

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 22-30

SAMSUNG ELECTRONICS

AMERICA, INC.,

COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,

RESPONDENT.

**COMPLAINANT SAMSUNG ELECTRONICS AMERICA, INC.'S
PROPOSED FINDINGS OF FACT**

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Pursuant to 46 C.F.R. § 502.214, Complainant Samsung Electronics America, Inc. (“SEA”) submits the following Proposed Findings of Fact (“PFF”) in support of its Initial Brief:¹

I. INTRODUCTION

1. On October 25, 2022, pursuant to 46 U.S.C. § 41301, SEA filed its Verified Complaint (“Compl.”) against Respondent ZIM Integrated Shipping Services, Ltd. (“ZIM”) (collectively, the “Parties”). CX_00001, Compl. ¶ 1

2. In its Complaint, SEA made allegations concerning the representations ZIM makes to the general public, quoting ZIM’s website in regard to its offering of a full range of services from arrangements overseas to the final destination at SEA distribution centers and customers inland, otherwise known as inland transportation or “store door” delivery. CX_00003, Compl. ¶¶ 10-15.

3. In regard to the transportation of cargoes, SEA alleged that it is the consignee of cargoes of home appliances shipped to the U.S. in ocean shipping containers by ZIM and that ZIM transported SEA containers under through bills of lading, or sea waybills, from the overseas locations through U.S. ports and on to designated U.S. inland locations. CX_00006, Compl. ¶¶ 27-28.

4. In connection with ZIM’s carriage of cargo, SEA’s Verified Complaint alleges five separate counts in violation of the Shipping Act:

- VIOLATIONS OF 46 U.S.C. § 41102(c), Unjust and Unreasonable Practices in Handling Property. CX_00010, Compl. ¶¶ 47-54.
- VIOLATIONS OF 46 U.S.C. § 41104(a)(3) - 46 U.S.C. § 41102(d), Retaliation. CX_00013, Compl. ¶¶ 55-62.

¹ Citations to information in the record are contained in the Appendix (“App.”). The PFF is submitted today per the August 21, 2023 “Order Granting Emergency Unopposed Motion to Extend Time to File Briefs,” providing Complainant’s “brief, proposed findings of fact, and appendix” were due August 23, 2023.

- VIOLATIONS OF 46 U.S.C. § 41104(a)(10), Refusal to Deal. CX_00014, Compl. ¶¶ 63-67.
- VIOLATIONS OF 46 U.S.C. § 41104(a)(15), OSRA – Invoices without Information. CX_00015, Compl. ¶¶ 68-72.
- VIOLATIONS OF 46 U.S.C. § 41104(a)(14), OSRA – Unreasonable Charges. CX_00016, Compl. ¶¶ 73-75.

5. Since 2020, SEA has sought reparations from ZIM in connection with the payment of more than 2,000 individual demurrage charges and more than 7,000 detention-type charges. CX_00010, Compl. ¶ 51.

6. After fact and expert discovery, SEA’s direct damages in the nature of the over 9,000 inland transportation charges that have improperly been passed on to SEA by ZIM under store door terms was calculated to total \$10,807,038. CX_05784, Expert Report of Gregory E. Smith (“BRG Report”), ¶ 40; Exs.1 & 2, thereto; CX_06500, Expert Rebuttal Report of Ricardo J. Zayas, CPA, CVA, CFE, CFF (“Zayas Report”) ¶ 7.

7. SEA incurred additional employment and leasing costs, mitigation costs and lost revenue in connection with ZIM’s actions. These consequential damages were calculated to total approximately \$1.4 million. CX_00001, Compl. ¶ 2; CX_06077, BRG Report ¶¶ 59, 62.

8. SEA also seeks an order requiring ZIM to cease and desist from further unlawful conduct. CX_00002, Compl. ¶ 4. This includes ZIM’s attempt to collect demurrage and detention (“D&D”) charges that have been billed to SEA but not yet paid. *Id.*

9. Finally, SEA seeks recovery for attorney fees, along with applicable pre- and post-judgment interests. CX_00001, Compl. ¶ 1; CX_06077, BRG Report, ¶¶ 59, 62.

II. THE PARTIES

A. Complainant Samsung Electronics America, Inc.

10. SEA is a corporation organized and existing under the laws of the State of New York, with a principal place of business at 85 Challenger Road, Ridgefield Park, New Jersey, 07660-2118. CX_00001, Compl. ¶ 1.

11. SEA is a leading consumer electronic products company. SEA was incorporated in the United States in 1978. SEA offers home appliances, phones, tablets, smartwatches, mobile accessories, mobile audio, televisions, monitors, and computer products to the American public. CX_00002, Compl. ¶ 7; CX_02173, SEA 143(b)(6) designee Michael Rapske² Dep. Tr. 33:6.

B. Respondent ZIM Integrated Shipping Services Ltd.

12. ZIM is a global ocean carrier with its corporate office at 9 Andrei Sakharov Street, “Matam” - Scientific Industries Center, P.O.B. 1723, Haifa 31016, Israel, conducting business in the U.S. through ZIM American Integrated Shipping Services Company Co. LLC (“ZIM U.S.”), with its principal corporate office at 5801 Lake Wright Drive, Norfolk, Virginia 23502. CX_00001, Compl. ¶ 2; CX_03058, ZIM 143(b)(6) designee Yaacoub Yaacoub³ Dep. Tr. 15:17-25.

13. ZIM is a vessel operating “ocean common carrier” as that term is defined by 46 U.S.C. § 40102(7) and (18) and is subject to regulation by the FMC. CX_00020, Answer ¶ 2.

14. When addressing the scope of its transportation services, ZIM publicly boasts: “ZIM’s transport capabilities reach far beyond ocean lanes and ports. We also provide extensive land transport and door-to-door services, offering customers a comprehensive solution with one point of contact, so you can rely on our trusted quality standards and advanced monitoring methods

² VP, Logistics Operations at SEA.

³ Director of Finance at ZIM U.S.

to take care of the entire shipping process.” CX_08315, ZIM, Services, *Inland Transport*, <https://www.ZIM.com/services/cargo-services/inland-transport>.

15. ZIM also advertises offering a high level of service:

“We work hand-in-hand with the best providers to offer excellent full-service intermodal transport. By truck, rail or barge, anyone transporting ZIM’s cargo has undergone a rigorous selection process and adheres to strict guidelines. As an independent carrier, ZIM is able to keep a close eye on each stage of transport, offering optimal support and meticulous care every step of the way.” *Id.*, ZIM, Services, *Inland Transport*, <https://www.ZIM.com/services/cargo-services/inland-transport>.

16. Moreover, ZIM specifically markets its capabilities in shipping appliances: “We have the expertise to ensure that everything from electrical appliances to commodities and any other dry cargo receives first-class treatment. Our personal, exclusive service provides optimal results and peace-of-mind, thanks to hands-on attention for each and every consignment.” CX_08316, ZIM, Services, *Dry-cargo*, <https://www.ZIM.com/services/cargo-services/dry-cargo>.

17. ZIM further advises the shipping public that the all-in freight rates charged by ZIM for store door transportation will maximize convenience and save costs for consignees like SEA. CX_08315, ZIM, Services, *Inland Transport*, <https://www.ZIM.com/services/cargo-services/inland-transport>.

III. ZIM’S MOVEMENT OF SEA CARGO

A. SEA Relied On ZIM For Store Door Service To Deliver Goods To American Consumers

18. Based on anticipated consumer demand for home appliance products, SEA places orders with overseas factories for the manufacturing and production of said products. CX_02173, Rapske Dep. Tr. 38:2-22; CX_02321, SEA 143(b)(6) designee Maria Kristina Fernando⁴ Dep. Tr. 34:18-22.

⁴ Direct Ship Operations at SEA.

19. SEA is designated by the shippers as the consignee of the designated bills of lading. CX_02355, Fernando Dep. Tr. 35:3-18.

