

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 22-30

SAMSUNG ELECTRONICS
AMERICA, INC.,
COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,
RESPONDENT.

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

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I. INTRODUCTION

On September 23, 2022, Samsung Electronics America, Inc. (“SEA” or “Complainant”) issued a Notice of Demand for Action to ZIM, asserting claims against it that were virtually identical to those at issue in this proceeding. On October 5, 2022, well within the deadline imposed for a reply, ZIM emailed a letter to SEA requesting the additional information it needed to evaluate and arrive at a resolution of SEA’s claims. RX-0016 though RX-0022. Instead of responding to ZIM’s request, SEA filed this lawsuit.¹

Since that time, SEA served an avalanche of data on ZIM comprising more than 155,000 pages of documents, participated in more than a dozen depositions and adduced two expert opinions to bolster its claims, yet, as the Presiding Officer found, SEA has still failed to answer

¹ SEA doggedly maintained that it never received ZIM’s letter and the absence of a response compelled it to file this lawsuit. This assertion, like many of its others, was disproven because a copy of ZIM’s letter was found in SEA’s production, thereby confirming its receipt of ZIM’s request. SEA’s assertion on this issue, like many of the proposed factual findings it advanced in this proceeding, was rejected by the Presiding Officer. *See*, Initial Decision (“ID”) at 66.

the fundamental question that ZIM put to it 2 ½ years ago: how did ZIM's acts or omissions cause the damages sought by SEA? Instead of answering this question, SEA's approach to this litigation has been to argue that ZIM had shortcomings which, without a showing of causation, entitle it to reimbursement of every demurrage, detention and storage charge that SEA paid over a three-year period. The Presiding Officer correctly rejected SEA's tactic, finding that SEA failed to prove a causal link between ZIM's alleged acts and/or omissions and the damages SEA has claimed.

In its Exceptions, SEA has doubled down on this strategy but, in an attempt to hedge its bet, has requested a Rule 251 hearing in the event that its attempt to circumvent proof of causation is unsuccessful. The FMC should reject SEA's Exceptions.

II. PROCEDURAL HISTORY

As noted above, SEA filed its complaint in this proceeding on October 13, 2022. Thereafter, the parties conducted extensive fact discovery, exchanged reports issued by expert witnesses with maritime and financial expertise, and concluded the discovery phase with the depositions of these experts.²

Following the close of discovery, SEA filed its Brief and Proposed Findings of Fact; ZIM responded; and SEA filed its Reply. Thereafter, the parties undertook additional efforts to settle the matter, but those efforts were ultimately fruitless. Following extensions to the scheduling order related to the settlement efforts and the scope of this proceeding, the Presiding Officer issued the ID on April 22, 2025.

In the ID, the Presiding Officer concluded that SEA had shown that ZIM acted unreasonably, in violation of the Shipping Act, when it employed cargo holds in the enforcement

² ZIM moved to strike the report of SEA's expert, John McCown, which was denied by the Presiding Officer. ID at 8. Although Mr. McCown's report was not formally stricken, it appears that the Presiding Officer gave no weight to his opinions and testimony which, aside from being mentioned in response ZIM's motion to strike, were not cited anywhere in the ID.

of its contractual maritime liens against SEA's cargo. ID at 2. ZIM filed Exceptions to this ruling. *See*, Respondent's Exceptions to Initial Decision, FMC Dkt. 22-30, #63 ("ZIM Exceptions").

As to SEA's remaining allegations that ZIM violated the Shipping Act, the ID held that SEA failed to adduce sufficient evidence to support all but one of its other claims. More specifically, the ID stated that SEA failed to show that "ZIM was responsible for all detention and demurrage charges on door delivery/carrier haulage shipments." ID at 3. SEA also failed to establish that ZIM retaliated against SEA, that ZIM refused to deal with SEA, or that ZIM did not comply with post-OSRA invoicing obligations. Instead, the Presiding Officer agreed with ZIM's arguments that SEA had failed to provide the evidence necessary to carry its burden of proof and declined to adopt SEA's characterization of "store door" terms. The Presiding Officer further held that claims related to demurrage and detention charges, even a large volume of charges, require a fact-sensitive analysis of each individual charge.

Now before the Commission are the Exceptions filed respectively by each party. The ZIM Exceptions dispute the Presiding Officer's holding that the cargo holds ZIM employed were in violation of the Shipping Act and maintain that ZIM's contractually extended maritime liens were properly exercised pursuant to established maritime law. ZIM also disputes the amount of the reparations awarded to SEA because it is not supported by evidence in the record and is contradicted by the Presiding Officer's findings of fact and other evidence in the record.

SEA's Exceptions dispute each of the Presiding Officer's holdings that does not favor SEA, including the Presiding Officer's calculation of reparations. ZIM herewith submits its Reply to Complainant's Exceptions.

III. ARGUMENT

The Complainant seeks to shift blame to ZIM for problems caused in large part by SEA's own acts or omissions and to characterize those problems as violations of the U.S. Shipping Act

of 1984, as amended (“Shipping Act”). In so doing, SEA seeks to recover the entirety of the charges that it paid to ZIM and third parties even though the evidence confirms, and the Presiding Officer found, that SEA’s own acts and omissions and those of its agents resulted in charges for which SEA was responsible. (ID at 97-8) To be clear, the ID did find that ZIM had shortcomings, but it also held that SEA failed to demonstrate any causation between ZIM’s conduct and the amounts claimed by SEA. This fatal deficiency in SEA’s proof resulted from its failure to undertake a shipment-by-shipment analysis to demonstrate which party should bear responsibility for each charge in question. By seeking to recover all of the charges SEA paid – even those for which SEA admits it was liable – the Presiding Officer properly found that SEA failed to prove that ZIM proximately caused SEA’s alleged damages as required by the Shipping Act.

A. THE ID CORRECTLY HELD THAT SEA DID NOT CARRY ITS BURDEN OF PROOF WITH RESPECT TO REPARATIONS

1. The Burden of Persuasion is On SEA

Under the Administrative Procedure Act and FMC regulations, the burden of proof is on the proponent of the order, in this case SEA. 46 C.F.R. §502.203. The burden of proof in FMC cases is often referred to as the burden of persuasion. *Santa Fe Discount Parking v. Board of Trustees*, 3 F.M.C.2d, 59, 68 Dkt. No. 14-06 (FMC, April 16, 2021). *See also Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake, LLC*, Dkt. No. 11-11, 2013 WL 9808672, at *31 (ALJ, Jan. 10, 2013). The “burden of proof” and “burden of persuasion” refer to the ultimate obligation to prove a claim by a preponderance of the evidence. *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 WL 9966245 (FMC Dec. 17, 2014 (“Under the Administrative Procedure Act (APA), [Complainant] has the burden of proving, by a preponderance of the evidence, that the [Respondent] violated the Shipping Act, and this burden of persuasion does not shift.”) *Id.* at 27.

In proceedings before the Commission and its administrative law judges, the complainant has the burden of production, which is the obligation to make a prima facie case. If the complainant makes a prima facie case (e.g., as to the unreasonableness of a practice), the burden of production then shifts to the respondent, who would then need to point to evidence that justifies its challenged conduct. *River Parishes Company, Inc. v. Ormet Primary Aluminum Corporation*, Dkt. 96-06, 1999 WL 125991, at *23 (FMC, Feb. 3, 1999). Regardless of the shifting burden of production, the complainant retains the ultimate burden of persuasion.

The ID in this proceeding held that SEA met its burden of persuasion with respect to the unreasonableness of the imposition of cargo holds. The ID also held that it would be unreasonable to presume that all demurrage/detention charges incurred on an inland move performed by a customer-nominated trucker (“CNT”) were automatically the responsibility of the customer. ID at 74-75, 82. However, as explained below, the fact that SEA may have met its burden of persuasion with respect to the existence of a violation does not necessarily mean that SEA met its burden with respect to its entitlement to reparations.

2. SEA Did Not Meet Its Burden of Persuasion With Respect to Causation

SEA improperly conflates proof of a violation with proof of causation, thereby ignoring the issue of causation and, as a result, failing to meet its burden of persuasion with respect to this element of its claim.

