BEFORE THE
FEDERAL MARITIME COMMISSION

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

RESPONDENTS' OPPOSITION TO
COMPLAINANT'S MOTION FOR EXPEDITED RELIEF

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August 22, 2022

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Respondents Hamburg Südamerikanische Dampfschifffahrtts-Gesellschaft A/S ("HSDG") and Hamburg Sud North America, Inc. ("HSNA"), through counsel, hereby oppose the Motion for Expedited Relief ("Motion") filed by Complainant OJ Commerce, LLC ("OJC").

I. INTRODUCTION

The Motion seeks premature and unnecessary judicial intervention in routine discovery disputes that OJC has failed to address through the required "meet and confer" procedure. The Motion contains statements and allegations that are at best misleading and at worst untrue. The Motion is also devoid of legal merit and exceeds the page limitation contained in the regulations. Accordingly, the Motion should be denied.

II. ARGUMENT

A. OJC's Counsel Failed to Meet and Confer with Respondents' Counsel

Under 46 C.F.R. §502.71, any non-dispositive motion must be discussed with the other party prior to the filing of same. Contrary to the certification contained in the Motion, OJC's counsel did not meet and confer with Respondents' counsel in good faith concerning the discovery disputes that are the subject of the Motion.

Prior to the filing of the Motion, OJC's counsel did not express any concern, raise any question, or request any discussion of: (i) the completeness of Respondents' response to OJC's RFP 26; (ii) Respondent's designation of information produced in response thereto as "Attorneys' Eyes Only"; or (iii) Respondents' claw-back of certain documents produced in discovery on the grounds of the work product doctrine. Finally, although there was an exchange of emails about OJC's request to depose Messrs. Skou and Jany, OJC's counsel never responded to Respondents' August 10 email request for 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. Accordingly, any "meet and confer" that may have occurred – *via email* – with respect to OJC's request for those depositions cannot be considered to have been conducted in good faith on the part of OJC's counsel.

Because it is a requirement under Commission regulations to discuss a non-dispositive motion, and because OJC's counsel failed to comply with this requirement, the entire Motion should be dismissed as non-compliant with the regulations and premature.

B. Messrs. Skou and Jany Should Not Be Deposed

During the pendency of the Motion, OJC served notices of deposition of Soren Skou and Patrick Jany. These depositions should not be permitted.

OJC elected to file its Complaint against Respondents. Given that Maersk A/S acquired Respondents, however, Respondents' counsel have cooperated with OJC's counsel and produced relevant documents from Maersk A/S and have made relevant employees of Maersk A/S' subsidiaries available for deposition – without the necessity of third-party subpoenas.

Messrs. Soren Skou and Patrick Jany are the Chief Executive Officer and Chief Financial Officer, respectively, of Maersk A/S' parent company, A.P. Moller-Maersk A/S. Neither Mr. Skou nor Mr. Jany are employees of Maersk A/S. Even if these individuals were employees of Maersk A/S (which they are not), 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. Moreover, 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. On August 18, 2022 – while the instant Motion 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 in the accompanying Motion for Protective Order, which is incorporated by reference herein.

C. Respondents Have Properly Asserted the Work Product Doctrine

OJC's challenge to Respondents' assertion of the work product doctrine is baseless. The two emails in question were appropriately redacted to protect information prepared in anticipation of litigation and protected by the work product doctrine. This is clear from the very cases that OJC cited in its Motion. "The work product doctrine applies to '(1) a document or tangible thing, (2) that was prepared in anticipation of litigation, and (3) was prepared by or for a party, or by or for his representative.'" *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 73-74 (S.D.N.Y. 2010) (cited in Motion at 7-8). The emails in question were not prepared in the "ordinary course of business" as OJC argues. Motion at 7. Rather, they were prepared

specifically in response to a threat of litigation received from OJC's counsel. The following description of the emails on Respondent's privilege log confirms this:

> Confidential communication among representatives of Respondent — following receipt of letter from counsel for Claimant threatening to file a breach of contract action in court — containing mental impressions, conclusions, legal theories and opinions of Respondent's representatives about the threatened litigation.

Exhibit #4 to Motion. Tellingly, in its Motion, OJC omits – with an ellipsis – this critical part of the privilege log description confirming that the emails were prepared in anticipation of litigation. Motion at 7 (omitting "following receipt of letter from counsel for Claimant threatening to file a breach of contract action in court").