20. SEA does not contract with ocean carriers, like ZIM, for the transportation of its products. Rather, the service contract for the transportation of goods destined for SEA is between ZIM, on one hand, and Samsung Data Systems (“SDS”) or Samsung Electronics Logitech Co., Ltd. (“Logitech”) on the other. CX_02205, Rapske Dep. Tr. 33:8-22; *see also* CX_05288, Shpitzer Dep. Ex. 6. SDS and Logitech are corporate entities distinct from SEA. Rapske, *Id.*

21. The U.S. end-point for SEA shipments was typically a SEA distribution center or a SEA customer’s warehouse. CX_02050, SEA 143(b)(6) designee Jeung Choi⁵ Dep. Tr. 13:20-25, 101:12-102:12.

22. When cargo is moving to SEA under one of the contracts signed by SDS or Logitech, the responsibility for paying the ocean carrier freight charges for the transportation of the cargo lies with SDS or Logitech. CX_02173, Rapske Dep. Tr. 42:5-16.

23. SEA is not responsible for paying any local charges when the cargo arrives in the United States. *Id.*, Rapske Dep. Tr. 42:12-16.

24. Before the end of 2022, ZIM moved cargo for SEA on store door terms such that ocean carrier was responsible for handling the movement of the goods from pickup points overseas to the U.S. end-point. *Id.*, Rapske Dep. Tr. 40:20-24.

25. SEA was entirely dependent upon ZIM for inland transportation after containers were offloaded from ZIM container ships at U.S. marine terminals. *Id.*, Rapske Dep. Tr. 66:7-19; CX_02050, Choi Dep. Tr. 75:2-14; CX_00002, Compl. ¶ 10.

⁵ Senior Director of Logistics at SEA.

26. SEA did not have operations capabilities for the handling of inland moves. CX_02050, Choi Dep. Tr. 74:16-24. For example, SEA did not have a trucking dispatch operation to arrange for pick-ups or drop offs of containers from marine or rail terminals. *Id.* Likewise, SEA did not have any agreements with rail or trucking companies to handle inland transportation. *Id.*, Choi Dep. Tr. 66:18-23. And SEA does not have written transportation contracts with Customer Nominated Truckers (“CNTs”) for the inland moves from the ZIM ports of discharge to SEA’s customers or SEA’s warehouses. *Id.*, Choi Dep. Tr. 62:15-23; 66:18-23; 69:20-70:3.

27. ZIM handled SEA cargo on store door terms until well into 2022. At the time, in light of ZIM’s inability or outright refusal to perform its store door responsibilities and resulting detention and demurrage charges, the terms of ZIM cargo movements changed to container yard or “CY.” CX_02173, Rapske Dep. Tr. 41:6-10.

28. Under CY terms, ZIM’s responsibilities terminated when the container was delivered to the port or the rail ramp. *Id.* Once a container arrived at these locations, SEA assumed responsibility for further inland moves for the containers. *Id.*

29. SEA’s move to CY terms at the end of 2022 was the direct result of ZIM renegeing on its responsibilities as SEA could no longer be “reliant” on ocean carriers anymore to handle the drayage moves. *Id.*, Rapske Dep. Tr. 42:1-4.

B. ZIM’s Use Of Customer Nominated Truckers

30. The Zim service contracts provided that SEA could designate a “preferred trucker” or CNT. A CNT is a trucker that a shipper may recommend to an ocean carrier to handle the inland transportation, which recommendation the ocean carrier was not required to honor. CX_02173, Rapske Dep. Tr. 60:9-11; CX_02050, Choi Dep. Tr. 52:10-16; CX_02321, Fernando Dep. Tr. 24:13-22.

31. The operations team in SEA's logistics department recommends the CNT to ZIM. CX_02470, Fernando Dep. Tr. 25:21-26:11. SEA nominated CNTs to ZIM that were familiar with SEA's warehouses and customer facilities. *Id.*

32. SEA's CNT recommendation is made to foster consistency in delivering loads in so far as the truckers have familiarity with the processes to deliver the loads for SEA, which, in turn, results in efficiencies. CX_02050, Choi Dep. Tr. 56:18-57:1; CX_02321, Fernando Dep. Tr. 25:2-7.

33. SEA also would recommend a particular trucker because that trucker is already experienced in and familiar with how to deliver to SEA's warehouses, and would therefore assist the ocean carrier in fulfilling its store door transportation obligations: "Our recommendation is you [ZIM] use one of the nominated truckers that we recommend because they already know how to service those locations. They have volumes going from other providers where you can set up drop-and-hooks. It's actually to make it easier for the steamship line and easier for those moves in that place." CX_02173, Rapske Dep. Tr. 82:1-7.

34. While SEA could nominate a CNT, ZIM ultimately had to approve using the CNT and hire the CNT. CX_03797, Michalski Dep. Tr. 45:15-17; CX_02050, Choi Dep. Tr. 63:4-16.

35. ZIM is not required to use a CNT that SEA has recommended. CX_02173, Rapske Dep. Tr. 60:17-20; 82:8-13; CX_02050, Choi Dep. Tr. 70:8-13; 71:25-72:4.

36. Every CNT nominated by SEA and ultimately hired by ZIM for SEA's store door moves was vetted and approved by ZIM. SEA recommends a CNT to ZIM to use on particular routes and ZIM takes the recommendation into consideration, builds out the rates, evaluates the proposed trucker's capabilities and ultimately decides whether to use a CNT. CX_02050, Choi Dep. Tr. 53:4-7; 63:4-11. In addition, ZIM reviewed the trucker's safety records and its good

standing and participated in the Uniform Intermodal Interchange and Facilities Access Agreement (“UIIA”). If a CNT had been approved by ZIM, ZIM and the CNT would then enter into an agreement for transportation services. CX_03797, Michalski Dep. Tr. 45:10-46:5; CX_03992, Michalski Dep. Ex. 3.

37. The CNT approval process was driven by ZIM, and the agreements were solely between ZIM and the CNT. SEA did not have separate transportation agreements with the CNT and the movement of cargo was handled by ZIM. The utilization of a CNT did not change SEA’s involvement with the shipment nor did it change how ZIM handled SEA cargo. As explained by James Michalski, ZIM U.S.’s VP, Regional Logistics:

A. It’s the same process. The route -- the route and the rate is updated manually here in Norfolk. That gets uploaded and transferred over to the IMS system. So when the IMS goes to dispatch a container, they see that the CNT --- or the trucker is flagged as a preferred and then gets dispatched according to -- accordingly.

Q. Okay. So the communications are the same, the dispatch is the same, ZIM’s operations with them are the same

A. Yes.

CX_03797, Michalski Dep. Tr. 42:11-21; *see also* CX_02050, Choi Dep. Tr. 70:8-13.

38. ZIM determines or decides which trucker to use, and regardless of whether ZIM chooses a CNT or ZIM’s house trucker, ZIM is responsible for demurrage under store-door terms as the CNT is contracted by and is working for ZIM. CX_02173, Rapske Dep. Tr. 66:15-19; CX_02050, Choi Dep. Tr. 74:4-75:7. ZIM arranged for the transport of SEA containers and the ratio of CNT usage to house trucker usage was about 50%/50%. CX_02173, Rapske Dep. Tr. 81:4-10.

C. ZIM's Store Door Responsibilities Remain Unaffected by Use of CNTs

39. Even where a CNT was used by ZIM, SEA did not handle the inland movement of cargo nor did it have any involvement or responsibility in scheduling or arranging the truckers. CX_02050, Choi Dep. Tr. 69:11-13. SEA's operations did not have trucking dispatch so SEA did not arrange for or dispatch truckers. In addition, the ocean carrier paid the truckers, regardless of whether they were the ocean carrier's house trucker or a CNT.

40. If a CNT has been asked to move a SEA shipment and does not have the capacity to handle it, or if a chassis shortage arises, under store door moves, the shipping liner has the responsibility to procure another trucker to deliver the loads and does not need approval from SEA to do so. CX_02173, Rapske Dep. Tr. 82:8-13; 83:11-84:15; CX_02050, Choi Dep. Tr. 72:12-18.

