

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 22-30

SAMSUNG ELECTRONICS

AMERICA, INC.,

COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,

RESPONDENT.

**COMPLAINANT'S REPLY TO RESPONDENT'S EXCEPTIONS
TO THE INITIAL DECISION**

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ZIM’S USE OF PURPORTED LIEN RIGHTS TO HOLD CARGO AND CHARGE NEW D&D WAS AN UNREASONABLE ABUSE OF PROCESS AND REFLECTS ZIM’S “REPEAT OFFENDER” STATUS.....	3
A. It is Well-Established that Holding Cargo to Coerce Payment of Charges on Other Cargo is an Unreasonable Practice under the Shipping Act	5
B. Contrary to ZIM’s Argument (Section III(A)), the Shipping Act Authority Holding that the Exercise of Liens on Cargo to Coerce Payment of Charges on Other Cargo is Unreasonable Is Not “Unsettled”	5
C. ZIM’s Attempts to Distinguish <i>Adenariwo</i> and Other Shipping Act Authority (Section III (A)) on the Basis that the Authorities Only Apply to “General Lien Clauses” but Not Purported Service Contract Provisions Are Meritless.....	8
D. ZIM’s Argument That It Had Extended Lien Rights (Section III(B)) is Not Supported by the Evidence in the Record.....	11
E. ZIM’s Argument that “Precluding Contractually Extended Liens Will Impede Cargo Fluidity” (Section III(D)) Is Contradicted By the Record and Fails to Justify ZIM’s Cargo Holds or Charging New D&D on Held Cargo.....	18
F. ZIM’s Argument that “Chronic Delinquency Required ZIM to Employ Cargo Holds” (Section III(C)) is Not Supported by the Evidence in the Record and Does Not Justify the Reasonableness of its Cargo Hold Practices	21
III. ZIM’S ATTEMPT TO ESCAPE ANY REPARATIONS WHATSOEVER WHEN LIABILITY WAS ESTABLISHED FOR TWO UNREASONABLE PRACTICES VIOLATING THE SHIPPING ACT IS WITHOUT BASIS AND UNJUST.....	26
A. The Reparations Award is Not “Arbitrary and Capricious” (Section IV(A)) and Does Not Contain a “Logical Inconsistency”	26
B. The Reparations Decision is Not “Unsupported by the Evidence” (Section IV(B))—SEA More than Satisfied the Required “Reasonable Degree of Certainly” Standard	28
1. ZIM’s Four Bullet Point Observations Should be Rejected	29
2. The Policy Implications Are Substantial if ZIM’s Exceptions Are Accepted.....	35
IV. CONCLUSION.....	40

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Adebisi A. Adenariwo v. BDP Int’l, ZIM Integrated Shipping, Ltd.</i> , Dkt. No. 1921(I), 2017 FMC LEXIS 28 (FMC Feb. 14, 2017).....	7
<i>Adebisi A. Adenariwo v. BDP Int’l, ZIM Integrated Shipping, Ltd.</i> , Dkt. No. 1921(I), 2013 WL 12618258 (SO Mar. 7, 2013).....	<i>passim</i>
<i>Adebisi A. Adenariwo v. BDP Int’l, ZIM Integrated Shipping, Ltd.</i> , Dkt. No. 1921(I), 2014 WL 13110647 (FMC Feb. 20, 2014)	<i>passim</i>
<i>Adenariwo v. FMC</i> , 808 F.3d 74 (D.C. Cir. 2015).....	5, 7, 33
<i>Bank of British North America v. Freights, etc. of the Hutton's</i> , 137 F. 534 (2d Cir. 1905).....	17
<i>Bernard & Weldcraft Welding Equipment v. Supertrans International</i> , Dkt. No. 02-12, 2003 WL 136313 (ALJ Jan. 8, 2003)	16
<i>The Bird of Paradise</i> , 72 U.S. 545 (1866).....	15, 16, 17
<i>Corpco International, Inc. v. Straightway, Inc.</i> , Dkt. No. 97-05, 1998 WL 940257 (FMC June 8, 1998).....	10
<i>Evergreen Shipping Agency (Am.) Corp. v. FMC</i> , 106 F.4th 1113 (D.C. Cir. 2024).....	27
<i>In re Goguen</i> , 691 F.3d 62 (1st Cir. 2012).....	28
<i>MAVL Capital Inc. v. Marine Transp. Logistics, Inc.</i> , Dkt. No. 16-16, 2022 WL 2209421 (FMC June 10, 2022)	29
<i>N.H. Shipping Corp. v. Freights of the S/S Jackie Hause</i> , 181 F. Supp. 165 (S.D.N.Y. 1960)	17
<i>Petra Pet, Inc. v. Panda Logistics Ltd.</i> , Dkt. No. 11-14, 2012 WL 11914703 (ALJ Aug. 14, 2012).....	<i>passim</i>
<i>Port Auth. of N.Y. v. N.Y. Shipping Ass’n</i> , Dkt. Nos. 84-6 and 84-8, 22 S.R.R. 1217 (ALJ 1984).....	12

<i>TCW, Inc. v. Evergreen Shipping Agency (America) Corp.</i> , Dkt. No. 1966(I), 2025 WL 516256 (FMC Feb. 13, 2025)	<i>passim</i>
<i>Tienshan v. Tianjin Hua Feng Transport</i> , Dkt. No. 08-04, 2011 WL 7144007 (ALJ Mar. 9, 2011).....	10
<i>Total Fitness Equipment, Inc. v. Worldlink Logistics, Inc.</i> , Dkt. No. 1831(F), 1998 WL 940255 (FMC 1998)	11
<i>Tractors & Farm Equip. Ltd.</i> , Dkt. No. 81-57, 26 S.R.R. 788 (ALJ 1992)	29
<i>U.S. ex rel Fago v. M & T Mort. Corp.</i> , 235 F.R.D. 11 (D.D.C. 2006)	20
<i>Worldlink Logistics, Inc. v. Federal Maritime Comm'n</i> , 203 F.3d 54 (DC Cir. 1999)	11
<i>In re World Imports Ltd.</i> , 498 B.R. 58 (Bankr. Ct. E.D. Penn. 2013).....	15, 16
<i>In re World Imports Ltd.</i> , 820 F.3d 576 (3rd Cir. 2016)	15, 16
Statutes	
46 U.S.C. § 41102(c)	<i>passim</i>
46 U.S.C. § 41305(b)	29
Other Authorities	
46 C.F.R. § 502.143(b)(6).....	20
46 C.F.R. § 502.227(a)(6).....	27
46 C.F.R. §502.251	3, 35
46 C.F.R. § 545.4	8
Interpretive Rulemaking, 85 Fed. Reg. 29638 (May 18, 2020).....	5, 6, 14

I. INTRODUCTION

Complainant Samsung Electronics America, Inc. (“SEA”), through its counsel, respectfully submits this reply to the “two findings by the Presiding Officer which warrant the filing of Exceptions,”¹ according to Respondent ZIM Integrated Shipping Services Ltd. (“ZIM”). ZIM Except. at 2. SEA emphasizes that ZIM challenges only two “findings” in the Presiding Officer’s April 22, 2025, Initial Decision (“ID”). ZIM leaves unchallenged multiple critical findings concerning ZIM’s policies and practices that were unjust and unreasonable under 46 U.S.C. § 41102(c) of the Shipping Act and which should be adopted in the Commission’s Final Decision. While SEA is mindful that the Commission’s review is *de novo*, it is telling that ZIM takes no exception to several important ID rulings:

- With respect to SEA’s successful Section 41102(c) claim, ZIM concedes four of the five elements, namely: (i) ZIM’s common carrier status (ID at 62); (ii) ZIM’s receiving, handling, storing or delivering property (*Id.*); (iv) ZIM’s cargo hold and customer nominated trucker (“CNT”) practices were on a normal, customary, and continuous basis (ID at 89), and (v) establishing liability for cargo holds and CNT billing practices, with proximate cause found to exist. ID at 89-90.
- Concerning element three of the Section 41102(c) claim—unjust and unreasonable practices—ZIM mounts only a modest challenge:
 - ZIM never references the terms “store door/carrier haulage” in its exceptions. Key findings on SEA containers moving on “store door terms” remain unchallenged entirely, including Findings of Fact (“FF”) ¶¶23, 30, 123, 170, 182, and the conclusion of law as to moving SEA cargo on store door terms. ID at 64.²

¹ ZIM’s eighteen-page exceptions filed May 14, 2025 (“ZIM Except.”).

² The Presiding Officer did not find super all-in rates for store door “include demurrage and detention” and SEA’s exceptions challenge this finding, along with correcting the record as to ZIM witness Moshe Shpitzer’s testimony. ID at 66-67. SEA’s exceptions dated May 16, 2025 (“SEA Except.”) at footnote 5 address the Presiding Officer’s correct observation regarding an errant citation. In its exceptions, SEA shows that the actual proper citation is a few pages later in the email chain which shows what “super all-in” rates meant, per a chart and ZIM deposition testimony. ZIM’s potshot that “numerous citations” did not support the record and “minimized SEA’s credibility” (ZIM Except. at 2), is undermined when there was one reference in the ID and SEA forthrightly corrected that one reference to the record in its exceptions.

- ZIM does not take exception to the ID’s holding that ZIM’s CNT/preferred trucker practice were unreasonable and unlawful. ZIM never references CNTs once in its exceptions. ZIM does not challenge the ID’s finding that “ZIM presumed that when preferred truckers failed to perform, that the consignee was always responsible for demurrage and detention charges. This approach is not justified.” ID at 74.
- Regarding cargo holds, ZIM’s exceptions focus almost entirely on the scope of its “maritime lien” rights. Key findings were made as to ZIM’s practices during the four cargo hold periods reviewed, where ZIM weaponized the cargo hold process. ID at 77-81. ZIM ignores these details.
- With respect to ZIM’s billing practices, the ID’s conclusion that the evidence shows “substantial billing problems” is unchallenged. ID at 85. SEA addresses how the evidence should have supported a practice of violations in its exceptions, but these findings of fact and conclusions of law are critical and went unchallenged by ZIM.
- With respect to the reparations award for cargo holds, ZIM challenges the \$3.68 million award as “unsupported by evidence” and SEA addresses that argument in Section III.B, *infra*. But ZIM does not challenge the evidence that the cargo hold charges were between \$4.9 million (SEA’s evidence) and \$5.2 million (ZIM’s own evidence). ID at 97-98.
- ZIM does not challenge the expert opinions of SEA experts John McCown and Greg Smith. They are reliable and should be relied on by the Commission. The McCown Motion to Strike was denied altogether (ID at 8), and this is important because Mr. McCown’s opinions and evidence as to ZIM’s staggering demurrage and detention recoveries³ (based on public filings as an entity regulated by the Securities and Exchange Commission) that should be relied upon by the Commission when considering ZIM’s motivations in regard to the Incentive Principle.
- SEA’s damages expert Greg Smith’s findings were found to be more reliable than ZIM’s damages expert, Ricardo Zayas, who ZIM does not mention once in its exceptions. ID at 98.