It is undisputed that in order to establish a successful claim for reparations based on an unjust or unreasonable practice, the practice must be the proximate cause of the claimed loss. 46 C.F.R. §545.4(e). As with all elements of a claim, the burden of proving causation falls on the claimant, SEA. *MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, Docket No. 16-16, 2022 WL 2209421, at *3 (FMC June 10, 2022) (complainant bears burden of proving entitlement to reparations).

Here, SEA has made no showing that the charges it seeks to recover were caused by an unreasonable practice on the part of ZIM. Rather, SEA argues that having proved that (a) an unreasonable practice existed and (b) it paid charges, it is automatically entitled to recover every penny it claims to have paid without proving that the charges were paid *because of* the practice. This is contrary to clear Commission precedent holding that “establishing a violation alone does not justify reparations.” *MAVL Capital Inc., et al. v. Marine Transport Logistics, Inc., et al.* 2022 WL 2209421, at *3 (FMC Jun. 10, 2022). The ID correctly rejected SEA’s suggestion that it need not establish causation, and the Commission should now do the same.

The ID held that the assessment of demurrage/detention charges on carrier haulage/store door delivery shipments are not unreasonable *per se*. In keeping with the well-established principles that reasonableness is a factual issue and that the reasonableness of demurrage/detention charges requires the consideration of numerous factors, 46 C.F.R. §545.5(f), the ID held that in order to determine whether a particular charge is reasonable or unreasonable requires an assessment of the reason the charge in question was incurred. ID at 70. As the proponent of an award for reparations, SEA is obligated to prove that the unreasonable practice was the proximate cause of those charges. As the Presiding Officer correctly held, it has failed to do so with respect to the demurrage, detention, and other charges SEA claims it is entitled to have refunded.

SEA would have the Commission abandon the requirement that a complainant demonstrate causation, as well as the assessment of reasonableness based on facts, and would instead have the Commission simply assume, without proof, that any and all charges of a type that might have been caused by the practice were in fact so caused. Such an approach to the issue of reparations is legally unsound and would create a disincentive for cargo interests to maintain cargo fluidity and/or avail themselves of the dispute resolution procedures the Commission has required carriers

to establish.³ In this regard, it makes far more sense not to award reparations for a violation where causation has not been proven than to adopt SEA's approach of awarding whatever reparations the complainant seeks based solely on the existence of a violation without evidence of causation.

SEA's reliance on *Hapag-Lloyd A.G. and Hapag-Lloyd (America) – Possible Violations of 46 U.S.C. § 41102(c)*, FMC Docket No. 21-09, 2022 WL 1239377 (ALJ April 22, 2022) is misplaced. There, the Presiding Officer, unsure of how to apply the factors enumerated in 46 C.F.R. Part 545 to an enforcement proceeding, ruled that collection of charges not yet paid would cause harm to those paying them and thereby satisfied the proximate cause requirement. The difference between *Hapag-Lloyd* and this proceeding is that in *Hapag-Lloyd* the Commission's Bureau of Enforcement met its burden of persuasion that the charges in question were caused by the practice at issue. Here, SEA has made no effort whatsoever to prove that any of the thousands of charges it waited years to try to recover were in fact attributable to ZIM's practice of charging demurrage/detention on store door movements performed by the CNTs nominated by SEA.

3. The Burden Of Persuasion As To The Reasonableness of Charges Does Not Shift To ZIM

In a tacit recognition of its failure to prove causation, SEA erroneously argues that because it has met its burden of persuasion with respect to the existence of an unreasonable practice, the burden of persuasion is shifted to ZIM to prove the charges are reasonable. This argument is devoid of merit.

Had SEA made a prima facie showing that the amounts it seeks to recover were caused by the unreasonable practice, then the burden of production would have shifted to ZIM to refute that

³ SEA's reference to the Commission's policy statement on class actions carries no legal weight with respect to Complainant's burden of proof. That policy statement is not a rule, was issued without notice and comment, has no discernable legal effect, cites no legal authority in support of its conclusion, and is a simplistic approach to a topic the FMC previously acknowledged raises complex issues of first impression. *In Re Vehicle Carrier Services*, 1 FMC 2d 440, 470 (FMC October 21, 2019). In any event, an informal policy statement cannot modify a statutory requirement to demonstrate causation and the requirement to prove damages with reasonable certainty.

showing and demonstrate reasonableness. However, SEA's only argument as to causation is that the practice in question existed. It has not offered any evidence as to the cause of any particular charge or charges, and the ID correctly held that, under these circumstances, an award of reparations was not appropriate.

SEA tries to distract from this gaping hole in its case by advancing various arguments not directly related to the issue of causation as a reason why the Commission should dispense with the requirement that a complainant prove it is entitled to reparations. Each of these arguments not only misses the mark, but is also inherently flawed.

SEA spends considerable time on the FMC's so-called interpretative rule on demurrage and detention (46 C.F.R. Part 545) and the application of that rule in *TCW, Inc. v. Evergreen Shipping Agency (America) Corp.*, Docket No. 1966(I), 2025 WL 516256 (FMC Feb 13, 2025). There are two main problems with SEA's reliance on *TCW*. First and foremost, by focusing narrowly on the incentive principle portion of the interpretative rule, SEA is committing the same error for which the U.S. Court of Appeals reversed the FMC's decision.⁴

The Commission, when adopting the interpretative rule, indicated that it would consider factors, arguments, and evidence other than those listed in the rule. 46 C.F.R. §545.5(f). Among the factors contemplated by §545.5(f) is whether the cargo interest has complied with its customary responsibilities. 85 *Fed. Reg.* at 29647. Thus, any analysis of reasonableness under the interpretative rule necessarily involves consideration of whether the cargo interest complied with its customary responsibilities.⁵ This is precisely what the Presiding Officer did. The Presiding

⁴ ZIM notes that the FMC's decision on remand has been appealed to the D.C. Circuit. Since the FMC's decision on remand appears not to have considered the additional factors the Court of Appeals instructed the Commission to consider, it seems likely that the Commission will be reversed again.

⁵ SEA itself concedes that factors beyond the incentive principle need to be considered in analyzing reasonableness. *See* SEA Exceptions, p. 21, n. 7.

Officer declined to find that charging demurrage and detention on a store door (i.e., carrier haulage)/customer-nominated trucker move is unreasonable *per se*, and instead opted for a factual analysis of reasonableness on a shipment-by-shipment basis. Again, this is consistent with the approach taken by the FMC with respect to application of the interpretative rule.

Second, nothing in *TCW* even suggests that the interpretative rule or that decision alters the requirement that a complainant prove proximate cause. Similarly, nothing in *TCW* or its application of the interpretative rule supports SEA's apparent argument that 46 C.F.R § 545.4(d) somehow shifts the burden of persuasion to ZIM.

SEA's attack on the ID's focus on a shipment-by-shipment analysis also suffers from two fatal flaws. First, SEA's effort to distinguish previous decisions holding a shipment-by-shipment analysis is required, on the grounds that those cases involved merchant haulage rather than carrier haulage, fails because analysis of the reasonableness of a charge is the same regardless of whether the shipment is carrier haulage or merchant haulage. In this regard, ZIM is unaware of any precedent supporting a distinction between the analysis of charges in these two contexts. Moreover, the only Commission guidance on this point undermines SEA's argument.

SEA cites the Commission's statement that it will scrutinize demurrage on carrier haulage moves carefully⁶ in support of its argument that the assessment of demurrage on carrier haulage moves is unreasonable *per se*. However, if demurrage charges on carrier haulage moves were unreasonable *per se*, then close scrutiny would not be required. The fact that such charges will be scrutinized closely merely affirms that the Presiding Officer correctly determined that the reasonableness of charges must be determined on a shipment-by-shipment basis.

⁶ Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29665 (May 18, 2020).

The second flaw in SEA’s attempted distinction is that the shipment-by-shipment analysis is not something merely adopted by administrative law judges. The decision in *TZ SSE Buyer, LLC v. Yang Ming Marine Transp. Corp.*, Docket No. 24-10, 2025 WL 1083815 (ALJ March 25, 2025) became administratively final on April 24, 2025, when the Commission determined not to review the initial decision. Accordingly, by operation of law, the Commission has now adopted the requirement of a shipment-by-shipment analysis. 46 C.F.R. §502.227(a)(3).