41. ZIM does not have to notify SEA when it is engaging a different trucker than the recommended CNT, and ZIM can also turn to a house trucker that is managed by ZIM. CX_02050, Choi Dep. Tr. 72:19-25; CX_02321, Fernando Dep. Tr. 44:2-3.

42. If a CNT recommended by SEA to ZIM failed to pick up a container at an ocean terminal and free time expired and demurrage began to run, the shipping liner remained responsible for getting the container delivered on time, and ZIM was responsible for the demurrage because it was a store door move. CX_02173, Rapske Dep. Tr. 66:7-19; CX_02050, Choi Dep. Tr. 74:4-24. ZIM has confirmed that "if it's a Z[IM] door move, Z[IM] has trucker, then if they cannot deliver in a timely manner, then Z[IM] is responsible for the demurrage." CX_02800, Speight Dep. Tr. at 135:4-7.

43. If a container is on demurrage, the CNT or steamship line would notify SEA, who, in turn, would be forced to arrange for payment directly to the terminal for the container to be released. CX_02050, Choi Dep. Tr. 60:2-7.

44. SEA would reimburse a CNT for a demurrage charge under limited circumstances, such as when there is a customs hold or where SEA had a customs inspection. CX_02050, Choi Dep. Tr. 80:3-11; CX_02173, Rapske Dep. Tr. 67:1-10.

45. Under store-door terms, the responsibility of inland movement of cargo remained with ZIM. Yet, in and around 2021, ZIM began to distinguish between CNTs and house truckers (even though a CNT could also be a house trucker). CX_03797, Michalski Dep. Tr. 46:13-16; *see also* CX_03057, Speight Dep. Ex. 7 (identifying instances the allocation of responsibility for store door moves).

IV. The Pandemic Caused Both Increased Consumer Demand For Home Appliances and Numerous Inland Transportation Issues

46. The pandemic caused a surge in consumer demand for SEA home appliances such as refrigerators, ranges, microwave ovens and washing machines. CX_02173, Rapske Dep. Tr. 40:4-16. Demand for home appliances experienced rapid growth as consumers found themselves spending more time at home and with greater disposable income. CX_07533, Nora Naughton & Austen Hufford, *Why You Might Have Trouble Getting the Refrigerator, Can of Paint or Car You Want*, WALL ST. J. (Oct. 25, 2020), <https://www.wsj.com/articles/factories-rush-to-keep-up-with-post-lockdown-shopping-11603627201>; CX_02173, Rapske Dep. Tr. 40:4-16; CX_07523, Business Wire, *Household Appliances See a Surge in Sales Amid Covid-19 Lockdowns* (June 18, 2020), <https://www.businesswire.com/news/home/20200618005640/en/Household-Appliances-See-Surge-in-Sales-Amid-COVID-19-Lockdowns---ResearchAndMarkets.com>].

47. Against this backdrop, SEA has always been motivated to move its goods in the most efficient way possible, and this was only heightened during the pandemic with a surge in purchases of household appliances causing manufacturers and retailers to ramp up efforts to meet consumer demand, and some retailers reporting two-month backlogs in fulfilling orders for

consumer appliances. CX_02173, Rapske Dep. Tr. 40:4-16, 76:25-77:22, 78:12-23; CX_07525, Leslie Brinkley, *Surge in Home Appliance Sales Creating Shortages Amid COVID-19 Pandemic*, ABC7 News (Sept. 25, 2020), <https://abc7news.com/amp/appliance-sales-home-appliances-remodels-covid-19-supply-and-demand/6564835/>.

A. Ocean Carriers, Including ZIM, Began Experiencing Significant Supply Chain Disruptions

48. As demand for products increased, vessels transporting household appliances and other consumer goods often had to anchor offshore due to a lack of capacity at ports trying to accommodate the increase in shipments, overflow locations often had to be set-up. CX_02173, Rapske Dep. Tr. 85:5-16; CX_07525, Leslie Brinkley, *Surge in Home Appliance Sales Creating Shortages Amid COVID-19 Pandemic*, ABC7 News (Sept. 25, 2020), <https://abc7news.com/amp/appliance-sales-home-appliances-remodels-covid-19-supply-and-demand/6564835/>.

49. Issues such as trucker shortages, port congestion, empty return restrictions, and rail movement exposed weaknesses in ZIM's ability to meet its store door obligations. CX_03797, Michalski Dep. Tr. 52:2-5; 76:9-21.

1. Trucker Shortages

50. SEA depended on ZIM for store moves because it did not have its own in-house infrastructure for inland transportation. *See, supra*, ¶¶ 25-26.

51. The trucker shortage issues were laid bare in a March 24, 2021 email from ZIM VP, Regional Logistics, Mr. Michalski, stating “we simply could not find a motor carrier that would accept cargo ... in hindsight, paying that premium sooner to secure a motor carrier would have been well worth it if a vendor was available, but being the start of the major truck availability

issues in late November [2020], it would have seemed ludicrous to pay such a premium.”
 CX_07462, ZIM0084271.⁶

52. ZIM’s Intermodal Manager, Matthew Frigo, detailed the scale of the trucker shortages in a February 24, 2022 email, stating “there are multiple trucker availability issues in most markets” and that there are “66 door moves where we can’t find any vendor to accept.”
 CX_02729, Frigo Dep. Ex. 13.⁷

⁶ Bill of Lading: ZIMU1149135.

⁷

Bill of Lading	Container Number
ZIMUHCM8107470	ZCSU2671287
ZIMUHCM8107470	TGHU5089087
ZIMUSNH20943338	FCIU4119385
ZIMUHCM80119994	FSCU8148400
ZIMUSEL7051055	DF5U6537270
ZIMUSEL7054864	GA0U6052661
ZIMUSNH20317491	ZIMU1086800
ZIMUSNH20317491	TGBU2609223
ZIMUSNH20317491	TEMU6077880
ZIMUSNH20317491	ZIMU1102834
ZIMUSNH20317491	ZIMU1252710
ZIMUSNH20318860	ZIMU1139807
ZIMUSEL7051056	SEGU5423180
ZIMUSEL7051056	TCNU8705707
ZIMUFOS053167	TGBU5414056
ZIMUOSS8016893	TCKU7359082
ZIMUOSS8016893	TCKU7351570
ZIMUSHH30366584	ZCSU2609866
ZIMUSHH30366584	ZCSU2668679
ZIMUSHH30366584	ZCSU2744491
ZIMUSHH30366584	TGBU7130790
ZIMUSHH30366584	ZCSU2789752
ZIMUSHH30366584	TCKU4700641
ZIMUSHH30366584	GVCU5326954
ZIMUSHH30366584	ZCSU8736050
ZIMUSEL200216043	TGBU5492228

53. ZIM was aware of these trucker shortages, yet blamed SEA because of its use of preferred truckers, despite ZIM acknowledgement that preferred or CNTs were essentially treated the same by ZIM. CX_05087, ZIM 143(b)(6) designee Moshe Shpitzer⁸ Dep. Tr. 125:3-12.

2. Port / Terminal Congestion

54. ZIM was concerned about congestion as early as April 2020. For example, former ZIM U.S. President George Goldman observed that ZIM needed to “revisit [the] detention piece” as during that time, “the facilities and cargoes movement cannot be done because of congestion (w/housing, yards, terminals, ramps, etc)” and “these facilities are open but conveyance cannot happen.” CX_05597, Rosenberg Dep. Ex. 6.

55. Due to congestion caused by the pandemic, “the primary driver of increased cumulative amounts collected across the industry was an increased number of days with D&D daily rates being applied.” CX_06760, Clair Report ¶ 38.

56. ZIM U.S.’s VP, Regional Logistics, Mr. Michalski, noted: “The change and the impact to the inland [caused by the pandemic] was the fact that we saw, as an industry, a surge in volume, and with that surge came a direct effect on congestion, customers keeping containers at their facilities well past 45 days on the street.” CX_03948, Michalski Dep. Tr. 152:1-7.