These key determinations by the Presiding Officer lay a foundation for the additional awarding of reparations by the Commission. SEA’s exceptions address why ZIM’s practices are unreasonable under the Shipping Act and support an award of reparations for no less than \$10,763,233, before assessing double reparations for ZIM’s “repeat offender” cargo hold practices, interest, and ultimately legal fees once SEA submits an application following the Commission’s

³ CX_08560-CX_08578, McCown Report ¶¶54-86 (addressing the evidence based on ZIM’s own records of demurrage and detention recoveries during the pandemic).

Final Decision. ZIM's exceptions to "two findings" do not alter this conclusion, and should be dismissed based on the holding and analysis below correctly rejecting ZIM's discredited maritime lien right theory, which was first rejected a decade ago by this Commission, let alone its challenge to the \$3.68 million in reparations already awarded for part of ZIM's cargo hold damages.

Furthermore, the relief ZIM is asking the Commission to grant—reversing any award of reparations—is fundamentally at odds with the Shipping Act's purpose of ensuring an efficient, competitive, and economical transportation system and the intended primary purpose of demurrage and detention to promote freight fluidity. ZIM is a repeat offender that engaged in multiple, systemic violations of the Shipping Act, that forced SEA to pay over \$10 million in demurrage and detention charges, and profited outrageously from demurrage and detention charges during the pandemic. Denying SEA any reparations whatsoever, as opposed to an award of nearly all of the D&D charges that SEA was forced to pay ZIM as a result of its unreasonable and unlawful practices, would perversely benefit the wrongdoer. *See* Section III. B. 2, *infra* (addressing serious policy implications if ZIM's exceptions were to be accepted by the Commission).

Finally, if there is any question about the sufficiency of evidence supporting proof of reparations, the appropriate remedy is not awarding the wrongdoer with a windfall of ill-gotten gains. Rather, if after its review, the Commission remains concerned with the sufficiency of reparations evidence, the Commission is equipped with Rule 251 and should provide an opportunity for the parties to address proof of reparations before the order of the Commission awarding reparations is entered. 46 C.F.R. § 502.251.

II. ZIM'S USE OF PURPORTED LIEN RIGHTS TO HOLD CARGO AND CHARGE NEW D&D WAS AN UNREASONABLE ABUSE OF PROCESS AND REFLECTS ZIM'S "REPEAT OFFENDER" STATUS

ZIM's primary exception challenges the ID's holding that "Commission caselaw is clear that containers should not be held for amounts due for other containers. Therefore, the cargo holds

were unreasonable...” ID at 82. ZIM erroneously argues that rights to lien cargo under general maritime law, and maritime law precedent recognizing contractual extension of lien rights over substitute cargo, should overrule well-settled Commission precedent interpreting the reasonableness of lien enforcement under the Shipping Act. The ID properly rejected ZIM’s arguments, which ZIM repeats here. SEA does not dispute that maritime law permits possessory liens, nor that maritime law recognizes the contractual extension of such liens to other/substitute cargo. But the issue here under the Shipping Act is whether ZIM exercised its purported lien rights *reasonably* and *lawfully* in compliance with the Shipping Act. ID at 78. ZIM did not.

To reasonably exercise lien rights under the Shipping Act, a common carrier, such as ZIM here, must at a minimum (1) have a valid lien over the cargo to exercise (failing that, ZIM has no right to exercise liens on such cargo at all), and if so, (2) exercise such liens in compliance with the Shipping Act. Moreover, because ZIM assessed and collected over \$5.2 million in additional D&D charges by holding and refusing to move SEA cargo, the D&D charges must be reasonable under the Interpretive Rule and the Incentive Principle.

ZIM collapses these elements, conflating the existence of its purported lien rights with an unchecked right to exercise such liens and charge D&D as a result. ZIM Except. at 3. That is simply not the case, and it was squarely rejected by the ID: “While ZIM has a right to place a maritime lien on cargo, that right is not unfettered.” ID at 82. Furthermore, ZIM argues in its exceptions that it had a contractually-extended right to lien other cargo that is not substantiated in the record nor supported by the authorities it cites. ZIM Except. at 9-10. Having neither the contractually-extended right to lien other cargo, nor an unfettered right to exercise such liens under the Shipping Act and the Incentive Principle, the Commission should find that ZIM’s cargo hold practice and charges are unreasonable and unlawful.

A. It is Well-Established that Holding Cargo to Coerce Payment of Charges on Other Cargo is an Unreasonable Practice under the Shipping Act

ZIM takes exception to the ID and precedent cited therein that “transportation of cargo cannot be aborted or cargo held to coerce payment of debt for other shipments.” ID at 76. In the *Adenariwo* case, the Initial Decision and the Commission found that ZIM’s practice of holding an unrelated shipment to induce payment for demurrage on a prior shipment was unreasonable. *Adebisi A. Adenariwo v. BDP Int’l, ZIM Integrated Shipping, Ltd.*, Dkt. No. 1921(I), 2013 WL 12618258, at *6 (SO Mar. 7, 2013) (“*Adenariwo I*”), *aff’d* 2014 WL 13110647 (FMC Feb. 20, 2014) (“*Adenariwo II*”), *partially aff’d on other grounds sub nom., Adenariwo v. FMC*, 808 F.3d 74 (D.C. Cir. 2015) (“*Adenariwo III*”) (collectively “*Adenariwo*”). When there is an underlying legal right to a lien on other cargo for charges against prior cargo, the relevant inquiry is to consider the *reasonableness* of enforcing that lien on other cargo.

B. Contrary to ZIM’s Argument (Section III(A)), the Shipping Act Authority Holding that the Exercise of Liens on Cargo to Coerce Payment of Charges on Other Cargo is Unreasonable Is Not “Unsettled”

ZIM argues that the ID erred, claiming that the reasonableness of expanded contractual lien rights is “unsettled vis-à-vis the Shipping Act.” ZIM Except. at 6. ZIM should know that is, at best, a misrepresentation of applicable legal precedent, given that the Presiding Officer and the Commission admonished ZIM a decade ago in *Adenariwo* for cargo hold conduct similar to the instant case. Nevertheless, ZIM asserts that the issue is “unsettled,” citing a footnote in the Final Rulemaking of the Interpretive Rule on Demurrage and Detention. ZIM Except. at 6 (citing 85 Fed. Reg. 29638, 29661 n. 365 (May 18, 2020)).

Footnote 365 provides no support for ZIM’s assertion that the Commission’s view on cargo holds is unsettled generally, or in *Adenariwo* specifically. Discussing the Commission’s determination not to adopt bright line rules with respect to dispute resolution policies, the cited

paragraph goes on to warn that “the practice of ‘shutting out’ truckers, intermediaries, or consignees from ocean carrier systems or terminals not only appears to impede efficient cargo movement, but raises potentially serious concerns under other Sections of the Shipping Act.” 85 Fed. Reg. at 29661. The footnote itself acknowledges that carriers have maritime liens on cargo they transport, but nonetheless “the Commission would need to examine precisely the lien at issue.” *Id.* at 29661 n. 365 (citing *Adenariwo II*, 2014 WL 13110647 and *Petra Pet, Inc. v. Panda Logistics Ltd.*, Dkt. No. 11-14, 2012 WL 11914703, at *20-22 (ALJ Aug. 14, 2012)). That, of course, is what the Commission did in *Adenariwo* and what the ID did in this matter.

In *Adenariwo*, the Initial Decision and the Commission majority held that ZIM violated the Shipping Act on alarmingly similar facts. 2013 WL 12618258, at *6. In *Adenariwo*, complainant purchased construction materials from the US to be transported to Nigeria by ZIM. ZIM moved complainant’s cargo in two containers, which were shipped separately. Due to errors in the bill of lading (not the fault of complainant), when the first container (Container No. 1) arrived at the port it was not released to complainant and demurrage fees began to accrue. When the second container (Container No. 2) arrived a month later, ZIM’s agent refused to release it until complainant paid the outstanding demurrage fees for Container No. 1. As a result, demurrage fees began to accrue on Container No. 2 as well. Ultimately, both containers were seized by Nigerian Customs officials and the cargo was auctioned off.

In *Adenariwo I*, the complainant sought to pursue its claims through the FMC’s informal adjudication process and sought reparations in the amount of \$50,000 per container for a total of \$100,000. The Settlement Officer dismissed the claim for Container No. 1 for failure to timely file the complaint within the Shipping Act’s three-year statute of limitations, but held that ZIM had violated Section 41102(c) of the Shipping Act by refusing to release Container No. 2 because of

the unpaid demurrage fees from Container No. 1. While the Settlement Officer awarded the complainant reparations in the amount of \$18,308.94, it denied the remainder of the complainant's requested relief, finding that it could have mitigated its damages by paying demurrage fees on the two containers, and securing the release of the cargo. 2013 WL 12618258 (Settlement Officer's Decision).

In *Adenariwo II*, the Commission majority affirmed the Settlement Officer's reparation award and its finding that the complainant had a duty to mitigate damages. 2014 WL 13110647, at *2 (Order Affirming Settlement Officer's Decision). Two Commissioners dissented on the basis of a long-standing objection to applying Section 41102(c) to complaints alleging only single or isolated incidents, without showing repetitive acts or continuous practices. *See id.* at *3 (Commissioners Khouri and Dye dissenting on the basis that holding one container for charges on a second container failed to allege "a 'practice' of holding shipments for unrelated charges").

On appeal before the United States Court of Appeals for the District of Columbia Circuit, the appellate court held that the FMC improperly reduced complainant's reparations award, finding that under the "the settlement officer's reasoning, a wrongdoer, such as ZIM, can set unlawful conditions for the release of an injured party's property and have the damages it owes the injured party reduced if the injured party cannot or does not meet those unlawful conditions." *Adenariwo III*, 808 F.3d at 80. It further held that "[m]itigation does not allow a wrongdoer to shift the cost of its malfeasance to the injured party." *Id.*⁴

⁴ On remand, the Commission, with Commissioners Khouri and Dye concurring, awarded the complainant the maximum available reparations, not subject to mitigation. *Adebisi A. Adenariwo v. BDP Int'l, ZIM Integrated Shipping, Ltd.*, Dkt. No. 1921(I), 2017 FMC LEXIS 28 *8 (FMC Feb. 14, 2017).

