BEFORE THE
FEDERAL MARITIME COMMISSION

OL USA, LLC, Complainant, v. MAERSK A/S, Respondent.	)	DOCKET NO. 24-11

MAERSK'S MOTION TO DISMISS OL USA CLAIMS FOR LOST REVENUES AND DEMURRAGE/DETENTION

Respondent, MAERSK A/S ("MAERSK"), respectfully submits this motion pursuant to 46 CFR Secs. 502.70 and 502.150(b) for an Order: (A) dismissing Complainant, OL USA, LLC's ("OL USA's"), claims against MAERSK for loss of business, loss of revenue, loss of profits, demurrage and detention for failure to comply with the Order on Motion to Compel and Amended Scheduling Order served on June 14, 2024 and (B) barring OL USA from using or relying on any documents not produced by OL USA on or before June 17, 2024.

STATEMENT OF MATERIAL FACTS

I. OL USA's ALLEGED DAMAGES.

OL USA's Verified Complaint, dated February 9, 2024, makes the following allegations with respect to its claimed economic damages:

(A) OL USA purchased the five (5) subject containers from HONOUR LANE SHIPPING ("HLS") for $32,500.00 in response to HLS's demand (¶ 21);

(B) Unspecified lost profits (¶28)

(C) Detention/per diem charges on the five (5) containers totaling $583,585.00 (¶¶ 29-32, 34);

(D) Storage costs for one (1) container in the amount of $1,910.00 (¶ 33); and

(E) Unspecified monetary damages, financial harm and deprivation of property as a result of OL USA's alleged inability to access MAERSK's public Tariff (¶¶ 43, 45, 48).

OL USA's Initial Disclosures, dated March 22, 2024 (Exhibit "A" hereto) pursuant to Sec. 502.141 (Exhibit "A," Sec. 11, p.3) do not contain a statement of estimated damages, but refers to its Rule 26 statement of damages served in the related action pending in the United States District Court for the Southern District of New York ("SDNY action"). OL USA's Rule 26 Initial Disclosures in the SDNY action (Exhibit "B" hereto) includes a damages statement for: (A) $32,500.00 for the alleged payment to HLS to purchase the containers; (B) $677,024.00 in "detention/demurrage" charges on the five (5) containers "based on MAERSK's rates; and (C) unspecified "lost profits." (Exhibit "B, Sec. C, p. 3). Like OL USA's Initial Disclosures (Exhibit "A") served in this action, its Rule 26 Initial Disclosures (Exhibit "B") in the SDNY action contain no computation or estimate of its alleged "lost profits" claim. *Id.*

As discussed below, OL USA contends its detention/demurrage claim against MAERSK is not based on OL USA's own Tariff rates. Rather, according to OL USA, MAERSK should have to pay MAERSK's own Tariff detention/demurrage rates to OL USA. OL USA has produced no Tariff provision, service agreement or other contract document supporting its detention/demurrage claim against MAERSK, or any evidence that MAERSK agreed to pay demurrage/detention charges to OL USA, or any evidence that OL USA has sustained actual damages equivalent to its $677,024.00 detention/demurrage claim against MAERSK.

II. THE JUNE 14, 2024 ORDER ON MOTION TO COMPEL.

In response to MAERSK's motion to compel OL USA's discovery responses filed on June 6, 2024, the ALJ served an Order on Motion to Compel and Amended Scheduling Order on June 14, 2024 ("June 14 Order") (Exhibit "C" hereto). The June 14 Order (Exhibit "C")

recites that OL USA did not comply with the June 3, 2024 deadline for the Complainant to respond to MAERSK's March 14, 2024 discovery requests and complete OL USA's document production. The June 14 Order notes OL USA's representation that it "will complete production of documents and respond to interrogatories by June 17, 2024." The June 14 Order directs OL USA to "provide responses to the remaining outstanding requests for documents and interrogatories by June 17, 2024" (Exhibit "C").