57. Despite port congestion being outside of SEA’s control, issues related to port congestion such as container availability was not a factor considered by ZIM in determining whether or not to waive D&D charges. For example, a chart showing a list of charges that was waived by ZIM’s Demurrage Committee in 2021 indicates that the number of waiver requests related to Port Congestion were denied because of “No ZIM Error.” CX_03997-CX_03999, Michalski Dep. Ex. 6a.

⁸ Commercial Director for the Trans-Pacific Eastbound Trade at ZIM U.S.

3. Empty Return Restrictions

58. Empty container return restrictions also created challenges for successful store door moves of SEA cargo.

59. Truckers would often be rejected by a terminal when attempting to return an empty container. CX_07419-CX_07433, ZIM0053217-ZIM0053130.

60. SEA made numerous efforts to efficiently return empty containers and often communicated these efforts to ZIM. For example, on March 26, 2020, Ms. Fernando of SEA emailed ZIM, writing:

“Please advise that, we have received a report from our carriers that they’re having an issue in returning the containers at the terminal[.] These containers need to be returned because we are avoiding the PER DIEM or any unnecessary charges . . . [A]ny expenses accrue due to empty termination issue, SSL will be liable for all the cost[.] This is a clear shipping companies issue not SAMSUNG nor the carrier. Please advise if you’re having this issue from your side[.] If yes, please advise the Port and terminal and any plan to correct the issue.” CX_07238-CX_07366, ZIM0014187-ZIM0014225.⁹

61. In an internal ZIM email chain in 2021, personnel identified SEA as one of its top twenty customers that had aging containers *with no movement*. ZIM’s Global Cargo Flow Manager stressed the need for ZIM U.S. employees to facilitate the movement of containers and the return of empty containers to ZIM. CX_07245-CX_07246, ZIM0075543-ZIM0075544.

62. In October 2022, Jeung Choi of SEA e-mailed other SEA employees regarding empty containers that were incurring detention and stated that the goal “is to clean up the data and terminate the empties and get below 300 by the end of this week.” Ms. Fernando of SEA replied to the email, noting that there were 223 aging containers, some of which were ZIM containers, that had not been returned and emphasized the goal of terminating the empties by the end of the week. CX_07481-CX_07483, SEA01377604-SEA0137606.

⁹ The email in question did not contain reference to specific container numbers.

63. In another example of ZIM’s lack of communication, ZIM canceled several cargo loads scheduled for pickup by the trucking company AV Logistics without explanation, prompting AV Logistics to notify SEA that it “may not be able to pick up all the empties that are in per diem.” CX_07186-CX_07189, SEA0062920-SEA0062923.

64. Despite SEA’s efforts, ZIM did not assist SEA with empty returns, often not responding to emails or responding in a delayed fashion. CX_07235, SEA0136021.

4. Rail Movement

65. Rail movement was often mismanaged by ZIM, at times failing to move containers from the marine terminal to railroad, which is a component of the inland transportation entirely within ZIM’s responsibility.

66. For example, on July 29, 2021, SEA inquired about the status of 10 containers that had been sitting at the port of Savannah since June 2021 and were still on the terminal in September 2021. The email states: “The below loads are still pending rail. These load arrived from June. We really need to move these loads to rail Who will be the carrier?” ZIM responded that the containers were in “demurrage and needed to be paid to load cntrs to train.” CX_07308, SEA0051129.¹⁰ ZIM

¹⁰

Bill of Lading	Container
ZIMUSEL200221345	CAIU8900464
ZIMUSEL200221347	TCNU4951446
ZIMUSEL200221348	TCNU6832528
ZIMUSEL200221350	TGHU5122117
ZIMUSEL200221351	TLLU5911644
ZIMUSEL200221352	ZCSU8666328
ZIMUSEL200221353	ZCSU8968101
ZIMUSEL200220576	BEAU5044020
ZIMUSEL200221346	TCKU7357156
ZIMUSEL200221349	TCNU8905520

did not communicate to SEA about the delays, demurrage accrued, and ZIM required that SEA pay the terminal demurrage before moving the containers to the rail. *Id.*

67. As a consequence of ZIM's failure to handle rail movement, SEA incurred \$540,606 between 2020 and 2022. CX_06248, BRG Report Ex. 2.

V. DRAMATIC PANDEMIC-ERA CHANGES IN ZIM'S DEMURRAGE AND DETENTION PRACTICES

68. Pre-pandemic, from a shipowner's standpoint, an ocean carrier was responsible in door-to-door moves for moving cargo to the inland delivery point such that no D&D charges were charged to the consignee unless caused by the consignee. CX_08532, SEA Liability Expert Report of John D. McCown ("McCown Report") ¶ 27.

69. ZIM would, from time to time pre-pandemic, reach out to SEA for modest D&D charges once a container was delivered to its destination. *See, e.g.*, CX_07229-CX_07234, CX_00047-CX_1538, CX_07222, ZIM0078449-ZIM78463; CX_000000, SEA0000757-760; CX_07168-CX_07176, SEA0066477-485; CX_05784, BRG Report ¶ 18 (based on interviews with M. Rapske, May 26 and June 19, 2023).¹¹

70. In such a case, SEA would investigate the root cause of the charges and if SEA determined that it contributed to the occurrence of the charges, then it would make the payment. CX_07177-CX_07185, SEA0133446-454; CX_07152-CX_07167, SEA0066159-174; CX_05784, BRG Report ¶ 18 (based on interviews with M. Rapske, May 26 and June 19, 2023).

71. During the pandemic and to this day, ZIM's Dedicated Service Group Customer Service Manager Barbara Speight similarly recognized that in a ZIM store door move where ZIM's

¹¹ Mr. Smith testified during his deposition that it is his practice, as he interviews SEA employees, "to immediately enter into [his] draft" expert report the information he learned from the interview. As such, Mr. Smith's report represents contemporaneous recognition of information gained from the interviews. CX_05970, Smith Dep. at 24:22-25:12.

trucker cannot deliver on time, ZIM is responsible for the demurrage. CX_02934, Barbara Speight, individual capacity and as a 143(b)(6) designee, Dep. Tr. 135:4-7.

72. ZIM's Container Equipment Manager Tera Haynie and U.S. Intermodal Manager, Matthew Frigo respectively, acknowledged that in regard to the availability for pickup of goods on a door move, if SEA's goods were not available. then ZIM should not charge SEA demurrage. CX_04170, Haynie, individual capacity and as a 143(b)(6) designee, Dep. Tr. 164:22-23; CX_02637, Frigo, individual capacity and as a 143(b)(6) designee, Dep. Tr. 164:12.

73. Before the pandemic, SEA did not incur any sizeable D&D charges for its use of ZIM for store door moves. In fact, SEA incurred less than \$10,000 in demurrage for 2020. CX_05931, BRG Report Ex. 2 (Summary of D&D charges by Quarter Invoiced, tabulated based on "the data produced by SEA...extracted from its SAP system") ¶ 31.

74. During the pandemic, however, ZIM no longer met its D&D responsibilities on store door moves by paying charges issued by third-parties or not issuing charges directly. Instead SEA was forced to pay ZIM and terminals under protest to have its goods released on store door moves. CX_02214-CX_02215, Rapske Dep. Tr. 42:20-43:5.

75. Due to this change in ZIM policy, SEA was placed in a Catch-22 situation by immediately being required to arrange payment for D&D charges as "[SEA] did not have the ability to pay other than through the credit card to pay the terminals directly because we didn't have any contracts with the terminals." CX_02234, Rapske Dep. Tr. 62:7-11.

A. Dramatic Pandemic-Era Changes In ZIM's Demurrage And Detention Practices

76. During the pandemic, ZIM's D&D practices underwent a profound change. SEA personnel responsible for tracking SEA's store-door moves with ZIM noticed significant changes

in ZIM's demurrage billing practices at the beginning of 2021. CX_02214, Rapske Dep. Tr. 42:20-44:4, CX_02280, Rapske Dep. Ex. 1.