The facts in *Adenariwo* are analogous to the issues presented here. Indeed, as the Respondent in *Adenariwo*, ZIM **knew** that continuing to engage in holding cargo and assessing D&D charges on a far wider scale would not somehow become more reasonable nor make the precedent “unsettled.” Nor is there any merit in ZIM’s claim on exceptions that the dissenting opinions in *Adenariwo II* further confirm the “Commission’s absence of clarity on this issue.” ZIM Except. at 6-7. Commissioners Dye and Khouri dissented in *Adenariwo II* to finding that discrete, one-off actions were sufficient to constitute a practice under Section 41102(c), and called for reform of Commission precedent on the Section 41102(c) practices element, which the Commission did with the 2018 promulgation 46 C.F.R. § 545.4. *See Adenariwo II*, 2014 WL 13110647, at *3 (Commissioners Dye and Khouri dissenting). The dissents **did not challenge the majority’s decision that the challenged practice was unreasonable, and here, it is not contested that ZIM’s conduct constitutes a practice.** There is no basis for ZIM’s claims that the Commission’s views are unsettled or that there is a lack of clarity on this issue. Quite to the contrary, the ID found that “the *Adenariwo* decision shows that **ZIM is a repeat offender.**” ID at 78 (emphasis added).

C. ZIM’s Attempts to Distinguish *Adenariwo* and Other Shipping Act Authority (Section III (A)) on the Basis that the Authorities Only Apply to “General Lien Clauses” but Not Purported Service Contract Provisions Are Meritless

In addition to misconstruing the dissenting opinions in *Adenariwo*, ZIM also makes a futile attempt to distinguish *Adenariwo* and other Shipping Act authority by (i) claiming “*Adenariwo* is totally inapposite to the present case because it involved the assertion of a general lien clause in the terms and conditions of a bill of lading,” and (ii) asserting that this dispute involves “the shippers and corporate affiliates of SEA knowingly and freely executed service contracts that granted ZIM a lien that was broader than a common law possessory lien.” ZIM Except. at 7. Neither argument is correct.

The ID correctly explained that “there is no indication in the *Adenariwo* decisions that the holding was related to the type of lien clause or whether the litigant had signed the contract. Moreover, here, SEA was the consignee and not a party to the service contracts.” ID at 78. This finding is well supported when reading both *Adenariwo* decisions. ZIM is conjuring distinctions that do not exist in an effort to circumvent Commission findings a decade ago that went unheeded by ZIM.⁵

ZIM next attempts to distinguish the other Commission precedent relied upon in the ID as “off point and completely inapposite to the issue that is at the core of ZIM’s Exceptions” on the basis of the same straw man argument that “none of the cases relied upon by the Presiding Officer involved a shipper which negotiated and executed a service contract with the ocean carrier that specifically expanded the latter’s maritime lien for unpaid charges related to delivered containers to subsequent shipments.” ZIM Except. at 7-8. ZIM’s arguments are spurious.

ZIM concedes the holding in *Petra Pet, Inc. v. Panda Logistics Ltd.*—finding enforcement of a purported lien against new cargo was unreasonable—but contends that *Petra Pet* is inapplicable because SEA “dealt directly with ZIM and received the benefits of ZIM’s services.” ZIM Except. at 8. That is a meaningless distinction. *Petra Pet* makes clear that even if the complainant had been responsible for the respondent intermediary’s debt, “the issue should have been resolved following lawful procedures, not by withholding cargo. None of the cases cited by respondents permit withholding cargo shipments for payment of debts for previous, unrelated shipments. And, Commission precedent is clear (and was relied upon by complainant) that

⁵ As explained in Section II.D, *infra*, the purported service contracts should not have been admitted or relied on in the first place. It is not contested that SEA was not a party to any service contracts, that SEA did not execute any service contracts, and, as detailed in SEA’s exceptions, there is insufficient evidence in the record for the Commission to properly consider the service contracts in this case. SEA Except. at 23-25.

transportation of cargo cannot be aborted or cargo held to coerce payment of debt for other shipments.” Dkt. No. 11-14, 2012 WL 11914703, at *22 (ALJ Aug. 14, 2012), *aff’d* 2013 WL 9808694 (FMC Oct. 31, 2013).⁶

In addressing *Tienshan v. Tianjin Hua Feng Transport*, ZIM similarly argues that the unlawful coercion of payment for charges on other shipments at issue in that case is nevertheless distinguishable from the similar facts at issue here, because “there was no agreement in place which made Tienshan responsible for [the] unrelated charges.” ZIM Except. at 8. But this too is a red herring. The ID in *Tienshan* did not turn on whether there was an agreement in place making the complainant liable for unrelated charges. Indeed, the Presiding Officer found that even assuming the respondent had a maritime lien on the cargo of containers at issue to secure payment owed to it, “[a]n NVOCC that holds cargo hostage to its demands for money allegedly owed for prior shipments violates section 10(d)(1).” Dkt. No. 08-04, 2011 WL 7144007, at *16-17 (ALJ Mar. 9, 2011), *admin. final* Apr. 12, 2011.

ZIM’s attempt to distinguish *Corpco International, Inc. v. Straightway, Inc.*, fails for similar reasons. In *Corpco*, the Commission held that it was unreasonable for the NVOCC to withhold a bill of lading until the complainant paid the VOCC for additional charges that the NVOCC refused to pay, not because of the purported absence of a “written and signed agreement which expanded the [NVOCC’s] common law lien” as ZIM asserts, but because the NVOCC unlawfully failed to carry out its obligation to deliver the cargo. Dkt. No. 97-05, 1998 WL 940257, at *7 (FMC June 8, 1998) (“Where an NVOCC essentially shirks its duty and consequently forces its shipper-customer to assume the NVOCC’s obligations in order to ensure delivery of the cargo,

⁶ Moreover, as discussed further below, the broad scope of the extended lien right in *Petra Pet* was not at issue, but regardless, the ALJ and the Commission found that enforcing it by holding unrelated cargo was unreasonable. *Id.* at *20-22.

the NVOCC is liable to the shipper in reparations for the amount of money paid by the shipper to secure the cargo”).

Finally, regarding *Total Fitness Equipment, Inc. v. Worldlink Logistics, Inc.*, ZIM again does not challenge the Commission’s holding that withholding the release of cargo based on a debt unrelated to the specific cargo in order to facilitate payment is an unreasonable practice in violation of Section 10(d)(1). Instead, ZIM claims that *Total Fitness* is inapplicable because of the absence of a “written agreement that expanded the carrier’s lien.” ZIM Except. at 9. But the Commission’s holding did not turn on the scope of the carrier’s lien rights. Rather, the Commission held that holding cargo to force payment on other debts was an unreasonable practice in connection with “receiving, handling, storing, or delivering property.” Dkt. No. 1831(F), 1998 WL 940255, at *10-12 (FMC 1998), *aff’d sub nom. Worldlink Logistics, Inc. v. FMC*, 203 F.3d 54 (D.C. Cir. 1999).

The line of FMC cases cited above are on point, as acknowledged in the ID’s analysis, and ZIM’s superficial attempts to distinguish them from the facts here are unconvincing at best. Instead, the cases provided fair warning to ZIM that its cargo hold practices violate the Shipping Act.

D. ZIM’s Argument That It Had Extended Lien Rights (Section III(B)) is Not Supported by the Evidence in the Record

In addition to the applicability of *Adenariwo* and other cases relied on in the ID for the proposition that holding cargo to coerce payment on unrelated cargo is unreasonable under the Shipping Act, ZIM’s exceptions on this point fail as a matter of fact for two additional reasons.

First, **it is not contested** that SEA was not a party to any service contract with ZIM. ID FF ¶18.⁷ As such, even if any of the Commission authority actually turned on the presence or absence

⁷ The proffered service contracts do not even designate SEA as an affiliate of the shippers. *See* ID FF ¶¶13-14 (SEA is not listed as an affiliate by either shipper, Samsung SGSA or Logitech).

of a “written agreement” with a consignee to expand lien rights, which they do not, ZIM fails to establish that SEA has any such bilateral (or other) form of written agreement with ZIM to contractually extend lien rights.

Moreover, ZIM’s assertion that it has contractually extended lien rights relies entirely on language in a service contract that ZIM failed to authenticate and failed to establish was applicable to the shipments at issue. As explained in SEA’s exceptions, SEA Except. at 23-25, to the extent that any ZIM service contract is used in the ID or this proceeding, ZIM’s has the burden of production to show, with supporting evidence, that any purported service contracts or provisions therein justify that its practices were otherwise reasonable. To meet its burden of production, ZIM must first authenticate any service contracts and then demonstrate that the provisions therein are reasonable justifications under the Shipping Act. As ZIM has done neither, the purported service contracts should have no bearing on the Commission’s review of the facts here. *See Port Auth. of N.Y. v. N.Y. Shipping Ass’n*, Dkt. Nos. 84-6 and 84-8, 22 S.R.R. 1217, 1219-20 (ALJ 1984) (“the harm does not lie in admitting what may be unreliable evidence initially but in basing a decision on such evidence, i.e., in failing to sift out such evidence from reliable evidence when reaching a decision”). The purported service contract provisions should be afforded no weight.

Second, even if the service contract language was admissible, the language ZIM relies on does not establish the purported expanded lien rights. ZIM relies on the following provision:

8 – FREIGHT, CHARGES AND INVOICING

The Merchant and all affiliates, subsidiaries, association members and agents acting on Merchant’s behalf, as well as all other parties responsible for freight under the Bill of Lading, and the cargo itself, are jointly and severally obligated to pay, on demand, all freight charges, dues, taxes, per diem, collection fees, or charges and/or other expenses in connection with the goods.

The Carrier, its servants or agents, shall have both a maritime and contractual lien on the goods or any part thereof, and the Carrier or its Agent shall have the right to sell such goods, whether privately or by public auction, upon reasonable notice to the Merchant, for all freight (including additional freight payable as is herein stipulated) primage, deadfreight, demurrage, detention, container demurrage, charges, salvage, average of any kind whatsoever, stamps, duties, fines or penalties.

The lien hereby accorded may be exercised by the Carrier, its servants or agents notwithstanding that it or they may have parted with actual or constructive possession of the goods. Nothing in this clause shall prevent the Carrier from recovering from the Merchant the difference between the full amount due, and the net amount realized by the exercise of the rights given to the Carrier under this Clause.

See RX-1792; RX-1819-20; RX-1855; RX-1883 and RX-1922-23. ZIM reaches the erroneous conclusion that “[t]hus, the service contracts and the prevailing law cited above entitled ZIM to lawfully employ the Cargo Holds.” ZIM Except. at 10. But ZIM’s reliance on a general lien clause is not enough to support ZIM’s conclusion that it has contractually-extended lien rights over other cargo.

The first paragraph provides for joint and several payment liability for freight charges and (presumably) legitimate charges in connection with the cargo, on the cargo, and on affiliates of the shipper when acting on the shipper’s behalf. But the joint and several liability provision in the first paragraph does not establish a basis for liability; it only addresses who is jointly and severally liable for charges legitimately due (and in paragraph two, the sale remedy). It does not support that ZIM can require “on demand” payment for any and all D&D charges from the shipper, nor can it demand joint and several liability from any and all affiliates of the shipper not acting on the shipper’s behalf.