SEA’s attempt to suggest that the risk of any uncertainty must fall on ZIM (SEA Exceptions at 29) is also incorrect for two reasons. First, the risk of uncertainty falls on the wrongdoer only when the wrongdoer has prevented the precise computation of damages. *Cal. Shipping Line, Inc. v. Yang Ming Marine Transp. Corp.*, 25 S.R.R. 1213, 1230 (1990). Here, ZIM has done nothing to prevent the computation of damages. Accordingly, this principle is irrelevant. Second, SEA has presented a detailed list of the charges/costs to which it claims to be entitled – there is no uncertainty as to the amount of damages claimed. The issue is not uncertainty of the amount, but SEA’s failure to prove causation. Thus, once again, this principle is inapplicable.

B. THE FACTUAL RECORD DOES NOT SUPPORT SEA’S EXCEPTIONS

SEA’s arguments for a greater reparations award not only lack legal merit, but are also unsupported by the facts.

As discussed below in detail, the Presiding Officer correctly found that there were situations in which SEA was unable to take delivery of cargo in a timely manner (ID Finding of Fact (“FOF”) #131), failed to timely respond to requests for actions necessary to process its containers (FOF #139), or did not timely clear Customs (FOF #165). These are all situations in which SEA failed to fulfill the cargo interest’s customary responsibility. Despite the many instances in which charges were attributable to the act or omission of SEA (ID at 70), charges that were incurred as a result of SEA’s non-performance were included in the damages calculation of

SEA's expert. FOF #134. This means that, as a factual matter, SEA has failed to demonstrate its damages with reasonable certainty.

1. SEA Controlled the Inland Movements of Its Shipments.

SEA has argued, in the proceedings below and in its Exceptions, that ZIM solely controlled the inland movement of SEA's shipments simply because they were transported on a "store door" basis. The record does not support this assertion.⁷ To the contrary, the evidence is clear that SEA directed the movement of its shipments – not ZIM.

a. Pre-Pulling and Cargo Storage

One example of this control was confirmed by evidence that SEA would regularly direct that shipments be "pre-pulled" from an ocean terminal and stored off-site when its warehouse facilities were unavailable to accept delivery before the expiration of free time.

SEA's expert acknowledged that prepull and storage is an interim move in which a container is removed from the terminal facility in order to avoid or minimize demurrage charges and stored elsewhere until it is actually delivered to its final destination. CX_05798-05801, Smith Rep. ¶29(m). And, the record is replete with evidence which confirms that SEA exercised this control in order to avoid terminal demurrage:

- On March 17, 2020, SEA instructed XPO Logistics, its customer-nominated trucker ("CNT"), that thirteen containers were to be pre-pulled two weeks before the customer's requested delivery date. RX_0814-15 (Bates nos. SEA0132657-58).

⁷ A common strategy is evident from SEA's Exceptions, which has been carried over from its original Brief and Proposed Findings of Fact: SEA regularly seeks to shift responsibility for its own actions and omissions upon ZIM; but, in its attempt to do so, SEA relies upon citations to documents, testimony, expert opinions and legal precedent that do not support its claims. This shortcoming was identified in the ID and cited as a reason why SEA did not carry the burden of proving its claims. ID at 8, 66, 70, 85, 87, 92, 95, 96, 97, 100.

- On May 28, 2021, SEA instructed ZIM to have a container pre-pulled and stored because the last free day would expire 26 days prior to the customer’s first available appointment; RX_1023-25 (Bates nos. SEA0046788-90).
- On March 4, 2021, SEA issued a blanket instruction to its CNTs that they must “prepull the loads before the port/rail LFD (“last free day”) if needed, kindly advise the rates and detail information for approval.” RX_1978 (Bates No. SEA0005779).
- When SEA’s customers could not accept cargo within a terminal’s free time, it instructed its CNT on June 3, 2021, to prepull and store the cargo to avoid higher on-port demurrage charges. RX_1688-1712 (Bates nos. SEA0008017-41).

b. Control of Shipments by SEA and Its Customers

Control over the delivery of shipments was also directly exercised by SEA and its customers, and the latter’s requirements affected when and how shipments were delivered. Significantly, ZIM was forced to comply with these requirements.

This was not a recent phenomenon as SEA had provided instructions and directions to its CNTs regarding the required dates of delivery and the type of delivery (“drop and hook” or “live unload”) to its customers before the pandemic:

- On June 4, 2019, SEA issued delivery instructions directly to the motor carrier, PBI Industries regarding delivery of shipments to Lowe’s. RX_1684-85 (Bates nos. SEA0000652-53).
- On June 21, 2019, SEA issued delivery instructions directly to another trucker, Container Port Group (CPG) regarding deliveries to Lowe’s. RX_1680-82 (Bates nos. SEA0002095-97).

- *See also*, RX_1755-59 (Bates nos. SEA0002631-35) – a June 4, 2019 instruction from SEA to another CNT, XPO Logistics, issuing instructions for deliveries to Lowe’s.

During and after the pandemic, the control over the movement of its shipments by SEA and its customers continued, as was confirmed by indisputable evidence in the record:

- RX_1490-1500 (Bates nos. SEA0027022-32) – This was a February 18 – March 10, 2020 email exchange in which SEA directed a change of the trucker selected by ZIM, World Logistics to Harvest, a trucker designated by SEA. The email string included detailed instructions from SEA to Harvest regarding pre-pulling and delivery of the shipments.
- RX_1195-99 (Bates nos. SEA0133985-89) – This was a lengthy March 13 – April 21, 2020 email exchange between a motor carrier, XPO Logistics, and SEA regarding the prepull and storage of shipments. It further evidences significant delays by SEA in responding to XPO’s request for authorization to pre-pull containers in order to prevent demurrage.
- RX_0811-15 (Bates nos. SEA013265458) – A March 17 – 19, 2020 email string between SEA and XPO Logistics, this exchange discusses whether live unload or drop and hook deliveries would be made to Lowe’s and the relevant charges.
- RX_0832-34 (Bates nos. SEA0135895-97) – This email exchange dated December 29, 2020, evidences a vigorous dispute between SEA and its motor carrier, AV Logistics, regarding the latter’s lack of capacity to cover or pre-pull 22 containers and whether AV Logistics or SEA should cover the resultant demurrage.

The foregoing examples flatly contradict SEA’s claims that it was entirely reliant on ZIM for management of inland transport.

In addition, some of SEA’s customers, such as Best Buy, imposed rigorous appointment requirements. Specifically, Maria Kristina Fernando of SEA notified ZIM that “We need to find

a trucker with BBY (Best Buy) portal now. Setting up with BBY portal it takes days to be registered and the trucker must have enough patience to under (*sic*) the appt request.” RX_1069-70 (Bates no. SEA0000167).

Another SEA customer, Lowe’s, dictated the required delivery dates for shipments, which resulted in the delivery of shipments after free time had expired. *See* RX_0814 (Bates no. SEA0132657) - confirming a last free day of March 18, 2020, for 13 containers and a requested delivery date by Lowes of April 1, 2020. *See also*, RX_1963-68 (Bates nos. SEA0005764-69) - confirming that Lowe’s containers went into demurrage before the CNT could pick them up due to a maximum delivery of five containers per day, slow devanning at the warehouse, accumulations of pre-pulls and storage, and no remaining storage capacity.

Further, many SEA warehouses and facilities scheduled appointments for delivery that created delays which were simply not within the control of ZIM. *See*, RX_1576-82 (Bates nos. SEA0003414-20) - confirming that SEA’s warehouse double booked a slot which led to demurrage and detention (RX_1582). As a result of SEA’s error, Ms. Fernando admitted that SEA was responsible, advising ZIM: “Please send the invoice to SAMSUNG from 02.03 to 02.08, kindly advise the amount and we will approve it. It is not ZIM’s responsibility after that since the appt was provided for 02.09”. RX_0682 (Bates no. ZIM0031912). *See also*, RX_1688-89 (Bates nos. SEA0008017-18), confirming that 36 days of storage, 26 days of storage and 24 days of storage accrued due to customer appointment scheduling.