77. Starting in 2020, and then ramping up with dramatically increased frequency in 2021 and 2022, SEA was heavily billed for D&D charges on ZIM shipments. CX_05784, BRG Report, Ex. 2 (Summary of D&D charges by Quarter Invoiced, tabulated based on "the data produced by SEA ... extracted from its SAP system," ¶ 31).

78. For 2020, SEA incurred less than \$10,000 in demurrage, but it incurred \$1.2 million in just the first quarter of 2021. *Id.*

79. ZIM contends that the increased charges resulted from various factors affecting container shipping industry, such as chassis shortages, trucker shortages, inclement weather, and port and terminal congestion matters. CX_03848, Michalski Dep. Tr. 52:2-5; 76:9-21.

80. Early in the pandemic, in April 2020, ZIM's senior leadership—including Mr. Saar Dotan (ZIM's EVP of Shipping), Mr. Goldman (ZIM's then-U.S. President), Mr. Mark Newcomb (ZIM US' General Counsel), and Ms. Ilana Rosenberg (ZIM U.S. CFO)—were revising ZIM's D&D policy. CX_05597-CX_05598, Rosenberg Dep. Ex. 6 thereto.

81. Noting that the pandemic "is a commercial issue and a political one," Mr. Goldman wrote to Mr. Dotan, suggesting that "revisit [the] detention piece" as during that time, "the facilities and cargoes movement cannot be done because of congestion (w/housing, yards, terminals, ramps, etc)" and "these facilities are open but conveyance cannot happen." *Id.*

82. In response, ZIM's U.S. CFO Ms. Rosenberg prepared a proposal for Mr. Dotan's review, which was intended to show how many days "customers [need] to keep the containers" "in order to maintain same level of income (7mil\$)." *Id.*

B. The Questionable Basis For Zim’s Pandemic-Era Demurrage And Detention Charges

83. ZIM admits that only valid and correctly issued D&D charges should go to customers and yet ZIM still issued all D&D charges to its customers, including SEA, assuming – *without verification of any kind* – their validity. CX_04597-CX_04598, CX_04627, Cleva Dep. Tr. 68:17-69:1; 98:9-14.

84. Nonetheless, as demonstrated more fully below, ZIM’s D&D charges practice during the pandemic was replete with systematic errors and did not factor in issues such as port congestion, chassis shortage, or trucker issues, among others.

1. Charging the Wrong Parties

85. ZIM repeatedly issued D&D charges to SEA that were owed by separate divisions of Samsung global affiliates and for which SEA itself was not responsible.

86. On June 23, 2021, Peter Kim, Senior Manager of Logistics Planning & Shared Services at SEA, notified ZIM of its rejection of D&D charges that were levied against shipments that did not belong to SEA and thus could not be approved by SEA. CX_07258-CX_07259, ZIM 0025379-ZIM0025380.¹²

87. In an email sent on February 7, 2022, SEA notified ZIM that its audit of two statements of account, one issued on January 6 and another issued on January 21, revealed that ZIM had incorrectly assessed charges respectively totaling \$506,820 and \$182,400 against SEA for containers that did not belong to SEA. CX_07417-CX_07418, ZIM0013365-ZIM0013366.

¹² Referencing containers: ZCSU70876, ZCSU89094, ZCSU84738, ZCSU71353, ZCSU86281, ZCSU87856.

88. On February 24, 2022, SEA wrote to ZIM, noting that ZIM had levied over \$366,000 of D&D charges on several containers that did not belong to SEA. CX_07415-CX_07416, ZIM0013363-ZIM0013364.

89. Despite this, Adrienne Martin (Collections Manager, ZIM U.S.) informed Cristina Marucut (SEA's Manager of DirectShip Operations) following a conversation between the two regarding the incorrect charges, that "the remarks provided do not indicate any dispute or billing discrepancies" and thus ZIM was "unable to remove the account from hold." CX_07414, ZIM0013363.

90. An internal email sent to SEA personnel on February 28, 2022 shows that SEA had identified multiple invoices that were wrongly billed to SEA instead of the proper Samsung division; the charges from these improperly-billed invoices totaled \$224,359. CX_07407-CX_07412, SEA0128432-SEA0128437.

91. On April 22, 2022, SEA's Jaehwan Lee emailed Keisha Bennett, an accounts collection specialist at ZIM, noting that SEA was incorrectly billed for several charges that were incurred by other subsidiaries. After failing to receive a reply from ZIM, Mr. Lee emailed Ms. Bennett again on May 2, 2022. CX_07468-CX_07470, ZIM0023358-ZIM0023360.

92. ZIM's incorrect billing practices caused problems not only for SEA but for other divisions of Samsung that were wrongly held accountable for charges belonging to SEA. On August 2, 2022, Samsung SDS America, Inc., a separate division of Samsung, wrote to ZIM, stating that ZIM was wrongfully holding Samsung SDS America cargoes based on charges for which SEA was responsible and that Samsung SDS America – "a totally different entity and separately operated company from Samsung Electronics [America]" – was "facing a serious issue

with our customers due to an issue that ZIM has not releas[ed] numerous containers which belong to our customers.” CX_07471-CX_07472, ZIM024577-ZIM024578.

93. On August 3, 2022, ZIM’s U.S. CFO emailed Ms. Martin, internally asking “Is it again the SDS vs. Electronics issue? Pls check and release if it’s not the right entity.” CX_07476, ZIM0049930.

2. Untimely Invoicing

94. ZIM’s U.S. CFO observed that during her tenure, the company always had issues or problems with timely billing. CX_05435, Rosenberg Dep. Tr. at 132:1-6.

95. Between 2020 and 2022, with no meaningful dispute resolution process to act as a check on its D&D actions, it was a well-established business practice at ZIM to issue invoices that included D&D charges that were clearly time-barred. CX_04638, Cleva Dep. Tr. 109:11-21.

96. Generally, ZIM bills *all un-invoiced* demurrage regardless of how old it is. CX_05427, Rosenberg Dep. Tr. 124:5-9; CX_04769, Cleva Dep. Ex. 9 at p. 9 (“in general, we will bill it all.”)].

97. By way of illustration, in February 2020, ZIM’s then-U.S. President, Mr. George Goldman, made a strategic decision to invoice these invalid, uncollectible charges, at times, to “cut a deal” with a customer and make sure ZIM does not lose money – all this despite Mr. Cleva’s internal warning to ZIM US’s management that there would be “heavy pushback” for issuing time-barred D&D charges and that certain strategic accounts will be “very unhappy.” CX_04761, Cleva Dep. Ex. 9; *see also* CX_04782-CX_04784, Cleva Dep. Ex. 11 at pp. 1-3.

98. By way of another example, one of the ZIM’s key Strategic Account customers wrote in February of 2020 to advise ZIM that it “continue[s] to receive invoices that have been issued more than 180 days after the event”; that in this particular instance, it received “an invoice that was issued 394 days after the event.” CX_04759-CX_04760, Cleva Dep. Ex. 8.

99. The Strategic Account customer in question further wrote: “to be perfectly blunt, you should be embarrassed to even raise such an invoice after so many days to any customer, let alone one of your largest global supports.” *Id.*

100. ZIM’s SA team “is responsible for a list of roughly 70 customers that, through an internal process, are considered strategic for ZIM.” CX_04550, Cleva Dep. Tr. 21:8-14.

101. The SA team’s primary goal was described as not “growing revenue,” but “[t]o maintain, foster, and develop the relationship globally with these normally quite large and global customers.” CX_04550, Cleva Dep. Tr. 21:20-22:4.

102. At all relevant times, SEA has been identified by ZIM as an important strategic account (“SA”). CX_04559, Cleva Dep. Tr. 30:16-20.

103. Once a time-barred invoice is issued, the onus of having to prove its inaccuracy or illegality based on the applicable contract falls on customers. CX_05427, Rosenberg Dep. Tr. 124:11-18.