The June 14 Order further directs MAERSK to submit copies of its March 14, 2024 Document Requests and Interrogatories propounded to OL USA. MAERSK complied by filing a Supplement to Motion to Compel on June 19, 2024 annexing its March 14, 2024 Document Requests and Interrogatories to OL USA together with OL USA's Responses to same (Exhibit "D" hereto).

III. OL USA'S NON-COMPLIANCE WITH THE JUNE 14 ORDER ON MOTION TO COMPEL.

Pursuant to the June 14 Order (Exhibit "C"), on June 17, 2024 OL USA served Responses to MAERSK's March 14, 2024 Document Requests and unsworn Responses to Interrogatories (Exhibit "D"). OL USA's late Responses to MAERSK's Document Requests and unsworn Responses to Interrogatories: (A) fail to produce responsive documents for numerous categories of MAERSK's Requests; (B) provide no meaningful disclosure of how the Complainant calculates its alleged "lost profits" damages and (C) fail to produce any documents evidencing specific lost shipping business or revenues related to the five (5) subject containers.

Despite the June 14 Order's: (A) June 17 deadline for OL USA's service of fully responsive answers to MAERSK's March 14, 2024 Document Requests and Interrogatories, including OL USA's "**Completion of Document Production**;" (B) July 17, 2024 deadline to commence fact depositions; and (C) August 28, 2024 deadline for the close of discovery, OL

USA's June 17 Responses (Exhibit "D") answer numerous MAERSK discovery requests with the recitation that the Complainant will produce additional materials at some indeterminate future date of its choosing. Specifically, OL USA's June 17 Responses answer MAERSK Document Request Nos. 3 through 18 and Interrogatory No. 8 as follows: "OL USA ***will produce***...responsive documents...***after*** a diligent search and a reasonable inquiry" (Exhibit "D," MSK-024 through MSK-028 (emphasis added).

A. MAERSK's Document Requests.

MAERSK's Document Request Nos. 1 through 18 (Exhibit "D," MSK-023 through MSK-028) seek OL USA's following records:

(A) Request No. 1 for OL USA's Tariff: The Complainant's Tariff is potentially relevant to its claim for detention/per diem charges claim and OL USA's NVOCC role. OL USA references its Tariff published at www.dpisusa.com which MAERSK has reviewed;

(B) Request No. 2 for OL USA/MAERSK Service Agreements: Responsive service agreements are potentially relevant to the detention/demurrage per diem charges claim. OL USA states it has no responsive service agreements, which should preclude them as a basis for the detention/demurrage claim by OL USA against MAERSK;

(C) Request No. 3 for OL USA's shipping documents relating to the five (5) subject containers: The documents are relevant to developing the underlying facts alleged in the Verified Complaint respecting OL USA's relationship with HLS and role in the shipments, its relationship with the Savannah drayage carriers allegedly involved in OL USA's wrongful return of the empty containers to the Georgia Ports Authority marine terminal and OL USA's alleged efforts to recover the containers;

(D) Request Nos. 4 and 5 for OL USA/HLS agreements and communications relating to the five (5) subject containers: Same as (C) above;

(E) Request Nos. 6-12 for OL USA's records reflecting its communications with MAERSK and other parties involved in the shipments: Same as (C) above;

(F) Request No. 13 for OL USA's documents reflecting any payment to HLS for the containers: OL USA produced a receipt for its alleged $32,500.00 payment to HLS, but has produced no other documents identifying or substantiating any other financial loss attributable to the five (5) containers;