The second paragraph provides that ZIM “shall have both a maritime and contractual lien on the goods or any part thereof” and that it “shall have the right to sell such goods” for unpaid

freight or other charges. It does not provide that ZIM's lien on such goods extends contractually to other goods without unpaid charges.

The third paragraph provides that ZIM's lien is not extinguished by the loss of actual or constructive possession of the cargo, which merely provides a contractual extension of the general maritime law possessory lien limitation. Thus, ZIM could presumably assert the lien on the cargo with unpaid charges after the cargo is no longer in ZIM's actual or constructive possession. However, it does not provide that ZIM's lien on such cargo extends to **other cargo** without unpaid charges.

ZIM does not explain, nor cite any legal authority, supporting its argument that the general lien language over goods with unpaid charges contractually extends lien rights to other cargo without unpaid charges. Moreover, even if ZIM could point to express language contractually extending liens on other cargo, contract rights are not a defense to Shipping Act violations. *See* Interpretive Rulemaking, 85 Fed. Reg. at 29648 (“[o]cean carriers and marine terminal operators (and ocean transportation intermediaries) do not have an unbounded right to contract for whatever they want. They are limited by the prohibitions of the Shipping Act, one of which is section 41102(c)”). In *TCW, Inc. v. Evergreen Shipping Agency (America) Corp.*, the Commission expressly rejected a similar defense and/or purported justification, rejecting respondent's argument that the claimant agreed to contractual terms allowing the respondent to invoice for the violative detention charges. Dkt. No. 1966(I), 2025 WL 516256, at *8 (FMC Feb. 13, 2025). The Commission held that “Claimant's agreement to these contractual provisions does not render Respondent's detention charges reasonable.” *Id.* The same well-settled principle applies here. Even if ZIM had contractually-extended lien rights, which it failed to establish, ZIM's contractual defenses or justifications should still be rejected.

Thus, ZIM's reliance on cases standing for the proposition that a party *can* contractually extend a lien right are not relevant to whether a practice of enforcing it on other cargo would be reasonable under the Shipping Act. In all events, those cases do not support ZIM's argument that it actually has contractually-extended lien rights. The lien clause in *Petra Pet*, for example, provided that: "[t]he Freight Forwarder shall have a lien on the goods and any documents relating thereto **for any amount due at any time** to the Freight Forwarder from the Merchant including storage fees and the cost of recovering same, **and may enforce such lien in any reasonable manner which he may think fit.**" 2012 WL 11914703, at *12 (emphasis added). As explained above, it was assumed in *Petra Pet* that the lien clause contractually extended a broad right to lien other cargo, which was found unreasonable under the Shipping Act. *Id.* at *20-22. But the language ZIM relies on **does not** purport to provide a lien on goods "for any amount due at any time" nor broadly permit enforcement "in any reasonable manner which he may think fit."

The non-Shipping Act maritime lien cases ZIM cites for the proposition that maritime liens can be extended contractually do not support ZIM's argument that it has such rights either. As an initial matter, the ID squarely rejected ZIM's reliance on *In re World Imports Ltd.*, 820 F.3d 576 (3rd Cir. 2016) and *The Bird of Paradise*, 72 U.S. 545, 554 (1866), on the basis that: "[w]hile these cases state that a maritime lien may be extended, modified, or excluded, they do not mention the Shipping Act. These cases do not address or overrule the Commission's long-standing line of cases holding that cargo cannot be held to extract payment for amounts due on other shipments." ID at 78. But even if that were not so, neither case supports ZIM's argument that the lien language it relies upon actually contractually extends its lien rights to other cargo.

In *In re World Imports Ltd.*, the lower court held that the lien provisions were unenforceable extensions of common law liens. 498 B.R. 58, 63-64 (Bankr. E.D. Penn. 2013). The

court of appeals reversed, holding that lien provisions were enforceable as extensions on other cargo, finding that the contractual language clearly extended the lien on prior indebtedness on other cargo: “OEC’s Tariff not only specifies the applicability of the maritime lien to unsatisfied debts of previous shipments in unambiguous language, but does so in a published document.” *World Imports*, 820 F.3d at 589. In addition, the court found express extension of the lien rights in other evidence in the record, including a credit application and resulting invoices. *Id.* at 584. The credit application provided that:

As security for any existing and future indebtedness of [World Imports] to [OEC], including claims for charges, expenses or advances incurred by [OEC] **in connection with any shipment or transaction** of [World Imports], and whether or not presently contemplated by [World Imports] and [OEC], [World Imports] hereby grants to [OEC] a general lien and security interest **in any and all property** of [World Imports] (including goods and documents relating thereto) **then or thereafter in [OEC’s] possession, custody or control or en route** (the “Collateral”). This general lien and security interest shall be in addition to any other rights [OEC] has or may acquire under other agreements and/or applicable law, and shall survive delivery or release of any specific property of [World Imports]...

Id. at 579 (emphasis added). The language in the invoices provided that “[the] Company shall have a general and continuing lien on **any and all property of Customer** coming into Company’s actual or constructive possession or control for monies owed to Company with regard to the shipment on which the lien is claimed, **a prior shipment(s) and/or both...**” *Id.* at 580 (emphasis added). The language ZIM purports to rely on as establishing a contractual extension of lien rights on other cargo comes nowhere close to the express and “unambiguous” language in *World Imports*.

The Bird of Paradise stands for the proposition that a ship owner can have a lien on cargo for freight, and “consequently may retain the goods after the arrival of the ship at the port of destination until the payment is made...” 72 U.S. at 554. But neither the principle that a carrier has a lien nor that it can contractually extend such a lien (whether in *The Bird of Paradise* or other applications of it such as in ZIM’s citation to *Bernard & Weldcraft Welding Equipment v.*

Supertrans International, Dkt. No. 02-12, 2003 WL 136313, at *14 n.14 (ALJ Jan. 8, 2003), *admin. final* Feb. 12, 2003) support ZIM’s assertion that it has actually established contractually-extended lien rights here.⁸

ZIM’s citation to *Bank of British North America v. Freights, etc. of the Hutton’s* provides no support for the purported extended liens. The case does not address the scope of contractual extension of lien rights to other cargo, but rather the propriety of substituting by hypothecation a lien on cargo to a lien on deposited advances in a bank account as a substitution of the *res, in rem*. 137 F. 534, 538 (2d Cir. 1905) (“[i]t is familiar doctrine of the admiralty courts that a maritime lien attaches not only to the original subject of the lien, but also to whatever is substituted for it, and that the lienholder may follow the proceeds wherever he can distinctly trace them”). Likewise, ZIM’s invocation of *N.H. Shipping Corp. v. Freights of the S/S Jackie Hause*, also fails. There, the court held that a shipowner had similarly not waived its cargo lien when its release of the cargo was conditioned on the substitution of freight money, held in escrow, for such cargo. 181 F. Supp. 165, 172 (S.D.N.Y. 1960). These cases highlight the problem with ZIM’s argument in a different context: ZIM has not established the purported contractual extension of liens to other cargo, nor has ZIM established a commensurate right to substitute its lien on cargo with unpaid charges for a lien on other cargo, deposit funds, or SEA’s bank account. *See* SEA PFF ¶142 (“For purposes of D&D charges, SEA does not have credit with ZIM”); ZIM RPF ¶142 (“Admitted”).

⁸ ZIM’s argument that the ID “rejected” the holdings in *The Bird of Paradise*, and *In re World Imports Ltd.* is simply not true. ZIM Except. at 6. The ID’s holding that the “cases do not address or overrule the Commission’s long-standing line of cases holding that cargo cannot be held to extract payment for amounts due on other shipments” is certainly not an “incorrect statement of the Commission’s position on this issue.” The ID did not reject contractually-extended liens when they exist. The ID applied the Shipping Act and found that ZIM’s practice of enforcing purported lien rights to hold other cargo without unpaid charges was an unreasonable practice.

Thus, ZIM fails to establish as an initial matter that it was entitled to the extended contractual rights it claims, before even getting to the question of whether holding cargo on the basis of an extended lien was reasonable, which as explained above, it was not.

E. ZIM’s Argument that “Precluding Contractually Extended Liens Will Impede Cargo Fluidity” (Section III(D)) Is Contradicted By the Record and Fails to Justify ZIM’s Cargo Holds or Charging New D&D on Held Cargo

ZIM asserts generally that a contractually-expanded lien “facilitates the movement of cargo by allowing the carrier to release cargo without payment while still retaining a means to secure payment at a later date should it become necessary to do so,” and argues specifically that “ZIM’s exercise of its lien rights incentivized the movement of cargo.” ZIM Except. at 12-13. ZIM’s arguments are entirely erroneous.

First, ZIM claims that its cargo holding practice “incentivized the movement of the cargo” because “[a] significant portion of the demurrage charges due on cargo was assessed by and payable to marine terminal operators . . . [and] [t]he marine terminals would not release the cargo unless those charges were paid.” *Id.* at 13. That is a misdirection.⁹ The charges underlying the cargo holds here were disputed invoices on cargo after it was released from marine terminals (and inland rail terminals) and after the cargo was delivered. *See, e.g.*, ID FF ¶63 (SEA requesting “OUT GATE and IN GATE Date” information on invoices at issue in the first cargo hold that pertained to containers which were previously picked up from marine terminals and empty returns after delivery), ¶64 (discussing information on charges for “rail demurrage, port demurrage but also Perdiem” on delivered cargo, all of which pertained to released and/or delivered cargo). The vast majority of the underlying charges were for detention and similar charges only assessed after

⁹ The assertion that ZIM’s subcontracted marine terminals, rather than ZIM, would not release cargo unless demurrage was paid is also not substantiated by citation to any evidence in the record.

cargo is released and/or delivered to the inland destination. *See, e.g.*, ID FF ¶71 (ZIM email on first cargo hold claiming “[o]ver \$600K is overdue mostly for unpaid per diem/equipment detention invoices”). ZIM held new cargo on the basis of disputed charges on *previously released cargo*. It was the cargo holds that created new demurrage on the held containers, which ZIM then required SEA to pay before release.¹⁰

Second, despite conceding the ID’s finding that ZIM’s corporate representative testified that the exercise of the lien rights **did not incentivize cargo movement**, ZIM asserts that “the ID ignored” the testimony “of numerous other ZIM witnesses” purportedly to the contrary. ZIM Except. at 13 (citing ID at 79). ZIM does not cite “numerous other ZIM witnesses”; ZIM cites testimony of two of its witnesses, Mr. Cleva and Ms. Rosenberg. The ID did not “ignore” testimony from either of those witnesses, citing them more than ten times in the ID. As to their testimony about the Incentive Principle, ZIM made the same argument in its opposition brief below, almost verbatim, except that in the opposition the same two citations were attributed to “other ZIM witnesses,” which ZIM inexplicably now attributes to “numerous other ZIM witnesses.” *Compare* Zim Opp. Br. at 9 (emphasis added) to ZIM Except. at 13 (emphasis added).