104. In February of 2020, with respect to another ZIM customer, Mr. Ewan Greg (then-VP of Customer Service), Mr. Goldman, Ms. Rosenberg, Mr. Yaacoub, and Mr. Cleva, among others, were discussing what to do with “un-invoiced demurrage” which were only just discovered. CX_04761-CX_04771, Cleva Dep. Ex. 9. “[G]iven the reactions from customers to the old invoices the last few months,” Mr. Greg observed, issuing the un-invoiced demurrage now “will be throwing gas on the fire.” CX_04770, *id.* at 10. In response, Mr. Goldman instructed ZIM U.S. Finance team to “bill it all” and “take a proactive approach and speak to the Customers involved and explain these are coming.” CX_04769, *id.* at 9. Mr. Cleva, having reviewed the applicable contract language and determined the charges were already then time-barred, responded: “I feel we have little option to pursue collection further.” CX_04768, *id.* at 8. While agreeing with Mr.

Cleva's conclusion that ZIM will "have no option but to waive" the un-invoiced demurrage charges in question, ZIM's U.S. CFO still requested Mr. Cleva to "try to collect first" and to "try to convince [the customer] to waive [the time bar] clause for this time...[a]nd ask for 50% demurrage." CX_04767, *id.* at 7. Mr. Cleva replied: the customer "will not agree to paying Z[IM] a "profit" for an error we/Z[IM] did to ourselves, but we may be able to explore a deal based on actual cost." *Id.* Mr. Cleva further requested to be "advise[d] [of] true/actual cost to Z[IM] on this case and I will attempt to cut a deal that will recover some/all of actual cost here." CX_04761, *id.* at 1.

105. By February and March of 2021, ZIM U.S. has been singled out by Mr. Dotan, ZIM Israel's EVP of Countries and also acting Head of Shipping, as a leading source of 90+ days overdue. CX_05630, Rosenberg Dep. Ex. 11.

106. On February 14, 2021, Mr. Dotan, to whom ZIM U.S. Finance team ultimately reports, wrote to ZIM U.S. CFO, noting that "82% of 90+ days overdue for the entire company is from U.S." and that he "need[s] to have more information and action on it." CX_05630, Rosenberg Dep. Ex. 11 at p. 4; CX_05436, Rosenberg Dep. Tr. at 133:4-15.

107. In response, on behalf of ZIM U.S. Finance team, ZIM U.S. Collections Manager explained various challenges her team faced, including "Billing Issues," i.e., "ZIM system are not set up to execute...requirements agreed to within the service contracts" and "IT enhancements are needed ...and will also help to reduce the delays and errors. CX_05628, Rosenberg Dep. Ex. 11 at 3.

108. On November 17, 2021, ZIM's global CEO reviewed "overdue balances in the US" and decided to "implement[] the process for holding cargo and blocking shippers for customers with overdue demurrage and detention in the US." CX_05651, Rosenberg Dep. Ex. 12 at 5.

109. Just two days later, on November 19, 2021, Mr. Eason Yun (ZIM Taiwan's Marketing Director) wrote: "[w]e got so many customers feedback CNEE do not get our invoices for DEM DET at destination." CX_05647, Rosenberg Dep. Ex. 12 at 1.

110. ZIM's U.S. CFO confirmed that she verified the statement above. CX_05444, Rosenberg Dep. Tr. 141:10-21.

111. On Dec 17, 2021, ZIM's U.S. CFO wrote to Eyal Ben-Amram (ZIM's Chief Information Officer), noting that "USA are sending mass demurrage invoices as PDF by mail to customers and truckers, a/k/a digital invoicing. Yesterday, December 6th, 2021, we discovered an internal error in SAP that caused a failure in the dispatch of demurrage digital PDF invoices to customers in USA" and that "majority of the failure happened during November of 2021 when a mass invoicing was done in USA, roughly approximately 15,000 invoices processed." CX_05654, Rosenberg Dep. Ex. 13 at 1.

112. ZIM's U.S. CFO described this "Email dispatch critical error" as "Demurrage invoices are not sent to customers in USA." CX_05654, Rosenberg Dep. Ex. 13 at 1. She added that "[t]his is a huge issue for us," which "creates enormous mess; triple the work, waste of [human capital], putting aside actual collection to address this mess." *Id.*

113. Even as ZIM was preparing to institute the Finance Hold No. 4 on January 11, 2022 (*see, infra*, ¶¶ 194-204), on December 23, 2021, Ms. Yael D'angeli (ZIM's Head of Strategic Account Unit) wrote to ZIM U.S. Finance team, including ZIM's U.S. CFO, that she was "[o]n a call with [Ms. Rosenberg] earlier this week [and she] saw Samsung's overdues are accumulating," but that she "[c]hecked with [her] team, and apparently, we are still missing details of the statement to take with Samsung Korea and US," i.e., SEA. CX_05672, Rosenberg Dep. Ex. 15 at 1.

114. On November 24, 2021, ZIM's U.S. CFO wrote to the SA team that: "enough is enough, and [customers] can ask questions, but that is not instead of paying on time. Appreciate your support and efforts, really do, but it can't continue this way. We are too flexible and allowing too much time discussing internally/externally forever. Starting next week, the speed of collection processes for SA will change." CX_05673, Rosenberg Dep. Ex. 15 at p. 2.

115. ZIM's decision to speed up collection was directly "in response to [the] global CEO's message" a week earlier on November 17, 2021 regarding implementation of Finance Holds for customers with overdue D&D charges in the U.S. CX_05459, Rosenberg Dep. Tr. 156:2-16.

116. On January 4, 2022 – a week before Finance Hold No. 4 was instituted – Ms. D'angeli wrote to ZIM's U.S. CFO, among others, noting that "[f]ollowing a meeting with our [global] CEO regarding SA overdues, mainly in US, the CEO instructed us clearly to reduce dramatically the overdues within 3 weeks. Otherwise, he will stop the service to [Strategic Accounts] with overdues." CX_05681, Rosenberg Dep. Ex. 16 at p. 1. ZIM's U.S. CFO understood the above message from the global CEO to mean that ZIM's U.S. overdues were "a concern to the CEO and the instruction was to address this concern." CX_05465, Rosenberg Dep. Tr. 162:12-19.

117. In January of 2022, James Michalski, ZIM U.S.'s VP, Regional Logistics, sent out an internal email, containing "a high-level recap of the per diem *ready for billing* ("RFB") broken out by customer" as a part of "Mass Billing Clean Up." CX_05625, Rosenberg Dep. Ex. 10 at p. 1.

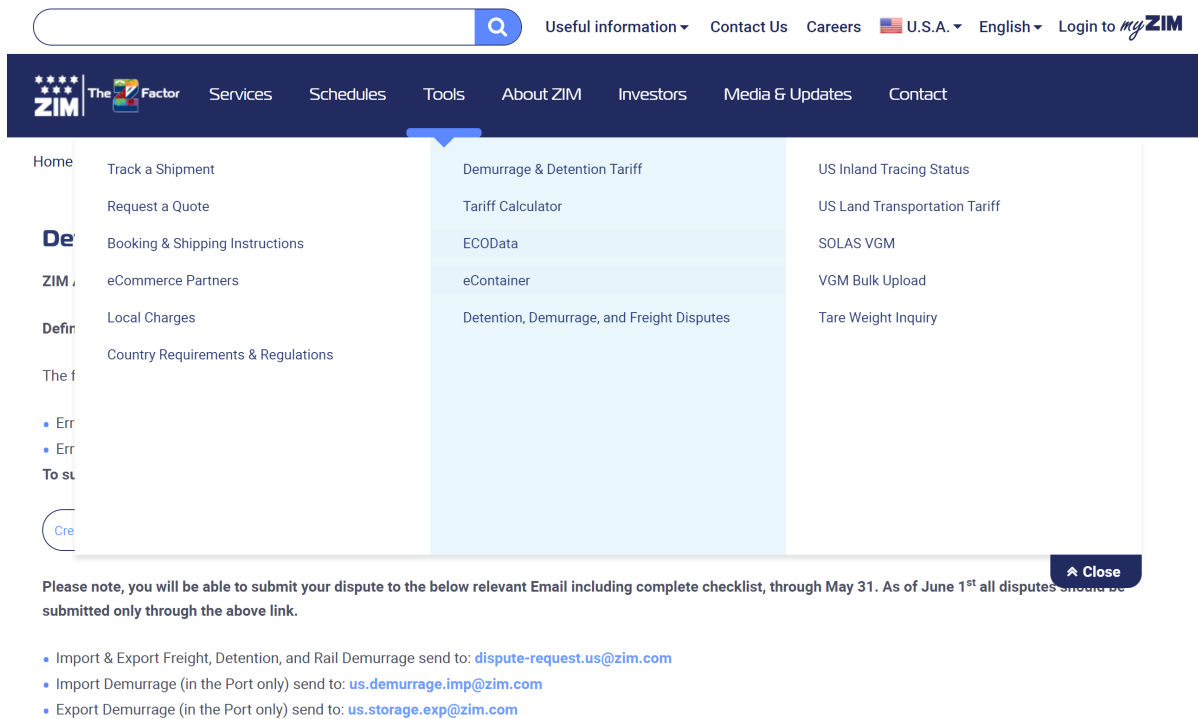
118. Mr. Michalski's email contained a category of "Time Barred" amounts defined as "Amounts for customers past their time bar limit in the contract that [ZIM U.S. Finance team] has instructed to negotiate." CX_05625, Rosenberg Dep. Ex. 10 at 1.