(G) Request Nos. 14-16 for OL USA's documents relating to its claims for lost cargo bookings, loss of business, loss or revenue, loss of profits and any mitigation efforts: OL USA answered it "will produce" responsive documents. However, OL USA has still produced no estimate, computation, documentary or other evidence substantiating any specific loss of bookings or revenues relating to the five (5) subject containers. Instead, on June 20, 2024, OL USA produced two (2) Excel summaries identified as Bates Nos. OL-269 and OL-270 (Exhibit "E" hereto) purportedly listing 2022 China/U.S. import shipments transported by other steamship carriers on which OL USA allegedly realized an "average profit" of $2,249.45 per 40-foot container (Exhibit "E," MSK-049). Aside from the fact that the latter summaries (Exhibit "E") are unsupported by any underlying documents used or relied on to create them, they contain no evidence of any specific loss of business, revenues or profits, let alone any quantifiable loss attributable to the five (5) subject containers; and

(H) Request Nos. 17 and 18 for OL USA's documents reflecting its efforts to access MAERSK's Tariff and investigation of any alleged MAERSK Shipping Act violation: These documents are directly relevant to OL USA's core claim of a Shipping Act violation by MAERSK.

To recap, OL USA has served complete responses to MAERSK Document Requests Nos. 1, 2 and 13 and availed itself of an open extension of time to produce documents

responsive to MAERSK's other 15 Document Requests. OL USA's Responses to OL USA's Request Nos 3-12 and 14-18 state that it "will produce" the requested documents at some unspecified date that now lies well beyond the June 14 Order's June 17, 2024 deadline for OL USA to complete its documents production (Exhibit "C").

A. MAERSK's Interrogatories.

MAERSK's Interrogatories 7 and 8 (Exhibit "D," MSK-036 and MSK-037) request OL USA to set forth the details of its claims for loss of business revenues and profits, including: (A) the dates and customers involved; (B) dollar amounts of alleged losses; (C) the mathematical formula used by OL USA to calculate its alleged losses and (D) supporting documents. OL USA's Responses to MAERSK's Interrogatory Nos. 7 and 8 reference the $32,500.00 it allegedly paid to HLS for the five (5) containers. OL USA's Interrogatory Responses Nos. 7 and 8 also vaguely contend it "could have used [the containers] for shipments or sold them" and that its lost profits "can be calculated by multiplying the number of trips inbound, the number of containers, and the extra margin."

As to the Complainant's claimed economic losses, OL USA fails to identify any specific shipment, voyage, trip or container with respect to which it lost specific customer cargo bookings or revenues. OL USA offers no excuse why it cannot, or will not, state its "lost profits" claim as a dollar amount. Significantly, OL USA fails to identify or produce any contemporaneous communications or other documents reflecting a single cancelled booking or other loss of business as a result of any of the five (5) subject containers being unavailable, or even a specific loss stemming from any shortage in OL USA's container inventory, if it has one.

In sum, OL USA fails to provide any estimate, computation, calculation or formula for determining its claimed loss of business revenue or profits. With respect to OL USA's China import shipment summaries (Exhibit "E") produced late on June 20, these

documents provide no method to determine how OL USA allegedly uses trip data, Bills of Lading, freight bills, container quantities or "extra margins" to calculate identifiable economic loss related to the five (5) subject containers. Furthermore, OL USA fails to produce any underlying data or documents that it supposedly used or relied on to prepare the summaries (Exhibit "E"). The summaries (Exhibit "E") should be barred, not only because they were produced late after the June 17 deadline, but also because they fail to comport with the evidence rules governing data summaries requiring production of underlying documents and data. Sec 502.204(a) Fed. R. Evid. 1006.

Lastly, OL USA's non-production of the documents and data it used to create the summaries (Exhibit "E") is also a failure to respond to MAERKS's Interrogatory Nos. 7(E) and 8(B) that request all documents the Complainant relied on or referred to in responding to those Interrogatories (MSK-036 & MSK-037). OL USA's discovery obstruction has severely prejudiced MAERSK's defense by impeding depositions and MAERSK's further preparation of required submissions.