SEA’s management of its CNTs included oversight to make sure its containers were not at risk of non-delivery. *See*, RX_1385-87 (Bates nos. SEA0124243-45) - showing how SEA intervened when AV Logistics, one of its CNTs, was at risk of being shut out do to non-payment

of invoices. *See also*, RX_0832-35 (Bates nos. SEA0135895-98), in which SEA addressed issues with AV Logistics and how it could improve its performance for SEA.

SEA also caused demurrage to be incurred by scheduling appointments and deliveries after the last free day for a container had expired - *see*, RX_1465-74 (Bates nos. SEA0127765-74). *See also*; RX_1478-83 (Bates nos. SEA0133828-33) – this was a March 23, 2020 email from Ms. Fernando at SEA to AV Logistics criticizing it for not pre-pulling a container that was scheduled for delivery to Lowe’s after expiration of the LFD; RX_1023-25 (Bates nos. SEA0046788-90) – this email exchange evidences a delivery appointment on July 5, 2021 with an expiring LFD of May 28, 2021 – the issue was exacerbated by the failure of Ms. Fernando of SEA to respond to urgent requests to prepull the shipment to avoid rail storage charges; and, RX_0811-15 (Bates nos. SEA0132654-58) – this email exchanges discusses the extra costs incurred due to requested delivery dates of April 1, 2020 for thirteen containers scheduled for Lowe’s with LFD expiring on March 18, 2020. The email string also demonstrates further internal confusion between Samsung and SEA about whether the deliveries would be live unload or drop and hook, with the latter resulting in the assessment of additional charges.

Amazingly, SEA even directed its CNT to prioritize the delivery of shipments. *See*, RX_1208 (Bates no. SEA0139186), in which SEA instructed Harvest Transport, its CNT, to prioritize the delivery of 126 CMA containers over cargo being transported by other ocean carriers, including 19 ZIM containers.

Finally, SEA accrued demurrage when it changed the terms of the transit from store door to CY/CY and directed ZIM to terminate the shipment at the port because a rate agreement had not been reached with SEA’s CNT. *See*, RX_1162 (Bates no. SEA0011131); and, RX_1171-73 (Bates no. SEA004746264).

Notably, SEA has accepted its responsibility for demurrage when its customers or warehouses could not receive cargo. *See*, CX_02250-51, Rapske Tr. 77:23-78:11 in which SEA's Corporate Designee admitted that SEA was responsible for demurrage which accrued because a facility was unable to receive the cargo. *See also*, RX_0682 (Bates no. ZIM0031912) in which Ms. Fernando notified ZIM that SEA would accept responsibility for containers which accrued demurrage when a requested delivery date was scheduled after expiration of the LFD, noting "[i]t is not ZIM's responsibility after that since the appt was provided for 02.09."

c. SEA's Failure to Clear U.S. Customs

Demurrage was also incurred by SEA when it failed to timely clear its shipments through Customs. Notably, SEA readily admitted that it was responsible to clear its cargo through Customs and was responsible for any demurrage that resulted from delayed Customs' clearance. *See*, CX_02239, Rapske Dep. Tr. 67:1-10 (admitting Customs hold issues could cause demurrage to accrue and that same were attributable to SEA's own acts or omission). *See also*; CX_02244-45, Rapske Tr. 72:13 - 73:21, providing an example of delayed information from SEA, resulting in a Customs issue and concomitant demurrage. RX_0100, Rapske Dep. Ex. 8: "Today, Pactra has their trucker at the terminal to pick up the container only to discovery that there are no Customs clearances."

Related to the issue of demurrage being incurred because of SEA's failure to timely achieve Customs clearance, delays in the processing of paperwork and/or orders by SEA's customs brokers and/or SEA personnel also led to additional demurrage and detention:

- CX_02244-45, Rapske Tr. 72:13-73:21 – discussing an internal SEA email stating: "We don't have any EDI data for these containers. Please provide Asap to complete customs clearance. Also, please investigate the root cause of this issue. We have the same trouble almost every week."

- RX_0100, Rapske Dep. Ex. 8 – This is an email from SEA criticizing its broker, stating: “Kindly advise as to why we are seeing such delays in processing customers clearance and what steps/actions are being addressed to rectify such.”
- RX_1210-19 (Bates nos. SEA0109560-69) – this email string relates to the inability of PBI Industries, one of SEA’s CNTs, to pay terminal demurrage, resulting in further delays in delivery and the container incurring additional terminal demurrage.
- RX_1241-50 (Bates nos. SEA0113960-69) – appointments for delivery to Best Buy were not provided by SEA to its CNT, PB Industries, causing containers to remain at terminal after expiration of LFD.
- RX_1112-17 (Bates nos. SEA002322328) – SEA’s broker was unable to pay terminal demurrage, requiring its CNT, Harvest Transport, to advance the payment.
- RX_1306-13 (Bates nos. SEA0049720-27) - AV Logistics complained that SEA ignored its requests for clearing demurrage “everyday for the last 2+ weeks”). Responsibility for these delays and the resultant demurrage fell squarely on the shoulders of SEA.

Indeed, SEA admitted that it accrued demurrage on many occasions when its cargo did not clear Customs within free time. CX_02244-45, Rapske Tr. 72:13-73:21; RX_014446, Rapske Dep. Ex. 7; RX_0100, Rapske Dep. Ex. 8.

d. SEA’s Failures/Delays in the Provision of Delivery Instructions

SEA also incurred demurrage when it failed to provide delivery instructions for specific shipments, or when it delayed the issuance of same:

- RX_1121-34, SEA0136166-79 (CMA boxes ignored for nearly a month);
- RX_1138-59, SEA0137517-38 (SEA delayed a ONE shipment for weeks and failed to complete payment prior to appt, resulting in further delays);

- RX_1180-89, SEA0058313-22 (UPS, the local broker for SEA, failed to send timely delivery orders, resulting in delays and the resultant accrual of demurrage).
- Confusion and SEA's delays providing information to ZIM led to demurrage and detention. RX_0955-62 (Bates nos. SEA0023439-46); RX_0965-71 (Bates nos. SEA0025198-SEA0025204); RX_1252-60 (Bates nos. SEA0026423-31; and, RX_0811-15 (Bates nos. SEA0132654-58).
- Confusion and delays on the part of SEA in providing information to its CNTs also led to demurrage and detention. RX_1195-99 (Bates nos. SEA0133985-89); and RX_1269-80 (Bates nos. SEA0007716-27).

e. **SEA's Chronic Payment Delinquency Delayed Shipments**

As noted above in the Procedural History, ZIM has filed Exceptions to the ID, specifically excepting to the Presiding Officer's holding that ZIM's employment of cargo holds to enforce its maritime lien was a violation of the Shipping Act. The record, as described in ZIM's Exceptions, confirms that SEA's chronic delinquency in the payment of its receivables necessitated ZIM's exercise of its contractual maritime liens to persuade SEA to address and resolve its seriously overdue receivables. And, SEA's compulsive delinquency is further confirmed by the fact that it still has outstanding receivables owed to ZIM in the approximate amount of USD \$2 million.⁸ ID at 100. That evidence was described in ZIM's Exceptions to the Initial Decision and, for the sake of brevity, will not be reiterated here. (ZIM Exceptions, Point C).

⁸ ZIM has deferred prosecution of legal proceedings against SEA for these receivables because SEA's strategy, in response to suits filed by ocean carriers for unpaid charges, has been to seek a stay of the District Court litigation pending resolution of FMC proceedings. *See, e.g.,* Order Granting Defendant's Motion to Stay, *HMM Co., Ltd. v. Samsung Electronics, Inc.*, 24-cv-01454 (C.D. CA.), Dkt. No. 38. ZIM is evaluating its options for pursuing these receivables after this litigation has concluded.