C. ZIM Lacked A Meaningful Dispute Resolution Process, Violating Both The Shipping Act And OSRA

119. ZIM's conduct resulted in container processing and handling delays at SEA's warehouses and client delivery locations, as well as delays in container and equipment returns, resulting in further detention charges and injuries. CX_02144-CX_02145, Choi Dep. Tr. 95:18-96:20.

120. ZIM claims that if the invoice is disputed, it does not employ "credit suspension or Finance Hold. We don't take up collection actions on any invoice that is disputed." CX_03182, Yaacoub Dep. Tr. 125:9-14.

121. But ZIM will consider an invoice to be "disputed" if and only if it is "formally" disputed, *i.e.*, submission of a claim via its website (<https://www.zim.com/tools/detention-demurrage-and-freight-disputes>) as shown below. CX_03199, Yacoub Dep. Tr. 142:6-24.



122. Other than a choice to “Create Dispute,” customers currently have no other avenue to submit their dispute, and the ZIM website does not list any phone numbers. CX_03200, *see id.* at 143:7-14; CX_04610, Cleva Dep. Tr. 81:2-6; CX_08317, ZIM, Tools, Detention, Demurrage, and Freight Dispute Resolution Guidance, <https://www.zim.com/tools/detention-demurrage-and-freight-disputes>.

123. Even “if a customer disputes, not formally, but makes [a dispute] known repeatedly to [ZIM U.S. Finance] team via email or call,” ZIM does not consider the invoice “disputed.” CX_03200, Yaacoub Dep. Tr. 143:7-15. For those invoices customers dispute via emails or calls to their regular or preferred points of contact, ZIM will continue its efforts to collect them and impose more D&D charges until resolved. *Id.*

124. When SEA asked and prodded ZIM for proof as to its extensive invoicing practices, it went through the gauntlet of reviews and procedures to justify the charges being demanded by ZIM. CX_02439-CX_02440, Fernando Dep. Tr. 119:15-120:14.

125. ZIM would rely on its D&D committee to review cases with information provided by the customer and collected internally to determine if charges were inaccurate. CX_04598, Cleva Dep. Tr. 69:3-10.

126. However, a customer cannot directly request a waiver or discount of certain D&D charges to ZIM U.S. management. CX_05513, Rosenberg Dep. Tr. 210:4-18; CX_03891-CX_03893, Michalski Dep. Tr. 95:21-97:15.

127. Once the invoices are issued, the burden of having to prove the erroneous D&D charges falls entirely on the customers, and the remediation process is “almost always retroactive,” not proactive. There is no instance Mr. Cleva, ZIM U.S. Head of Strategic Accounts North America, knows of where ZIM has caught its own errors before the erroneous invoices were issued. CX_04598, Cleva Dep. Tr. 69:3-13.

128. ZIM asserts that it could not have proactively reviewed and verified the D&D charges SEA was forced to pay because those charges between 2020 and 2022 are time-sensitive. However, Mr. Cleva is not aware of any D&D charges that ZIM considers to be not time-sensitive, *i.e.*, they are *always* deemed time-sensitive. CX_04598, Cleva Dep. Tr. 69:11-25.

VI. ZIM’S PUNITIVE COLLECTIONS STRATEGY COMPOUNDED D&D CHARGES

129. ZIM U.S.’s collection policies and procedures are memorialized in a document entitled “Comprehensive Collections Policy” (“Collections Policy”). [CX_05600-CX_05624, Rosenberg Dep. Ex. 7.

130. ZIM U.S.’s Collections Policy – a 25-page document – is reviewed and approved by ZIM’s US CFO. CX_05405, Rosenberg Dep. Tr. 102:8-10; CX_05600-CX_05624, Ex. 7 thereto.

131. With respect to Strategic Accounts like SEA, the Collections Policy provides guidelines on timelines by which ZIM U.S. collections personnel must ensure, among other things, (i) receipt of all invoices, (ii) provision of any additional necessary or requested information, (iii) calling customers about the past due issues, and (iv) escalate, as appropriate, to the senior managers, including Collections Manager (Ms. Adrienne Martin). CX_05405, Rosenberg Dep. Tr. 102:8-10; CX_05602-CX_05603, Ex. 7 thereto at pp. 3-4.

132. ZIM U.S. Finance team led ZIM's efforts to collect D&D charges from consignees like SEA. Ms. Ilana Rosenberg, Mr. Yaacoub Yaacoub, and Ms. Adrienne Martin ("ZIM U.S. Finance"), with support from their direct reports, led ZIM's efforts to collect D&D charges from U.S. customers. CX_04583, Cleva Dep. Tr. 54:2-7; CX_04583, Rosenberg Dep. Tr. 149:4-7; CX_04773-04781, Cleva Dep. Ex. 10.

133. Mr. Yaacoub, Director of Finance for ZIM U.S., is responsible for "collection" as well as "disputes." CX_03073, Yaacoub Dep. Tr. 16:14-23. Mr. Yaacoub has three direct reports, all of whom are managers, and for ZIM U.S. "collection" efforts, he is assisted by Ms. Martin, ZIM U.S.'s Collections Manager. *Id.* at 16:25-17:11.

134. Mr. Yaacoub reports to ZIM's U.S. CFO, Ms. Rosenberg, who in turn, reports to ZIM US President, Mr. Yochai Nissim (previously, Mr. George Goldman). CX_03074, *id.* at 17:19-18:11.

135. ZIM U.S. President reports to Mr. Saar Dotan, ZIM Israel's Executive Vice President of Countries and also acting Head of Shipping. CX_03116-CX_03117, *id.* at 59:17-18; 60:1-3; CX_05391, Rosenberg Dep. Tr. 88:17-20].

136. ZIM's Israel-based headquarters' influence over ZIM U.S. Finance team with respect to its collection efforts was "huge." CX_03075, Yaacoub Dep. Tr. 18:12-17.

137. ZIM U.S. Finance team generates and updates a demurrage report called “USA Overdue Review” on a monthly basis. CX_03075, CX_05482, Rosenberg Dep. Tr. 83:12-16; 179:19-22.

138. The “USA Overdue Review” is for internal use by the ZIM U.S. Finance team, which then gets presented to the headquarters in Haifa, Israel. CX_05482-CX_05483, Rosenberg Dep. Tr. 179:23-180:3; CX_05711-05718, Rosenberg Dep. Ex. 19 (Mar. 2022 Version).

A. ZIM Began Implementing Finance Holds On SEA Containers To Extract Payment Of D&D Charges During The Pandemic Years

139. ZIM’s instrument of choice to collect D&D charges – even where disputed by shippers and consignees – was the *finance hold*. Referred to by Zim interchangeably as “cargo hold” and “credit suspension” (collectively, “Finance Holds”), the practice was used to induce customers to pay. CX_03099, Yaacoub Dep. Tr. 42:21-43:9; CX_05331, Rosenberg Dep. Tr. 28:7-13; CX_04630, Cleva Dep. Tr. 101:6-9; see also CX_04361-04376, Haynie Dep. Ex. 10.