IV. OL USA'S RESPONSE TO MAERSK'S SUPPLEMENT.

On June 26, 2024, OL USA filed a Response (Exhibit "F") to MAERSK's June 19, 2024 Supplement (Exhibit "D"). OL USA's June 26 (Exhibit "F") Response contains the following admissions and contentions: (A) "OL USA has produced all damages related documents in its possession and sufficiently explained the basis for lost profits…;" (B) "OL USA's lost profits claim is ***primarily supported by testimonial evidence***" purportedly given *ex parte* by the Complainant's President, Mr. Alan Baer, to CADRS during the June 21, 2024 mediation; (C) for the first time OL USA argues that it incurred an unspecified loss as a result of unspecified "other carriers' discounts" that the Complainant presumably could have applied to

the subject containers; (D) all evidence of such losses is "within the possession, custody and control of MAERSK" and (E) "MAERSK has all the documents and information it needs to understand and assess OL USA's lost profits claim" (Exhibit "F," ¶¶ 1-2). OL USA's contentions are incomprehensible.

OL USA's June 26 Response (Exhibit "F") abandons any pretense of continuing a "diligent search and a reasonable inquiry" for documents supporting its lost profits claim, as it promised to do only eleven (11) days earlier on June 17 (Exhibit "D"), or that OL USA "will produce" additional responsive documents. OL USA declares that MAERSK has "all the documents and information it needs" and OL USA has nothing more to produce because "OL USA's lost profits claims **primarily supported by testimonial evidence"** (emphasis added). In other words, OL USA is glad to talk about its lost profits claim, but cannot put a dollar sign on the claim, explain how it does so or document any discrete loss of revenue. OL USA fails to identify what documents it contends MAERSK has relating to "other carriers' discounts" or how those documents disclose OL USA's alleged revenue losses relating to the five (5) subject containers.

Enough is enough. OL USA's claim for illusory and unsubstantiated lost profits, loss of business, and loss of revenue should be barred under Sec. 502.150 (b)(2) for its failure to comply with MAERSK's discovery demands (Exhibit "D") and the June 14 Order (Exhibit "C").

V. OL USA'S DISCOVERY DEFAULT UNFAIRLY PREJUDICES MAERSK

It is apparent that OL USA has no meritorious claim for any actual provable loss of business, revenues or profits.

Pursuant to the June 14 Order (Exhibit "C") and MAERSK's Notice of Deposition served on June 28, 2024 (Exhibit "G" hereto) the depositions of OL USA's

designated fact witnesses were tentatively scheduled to begin on July 17, 2024, but adjourned at OL USA's request. To date, however, not only has OL USA failed to produce any estimate or computation of its claimed financial losses, it has not produced the documents and information itemized above (pages 4-7) requested in MAERSK's outstanding discovery demands (Exhibit "D") Lacking OL USA's "complete" document production mandated by the June 14 Order (Exhibit "C") to be finished by June 17, OL USA MAERSK cannot conduct meaningful depositions of OL USA's representatives. MAERSK should not be compelled to depose the Complainant's witness multiple times while OL USA dribbles out documents at its discretion.

To mitigate further prejudice to MAERSK, it is respectfully submitted that OL USA should be barred pursuant to Sec. 502.150(b)(2) from relying on or producing responsive to MAERSK's Document Requests and Interrogatories (Exhibit "D") be produced after June 17 deadline. MAERSK further respectfully requests an Order pursuant to Sec. 502.150(b)(2) and 502.150(b)(3) barring OL USA from supporting and dismissing all claims for loss of business, revenue, profits and container demurrage or detention based on the Complainant's failure to produce any relevant agreements, shipping orders, cancelled bookings, container inventories or other documents supporting those claims or documents underlying its import shipment summaries (Exhibit "E").

OL USA may contend, again, that MAERSK has all the documents it needs to understand the Complainant's lost profits claim. As discussed below, the federal courts reject this excuse for discovery non-compliance. OL USA has failed to provide a computation of the amount of its lost profits claim and timely produce all documents supporting the calculation. Therefore, MAERSK should not have to waste its resources taking meaningless or multiple depositions of the Complainant with respect to claims for which OL USA has not complied with Sec. 502.150.(b) and the June 14 Order (Exhibit "C").