However, SEA's payment delinquency was not limited to ZIM and in fact extended to its other vendors, including the motor carriers it had designated as CNTs and which it relied upon for the inland movement of its shipments. While ZIM was responsible for payment of inland freight charges to the CNTs, the latter were typically required by SEA to advance significant funds to cover demurrage charges assessed by terminals before containers would be released. These charges, as the Presiding Officer found, typically accrued because SEA:

“...failed to timely respond to requests for action needed for the processing of SEA's containers and requests to pay demurrage and detention charges on its containers. *See, e.g.*, RX 1023-125 (SEA repeatedly ignoring emails from ZIM regarding approval of pre-pull and storage plans for of (*sic*) its container); RX 1097-1100 (SEA failing to timely provide information needed for warehouse appointment); RX 1963-68 (SEA failing to respond to multiple emails from ZIM and CNTs to confirm accrued charges prior to pick up of its containers); RX 1688-1714 (ZIM DSG's repeated emails advising SEA that approval for pre-pull and storage charges was needed to proceed with delivery, for example, stating to Maria Fernando on May 27, 2021: “Please advise on the previous emails, this is my 4th email.” RX 1708; on June 1, 2021, “Additional charges have accrued on this shipment as pre-pull & storage were not approved. Please advise how to proceed.” RX 1692. On June 3, 2021, Maria Fernando finally responded, solely stating: “Approved.” RX 1688);RX 1532-37 (emails titled “*****PLEASE RESPOND-5TH MESSAGE** URGENT**TCNU564577-5 COPPELL, TX ZIMUSEL200234679 *Samsung* ***DETENTION***”from ZIM DSG to SEA starting November 12, 2021, to December 8, 2021, repeatedly asking SEA to approve payment for accrued detention charges on SEA's container). FOF #139

Because of the significant receivables owed to its motor carriers that resulted from SEA's non-responsiveness as described in the above Finding of Fact, the CNTs refused to move SEA's shipments until they received payment, resulting in further delays that were directly attributable to SEA. Evidence which demonstrates that delays were attributable to SEA's failure to pay its CNTs is incontrovertible:

- SEA accrued demurrage and detention when its CNTs were unable or unwilling to perform cargo movement for SEA. RX__0832-34 (Bates nos. SEA0135895 and SEA0135897).

- SEA ran up significant overdue balances with CNTs who would not accept delivery instructions prior to payment. *See*, CX_02365-70, Fernando Dep. Tr. 45:24-50:5 in which Ms. Fernando admitted that truckers Gold Point, CPG and AV Logistics either stopped moving cargo or threatened to stop moving cargo because SEA failed to pay them.
- RX_0055-57 (Bates No. SEA0117712-4) Fernando Ex. 2 – confirming that \$484,365 in charges had accrued for SEA’s account with AV Logistics and, because of delays in payment, AV threatened to suspend its service.
- RX_0130 (Bates no. SEAU0112720), Fernando Ex. 4 - SEA’s CNT, Harvest Transport, is shut out by ZIM due to SEA’s nonpayment of per diem charges.
- Driver detention charge incurred due to delay at SEA’s warehouse, after which SEA ignored requests for approval and payment for one month. RX_1533-37 (Bates no. SEA0023244-48).

2. The Initial Decision Correctly Held That SEA’s Conduct Caused Charges That Were Improperly Included in its Claim

Supported by the evidence described above, the Presiding Officer correctly made the following Findings of Fact which determined that SEA caused or contributed to the accrual of demurrage, detention and other charges. Specifically, the ID held that SEA was responsible for prepull storage and yard storage charges:

“SEA would normally be responsible for prepull storage, or yard storage charges resulting from it or its customer’s facilities’ inability to take delivery of a shipment, and not attributable to ZIM. FoF #130.

The ID correctly held that SEA was responsible for charges accruing because of the inability of SEA’s warehouses to accept delivery of its shipments:

“The 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.” FoF #134.

The ID held that SEA was responsible when its CNTs did not timely pick up shipments due to SEA’s failure to provide timely delivery instructions:

“SEA issued delivery instructions directly to truckers. (record citation omitted)” FoF #146;

“There were occasions when the demurrage charges accrued due to the trucker’s failure to pick up SEA’s containers prior to the last free day because they were not timely provided delivery orders. *See, e.g.,* RX 1967-76.” FoF #147.

The ID held that SEA was responsible for delays arising from CNTs refusal to transport shipments because of SEA’s payment delinquency:

“There were occasions when the CNT refused to deliver until SEA provided a payment plan for containers pending delivery. (citation to record omitted)” FoF #158.

The ID held that SEA was responsible for demurrage incurred because of SEA’s failure to timely clear shipments with U.S. Customs:

“There are instances where SEA would be responsible for demurrage or detention charges for inland moves, including when SEA’s customer was not able to take delivery before the last free day or where customs clearance is delayed. CX 2248-51; CX 2247 (customs clearance).” FoF #165.

Finally, the ID rejected SEA’s attempt to claim detention and demurrage charges in this proceeding which SEA had approved at the time the charges had accrued:

“SEA approved some of the detention and demurrage charges for which it seeks reparations...(Maria Fernando approving charges accrued due to failure to timely transmit pre-pull and storage charge approval); RX 1308 (Maria Fernando approving demurrage charges accrued because of outstanding charges owed to ports in Jacksonville, FL and Savannah, GA); RX 973 (approving invoices). FoF #169.

In summary, the evidence is overwhelming, and the Presiding Officer so found, that SEA’s actions caused demurrage, detention, and yard storage charges for all of the reasons described

above and that, because it improperly included those charges in its claim, SEA had failed to carry the burden of proof imposed upon it by the Shipping Act:

“SEA brought this proceeding and has the burden of proof. Therefore, proximate cause is met for some of the charges, but it is not possible to determine for which ones or how many. While proximate cause is met for liability purposes, when it comes to reparations, there is not sufficient evidence to award damages for these violations.” ID at 89. (Emphasis supplied).

The ID properly determined that, given SEA’s responsibility for the categories of charges discussed *supra*, it failed to carry the burden of proof required by the Shipping Act and dismissed SEA’s claims.

SEA’s Exceptions should accordingly be rejected.

C. THE PRESIDING OFFICER CORRECTLY FOUND THAT DEMURRAGE AND DETENTION CHARGES ON STORE DOOR DELIVERY MOVES ARE NOT *PER SE* UNREASONABLE

The Presiding Officer was correct in finding that the assessment of demurrage and detention charges on store door moves is not unreasonable *per se*.

As explained in Point A.3 above, the Commission’s statement that it will scrutinize demurrage on carrier haulage moves is in keeping with long-standing Commission precedent that reasonableness is a factual matter. This shows that the assessment of demurrage and/or detention charges on a store door/carrier haulage move is not unreasonable *per se*. The Commission’s shipment-by-shipment approach with respect to reasonableness is consistent with and reinforces the fact-intensive nature of the inquiry and demonstrates that SEA’s argument that it is unreasonable *per se* to assess such charges on store door/carrier haulage moves is incorrect as a matter of law.

Moreover, in this case, SEA’s argument is also unsupported by the facts, which show that SEA was regularly involved in the inland movement of its shipments. *See* Point B, *supra*.

D. SEA HAS NOT PROVEN DAMAGES WITH REASONABLE CERTAINTY

Under the Shipping Act, the Commission is to “direct the payment of reparations to the complainant for actual injury caused by a violation” of the Act. 46 U.S.C. § 41305(b). “Actual damages” are damages recoverable “as compensation for the actual loss or injuries sustained” due to the violation of the Shipping Act. *Cal. Shipping Line, Inc. v. Yang Ming Marine Transp. Corp.*, 25 S.R.R. 1213, 1230 (FMC 1990). Complainants alleging Shipping Act violations must prove those damages with reasonable certainty in order to recover. *See Rose Int’l, Inc. v. Overseas Moving Network*, 29 S.R.R. 119, 187 (FMC 2001) (“Complainant must prove with ‘competent evidence’ that it sustained actual loss or injury and that the violation of law was the proximate cause of that loss or injury with ‘reasonable certainty.’” (citing *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11, 25 (ALJ 1991))). Although mathematical precision is generally not required to prove damages with reasonable certainty, the complainant must nonetheless provide evidence sufficient to support a reasonable inference of the accuracy of their losses. *See MAVL Capital Inc. v. Marine Transp. Logistics, Inc.*, 5 F.MC.2d 109, 114 (FMC 2022). Accordingly, while damages need not be proven by absolute mathematical precision, an award of damages based on calculations that are unreliable or merely speculative would be improper. *See Rose Int’l* at 187. SEA has not met this standard.