Furthermore, the cases cited by OJC in the Motion confirm that the emails are eligible for work product protection even though they "appear to be between non-attorneys." See *Gucci America*, 271 F.R.D. at 74 (cited in Motion at 7) ("Unlike the attorney-client privilege, the work product doctrine does not require that the documents be prepared at the behest of counsel, only that they be prepared 'because of' the prospect of litigation."); *Stern v. O'Quinn*, 253 F.R.D. 663, 674 (S.D. Fla. 2008) (cited in Motion at 8) ("the mere fact that some, or even all, of the O'Quinn and Investigation Materials may have been prepared by [non-attorneys] does not mean that such Materials do not enjoy the protections of the work-product doctrine, provided that the Materials otherwise qualify for work-product protection."); *Auto Owners Insur. Co. v. Totaltape, Inc.*, 135 F.R.D. 199, 201 (M.D. Fla. 1990) (cited in Motion at 7) ("The work product doctrine protects from disclosure materials prepared in anticipation of litigation by or for a party or that party's representative (including its attorney)."). This is equally clear from the Advisory Committee Notes to Fed. R. Civ. P. 26(b)(3), which state that the work product doctrine extends "not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of

litigation or preparation for trial by or for a party or any representative acting on his behalf." Advisory Committee Notes, 1970 Amendment (emphasis added).

While OJC correctly notes that work product materials may be discoverable if a "party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means," Fed. R. Civ. P. 26(b)(3)(B) states that "[i]f the Court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative." Respondent redacted the two emails in compliance with this provision of the rule. The redactions were strictly limited to 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).

Finally, there was no waiver of the work product doctrine and Respondent has not used the work product doctrine as a "sword and a shield" as OJC contends. During its document collection efforts, Respondent took appropriate steps to identify and withhold information protected by the attorney-client privilege and/or the work product doctrine. The Amended Confidentiality Stipulation and Protective Order (the "Protective Order") entered by the Presiding Officer at the joint request of the parties confirms that "[i]nadvertent disclosure shall not be deemed as a waiver of any privilege or exemption in accordance with the provisions on inadvertent disclosure in the Federal Rules of Civil Procedure and Federal Rules of Evidence." Protective Order ¶ 14.[1] Contrary to OJC's argument, Respondent has not attempted to use the

[1] On August 5, 2022, Respondent's counsel gave notice of the inadvertent production of these two emails and requested that OJC return or destroy all copies of the emails as required by paragraph 15 of the Protective Order. Respondent's counsel gave OJC's counsel replacement copies of the emails (redacting the information protected by the work product doctrine) and a privilege log with respect to the redactions. Inexplicably and in violation of the Protective Order, OJC included with its Motion unredacted copies of the emails that should have destroyed a week earlier pursuant to the Protective Order. Declaration of

work product doctrine as "a sword and a shield." Motion at 8. For that doctrine to apply, a party must affirmatively use privileged information in support of its claims or defenses (as a sword) while at the same time protecting other privileged information (as a shield). *Stern*, 254 F.R.D. at 677 ("it is simply not fair to allow a party to wield the work-product protection as a sword to cut out the heart of an opposing party's case while simultaneously brandishing it as a shield from disclosure of any Achilles heels"). Here, Respondent is not using any information protected by the attorney-client privilege or the work product doctrine as a sword in support of its defenses (and OJC cites no such information in its Motion).

Accordingly, Respondents respectfully requests that the Judge deny OJC's Motion.[2]

D. A Finding of Contempt and Sanctions Is Inappropriate

OJC seeks an order holding Respondents in contempt for allegedly failing to produce documents responsive to RFP 26, and seeks an order striking any challenge to OJC's damages claims. This is unwarranted. As noted above, OJC has failed to meet and confer with Respondents regarding this issue. The first inkling Respondents had with respect to OJC's concern about the response to RFP 26 was when they read the Motion.

Moreover, OJC's characterization of Respondents' production is extremely misleading. Respondents did not produce a "single document" (Motion at 5) in response to RFP 26 as OJC claims. Respondents produced a single pdf file containing numerous documents, all of which

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Shlomo Y. Hecht, Exs. 6 & 7. OJC's counsel refused to withdraw the emails even though the sole case they cite in support of their position makes clear that "before a district court may engage in *in camera* review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that in camera review may yield evidence that establishes the exception's applicability." *United States v. Zolin*, 491 U.S. 554, 574 (1989). Respondents reserve their rights, including the right to seek sanctions, with respect to this blatant violation of the Protective Order.