LEGAL ARGUMENTS

VI. THE RELEVANT LEGAL AUTHORITIES SUPPORT DISMISSAL OF OL USA'S LOSS OF REVENUE AND DEMURRAGE/DETENTION CLAIMS.

(A) OL USA's Burden of Proof on Damages.

The Administrative Procedure Act requires an administrative law judge to issue an order based on... reliable, probative, and substantial evidence." 5 U.S.C § 556(d); *Steadman v. SEC,* 450 U.S. 91, 102 (1981).

To prevail under the Shipping Act, a complainant bears the burden of proving its allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Maher Terminals, LLC v. Port Auth. of N.Y. & NJ,* FMC Docket No. 08-03, 2014 FMC LEXIS 35, at *41 (FMC Dec. 17, 2014). Under the preponderance standard, a complainant must show that its allegations are more probable than not. *Crocus Investments, LLC v. Marine Transport Logistics,* Docket No. 15-04, 2021 FMC LEXIS 125, at *4 (FMC Aug. 18, 2021).

Pursuant to the Shipping Act, reparations may only be awarded for actual damages. 46 U.S.C. § 41305(b). "Actual damages" means "compensation for the actual loss or injuries sustained by reason of the wrongdoing." *Tractors & Farm Equip. Ltd v. Cosmos Shipping Co., Inc.,* 26 S.R.R. 788, 798 (ALJ 1992) [citing *California Shipping Line, Inc. v. Yangming Marine Transport Corp.,* 25 S.R.R. 1213, 1230 (FMC 1990)]. Damages evidence may not be based on mere speculation. *Waterman Steamship Corp. v. General Foundries Inc.,* Docket No. 93-15, 26 S.R.R. 1173, 1180, 1993 FMC LEXIS 73, at *40 (ALJ Dec. 9, 1993), adopted in relevant part, 26 S.R.R. 1424, 1994 FMC LEXIS 19 (FMC June 13, 1994).

Actual damages mean "compensation for the actual loss or injuries sustained by reason of the wrongdoing" which complainants must show to a reasonable degree of certainty.

Cal. Shipping Line, Inc. v. Yangming Marine Transport Corp., FMC No. 88-15, 1990 WL 427466, at *23 (FMC Oct. 19, 1990); *Rose Intl. Inc. v. Overseas Moving Network,* FMC No. 96-05, 2001 WL865708, at *76 (FMC June 7, 2001).

The complainant has the burden to prove damages "to a reasonable degree of certainty." *California Shipping Line, Inc. v. Yangming Marine Transport Corp.,* Docket No. 88-15, 25 S.R.R. 1213, 1230 (FMC Oct. 19, 1990) [holding that complainant's "proof is so speculative and conjectural that it lacks the requisite degree of certainty"); *Eden Mining Co. v. Bluefield Fruit & S.S. Co.,* 1 U.S.S.B. 41 (1922) [declining to award reparations because shipper's failure to obtain preferred rates does not "ipso facto establish [] the fact of their injury and the amount of their damage"];

Damages must be based on a reasonable approximation supported by evidence and by reasonable inferences. *Tractors & Farm Equipment Ltd. v. Cosmos Shipping Co.,* FMC No. 81-57, 26 S.R.R. 788, 798-799 (ALJ Nov. 23, 1992), admin. final, Dec. 31, 1992. Section 41305(b) provides that the Commission "shall direct the payment of reparations to the complainant for actual injury caused" by a Shipping Act violation if the claims were brought within the three-year time period for filing a complaint. 46 U.S.C. § 41305(b); § 4301(a). Complainants bear the burden of proving that they are entitled to reparations. *Yakov Kobel v. Hapag-Lloyd A.G.,* FMC No. 10-06, 2014 WL 25316331, at *13 (FMC July 30, 2014).