As ZIM argued in briefing, and as the Presiding Officer correctly found, SEA has not proven with reasonable certainty that ZIM’s conduct was the proximate cause of \$10,763,233.33 in damages. SEA’s claim for reparations includes ALL amounts paid over a three-year period for various charge categories despite acknowledging that there are circumstances in which it is responsible for the charges and acknowledging that any charges for which it is responsible are nonetheless included in the reparations being sought. In his deposition testimony, SEA’s expert, Mr. Smith, testified that his loss analysis does not include any adjustment or consideration of

inland transportation charges which may be the responsibility of SEA. CX_05987, 41:6-14. Put another way, SEA's alleged damages include charges that were incurred due to the acts or omissions of SEA described about in Point B, *supra*.

SEA argues that only \$43,804.74 in charges/costs is attributable to SEA based upon only four limited findings of fact and that, as a result, SEA is entitled to the remainder of the reparations its claims. This argument ignores both the facts and the law. While the four findings of fact cited by SEA do in fact identify specific instances in which SEA caused charges to be incurred, those four examples do not constitute all of the numerous instances in which the acts/omissions of SEA caused charges/costs to be incurred. *See* Point B, *supra*, at pp. 10 – 18. The numerous instances in which SEA failed to take delivery on time, clear Customs in a timely manner, prioritized other cargo or took other actions demonstrate that the amount of charges attributable to SEA for which SEA now seeks compensation, although not known with certainty, far exceeds \$43,804.74. Because SEA, which bears the burden of persuasion, has failed to demonstrate which charges/costs were attributable to ZIM, it has failed to meet its burden of persuasion and to prove the amount of reparations with reasonable certainty. The Presiding Officer was correct in so finding, and this portion of the ID should be affirmed.

Likewise, SEA's argument for an increased reparations award with respect to the cargo holds is flawed for the reasons set forth in ZIM's Exceptions to the ID. *See* ZIM Exceptions at pp. 14 -17.

E. SEA IS NOT ENTITLED TO RECOVER ANY DAMAGES ARISING FROM THE CARGO HOLDS

ZIM was compelled to use cargo holds in the enforcement of its contractual maritime liens on SEA's shipments in order to encourage SEA to respond to and deal with the significantly high receivables that it owed to ZIM. *See* ZIM Exceptions, Point III. C, which describe the significant

delinquencies SEA allowed to accrue, and that SEA unabashedly ignored, until the cargo holds were employed. Nevertheless, the Presiding Officer found that ZIM's use of cargo holds was a violation of the Shipping Act and awarded SEA \$3.68 million in reparations based upon figures in the report of SEA's expert.

As described above in the Procedural History, ZIM has filed Exceptions which challenge the Presiding Officer's determination that ZIM's use of the cargo holds was unreasonable and a violation of the Shipping Act. Further, ZIM's Exceptions have also challenged the quantum of damages, i.e., \$3.68 million, that was awarded by the Presiding Officer on the grounds that inconsistencies in the Findings of Fact do not support the amount awarded. *See* ZIM Exceptions, Point IV. For the sake of brevity, ZIM will not reiterate the arguments advanced in the latter submission and will limit this part of its Reply to the escalated award of \$5.2 million that SEA now seeks.

In its Exceptions, SEA argues that the award of \$3.68 million was in error and that the Presiding Officer should have awarded \$5,213,270 as reparations for the alleged violation arising out of the cargo holds. In support of this Exception, SEA argues that a note prepared by a ZIM witness, Yaacoub Yaacoub, which summarizes amounts totaling \$5.2 million that were owed by SEA at the times ZIM employed each cargo hold, are an "admission against interest." SEA incorrectly argues that this "evidence" was ignored by the Presiding Officer and somehow preponderates over the findings in the report of its own expert, from whose opinions the Presiding Officer arrived at the \$3.68 million that was awarded. The arguments advanced by SEA in support of this amended award are meritless.

At the outset, there is no competent or admissible evidence in the record to support SEA's assertion that it paid \$5.2 million to ZIM because of the cargo holds.⁹ The only admissible evidence which quantifies the amounts paid by SEA in response to the cargo holds that ZIM was compelled to employ was adduced from the testimony of Mr. Yaacoub and Ilana Rosenberg. The testimony from these witnesses confirmed that a total of \$1.3 million was paid as a result of the cargo holds and not \$5.2 million:

- First Cargo Hold (August, 2020): \$37,000 paid. CX_05341, Rosenberg, 38:3-23.
- Second Cargo Hold (May, 2021): \$510,000 paid. CX_03229, Yaacoub, 172:11-13; CX_05344, Rosenberg, 41:5-22.
- Third Cargo Hold (September, 2021): \$639,000 paid. CX_03229, Yaacoub, 172:14-17; CX_05349, Rosenberg, 46:3-19.
- Fourth Cargo Hold (January, 2022): \$120,000 paid. CX_03229, Yaacoub, 172:19-22.

SEA's claim that it paid \$5.2 million as a result of the cargo holds is accordingly unsupported by the record and simply untrue. To the contrary, the evidence in the record confirms that much less was paid, i.e., \$1.3 million. CX_03229-30, Yaacoub, 172:23-173:5.

In support of its unsupported \$5.2 million claim, SEA relies upon inadmissible figures that were selectively pulled from a note used by Mr. Yaacoub to assist with his testimony. This document was not authenticated, never marked as an exhibit at any deposition,¹⁰ and never demonstrated to be a business record of ZIM. Accordingly, it is neither reliable nor admissible evidence of what was owed or paid by SEA to remove cargo holds.

⁹ In fact, in the ID, the Presiding Officer did not determine whether SEA's damages estimates were legitimate but did recognize that, "for many of the improper charges, especially the ones which should have been billed to a different entity, SEA was able to check and contest those charges, so many of them did not end up being paid." ID at 97.

¹⁰ SEA claims that the note was not available at Mr. Yaacoub's deposition; however, it was subsequently produced.

Of course, this “note” which SEA urges be admitted as an “admission against interest” exception to the hearsay rule, is not admissible at all. There is no evidentiary principle known as an “admission against interest.” The phrase was carelessly used by the District Court Judge in the sole case that SEA cites, *Almirante Steamship Corp. v. U.S.*, 1930 WL 61250 (S.D.N.Y. Oct 30, 1930); *aff’d sub nom; The Hisko*, 54 F. 2d 540 2d Cir. 1931); however, that evidentiary “principle” was not referred to by the Court of Appeals in its decision, and, more importantly, the case was decided more than forty years prior to the promulgation of the Federal Rules of Evidence, which became effective on July 1, 1975.¹¹ In short, even if the *Almirante* judge had cited a valid evidentiary rule, it has been superseded by the Federal Rules of Evidence which describe an “admission” and a “declaration against interest” as separate evidentiary principles – but the Rules do not recognize an “admission against interest.”

Under the Federal Rules of Evidence, an admission is an out of court statement which, if made by a party, is admitted into evidence under Fed. R. Evid. 801(d)(2).

A declaration against interest, which is found at Fed. R. Evid. 804(b)(3), is an exception to the Hearsay Rule¹² that applies when the declarant is unavailable and the statement was made against their own interest at the time it was made. Under the Rule, the out of court statement is admitted if: “(A) a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability; and (B) is supported by corroborating

¹¹ See, Historical Note to Fed. R. Evid. 101: “The Federal Rules of Evidence were adopted by order of the Supreme Court on Nov. 20, 1972, transmitted to Congress by the Chief Justice on Feb. 5, 1973, and to have become effective on July 1, 1973. Pub. L. 93–12, Mar. 30, 1973, 87 Stat. 9, provided that the proposed rules “shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress”. Pub. L. 93–595, Jan. 2, 1975, 88 Stat. 1926, enacted the Federal Rules of Evidence proposed by the Supreme Court, with amendments made by Congress, to take effect on July 1, 1975.”