The ID cited the testimony of ZIM’s Director of Finance for ZIM U.S. Mr. Yaacoub, testifying on ZIM’s behalf as its corporate representative with respect to cargo holds, in support of the finding that “the cargo holds were used as to obtain overdue payments but did not incentivize the flow of cargo,” because that is precisely what the witness testified:

ZIM’s witness, Mr. Yaacoub, agreed that “by placing the cargo hold, that puts urgency to Samsung to pay for the demurrage and detention charges at the

¹⁰ SEA was forced to pay ZIM and terminals under protest to have its goods released, and even for ZIM to initiate the intervening inland moves, on store door moves. CX_02214-CX_02215, Rapske (SEA) Dep. Tr. 42:20-43:5. Even after SEA issued payments to release the cargo from cargo holds, ZIM held cargo that had gone into demurrage during the cargo hold until payment had been received. CX_07367, SEA0018177.

time.” CX 3203-04. When asked whether he thought “implementation of cargo hold incentivize[s] the movement of cargo or containers,” he answered “No.” CX 3204; see also CX 5482 (“Q. So the point here is that the hold, the cargo hold was effective in incentivizing this particular customer to pay? A. That is correct.”); CX 3193.

ID at 78. Mr. Yaacoub’s testimony was made in his capacity as a 143(b)(6) corporate designee-testimony which is binding upon the ZIM corporate entity. 46 C.F.R. § 502.143(b)(6); *see also U.S. ex rel Fago v. M & T Mort. Corp.*, 235 F.R.D. 11, 24 (D.D.C. 2006) (“the testimony of a Rule 30(b)(6) deponent binds the corporation to the explanation given”); *see also Reilly v. Natwest Mkt. Groups Inc.*, 181 F.3d 253 (2d Cir. 1999) (“To satisfy Rule 30(b)(6), the corporate deponent has an affirmative duty to make available such number of persons as will be able to give complete, knowledgeable and binding answers on its behalf”) (quotations omitted). Moreover, the cited testimony of the “other ZIM witnesses,” Mr. Cleva and Ms. Rosenberg, does not contradict the ID’s finding or Mr. Yaacoub’s testimony. Consistent with Mr. Yaacoub, both Mr. Cleva and Ms. Rosenberg described cargo holds **as a tool to secure payment**. CX_04580, Cleva (ZIM) Dep. Tr. 51:2-6 (emphasis added) (a “tool[] that we turn to in specific situations where a customer may be nonresponsive or too slow or unwilling to remit on services rendered or resolve disputes”); CX_05330, Rosenberg (ZIM) Dep. Tr. 27:13-16 (“that’s the only tool that we have to make the customer or to incentivize the customer to make the payment and move the containers out”). The cargo holds incentivized **payment**, not the flow of containers that ZIM refused to move.

ZIM’s arguments also fundamentally miss the point that even if a cargo hold was otherwise permissible, ZIM still fails to explain how then **charging new D&D charges** on cargo ZIM unilaterally refused to move is justified under the Incentive Principle. The four cargo holds imposed by ZIM originally sought collection of an aggregate \$3,483,048.68 in disputed charges, for which ZIM released said holds for an aggregate payment of \$1,306,170.00. *See* ID FF ¶53 (first hold), ¶78 (second hold), ¶86 (third hold), ¶100 (fourth hold). But as a result of its decision and

action to not move the cargo, **ZIM charged and SEA paid an additional \$5,202,268 in new D&D charges as a result of the cargo holds** on other cargo, comprised of \$3,802,918 in new demurrage, \$502,331 in new rail storage, and \$897,019 in new detention.¹¹ ZIM refused to move **1,020** containers during these cargo hold periods—600 of which were held for more than two months at the height of the pandemic—which exacerbated the already disastrous congestion and decreased cargo fluidity.¹²

Even if ZIM could lawfully exercise cargo holds, which it could not, ZIM offers no credible justification for its decision to assess new and dramatically higher D&D charges resulting from the delays ZIM caused. ZIM’s interpretation of the Incentive Principle would turn it on its head.

F. ZIM’s Argument that “Chronic Delinquency Required ZIM to Employ Cargo Holds” (Section III(C)) is Not Supported by the Evidence in the Record and Does Not Justify the Reasonableness of its Cargo Hold Practices

ZIM repeatedly claims, without citation to any credible evidence in the record, that ZIM was “compelled” to employ cargo holds, that the cargo holds were “necessitated,” and that it held SEA’s cargo “as a last resort.” ZIM Except. at 10-12. First, ZIM did not have to resort to holding cargo. *See* ID at 82 (finding that “there are other avenues to collect debts that are owed”). And even if ZIM had the right to hold cargo, ZIM did not have to assess new D&D charges on SEA for cargo that ZIM held. ZIM could and should have waived or absorbed its own charges and its subcontractor charges, because, ultimately, no amount of additional D&D charges on SEA could

¹¹ *See* CX_01570, ZIM 0085708; RPF ¶¶155, 157-159 (ZIM admitting that the Yaacoub Schedule (CX_01570, ZIM 0085708) was prepared “to enable [ZIM’s corporate representative] to answer the detailed questions about cargo holds,” admitting to the cargo hold dates, and admitting that the Yaacoub Schedule “records Demurrage of \$3,802,918; Detention and Handling of \$897,019; and Rail Storage of \$502,331”).

¹² *See* ID at 75-76; CX_01570, ZIM 0085708 (chart); CX_05350-CX_05351, Rosenberg (ZIM) Dep. Tr. 47:11-48:3 (breaking out the 1,020 containers held during ZIM’s four cargo holds).

have incentivized SEA to move containers that SEA was not responsible to move and that ZIM refused to move.

SEA was clearly motivated and incentivized to have its goods moved quickly from vessels to the inland destinations—without the purported “incentive” of additional charges. The record shows that SEA was highly incentivized to obtain delivery of the cargo due to increased customer demand for its products during the pandemic, and repeatedly asked ZIM to do so. CX_02212, Rapske (SEA) Dep. Tr. 40:4-16. It is also not seriously disputed that SEA did not have the logistics capabilities to move cargo itself and relied on ZIM to move cargo to the inland destinations, *see e.g.*, ID FF ¶4; RPF ¶26, until the instant problems with ZIM and other carriers later led SEA to build out logistics capabilities to manage inland transportation moving under CY bills of lading, *see e.g.*, RPF ¶316 (admitting); ID FF ¶¶ 24, 26. In all events, for the SEA shipments under door bills of lading at issue in this case, SEA did not have the legal right or responsibility to move the cargo itself. *See* ID FF ¶¶21-22.

Second, ZIM’s attempt to blame SEA for ZIM’s decision to hold SEA cargo utterly fails to justify ZIM’s cargo hold practices. ZIM attacks SEA for an allegedly “inefficient approval process” for reviewing disputed invoices, but overlooks ZIM’s responsibility, as the issuer of the charges, to have a reasonable practice for issuing invoices in the first instance. On a store door move, where ZIM was responsible for, and controlled the inland movement of the cargo, ZIM should have known why it was purporting to charge SEA and if so, should have sent adequate invoices to the right people.

The evidence in the record showing that SEA repeatedly asked for information to understand the invoices, which ZIM complains that SEA was “chronically delinquent” in paying, highlights instead ZIM’s chronically unreasonable billing practices. The ID acknowledged ZIM’s

“substantial billing problems” including the fact that “consignees did not receive invoices for demurrage and detention,” that “SEA often had to request additional information or objected that billing was inaccurate” and that ZIM “billed SEA for charges belonging to other entities.” ID at 83-85. The ID further observed that “ZIM risks violating OSRA if this level of inaccurate billing continues.” ID at 85.

ZIM also issued invoices for charges already paid, and upon further review by ZIM, only a small number of those invoices were deemed valid. ID FF ¶113 (citing CX_05735) (“Attached and below is the list of DEM pending from ZIM Korea. You can see the payment plan - \$71,876.05 was already paid”); CX_05647-CX_05648, Rosenberg (ZIM) Dep. Ex. 12 at pg. 1-2 (discussing cargo holds even when payment delays were caused by ZIM’s billing problems: “We got so many customers feedback that their CNEE [consignee] do NOT got our invoice for DEM/DET at destination, or they already arranged the payment but still in our outstanding”). The ID acknowledged that “SEA had a legitimate basis to question some of the charges it received from ZIM.” ID at 81. Contrary to ZIM’s claims that SEA was chronically past due, the evidence shows instead that ZIM was chronically overcharging and under explaining, giving SEA very good reason to dispute invoices.

As to the cargo holds, the evidence in the record shows that ZIM repeatedly imposed cargo holds without adequately assessing the accuracy or validity of the underlying invoices on their face—aside from whether ZIM should have been charging SEA at all on the basis of ZIM’s unreasonable CNT practice of charging all D&D to SEA when movements merely involved a CNT and/or where SEA did not control the inland movement of the cargo under the carrier’s door deliveries.

For example, between August 5 and mid-August 2020, ZIM placed SEA cargo on hold, asserting that SEA owed approximately \$145,000. SEA PFF ¶163. On August 5, 2020, SEA was placed on hold. This first hold encompassed 70 containers, resulting in an additional \$20,000 in D&D charges. ID at 76; CX_01570, ZIM 0085708. That day, SEA asked ZIM to provide documentation to verify the validity of the charges, and noted that a number of the invoices were incorrectly billed, including several charges for unrelated entities. ID FF ¶63 (citing CX_07208-CX_07217). On August 20, 2020, SEA requested a response from ZIM regarding the disputed invoices. ID FF ¶65 (citing CX_07206). Ultimately, ZIM responded with a significantly shorter list of amounts allegedly owed, and SEA paid \$36,710 to remove the cargo hold. ID FF ¶53; CX_07204-CX_07206.

ZIM ratcheted up its cargo holding practice after the first hold, holding SEA's cargo three more times. By the fourth cargo hold, ZIM held 600 containers between January 11, 2022 and March 17, 2022, resulting in nearly \$3 million of new D&D charges, on the basis of ZIM's assertion that SEA owed approximately \$1.5 million on other containers, for which ZIM released the hold over two months later upon payment of less than \$120,000. ID at 76; ID FF ¶ 100.