The Commission has held: (A) damages must be the proximate result of a statutory violation; (B) there is no presumption of damage; and (C) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation. *James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist.,* FMC Docket No. 94-32, 2003 WL 22067203, at *7-8 (FMC Aug. 26, 2003) [quoting *Waterman v. Stockholms Rederiaktiebolag Svea,* 3 F.M.B. 248, 249 (1950)].

Establishing a Shipping Act violation 'alone does not justify reparations. A complainant must prove that it sustained a pecuniary loss as a result of the unlawful act. *Yakov Kobel,* 2014 WL 531633 I, at *13. "Reparations will only be awarded based on actual damages." *Yakov Kobel,* 2014 WL 5316331, at* 14 [citing *Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co.,* Inc., FMC No. 81-57, 1992 FMC LEXIS 86, at *59-60 (ALJ Nov. 23, 1992) (admin. final Dec. 31, 1992)].

Applying the above standards warrants dismissing OL USA's unfounded lost profits claim and its capricious demurrage/detention claim. These claims are unsupported by any evidence of actual lost shipping business service agreement or Tariff. OL USA's claims cannot possibly meet the "actual damages" standard established by the controlling statutory and decisional law. They should be dismissed.

(B) <u>OL USA's Loss of Revenue Claim Should be Dismissed.</u>

A legion of federal court precedents support dismissal of OL USA's claim for lost profits or revenues based on its failure to provide an estimate or computation of its alleged damages. In a benchmark decision, *Design Strategy, Inc. v. Davis*, 469 F.3d 287, 297 (2d Cir. 2006), the Second Circuit Court of Appeals held that the District Court properly excluded evidence of plaintiff's lost profits claim as a discovery sanction under Rule 37(c)(1) because the plaintiff failed to satisfy its obligation pursuant to Rule 26.

In *Pilitz v. Inc. Vill. of Freeport,* 2020 U.S. Dist. LEXIS 221462 (E.D. N.Y. 2020) the District Court addressed the arguments advanced by OL USA and precluded the plaintiff from introducing compensatory damages at trial for failing to provide computation of damages:

> Plaintiffs argue, among other things, that they have produced sufficient documents related to damages....[and] "lost opportunities for towing

> revenue and repair revenue, and resulting profit, need only be approximated to stand"...
>
> However, documents alone do not constitute a "computation" as required under Rule 26(a).... ("Put. imply, damages computations and the documents supporting those computations are two different things."); *Design Strategy* [citations omitted] In any event, even considering the documents Plaintiffs produced, they still provide an insufficient basis to compute damages.
>
> As the Second Circuit noted in *Design Strategy*, a party's failure to comply with Rule 26(a) is "especially troubling" when the requesting party specifically requests a calculation of damages, as Defendants repeatedly did here Plaintiffs make no attempt to justify their failure, and this Court is unable to discern a reason from the record. *Id.* at *8-12.

In *Spotnana, Inc.* v. *Am. Talent Agency, Inc.*, 2010 U.S. Dist. LEXIS 86457, (S.D. N.Y. 2010), the District Court granted an *in limine* motion precluding damages evidence for failure to comply with the Rule 26 requirement to provide a calculation of damages:

> Spotnana asserts that ATA's failure ever to make a meaningful disclosure warrants preclusion of its evidence of damages. In opposition, ATA principally advances two arguments. First, ATA contends that it has complied with Rule 26(e) because it has provided e-mail chains and a wire log that purports to state the amounts Spotnana charged ATA for its flights and the wire transfers ATA made to Spotnana....This argument misconstrues the disclosure requirements of Rule 26. ATA's proffered e-mail chains are not a "computation of each category of damages claimed" but rather a series of fragmented discussions about whether and how much ATA owed Spotnana for certain transactions ATA does not even indicate which of those transactions relate to this action and which do not. Therefore, ATA's argument that these e-mails satisfy its disclosure obligation fails.

