 19, or the morning of Monday, August 22. Late on Friday, August 19, counsel for OJC proposed a meet and confer on the afternoon of Monday, August 22.

¹ Simon Hecht is OJC's accountant and Jason Glover is OJC's Operations Director. Based on their positions, and their involvement in the communications between OJC and Respondents produced in discovery thus far, both individuals appear to have relevant information.

² There is no indication that OJC will be deposing Mr. Svenningsen or Mr. Bruner.

Despite good faith efforts to meet and confer, the parties were unable to meet and confer live prior to the filing of this Motion. However, they did exchange further emails on the subject on August 22nd. Counsel for both parties are of the view that that a live meet and confer on the issue of these depositions would have been futile.

IV. CONCLUSION

For all of the foregoing reasons, a protective order prohibiting OJC from taking the depositions of Messrs. Skou and Jany pursuant to the notices of deposition or subpoena should be issued.

Respectfully submitted,

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(305) 415-3443

Dated: August 22, 2022

EXHIBIT 1

Rohde, Wayne

From: Muaddi, Jawad B. <jawad.muaddi@morganlewis.com>
Sent: Wednesday, August 3, 2022 5:56 PM
To: Aaron Davis; Sam Hecht
Cc: Rohde, Wayne; Marston Jr., David W.; Sobotta, Kathryn; Ferraro, Jenna C.; Rachelle M Barstow
Subject: Notices of Deposition -- Jason Glover and Simon Hecht
Attachments: Notice of Deposition - Jason Glover.pdf; Notice of Deposition - Simon Hecht.pdf

****EXTERNAL SENDER****

Counsel:

Attached are the notices of deposition for Jason Glover and Simon Hecht.

Jawad

Jawad B. Muaddi

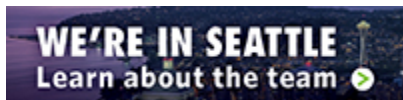
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EXHIBIT 2

Rohde, Wayne

From: Aaron Davis <davis@valhallalegal.com>
Sent: Wednesday, August 3, 2022 8:52 PM
To: Rohde, Wayne; david.marston@morganlewis.com
Cc: jawad.muaddi@morganlewis.com; Sobotta, Kathryn; Rachelle M Barstow; Sam Hecht
Subject: OJC v. Hamburg (FMC No. 21-11) - Depositions

****EXTERNAL SENDER****

Counsel,

Please provide dates for the depositions of the following individuals:

- Torben Svenningsen, Chief Commercial Officer at Maersk Line, Leesburg, Virginia
- James Russell Bruner, Chief Executive Officer at Maersk Line, Miami, Florida

Regards,
Aaron W. Davis, Esq.
VALHALLA LEGAL, PLLC
Phone: (763) 957-2397
davis@valhallalegal.com

EXHIBIT 3

Rohde, Wayne

From: Aaron Davis <davis@valhallalegal.com>
Sent: Thursday, August 4, 2022 12:27 PM
To: Rachelle M Barstow; Rohde, Wayne; david.marston@morganlewis.com
Cc: jawad.muaddi@morganlewis.com; Sobotta, Kathryn; Sam Hecht
Subject: Re: OJC v. Hamburg (FMC No. 21-11) - Depositions

****EXTERNAL SENDER****

Rachelle,

Please provide that information. Let us know if that contact is also the same for the following witnesses:

- Søren Skou; and
- Patrick Jany.

Thank you,
Aaron W. Davis, Esq.
VALHALLA LEGAL, PLLC
Phone: (763) 957-2397
davis@valhallalegal.com

From: Rachelle M Barstow <rachelle.barstow@maersk.com>
Sent: Thursday, August 4, 2022 9:28 AM
To: Aaron Davis <davis@valhallalegal.com>; Rohde, Wayne <WRohde@cozen.com>; david.marston@morganlewis.com <david.marston@morganlewis.com>
Cc: jawad.muaddi@morganlewis.com <jawad.muaddi@morganlewis.com>; Sobotta, Kathryn <KSobotta@cozen.com>; Sam Hecht <sam@hechtlawpa.com>
Subject: RE: OJC v. Hamburg (FMC No. 21-11) - Depositions

Aaron,

Please note that Messrs. Bruner and Svenningsen are with Maersk Line, Limited ("MLL"). MLL is a separate company within the Maersk group of companies that operates US flag vessels and carries US government cargo. MLL has absolutely nothing to do with Hamburg Sud or your client. If however you still wish depose Messrs. Bruner and Svenningsen, we can provide you with contact information for MLL's general counsel.

Thanks,
Rachelle

From: Aaron Davis <davis@valhallalegal.com>
Sent: Wednesday, August 3, 2022 8:52 PM
To: Rohde, Wayne <WRohde@cozen.com>; david.marston@morganlewis.com
Cc: jawad.muaddi@morganlewis.com; Sobotta, Kathryn <KSobotta@cozen.com>; Rachelle M Barstow <rachelle.barstow@maersk.com>; Sam Hecht <sam@hechtlawpa.com>
Subject: OJC v. Hamburg (FMC No. 21-11) - Depositions

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Counsel,

Please provide dates for the depositions of the following individuals:

- Torben Svenningsen, Chief Commercial Officer at Maersk Line, Leesburg, Virginia
- James Russell Bruner, Chief Executive Officer at Maersk Line, Miami, Florida

Regards,

Aaron W. Davis, Esq.

VALHALLA LEGAL, PLLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of August, 2022, the foregoing Respondents' Motion for Protective Order was served via electronic mail on:

Shlomo Y. Hecht
sam@hechtlawpa.com

and

Aaron Davis, Esq.
davis@valhallalegal.com



Wayne R. Rohde