ZIM's sweeping approach to imposing cargo holds undermines its meritless assertion that the holds promoted cargo fluidity. Indeed, the record reflects that ZIM was reckless and cavalier in using cargo holds and, similar to its approach in billing, did little to confirm whether the shipments it was holding were in fact SEA cargo. Instead, ZIM detained numerous containers for unrelated entities, including foreign entities not within the corporate structure of SEA. ID at 83-84. For example, in one instance, ZIM improperly held ten containers of a different Samsung entity, but when that entity requested that ZIM release the containers, ZIM initially rejected the request, ID FF ¶114 (citing CX_05734, Rosenberg (ZIM) Dep., Ex. 27), and only released the

containers six days later, admitting that “[a]fter further review, we understand that the 10 cnts below belong to a separate entity, C&T (which was not mentioned below). Following that understanding, we will release the 10 cnts immediately (because, as stated in my below email, the hold is related only to Samsung Electronics).” ID FF ¶115 (citing CX_05734, Rosenberg (ZIM) Dep., Ex. 27).

In another example, approximately seven months later, ZIM was yet again holding unrelated shipments. ID FF ¶120 (citing CX_07471-CX_07475, ZIM0024577-ZIM0024581) (Samsung SDS America Inc. emailed ZIM that “[w]e, Samsung SDS America are facing a serious issue with our customer due to an issue that ZIM has not releasing numerous containers which belong to our customers...We, Samsung SDS is [sic] a totally different entity and separately operated company from Samsung Electronics”). The ID expanded on these examples, providing two pages worth of additional examples, in eight separate bullet points, showing ZIM billing “SEA for charges belonging to other entities.” ID at 83-84. ZIM’s blunderbuss approach to cargo holds increased congestion and decreased freight fluidity.

The fact that ZIM was successful in using coercive holds to extract some disputed payments from SEA in order for SEA to get its cargo released is not evidence that ZIM’s practices were reasonable. As noted above, ZIM asserted holds on the basis of millions in facially improper charges, originally claiming \$3,483,048.68 in charges purportedly due and owing, but releasing the holds for \$1,306,170. ID at 76.

Finally, ZIM’s suggestion that releasing the holds for less than the amounts ZIM originally claimed somehow indicates reasonableness—representing that it “released the holds without receiving payment in full, and as previously noted, ZIM still has claims against SEA for approximately \$2 million,” i.e., for the difference—is utterly unsupported and contradicted by the

record. As discussed above, the original demands were riddled with erroneous charges. As to whether SEA still owes the \$2 million, the ID expressly rejected that below: “ZIM alleges that SEA currently owes ZIM approximately \$2 million in charges; however, that amount is not substantiated and ZIM does not suggest that it should impact the reparations amount.” ID at 100 (citing ZIM Br. at 14; RX_2).

In sum, ZIM has failed to substantiate with any evidence in the record that it was forced to use unreasonable cargo holds because of alleged “chronic delinquency.” On the contrary, the record shows, and the ID concurs, that ZIM utterly failed to show that its coercive cargo hold practices, including charging new D&D on held cargo, were justified or were reasonable practices.

III. ZIM’S ATTEMPT TO ESCAPE ANY REPARATIONS WHATSOEVER WHEN LIABILITY WAS ESTABLISHED FOR TWO UNREASONABLE PRACTICES VIOLATING THE SHIPPING ACT IS WITHOUT BASIS AND UNJUST

A. The Reparations Award is Not “Arbitrary and Capricious” (Section IV(A)) and Does Not Contain a “Logical Inconsistency”

ZIM’s reparations exception devotes a few bullet-points which strain to find reversible error where none exists. ZIM argues there is a “logical inconsistency” between the ID’s analysis and its Findings of Fact. Specifically, ZIM points to the ID’s Finding of Fact 134, which concludes that “[t]he charges reflected in the damages report by SEA’s expert witness, Mr. Smith, include demurrage/detention, prepull, storage and yard storage charges that were attributable to SEA because its facilities were unable to take delivery of the shipments. CX 5931-44; CX 2251,” arguing that it is inconsistent with the ID’s analysis of reparations for ZIM’s unlawful cargo holds without requiring a “shipment-by-shipment” analysis to determine why specific containers incurred demurrage and detention. ZIM Except. at 15 (citing ID at 70).

First, it is abundantly clear that there is no logical inconsistency because it is clear “why specific containers incurred demurrage and detention” when subjected to ZIM’s cargo holds: ZIM

refused to move the cargo under its cargo holds, ID at 75, and ZIM assessed and collected demurrage and detention as a result of refusing to move the cargo. ID at 99; CX_02996, Speight (ZIM) Dep. Tr. 197:1-7. Second, the ID’s analysis is not “arbitrary and capricious”¹³—far from it. The ID explains precisely why the “shipment-by-shipment” analysis ZIM seeks as to cargo holds was not warranted. The discussion of a “shipment-by-shipment” requirement cited by ZIM on page 70 of the ID did not pertain to cargo holds; rather, the ID made this statement in the context of its store door analysis.

Here, the ID correctly determined that the cargo hold practice found unreasonable was applied to the cargo held in a manner that did not turn on facts and circumstances of individual shipments—the holds were applied to cargo that was in ZIM’s custody and control, period. Thus, the ID found that “during the cargo holds, SEA was blocked from obtaining delivery of any of its containers. Therefore, failures to pick up containers were, in the first instance, ZIM’s fault. Whether or not SEA’s customer was able to accept delivery or had other constraints is not relevant as ZIM had decided to hold all of SEA’s cargo.” ID at 99 (emphasis added). The ID continues that “[s]imilarly, delays caused by supply chain disruptions, lack of chassis, unavailability of truckers, or other potential causes of delays do not need to be deducted from the amount of demurrage charged during the cargo holds as the primary cause of the demurrage was the cargo hold itself. There is no way to determine whether the containers would have been delivered timely had ZIM

¹³ The standard of review on exceptions to the initial decision is *de novo*, as ZIM noted in its “Standard of Review” section of its exceptions. ZIM Except. at 3 (“In reviewing the ID the Commission has all the powers which it would have in making the initial decision. 46 C.F.R. § 502.227(a)(6). In other words, the ID is reviewed under a *de novo* standard”). Therefore, ZIM’s argument for an “arbitrary and capricious” reversible error standard is inapplicable and premature, as it will be the standard applicable on review by a court on appeal. *Evergreen Shipping Agency (Am.) Corp. v. FMC*, 106 F.4th 1113, 1118 (D.C. Cir. 2024).

not imposed the cargo hold. Therefore, any efforts to deduct demurrage caused by any of those potential other reasons would be speculative.” *Id.*

Indeed, the unlawful practice was applied generally to cargo in ZIM’s possession, and was not based on other individual factual circumstances of each shipment. Thus, “shipment-by-shipment” factors had no bearing on the reasons the D&D was charged.¹⁴ And ZIM offered no evidence that its charges during the cargo holds had any other reasonable justification globally, or as to any specific charge, sufficient to establish a superseding or intervening cause overcoming that the cargo hold practice was the proximate cause of the D&D charges that resulted. *See, e.g. In re Goguen*, 691 F.3d 62 (1st Cir. 2012) (compiling cases holding that the burden of proving a superseding cause is on the defendant) (citations omitted).

B. The Reparations Decision is Not “Unsupported by the Evidence” (Section IV(B))—SEA More than Satisfied the Required “Reasonable Degree of Certainly” Standard

ZIM’s exception arguing that the ID is allegedly “unsupported by the evidence,” ZIM Except. at 15, is broken up into one larger argument and four smaller, haphazard attempts, in the form of bullet points, to show that the ID’s award of reparations was unsupported by the evidence. Each is addressed below in turn. SEA then addresses how ZIM’s extreme position of no reparations whatsoever despite multiple liability findings, if taken to its natural conclusion, would be grossly unfair to SEA who was forced to pay these reparations first.

¹⁴ SEA was “blocked from obtaining delivery of any of its containers.” ID at 99. ZIM ceased giving work orders to its subcontracted truckers to pick up the cargo from marine and inland rail terminals, to move the cargo, deliver the cargo, or return the equipment. CX_02992-CX_02995, Speight (ZIM) Dep. Tr. 193:22-196:11. *See, e.g.*, ZIM’s application of the cargo holds to 600 SEA containers in all stages of inland transportation during a three-month-long Finance Hold. ID at 76.

1. ZIM’s Four Bullet Point Observations Should be Rejected

a) Adding 30 Days After Lifting the Cargo Holds in the Smith Expert Report Was Supported by the Evidence

ZIM first takes issue with the Greg Smith Expert Report and its use of a cutoff for charges accruing 30-35 days after lifting each cargo hold to capture the impact of the backlog created by releasing holds on containers at the same time—all of which were then in demurrage. ZIM argues that the use of a 30-35 day period is not supported by the evidence. ZIM Except. at 15-17.

First, the standard for proving entitlement to reparations is a “reasonable degree of certainty.” ID at 96-97 (citing *MAVL Capital Inc. v. Marine Transp. Logistics, Inc.*, Dkt. No. 16-16, 2022 WL 2209421 (FMC June 10, 2022) and *Tractors & Farm Equip. Ltd.*, Dkt. No. 81-57, 26 S.R.R. 788 (ALJ 1992)). If a Complainant proves its actual injury was caused by a violation of the Shipping Act, the Presiding Officer shall order reparations. 46 U.S.C. § 41305(b). That is precisely what the Presiding Officer did here. SEA adequately proved its entitlement to reparations, as the ID also acknowledged when it awarded reparations for the cargo hold violations. ID at 100.

SEA not only met but *exceeded* the requisite “reasonable certainty” standard by conducting a charge-by-charge analysis of actual payments of new D&D charges resulting from the cargo hold violations. This analysis is reflected in SEA’s Greg Smith Expert Report Exhibits 9 and 10. CX_05932, Smith Expert Report, Ex. 9; CX_05945, Smith Expert Report, Ex. 10. Indeed, ZIM’s own corporate representative testified to and produced ZIM’s own analysis of the charges ZIM collected due to the cargo holds, which ZIM referred to as the “Yaacoub Schedule.” CX_01570, ZIM 0085708; RPF ¶¶154-159 (ZIM admitting that the Yaacoub Schedule at CX_01570, ZIM 0085708 was prepared “to enable [ZIM’s corporate representative] to answer the detailed questions about cargo holds” (¶157), admitting to the four cargo holds and dates (¶158), and

admitting that the Yaacoub Schedule “records Demurrage of \$3,802,918; Detention and Handling of \$897,019; and Rail Storage of \$502,331”) (¶159)).