> Second, ATA asserts that Spotnana already possessed information sufficient to determine ATA's damages and that such information was difficult to analyze because of Spotnana's purported "unorthodox and sloppy accounting practices." Even if these facts were true--and Spotnana denies them--they would not relieve ATA of its burden under Rules 26(a) and (e) affirmatively to disclose its own computation to Spotnana. *Id.* at *2-4.

The *Spotnana* Court's reasoning is especially apposite here where OL USA not only failed to provide an estimate of its lost profits with supporting documents, but the documents OL USAA would have to produce to substantiate its China import summaries (Exhibit "E") have no bearing at all on the five (5) subject containers, or any shipments or revenue OL USA purportedly lost because the containers were unavailable.

In *Agence France Presse v. Morel,* 293 F.R.D. 682 (S.D.N.Y. 2013), the District Court precluded the plaintiffs' damages theory that was first submitted during the preparation of the pre-trial order.

> In essence, Plaintiff argues that because the *information* that underlies his newly disclosed theory of damages came from materials produced by the Defendants, he had no obligation to amend or update his damages disclosure.
>
> Plaintiffs' argument is wrongheaded because he improperly conflates the *information* that was provided to him in discovery- for example, the fact that Getty licensed the images at issue 105 times-with his own *damage theory and calculation* claiming that each of those licenses constitutes a distinct and remediable violation under the DMCA. As other courts have reasoned, even a party's own production of documents supporting its theory of damages cannot excuse that party from its separate obligation to disclose a damages computation. *Id.* at 684.

Morel is relevant to this case where OL USA's ever-shifting damages theory is now allegedly based, at least in part, on other ocean carriers' discounts that still remain unidentified.

See also, *Szusterman v. Amoco Oil Co.,* 112 Fed.Appx. 130, 131-32 (3d Cir. 2004) [evidence of damages excluded where plaintiff failed to provide his methodology for calculating damages]; *In Re Oakwood Homes Corp.,* 340 B.R. 510, 540-541 (Bkrtcy. D. Del. 2006) ["Courts have understood the word [computation] to require "a specific computation of a plaintiff's damages ... Simply reciting a dollar figure, however is not enough."]; *Super Future Equities, Inc. v. Wells Fargo Bank Minnesota, N.A.*, 2007 WL 4410370 at 7 (N.D.Tex. 2007) [plaintiff's expert affidavit disregarded on motion for summary judgment where it failed to comply with Rule 26(a)(1)(C) by providing method for calculating value of certificates]; *Gilvin v. Fire,* 2002 WL 32170943 at 3 (D.D.C. 2002) ["...because plaintiff failed to provide Defendant with a computation of his damages for expense restrictions and failed to provide any factual basis whatsoever for the claim, plaintiff may not present evidence at trial of those damages."]; *TSE v. UBS Financial Services, Inc.*, 2008 WL 463719 (S.D.N.Y. 2008) ["Here, defendant's opportunity to rebut plaintiff's misleading evidence was gravely handicapped by plaintiff's failure to disclose her calculations in advance of trial. Under Rule 26(a)(1)(C), Fed.R.Civ.P., plaintiff was required to disclose her damages calculation as part of her initial disclosures at the outset of the case"].

OL USA's lost profits claim should be barred as purely speculative and failing to meet the "actual damages" standard.

(C) OL USA's Detention and Demurrage Claims Are Unsupported by Any Contract.

OL USA contends that MAERSK should have to pay *its own* detention/demurrage Tariff rates to the Complainant (Exhibit "B," Sec. C, p. 3). The Complainant's

detention/demurrage claim appears to be based on an equitable theory unmoored to any proof that OL USA actually sustained container loss-of-use damages, or that MAERSK ever agreed to pay its own detention/demurrage Tariff rates to OL USA. Absent a contractual agreement, MAERSK cannot be compelled to pay demurrage/detention charges to OL USA.