¹² The Hearsay Rule bars the admission of an out of court statement that is offered for its truth. Fed. R. Evid. 801(c).

circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.”

Without parsing this evidentiary issue further, Mr. Yaacoub’s notes are clearly neither an admission nor a declaration against interest – they were merely a summary of figures he compiled to assist with his testimony. Contrary to SEA’s strident assertion that “(i)t is inexplicable why the ID discounted this admission by ZIM...,” Mr. Yaacoub’s notes and all the other evidence adduced by SEA were considered below and given the weight that the Presiding Officer deemed appropriate:

“In SEA’s brief, it states that “ZIM’s data provides that SEA incurred \$5.2 million in demurrage charges related to finance holds.” Brief at 8, 61. This is more than the number calculated by SEA’s expert using the SEA data or the ZIM data. The evidence includes a chart created by ZIM’s Mr. Yaacoub, which identifies four cargo hold periods, and identifies demurrage, rail storage, and detention and handling for each period. CX 1570. There is limited information in the record about how these numbers were compiled. The total amount of demurrage, \$3,802,918, is within 5 percent of the amount calculated by SEA’s expert witness, in part because it includes one additional timeframe. *Compare* CX 1570 *with* CX 6245. There is not sufficient foundation to rely on Mr. Yaacoub’s numbers, but they do serve to corroborate SEA’s expert’s calculations on damages. Mr. Yaacoub’s chart also includes columns for rail storage, totaling \$502,331, and detention and handling, totaling \$897,019, that are not included in SEA’s expert’s calculation of demurrage charges related to the cargo holds. There is not sufficient evidence in the record to include the damages for rail storage. Moreover, the cargo holds did not prevent SEA from returning containers, so detention is not awarded.” ID at 97-8 (emphasis supplied)

In short, the Presiding Officer arrived at a holding that SEA does not like so it has disingenuously divined a non-existent “declaration against interest” evidentiary principle and argued that the Presiding Officer improperly “rejected”, “discounted” and “erred in not considering” (SEA Exceptions at 30-1) the evidence which they prefer.

Notably, even the *Almirante* case cited by SEA does not give the importance to bookkeeping records to which SEA subscribes. In his holding, the District Judge’s statement in *Almirante* was that evidence about a vessel’s value contained in the books and records of the

plaintiff were admissible, along with expert opinions about valuations that were based upon the depreciated cost of rebuilding the plaintiff's vessel. This holding, which was disingenuously advanced by SEA as supporting "a baseline for recovery of these cargo hold-related damages...." (SEA Exceptions at 32) simply does not support the result that SEA has urged.

In summary, the non-existent "admission against interest" principle which the artificer, SEA, has divined to fill the gap in its evidence simply does not exist. There is simply no evidence in the record which supports SEA's claim that it paid \$5.2 million. Indeed, to the contrary, the only admissible evidence as to the amount paid to ZIM following the cargo holds was \$1.3 million. Finally, all the evidence SEA submitted was considered by the Presiding Officer in the very same way that the *Almirante* judge did; i.e., the evidence which plaintiff relied upon was evaluated in conjunction with all the other evidence adduced in the case. Here, the Presiding Officer did the same and rejected the \$5.2 million figure for the cogent reasons described in the Initial Decision. ID at 98-9.

SEA's renewed demand for an award of \$5.2 million should accordingly be denied.

F. SEA IS NOT ENTITLED TO FURTHER PROCEEDINGS UNDER RULE §502.251

SEA, in a tacit admission of the deficiency of its case, now argues that it should be allowed a second chance to prove damages under Rule 251 of the Commission's Rules of Practice and Procedure. SEA is incorrect.

Rule 251 provides:

If many shipments or points of origin or destination are involved in a proceeding in which reparation is sought (See § 502.63), the Commission will determine in its decision the issues as to violations, injury to complainant, and right to reparation. If complainant is found entitled to reparation, the parties thereafter will be given an opportunity to agree or make proof respecting the shipments and pecuniary amount of reparation due before the order of the Commission awarding reparation is entered. In such cases, freight bills and other exhibits bearing on the details of all

shipments, and the amount of reparation on each, need not be produced at the original hearing unless called for or needed to develop other pertinent facts.

The foregoing rule does not apply here.

Rule 251 is not intended to give complainants a second bite at the apple, as SEA is seeking here. Rule 251 is most often applied in situations where a proceeding has been bifurcated, and liability is tried separately from damages. *See, e.g., All Marine Moorings, Inc. v. Ito Corporation of Baltimore*, FMC Docket No. 94-10 (ALJ Oct. 6, 1995); *Gulf Container Line v. Port of Houston Authority*, FMC Docket No. 89-18 (FMC May 3, 1991). Rule 251 is also applied in situations where the amount of damages is unclear from the record below *See, e.g., Color Brands, LLC v. AAF Logistics, Inc.*, FMC Docket No. 22-18 (FMC Jan. 18, 2024); *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 27 S.R.R. 1251 (FMC 1997). Neither of these considerations is relevant here.

Further, *Ceres Marine Terminal*, the only case cited by SEA in its Exceptions in support of its Rule 251 argument, is completely inapposite. That case involved an initial decision that was so deficient that the Commission decided the case *de novo* on the exceptions and remanded the case for a determination on damages because it literally had no idea what the damages might be. As noted, that is not the issue in this proceeding.

This proceeding was not bifurcated, and a robust record was developed with respect to damages. SEA produced two expert reports on damages issues and detailed information on the quantum of damages it was claiming. But, instead of adducing substantive evidence to support its claim, SEA attempted to prove its damages through the “creative accounting” opinions promulgated by its experts and failed. What SEA is actually now seeking is a second chance to prove the causation it failed to demonstrate the first time around. This is not the purpose of Rule 251.

SEA could have proposed or sought to bifurcate this proceeding so that liability issues would be tried first and damages issues tried only after a ruling on liability. It did not do so and opted to present its entire case at the same time, forcing ZIM to similarly hire a damages expert and respond to SEA's case. To remand this proceeding for further briefing on damages would unfairly reward SEA for using a strategy that failed to make its case the first time around. What happens if the case is remanded for further findings on damages and SEA then excepts to those findings? How many times will SEA be allowed to try to prove its case?

G. ZIM'S INVOICING PRACTICES WERE REASONABLE

ZIM's invoices during the course of the Covid-19 pandemic were not perfect, but ZIM did have a practice of using its best efforts to resolve any mistakes. In the ID, the Presiding Officer makes clear that ocean carriers are not required to conform to some imaginary perfect dispute resolution procedure. Instead, the ID follows precedent wherein reasonableness determinations do not adhere to some all or nothing standard but instead take into consideration the totality of circumstances surrounding specific claims.

SEA argues that a collection of defective invoices somehow gives rise to a practice, but nowhere in its argument does SEA consider the Commission's definition of a practice, namely that a practice must be "normal, customary, and continuous." This is because a handful of defective invoices is not a practice under Section 41102(c), no matter how desperately SEA desires that this be so. On the contrary, the Commission has held that "select instances of errors and mix-ups" do not support a finding of a practice under Section 41102(c). *Bakerly, LLC v. Seafrigo USA, Inc.*, FMC Docket 22-17, Order Denying Exceptions and Affirming Initial Decision at 35 (Oct. 30, 2024). Instead, the Commission concluded that a small number of defective invoices out of a sizeable number were not a practice "when viewed in the context of the sheer number of invoices"

and when considering the “context of the pandemic-related unpredictable conditions.” *Id.* at 35-36.

There, as here, ZIM faced substantial challenges in its operations, including as the result of the sheer volume of cargo moved by SEA and its related Samsung affiliates, pandemic-related stressors, and SEA’s own staunch resistance to offering assistance when an invoice was misdirected. FOF ## 172, 173; *see also* ID at 84. Accordingly, the Presiding Officer rightly determined that ZIM’s isolated instances of billing errors were not a practice, particularly where ZIM was actively engaged in improving its billing accuracy, including with regards to SEA invoicing. *Id.* at 84-85.