[2] OJC has also requested a privilege log identifying documents withheld on the basis of privilege or work product. Respondents are preparing their log and will provide it to OJC's counsel shortly. Respondents similarly requested that OJC's counsel produce a privilege log.

can be found at Exhibit #1 to the Motion. This production is not a "single document." Moreover, contrary to the assertion of OJC's counsel, pages HS013468 through HS013497 consist of "policies, procedures, guidance, training or instructions regarding pricing for shipping or determining prices charged for shipments under service contracts…" as contemplated by the Presiding Officer's June 29, 2022 Order. OJC has seriously mischaracterized Respondents' production.

Finally, OJC counsel seriously misrepresents the testimony of Matthew Hill. Mr. Hill did not testify that emails establishing HSDG spot rates are sent every week. He testified that he receives and retains emails setting forth the Shanghai Container Freight Index spot rate. *See* Transcript of Deposition of Matthew Hill, pages 74-80, attached hereto as Exhibit #1. In other words, the emails over which OJC's counsel expresses incredulity are from an entirely different source and contain an entirely different type of information than those produced by Respondents and found in Exhibit #1 to the Motion.

There is approximately one month remaining in discovery in this proceeding. If OJC's counsel confers with Respondents' counsel as they are required to do, counsel for Respondents believe OJC's concerns regarding the fulsomeness of the response to RFP 26 can be resolved or at least narrowed without the need for the intervention of the Presiding Officer. Should such intervention later be needed, the Presiding Officer would have the benefit of the parties' having attempted to resolve or at least narrow the issues before they are presented for resolution.

Under the foregoing circumstances, a finding of contempt is inappropriate and there is no basis to sanction Respondents. Accordingly, the Motion should be denied with respect to these requests.

E. The Motion for Redesignation of AEO Materials Should Be Denied

The Motion for re-designation of certain materials that Respondents have labelled "Attorneys' Eyes Only" or "AEO" should be denied. Respondents have designated documents produced in response to OJC's discovery requests as AEO (*see* Exhibit #1 to Motion). Documents relating to pricing and pricing strategy are highly confidential and sensitive, even if historic. *U.S. ex rel. Daugherty v. Bostick Lab'ys*, No. 1:08-CV-354, 2013 WL 3270355, at *6 (S.D. Ohio June 26, 2013)(court found that applying AEO designation to information going back two years from the date of the order reasonably protected defendants' competitive interests). Accordingly, the designation is appropriate.

As was the case with other issues raised in the Motion, the first indication that OJC had any objection to the designation was the filing of the Motion. Thus, OJC has failed to confer with Respondents as required by FMC regulations.

OJC also overstates the significance of the spot rate emails produced by Respondents and included in Exhibit #1 to the Motion. OJC claims that the AEO designation precludes OJC's non-attorney personnel from fully calculating damages based on the difference between the services contract rates OJC claims it should have had and the spot market rates. Motion at 4-5. This assertion is puzzling, given the fact that the spot rate information produced covers the period from the fall of 2019 to the fall of 2020, whereas OJC is attempting to calculate damages for the allegedly wrongful non-renewal of its contract beyond May 31, 2021.

Having said this, and without prejudice to their position, 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, without prejudice to Respondents' position that the information is not relevant to any such calculations.

For the foregoing reasons, the Motion to re-designate the AEO materials should be denied.

III. CONCLUSION

For the foregoing reasons, the Motion should be denied.

Respectfully submitted,

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Dated: August 22, 2022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of August, 2022, the foregoing Respondents' Opposition to Complainant's Motion for Emergency Relief was served via electronic mail on:

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and

Aaron Davis, Esq.
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Wayne R. Rohde

EXHIBIT 1

customers?

A The short term rate is an indicator of market rate for short term business.

Q And what do you mean by short term rates?

A It is a spot business, short term business, business that is not contracted on an annual or longer basis.

Q And how do you determine the spot rate?

A I do not determine the spot rate.

Q How do you know what the spot rate is?

A I do not know what the spot rate is.

Q So, the spot rate is not taken into consideration when determining the price in a contract?

A The spot rate is taken into consideration for short term business. It is an indication of where the market is trending. But it is not taken specifically -- it is not a lead indicator for what we do for pricing long term business.

Q So, when you determine the price on an annual contract, do you take the spot rate into consideration at all?

A Not the specific number, no.

Q Do you take it in any other way aside from a specific number into consideration?

A Yes.

Q How so?

A Again as a market indicator, strength or weakness of market.