OL USA's published FMC Tariff No. 025421-001 (Exhibit "H" hereto) Rule No. 21, ***"Carrier [OL USA] does not own or lease equipment..."*** (emphasis added) (MSK-067). That being so, OL USA may have a daunting task proving that its supply of available containers was diminished by the unavailability of the five (5) subject containers. OL USA's Tariff Rule No. 2-005 (MSK-066) provides that OL USA merely passes along VOCC carriers detention/demurrage charges to shippers. Nothing in OL USA's published Tariff authorizes it to assess detention/demurrage charges to any party and the Tariff contains no rates for such charges that OL USA could assess to another party.

Therefore, OL USA's detention/demurrage claim against MAERSK is unsustainable under 46 U.S.C. Sec. 40501(a)(1) and (b)(3) which requires carriers' and freight forwarders' Tariffs to include their "rates" and any "level of compensation."

Detention is "the charge the Merchant pays for detaining Carrier equipment outside the port, terminal or depot, beyond the free time." ...Demurrage is "the charge, related to the use of the equipment only, the Merchant pays for Carrier's equipment beyond the free time allowed by Carrier for taking delivery of goods in the port, terminal or depot." *CMA CGM S.A. v. Leader Int'l Express Corp.*, 474 F. Supp. 3d 807, 811 (E.D. Va. 2020).

Detention and demurrage charges are based on contracts between shippers and ocean carriers, including tariffs, bills of lading and service contracts. Sorkin, *Goods in Transit*, § 25.01. ["The owners of ships, freight cars and other cargo conveyances have a financial interest in keeping the conveyances in continuous operation...Consequently, rail carriers, motor carriers,

and ship owners and voyage charters ***provide by agreement*** scheduled or specific times which are allowed for the loading of the rail car, vehicle or vessel and for the unloading or discharge of the cargo" (emphasis added)].

See also, CMA CGM S.A. v. Leader Int'l Express Corp., supra at 811["The service contract incorporated CMA's tariffs…as well as the terms and conditions of its bill of landing. Relevant here, the service contract provides that NVOCC is responsible to the carrier for fees incurred for shipments, including detention and demurrage"]; *Maersk Line A/S v. Carew*, 588 F. Supp. 3d 493 (S.D.N.Y. 2022) [claims for detention and demurrage based on service agreement]; *CMA CGM S.A. v. Dubitec Am., Inc.*, 2015 U.S. Dist. LEXIS 137004, *1-2 (E.D. Va. 2015)["Under the terms of the service contracts and the bills of lading issued in connection with these shipments, Defendant owes Plaintiff…outstanding costs resulting from 'freight charges, detention and demurrage charges'"].

The right of carriers and freight forwarders to assess and collect detention and demurrage charges is governed by Sec. 40501(a)(1) and (b)(3). The right is entirely statutory and contractual, not equitable, in nature. OL USA cannot recover such charges from MAERSK absent any OL USA Tariff authority or agreement between the parties entitling OL USA to such compensation.

VII. <u>CONCLUSION.</u>

Pursuant to 46 CFR Secs. 502.70 and 502.150(b), MAERSK respectfully requests an Order: (A) dismissing OL USA's claims against MAERSK for loss of business, loss of revenues, loss of profits, demurrage and detention and (B) barring OL USA from producing or relying on any documents not disclosed by the Complainant on or before June 17, 2024 in compliance with the June 14 Order (Exhibit "C").

In the event any part of this motion is denied, MAERSK respectfully requests, in their alternative, that this proceeding be stayed pursuant Sec. 502.150(b)(3) pending OL USA's full compliance with MAERSK's written discovery requests.

Dated: July 18, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2024, the foregoing MAERSK's Motion for Dismissal of Claims for Lost Revenues and Demurrage/Detention was served via electronic mail on:

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