Second, the ID properly found that “ZIM and its expert, Mr. Zayas, **do not object** to this thirty-day period... The thirty-day period, or thirty-five days for the third cargo hold, **is supported by the record as a reasonable timeframe** for demurrage due to the cargo holds.” ID at 100 (emphasis added). In support of this conclusion, the ID cited to paragraph 50 of the Smith Expert Report. In that paragraph, SEA’s expert explained that “SEA (and ZIM – the party responsible for inland transportation of the containers) would not be able to immediately remove the containers from the terminals. Once a hold is lifted, arrangements have to be made for the inland transportation, as well as for the payment of newly added demurrage during the hold, which often further delay the process...This indicates that a change in schedule can easily create a delay of over a month.” CX_05809-CX_05810, Smith Expert Report, ¶50. The record is clear, and the ID concurs, that SEA’s expert’s decision to account for a period of time after a cargo hold was lifted was supported by the evidence because it was a reasonable way to encompass the “practicalities of arranging for payment on accrued demurrage and scheduling inland transportation once a cargo hold is lifted.” *Id.* at ¶51. No contrary evidence was presented by ZIM.

If anything, ZIM’s own evidence shows that the ID’s reparations award was too low. As SEA explained more thoroughly in its exceptions, SEA Except. at 30-33, the Greg Smith Expert Report provided a detailed methodology for calculation of reparations for charges paid by SEA because of ZIM’s cargo hold practices, a methodology accepted by the ID, but it is not the sole evidence of SEA’s damages from the cargo holds. The evidence includes the Yaacoub Schedule noted above, which ZIM **admits** was prepared for ZIM’s Director of Finance, Mr. Yaacoub, “to enable him to answer the detailed questions about cargo holds” during his 143(b)(6) corporate

representative deposition on behalf of ZIM. RPF ¶157. ZIM **admits** that the Yaacoub Schedule is a record of the four cargo holds imposed on SEA. RPF ¶158. And ZIM **admits** that the Yaacoub Schedule accurately “records Demurrage of \$3,802,918; Detention and Handling of \$897,019; and Rail Storage of \$502,331” paid by SEA during the cargo holds. RPF ¶159 (a total of \$5,202,268 in D&D charges). Accordingly, the Yaacoub Schedule constitutes an admission against interest that \$5.2 million in D&D charges paid by SEA directly resulted from the cargo holds. CX_01570, ZIM 0085708; RPF ¶¶154-159. The representations and figures contained in the Yaacoub Schedule, prepared for and relied upon by ZIM’s corporate representative for his deposition, support a much higher reparations award than that provided by the ID. ZIM’s fixation with the 30-35 day cutoff period in the Greg Smith Expert Report and objection to it on the grounds that it is “unsupported by the evidence” is irrelevant.

b) ZIM Failed to Substantiate any Other Justifications or Superseding Causes for D&D Charges Resulting from ZIM’s Imposition of Cargo Holds

ZIM attacks the evidence relied upon in the ID, asserting that “at least some of the charges incurred during cargo holds could not have been delivered even had there been no hold due to the inability of SEA or its customers to accept delivery.” ZIM Except. at 17. ZIM cites no evidence in the record providing any evidentiary support for its bald assertion. Further, as explained above, and in the ID, delays caused by supply chain disruptions, lack of chassis, etc. need not be deducted from the demurrage charged during the cargo holds because: “There is no way to determine whether the containers would have been delivered timely had ZIM not imposed the cargo hold. Therefore any efforts to deduct demurrage caused by any of those potential other reasons would be speculative.” ID at 99. Not only is this speculative, it ignores the fact that ZIM’s practice during the cargo holds was **not moving** SEA’s cargo. Cargo was not picked up from terminals or being brought to warehouses or customers regardless of capacity concerns. If ZIM had evidence of other

“speculative” potential justifications or superseding causes, it was ZIM’s burden to substantiate its arguments with evidence—a burden it utterly fails to carry.

c) **ZIM Did Not Have a Practice of Distinguishing Between Cargo With Outstanding Charges and Those Without When Imposing Cargo Holds**

ZIM’s next point on this exception asserts that at least some of the cargo was being held for charges due on that cargo; accordingly, under the ID’s holding, those holds were pursuant to a valid lien and the amount of reparations owed should be reduced by the amount of demurrage incurred by cargo in the possession of ZIM that was being held for charges due on that cargo. ZIM Except. at 17.

This is flawed logic. First, ZIM produces no evidence that demurrage on containers during cargo holds were valid charges. Even if a container was in demurrage at the start of the hold, the calculation in the Smith Expert Report starts when the hold started, not before. And the reason for the holds was **not** because of any demurrage on held containers.

Second, **ZIM did not, as a matter of practice or ever, parse out which charges were due on which containers when making the decision to impose the cargo holds.** The ID even recognized that “internal ZIM records **do not seem to distinguish** between overdue amounts that are valid and overdue amounts that are disputed or missing information.” ID at 82 (emphasis added). If ZIM did not distinguish between valid and disputed underlying amounts, it could not have used that information to impose cargo holds on specific containers accordingly. Nor did it proffer any evidence to potentially substantiate that any such justifications existed. Instead, ZIM issued blanket, universal holds over all SEA cargo (and even on cargo that was not SEA’s). ID at 75 (“During a cargo hold, ZIM would not release or deliver any containers”).

ZIM’s argument that because some disputed invoices were paid to release cargo holds, that some demurrage and detention should be permissible, is also not supported by the record and is

fundamentally flawed. ZIM Except. at 17. ZIM’s citations to Findings of Fact 96 and 111 are erroneous. That evidence reflects ZIM’s demands that “the full past due balances must be paid before release of cargo,” ID FF ¶96, and similar demands reflecting that ZIM held all cargo during holds for the entirety of disputed amounts. ID FF ¶111; *see also* ID FF ¶109 (ZIM responding that cargo hold will not be released despite payments made and open disputes because “[u]ntil the full overdue balance is paid, we are unable to remove the account from hold”); ID FF ¶110 (“The only way to get the containers released is to pay the total overdue balance”).

The evidence shows, and the ID found, that the practice was unreasonable, not that it was sometimes reasonable and sometimes not. Nor does ZIM explain or substantiate with evidence in the record its new argument that some part of the unlawful practice should be reduced as a form of mitigation. *See, e.g., Adenariwo III*, 808 F.3d at 80 (“[m]itigation does not allow a wrongdoer to shift the cost of its malfeasance to the injured party”). ZIM’s halfhearted bulleted argument should be rejected and given no weight by the Commission.

d) ZIM’s Argument that Marine Terminals Do Not Always Issue Invoices Is Irrelevant

ZIM’s next bullet argument asserts that the ID’s findings on ZIM’s problematic invoicing practices in connection with disputed invoices underlying the cargo holds was flawed because some marine terminals do not always issue traditional invoices. ZIM Except. at 17-18. The argument is misleading and irrelevant. The ID makes no reference to demurrage collected by or payable to marine terminals when admonishing ZIM for its unreasonable invoicing practice, and ZIM offers no argument substantiated by evidence in the record that the unreasonableness of ZIM’s cargo hold charges, or its subcontractor’s charges, turned on whether a marine or inland terminal issued a separate invoice. More to the point, the demurrage resulting from ZIM’s cargo holds was unreasonable and proximately caused the payment by SEA of the resulting charges

based on the unlawful practice, not whether marine terminals issued invoices.¹⁵ The findings on invoicing pertain to ZIM’s own practices of chronic delay in issuing invoices, with inadequate information, and/or to incorrect entities. Imposing a cargo hold to coerce payment for charges that were not described adequately enough to meaningfully contest them is an unreasonable practice because it is “not fit and appropriate to the end in view.” ID at 82.¹⁶

e) **SEA Does Not Claim Charges Which Were Waived or Refunded by ZIM**

ZIM’s final effort to bolster its last exception is to rehash the argument that ZIM waived or refunded certain D&D charges which were not taken into account in the reparations award. ZIM Except. at 18. This argument is unavailing because **all** of the invoices and charges claimed in this proceeding were paid by SEA. CX_05816, Smith Expert Report, Ex. 1; CX_05803, Smith Expert Report, ¶32. ZIM’s own damages expert, Mr. Zayas does not contest that SEA paid each and every charge. CX_06571, Zayas (ZIM) Dep. Tr. 49:4-9. Any charges alleged to have been waived or refunded were not contested here. Furthermore, ZIM cites no evidence in the record substantiating that “waived” charges were actually due and owing. Indeed, evidence discussed above amply

¹⁵ The ID’s findings on invoicing practices and the cargo holds related to the reasonableness of certain of the disputed charges that ZIM claimed gave rise to the cargo holds—“[i]mposing a hold on SEA for invoices owed by different entities, when invoices have not been issued, or information not provided does not promote freight fluidity,” ID at 82—not as to damages for new demurrage or detention resulting from the cargo holds.

¹⁶ Regardless, directly paying a terminal charge is a common carrier responsibility under store door moves; **ZIM should have paid in intervening charges as an initial matter**, and only if ZIM had a legitimate basis to charge the consignee, should it have then properly invoiced the consignee. ZIM’s practices shifted during the pandemic and it no longer met its D&D responsibilities on store door moves. SEA PFF ¶74. This included forcing SEA to pay terminals directly under protest to have ZIM continue to move the cargo to the inland destinations. *Id.*; see also SEA PFF ¶43. This common carrier responsibility was foisted upon SEA. ID FF ¶¶22, 24. SEA did not have contracts with the terminals because SEA was entirely dependent upon ZIM for the inland transport of its goods, so SEA was forced to pay the terminals with a credit card because SEA “did not have the ability to pay other than through the credit card.” SEA ¶PFF 75.

shows that much of what ZIM claimed was due and owing when it initiated the cargo holds was not legitimate. In all events, ZIM provides no rationale or reasonable explanation for why it should receive the benefit of D&D charges assessed on unrelated SEA cargo that ZIM refused to move because ZIM “waived” charges erroneously assessed that were the purported basis for holding the cargo. Two wrongs do not make a right.

2. The Policy Implications Are Substantial if ZIM’s Exceptions Are Accepted

ZIM concludes its exception by stating, “[i]n light of the foregoing factual considerations, the award of reparations should be reversed.” ZIM Except. at 18. But if there is a real, true issue concerning the scope of reparations being “unsupported by the record,” the solution at the Commission level is not to reject SEA’s recovery altogether. SEA is the aggrieved party who was forced to pay over \$10 million in charges because of ZIM’s actions, and the Presiding Officer’s ruling showed a discomfort in providing that full relief because of perceived evidentiary gaps in supporting a damages finding. But the FMC is equipped with the Rule 251 authority to deal with precisely the situation described by the Presiding Officer, and then trumpeted by ZIM when saying reparations are “unsupported by the evidence.” 46 C.F.R. § 502.251.

The record in this case is sprawling. The Commission rules requiring discovery to be completed within 150 days, even with very modest extensions, barely leaves either party an opportunity to take stock of the full evidence collected. In particular from SEA’s perspective, when it is required to meet its burden on showing liability, the seventy-page initial brief and the reply brief are naturally going to focus on liability issues. There is logic in this with Rule 251 providing a stopgap, which is only applicable if a liability finding is reached and the scope of charges are vast. With thousands upon thousands of charges at issue here, CX_05816-CX_05930, Smith Expert Report, Ex. 1; CX_05931, Smith Expert Report, Ex. 2, this case would be the paradigmatic

use of Rule 251 if any evidentiary questions exist for the Commission, instead of providing no reparations whatsoever as ZIM urges.