H. THE PRESIDING OFFICER PROPERLY HELD THAT SEA DID NOT ESTABLISH A VALID CLAIM FOR RETALIATION

SEA’s argument that Zim has engaged in unlawful retaliation is specious.

As a legal matter, SEA’s argument is based on the “for any other reason” language of § 41103(a)(3). However, as the Presiding Officer correctly noted, the Commission’s statement on retaliation makes clear that the “for any other reason” language refers to other ways a shipper might bring unlawful activity to the Commission’s attention. ID at 91. The Presiding Officer also correctly found that SEA did not claim that anything ZIM was alleged to have done was done because SEA patronized other carriers, filed a complaint, or otherwise sought to bring unlawful activity to the attention of the Commission. ID at 92. Thus, as a matter of law, the Presiding Officer correctly held SEA has failed to establish a colorable claim for retaliation.

SEA’s Exceptions allege – without citing to any evidence in the record -- that ZIM imposed cargo holds because SEA disputed charges. This baseless allegation, which was not made before the Presiding Officer (ID at 92) strains credulity. In reality, the factual record clearly establishes that cargo holds were imposed because of past due amounts owed to ZIM. FOF ##53, 78, 86, and

100. Even if some of the charges that were the basis of the hold were disputed, the holds were imposed due to the overall amount of unpaid charges and not because some of the charges were disputed. Thus, SEA's untimely and unsupported allegation of the reason for the holds should be disregarded.

SEA's claim under Section 41104(a)(3) is also defective because it ignores precedent that is, indeed, sufficiently developed. SEA should be infinitely aware of this because its subsequent claims against ocean carriers under Section 41104(a)(3), which include near-identical allegations to those here, have been dismissed for the exact same defect.¹³ The ID is consistent with the Commission's precedent that has been applied consistently to SEA's exact allegations in its three other proceedings before the Commission.

SEA has failed utterly to allege the necessary elements of a valid claim for retaliation, and the Presiding Officer's dismissal of this claim should be affirmed.

I. OTHER ARGUMENTS ADVANCED BY SEA ARE WITHOUT MERIT

Below, ZIM dispenses briefly with certain other arguments made by SEA, all of which are irrelevant and devoid of merit.

¹³ See *Samsung Electronics America, Inc. v. COSCO Shipping Lines, Ltd.*, FMC Docket 24-16, Order on Motion to Dismiss at 12 (April 11, 2025; admin. final May 13, 2025); *Samsung Electronics America, Inc. v. Orient Overseas Container Line Limited and OOCL (Europe) Limited v. Samsung Electronics Company, Ltd.*, FMC Docket 24-17, Order Partially Granting Motion to Dismiss (Nov. 18, 2024, admin. final Dec. 19, 2024); *Samsung Electronics America, Inc. v. HMM Co., Ltd. f/k/a Hyundai Merchant Marine Co., Ltd.*, FMC Docket 24-23, Order Partially Granting Motion to Dismiss (Mar. 24, 2025, admin. final Apr. 24, 2025). If SEA's own dockets do not provide it with sufficient material to conclude that Commission precedent on this exact subject exists, other dockets are also instructive on this point. See, e.g., *20230930-DK-Butterfly-1, Inc. v. MSC Mediterranean Shipping Company SA*, FMC Docket 23-12, Order Granting Partial Motion to Dismiss (Mar. 25, 2024, admin. final Apr. 24, 2024).

1. The *Adenariwo* Decision Has No Bearing on This Proceeding, and ZIM is Not a “Repeat Offender.”

The *Adenariwo* decision is distinct from this proceeding and has no bearing on whether or not ZIM’s present actions violate Section 41104(a)(3) or SEA’s entitlement to reparations. SEA’s characterization of ZIM as a “repeat offender” is both misplaced and disingenuous.

The issue in the *Adenariwo* proceeding was whether a general lien clause in the terms and conditions of shipment could support a hold on cargo not specifically subject to certain charges. The decision accordingly addressed the scope of the common law possessory lien.

The ID concluded that *Adenariwo* left open the question of whether the “type of lien clause or whether the litigant had signed the contract” were relevant to the decision. ID at 78. The Presiding Officer also indicated that the service contracts between ZIM and SEA’s affiliates applied to the shipments consigned to SEA, saying that, “more likely than not, the service contracts provided by ZIM were utilized for these shipments.” ID at 63.

Accordingly, ZIM has not repeated the behavior that was found to violate Section 41102(c) in the *Adenariwo* proceeding, and, even if it did, this would not support a claim under Section 41104(a)(3) because SEA fails to allege that it engaged in the type of protected activity necessary to support such a claim.

Moreover, SEA’s invocation of “knowing and willful” as an argument for double damages is misplaced. That is a standard applicable only to Shipping Act penalties and is not applicable to claims for reparations, as explained below.

2. Civil Penalties Cannot Be Assessed in a Complaint Proceeding

SEA improperly suggests that civil penalties should be imposed on ZIM as a “repeat offender” insofar as cargo holds are concerned. As explained above, ZIM is not a repeat offender. Moreover, the FMC’s regulations explicitly state that civil penalties must not be requested and will

not be awarded in complaint proceedings. 46 C.F.R. §502.62(a)(4)(iv). SEA's suggestion is highly improper and should not be entertained.

3. SEA Is Not Entitled To Double Damages

Although Section 41305(c) was amended on June 16, 2022, to allow for the possibility of an award of double damages for a violation of Section 41102(c) of the Shipping Act, SEA is not entitled to double damages. The four cargo holds that are the basis for the reparations in the ID all occurred prior to June 16, 2022. FOF ## 52, 77, 85 and 99. The Commission, like other administrative agencies and the courts, generally applies the law in effect at the time the conduct occurred. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). Accordingly, since the Shipping Act in effect prior to June 16, 2022, did not provide for double damages for a violation of Section 41102(c), it would be unlawful to award double damages based on the cargo holds.

Moreover, since no damages were awarded for any other conduct, and those damages claims suffer from the deficiencies set forth in this Reply, it would be inappropriate to award any damages, much less double damages, for that conduct.

4. The ZIM-Samsung Service Contracts Applied To The Shipments At Issue

SEA devotes considerable energy to attacking the application of the service contracts between ZIM and SEA's affiliates to the issues in this proceeding. Given the role the service contracts played in the ID, an extensive reply to these arguments is unnecessary. It is sufficient to point out that SEA understood the service contracts to apply to the shipments in question (*see* RX-0642) and benefitted from the terms of those service contracts. This conclusion is also supported by the ID's finding that "more likely than not, the service contracts provided by ZIM were utilized for these shipments." ID at 63.

5. SEA's Change from Carrier Haulage to Merchant Haulage Is Not Attributable to ZIM

SEA suggests that it was forced to switch from carrier haulage/store door delivery to a merchant haulage/container yard transportation model because of ZIM. This claim defies logic. In 2021 and 2022, ZIM handled approximately 2.6% of the containers shipped to SEA. FOF #7. To suggest that SEA changed its business model completely due to alleged problems with a provider handling 2.6% of its business is simply not credible, particularly given SEA's legal action against other carriers, some of whom are much larger than ZIM. *See*, FMC Dockets No. 23-01 (*SEA v. SM Line*), 24-16 (*SEA v. COSCO*), 24-17 (*SEA v. OOCL*), and 24-23 (*SEA v. HMM*). To the extent SEA decided to change its business model with respect to ocean transportation, that decision is attributable to considerations that go far beyond ZIM.

IV. CONCLUSION

In light of the foregoing, SEA's Exceptions should be rejected in their entirety and the ID should be modified as urged in ZIM's Exceptions.

Respectfully submitted,

COZEN O'CONNOR

By: /s/ Wayne R. Rohde

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Dated: June 9, 2025

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of June, 2025, a true and correct copy of Respondent's Reply to Complainant's Exceptions to the Initial Decision were served on counsel for Samsung Electronics America, Inc. in FMC Docket No. 22-30.

/s/ Kathryn Sobotta