Q So, you take the spot rate to determine whether the market is weak or strong at that point when the contract is signed?

A Correct.

Q And I guess a high spot rate will increase -- will indicate that the market is strong?

A Typically, yes.

Q A low spot rate will indicate that the market is weak?

A Yes.

Q So, you take the spot rate into consideration when determining the pricing on a contract?

A Yes, it is taken into consideration.

Q Okay. How do you obtain the spot rate?

A Through third party indexes.

Q Can you elaborate please what this third party indexes are?

A Primarily the SCFI.

Q Do you know what SCFI stands for?

A Yes.

Q What is the -- what is SCFI stands for?

A Shanghai Containerized Freight Index.

Q And does that index breakout of spot rates by geographic region?

A Yes.

Q And how do you obtain these indexes? Is it electronic or paper format?

A It is electronic, internally electronically.

Q Is it like an e-mail that you receive on a regular basis?

A Yes.

Q How frequently you get those e-mails?

A Each week.

Q And every week you get an e-mail from the SCFI that breaks down the spot rates on all geographic regions or only a certain geographic regions?

A Only on certain geographic locations.

Q Does it include the Asian Pacific route to North America?

A Yes.

Q So, every week you get an updated index for that throughout while the spot rate is?

A Correct.

Q And what do you do with those e-mails? Do you save them somewhere in the system?

A I read them.

Q Okay. And after you read them, do you

discard them?

A No, I do not delete them.

Q So, you have e-mails and all those SCFI indexes that you received?

A I cannot comment definitively if I have all of the e-mails, but I read them and I do not delete them.

Q Do you know if you receive those SCFI indexes back in 2019?

A I do not recall.

Q Do you have a reason to believe that you did not receive them in 2019?

A No specific reason, but I do not recall.

Q Have you decided contracts rates back in 2019?

A I am sorry. Have I -- you said have I decided?

Q Yeah. Has you and your team made a determinations about contractual rates back in 2019?

A Yes.

Q Have you taken into consideration spot rates

and making decisions for contracts back in 2019?

A Potentially, I do not recall specifically though.

MR. ROHDE: Counsel, before you ask your next

question. We could, maybe, we discuss a lunch break and the timing of that?

MR. HECHT: Sure. I had in mind about 1:00, but if you want to take a lunch break within the next few minutes, that is fine with me as well. What is -- what do you have in mind?

MR. ROHDE: Matt, it is entirely up to you. How do you feel?

THE WITNESS: Yeah, I am fine with one. So if we go and conclude prior to one, I am fine with that.

MR. HECHT: Okay.

MR. ROHDE: Okay.

MR. HECHT: Are we still on the record?

THE COURT REPORTER: We are on the record, Mr. Hecht.

Q (By Mr. Hecht) Okay. Mr. Hill, do you recall ever receiving spot rates in any other format other than the SCFI indexes e-mails that you mentioned before?

A I do not recall specifically, no.

Q Okay. Do you have any reason to believe that you previously received the spot rates in a different format?

A No, I do not have reason to believe that I

received in other format.

Q Do you have reason to believe that you deleted any e-mail that you received back in 2019 containing the SCFI index spot rates?

A No, I do not have reason to believe that I deleted it.

Q Okay. Do you recall receiving spot rates SCFI indexes about spot rates back in 2020?

A No, I do not recall specifically.

Q Do you have any reason to believe that you did not receive SCFI indexes containing spot rates in 2020?

A No.

Q Do you recall getting SCFI index e-mails back in 2020, 21?

A I do not recall specifically, no.

Q Do you have any reason to believe that you did not receive e-mails in 2021 containing SCFI index spot rates?

A No, I do not.

Q Okay. Have you been asked by any member of

your team to produce SCFI index spot rates in this litigation?

A No, not that I recall.

Q Have you been asked to produce any documents

in this litigation?

A Yes.

Q What kind of documents were they?

A Strategic documents related to contract season preparation.

Q Strategic documents related to contract preparation?

A Contract season preparation.

Q Contract season preparation. And have you produced those documents that you are requested?

A Yes, I have.

Q How many documents have you produced?

A I do not recall specifically, but I would not guess more than a few three to five.

Q In what format are those documents that you produced?

A I believe e-mail and PowerPoint.

Q So, they were all electronic files?

A That is correct, yes.

Q What is the date of those documents that you produced? When were they authored?

A I do not recall specifically when they were authored.

Q The approximate date when they -- do you know the approximate date when they were authored?