ZIM's extreme position is particularly concerning from an equity standpoint. The Presiding Officer does not undertake an exhaustive analysis of Commission precedent to show that SEA and ZIM should have been focused on an each-container analysis from the beginning. To the contrary, there is no analysis of FMC rulings supporting this each-container requirement in every D&D case. The Presiding Officer here simply declares it is necessary, citing to the Commission's decision in *TCW* and the ALJ's decision in *Hapag-Lloyd*. ID at 70.¹⁷

But in those cases, the determination of whether the detention practices at issue were unreasonable necessarily turned on facts that differed for each shipment. Specifically, as to liability, whether charging detention on days when equipment could not be returned in fact occurred for containers on days when the terminal was closed and/or appointments were insufficient, and as to proximate cause, whether the complainant was charged on those days. Those circumstances differ on the basis of the facts of each shipment, *e.g.*, for a given container, was the terminal closed, and was detention charged. Hence, the ID's reading of *Hapag-Lloyd*—that “a closer reading of the case will show that a violation was found only for the days ‘when there is evidence that sufficient appointments were not available’ but that a violation was not found where there was no evidence regarding the availability of appointments”—may be applicable to the practices in that case, but it is not applicable to the practices in this case. ID at 70.

This case is materially different. The charges here arose while the carrier, ZIM, was responsible for the inland transportation, and the unreasonable practices here do not depend on

¹⁷ Citing *TCW, Inc. v. Evergreen Shipping Agency (America) Corp. & Evergreen Line Joint Service Agreement*, Docket No. 1966(I), 2025 WL 516256, at *8 (FMC Feb. 13, 2025) and *Hapag-Lloyd, A.G.*, Docket No. 21-09, 2022 WL 1239377, at *2, *30 (ALJ Apr. 22, 2022).

differences in shipment-specific facts. As to the cargo hold practice, the Presiding Officer correctly found that ZIM’s unreasonable practice was holding cargo (and charging new D&D on held cargo) for amounts purportedly “due for other containers.” ID at 82. That practice was applied to SEA cargo because it was in ZIM’s possession or control and “[d]uring a cargo hold, ZIM would not release or deliver any containers.” ID at 75. The unreasonableness of that practice **did not** depend on other factual circumstances that differed for each of the 1,020 containers held. Indeed, the Presiding Officer did not require a shipment-by-shipment analysis to establish either liability or reparations in connection with ZIM’s cargo hold practice. *See* ID at 82, 99 (D&D charged during cargo holds because ZIM refused to deliver the cargo and “any efforts to deduct demurrage caused by . . . potential other reasons would be speculative”). As to the CNT practice, ZIM’s unreasonable practice was charging SEA “solely on the basis that a preferred or customer nominated trucker was utilized.” ID at 3, 75. That practice was applied to all charges incurred on SEA shipments that utilized CNTs and the unreasonableness of that practice did not depend on other factual circumstances that differed for each CNT shipment.¹⁸

The only facts that differ by each shipment relevant to SEA’s affirmative case pertain to showing the amounts SEA paid for the charges assessed on each CNT shipment and during each cargo hold. *See, e.g.*, ID at 89 (the ID supports this in principle as to cargo holds: “[d]uring the cargo holds, ZIM did not deliver SEA’s cargo. Therefore, any demurrage and detention charges incurred during this timeframe proximately caused the damage, which is those charges”). The ID should have applied the same principle to the CNT practice as well: because ZIM’s practice

¹⁸ If ZIM had other lawful justifications for assessing specific D&D charges on the CNT shipments (or during the cargo holds), as SEA explained more fully in its exceptions, under the Commission’s well-established framework for evaluating Section 41102(c) claims, the burden of production should shift to ZIM to substantiate with evidence such justifications or otherwise establish superseding causes. SEA Except. at 38-45.

presumptively assessed D&D charges on SEA when a CNT was involved, the proximate cause of SEA's damages from the CNT practice was the D&D charges SEA paid on the CNT shipments.¹⁹

Despite this, the ID's view that a shipment-by-shipment approach that is potentially applicable in cases with a small number of shipments is also required in cases with thousands of shipments shows that, at a minimum, the Commission's precedent on large-scale charge cases is underdeveloped and perhaps unclear. In such a scenario, the Commission can set forth in its ruling here the guidelines that should be considered in large-scale charge cases. But this should not be held against SEA in this case when the parties can review documents in the record and provide an each-container analysis, if that is indeed what the Commission expects. When neither SEA nor ZIM presented evidence on a shipment-by-shipment basis in the manner suggested by the ID, they should be allowed to consider the evidence already in the record to do so. Or, alternatively, they should be permitted to supplement that record where needed on remand.

A remand would prevent ZIM from obtaining a windfall. Although the ID found evidence concerning ZIM's profit from these charges to be irrelevant, it is a curious position when considering that the Commission's discussion of the Incentive Principle speaks in terms of leverage and incentives. This was highlighted recently in *TCW*, 2025 WL 516256, at *6 ("ocean carriers have considerably more leverage over MTOs than shippers and truckers"), *9 ("most shippers and their intermediaries, even large commercial players, 'lack significant bargaining power as compared to ocean carriers'"). We urge the Commission to revisit the relevance of ZIM's profitability on these charges. The staggering gains show that issuing D&D charges was more than cost recovery and facilitating the movement of cargo. It was a profit center, pure and simple, and

¹⁹ See *TCW*, 2022 WL 18068977, at *7 (finding that respondent's practice of charging detention was the proximate cause of the claimed loss because respondent paid the charge).

had major implications on ZIM's revenue and profitability, as can be told in its public filings. SEA's liability expert, John McCown, is a shipping industry legend who has been associated with cargo containerization since its inception. See CX_08534, McCown Report, ¶3. He is also the leading authority on market analysis of ocean container carriers and the evidence proffered by him is revealing.

For example, the McCown report concluded that:

- “In five of the last seven annual periods covered, ZIM performed worse than the cumulative industry based on net income as a percent of revenue. It was only in the three years that experienced the most pronounced impact from the pandemic (2020, 2021 and 2022) that ZIM performed better than the entire industry.” CX_08563, McCown Report, ¶56.
- “[ZIM's] relative demurrage amount was almost the same in 2017 through 2019. On a per TEU basis, on average it worked out to just over one half of one day in excess of free time based on the average estimated tariff per diem rate of \$176. It marginally increased in 2020, but the sharpest increase, equivalent to a 124% spike in the amount per TEU, came in 2021. Another 24% increase occurred in 2022, bringing the amount per TEU to \$346.” CX_08569, McCown Report, ¶70.
- “For the full year of 2022, ZIM's container freight revenue of \$11.0 billion on a volume of 3.380 million TEUs equates to average revenue per TEU of \$3,240. Looking at this another way, the average demurrage revenue per TEU was 10.7% of the core average ocean freight rate obtained by ZIM.” CX_08569, McCown Report, ¶71.
- **“The total [demurrage collected] in 2021 and 2022 was \$2.146 billion, which was 307% higher than the \$527 million total amount recognized in 2017 and 2018.”** CX_08569, McCown Report, ¶72 (emphasis added).
- “The average ratio [of actually billed amounts compared to gross billable amounts] for the two years prior to the pandemic, 2018 and 2019, was 70.9%, meaning that 29.1% of the amounts that went into the portal were not billed as demurrage. The two years most affected by the pandemic, 2021 and 2022, had an average ratio of 90.8%, meaning that only 9.2% of the amounts that went into the portal were not billed as demurrage. **The fact that, during the pandemic, ZIM actually billed out 20% more of the billable demurrage as compared to pre-pandemic practices speaks for itself.** CX_08574-CX_08575, McCown Report, ¶80 (emphasis added).

It is because of practices by ZIM and other ocean carriers that OSRA was passed, providing the FMC with additional powers to curb these abuses. And the FMC would not maintain a demurrage and detention website noting the billions in charges by major ocean carriers if this was not a major concern of the Commission. *See* Detention and Demurrage, FMC, <https://www.fmc.gov/detention-and-demurrage/> (last accessed on June 2, 2025).

OSRA's mission was to support shippers and consignees of cargo who were wronged to ensure that they are not mistreated to the levels seen during the COVID-19 pandemic. The Commission has the power and obligation to not only help those injured post-OSRA, but to use the considerable powers of the Shipping Act prior to OSRA to redress wrongs by ocean carrier excess. This is especially important when SEA is simply seeking to recover monies **it has already fully paid out on the D&D charges**, as confirmed in the SEA damages report of Greg Smith. CX_05803, Smith Expert Report, ¶32. SEA respectfully urges the Commission reject ZIM's extreme position that SEA is entitled to zero reparations and that as a result ZIM should keep all of its wrongful charges.

IV. CONCLUSION

ZIM's exceptions challenging two "findings" should be rejected as they have no basis in the law or the evidentiary record. There is no basis to *reduce* the \$3,680,339 in reparations already awarded in the ID. And as elaborated upon in SEA's exceptions to the ID, and reiterated here for consistency, SEA requests that the Commission enter an order affirming the ID's finding of a violation with respect to both ZIM's unreasonable cargo holds and CNT practices. It also respectfully requests that the Commission make an additional affirmative finding that ZIM violated the Shipping Act with additional practices as set forth in SEA exceptions, and increase the reparations award to at least **\$10,763,233**. In the alternative, to the extent that there is any question about the adequacy of the evidence showing that ZIM's unlawful practices proximately

caused the D&D charges actually paid by SEA, the Commission should provide for a further evaluation of damages evidence pursuant to Rule 251.

Dated: June 5, 2025

Respectfully Submitted,

HOLLAND AND KNIGHT LLP

By: /s/ Christopher R. Nolan

Christopher R. Nolan
Allison N. Skopec
HOLLAND & KNIGHT LLP
787 7th Avenue, Floor 31
New York, NY 10019
Telephone: (212) 513-3200
chris.nolan@hklaw.com
allison.skopec@hklaw.com

Gerald A. Morrissey III
Kristine O. Little
HOLLAND & KNIGHT LLP
800 17th Street N.W., Ste. 1100
Washington, D.C. 20006
Telephone: (202) 469-5497
gerald.morrissey@hklaw.com
kristine.little@hklaw.com

Counsel to Samsung Electronics America, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the execution date which appears below, the undersigned served the attached document on counsel at the following email addresses:

Wayne R. Rohde
Christopher Raleigh
Kathryn Sobotta
Cozen O'Connor
1200 19th Street NW
Washington, D.C. 20036

wrohde@cozen.com
craleigh@cozen.com
ksobotta@cozen.com

Executed: June 5, 2025

/S/ Kristine Little