140. A cargo hold means that ZIM “will hold the release of the containers until [ZIM] receive[s] payment or commitment for payment.” CX_03125, Yaacoub Dep. Tr. 68:22-24.

141. Credit suspension means ZIM is taking a customer’s credit away “based on certain criteria.” CX_03125, Rosenberg Dep. Tr. 28:14-18.

142. For purposes of D&D charges, SEA does not have credit with ZIM. CX_03100, Yaacoub Dep. Tr. 43:5-6.

143. The main difference between the two forms of Finance Hold is what is being taken away from the customer: credit is being taken for credit suspension while a cargo hold is when the containers are held and not released. CX_05331, Rosenberg Dep. Tr. 28:19-24.

144. With a cargo hold, the impact is immediately realized in ZIM’s cargo database as the containers subject to hold are off-limits for trucker pick-up: “The customer or the trucker, on

behalf of the customer, cannot pick up the container” because “[t]he collection manager will ... put the hold on [ZIM US’s] system, and that will not allow the container to be released.” CX_03126, Yaacoub Dep. Tr. 69:5-15; CX_05331, Rosenberg Dep. Tr. 28:19-24; CX_04301, Haynie Dep. Tr. 295:12-17.

1. ZIM’s Finance Hold Encompassed More Than Containers with Unpaid Demurrage, But to All SEA Containers in Transit

145. Finance Holds were particularly debilitating because ZIM would refuse to release both containers with pending charges *and* containers without pending charges. Between 2020 and 2022, ZIM refused to release SEA containers from terminals at U.S. ports due to allegedly past due amounts (“Disputed Containers”) on *otherwise unrelated* SEA shipments that had not yet incurred any demurrage charges (“Unrelated Containers”). CX_01570, ZIM0085708; CX_02218, Rapske Dep. Tr. 46:17-47:8; CX_02285-CX_02307, Rapske Dep. Ex. 5; CX_03006, Speight Dep. Tr. 207:17-24.

146. ZIM would not move or release Unrelated Containers from a terminal until charges concerning Disputed Containers were satisfied, which practice would cause Unrelated Containers to remain at the terminal and accrue significant demurrage charges. CX_07435-CX_07461, SEA0127499-525; CX_7328-CX_07366, ZIM0014187-14225 (cargo holding Samsung SDS containers because “Samsung has not paid the past due balance for other shipments”).¹³

147. By way of example, on February 17, 2022, an email string details a series of communications between PB Industries, Inc. (“PBI”), a logistics management company, SEA and ZIM. CX_7328-CX_07366, ZIM0014187-14225. There, PBI was attempting to arrange inland transport for forty (40) containers at the port of Houston but those were categorized as “not

¹³ Five reefer containers are under ZIMUSEL7086080.

available” because of the Finance Hold ZIM imposed on “Samsung.” PBI further indicated that it would plan the schedule when the issue is resolved and the containers are available. *Id.*

148. The inland transportation of these 40 containers could have commenced on or about February 17, 2022. But ZIM’s Finance Hold prevented that from happening, resulting in demurrage charges assessed against SEA. *Id.*

149. As another example, the first container on the list of forty (40), TCLU8633718, remained in demurrage until after the Finance Hold was lifted in March 2022 and SEA paid \$15,540 in demurrage for just that one container. CX_01602, ZIM0024082.

150. For container TCLU8633718, ZIM initially invoiced SEA \$14,535 for demurrage starting February 2, 2022, during the Finance Hold period, through March 18, 2022, one day after the hold was released. CX_07489, SEA0023285.

151. ZIM subsequently invoiced SEA for another three days of demurrage, through March 21, 2022, totaling \$1,005. CX_07491, SEA0023342.

152. Once a hold is lifted, arrangements would then have to be made for the inland transportation, as well as for the payment of newly added demurrage during the Finance Hold, which often further delay the process. CX_07384-CX_07388, SEA0053641-645.

153. For example, on February 9, 2022, SEA asked ZIM to release the Finance Hold for four containers on an expedited basis, which request was rejected by ZIM. *Id.* There, trucker Harvest Transport had indicated to SEA that if it was not able to pick up this container on the next day, the next appointment would not be until the second week of March of 2022, resulting in a delay of over a month. *Id.*

2. Chronology of ZIM's Debilitating Finance Holds In 2020 to 2022

154. ZIM memorialized, based on its internal records, a schedule of when ZIM put a Finance Hold on SEA on account of alleged "past due balances" for SEA. CX_03083, Yaacoub Dep. Tr. 26:1-5.

155. Director of Finance for ZIM U.S, Mr. Yaacoub, relied on a chart throughout his May 3, 2023 deposition, but in particular, when it came to details of the four (4) Finance Holds ZIM imposed against SEA between 2020 and 2022. *Id.*

156. Mr. Yaacoub testified that other than the Finance Hold schedule, there were no other documents in front of him related to SEA. CX_03803, Yaacoub Dep. Tr. at 26:6-10.

157. The chart was *not* produced during discovery, but ZIM did so on May 12, 2023. CX_01538-CX_01570, May 12, 2023 email from Evelyn Joran of Cozen O'Connor producing ZIM 0085662 - ZIM 0085708.

158. ZIM's internal record shows that there were **4 periods of Finance Holds** against SEA between (1) August 5, 2020 and Mid-August 2020 ("Finance Hold No. 1"); (2) May 27 and June 30, 2021 ("Finance Hold No. 2"); (3) September 27 and October 16, 2021 ("Finance Hold No. 3"); and (4) January 11 and March 17, 2022, the latter of which lasted nine weeks ("Finance Hold No. 4"). CX_01570, ZIM0085708.

159. During these Finance Hold periods, according to the chart of Mr. Yaacoub, the financial impact on SEA was: approximately \$3.8 million in demurrage and \$900,000 in detention, and \$500,000 in rail storage, **totaling in \$5.2 million.** *Id.*

160. When asked to identify the Finance Hold periods, ZIM U.S. CFO corroborated the dates in Mr. Yaacoub's note for the most part: "the first hold was between August 8th of 2020 through August 11, 2020; the second hold was May 27, '21 through end of June '21; the third one

was from 27 of September ‘21 through October 6th, ‘21; and the last one was [January 11th], ‘22 through March 17th.” CX_0 5324, Rosenberg Dep. Tr. 21:17-22:5; 46:20-25.

a. Finance Hold No. 1

161. Finance Hold No. 1 was instituted on August 5, 2020 and lasted until “Mid-August 2020.” CX_01570M0085708.¹⁴

162. Inconsistent with Mr. Yaacoub’s note, ZIM U.S. CFO testified that the Finance Hold No. 1 began on August 5 (as opposed to August 8) and ended on August 11 (as opposed to mid-August) of 2020. *Id.*

163. ZIM U.S. CFO testified that at the time Finance Hold No. 1 was instituted, the alleged overdue balance owed to ZIM by SEA was approximately \$143,000, and SEA paid \$36,710 to lift the hold. CX_05341, Rosenberg Dep. Tr. 38:3-39:3.

164. Other than a blanket, unsubstantiated statement that ZIM has sent invoices representing the overdue demurrage amount, and SEA has received them “per [ZIM’s] regular process,” ZIM U.S CFO Rosenberg could not “answer when those specific invoices were sent” or to whom at SEA they were sent. CX_05332, CX_05334, Rosenberg Dep. Tr. 29:22-30:5; 31:3-16.

165. On August 5, 2020, SEA’s Maria Kristina Fernando sent an email to ZIM’s Adrienne Martin and Elizabeth Harris, an accounts collections specialist at ZIM, noting several issues with the invoices issued by ZIM, including multiple invoices that were rejected due to

¹⁴

Arrival Date	Containers
8/6/2020	29
8/7/2020	41

charges for demurrage that were calculated during periods of free time or were improperly sent to SEA rather than another Samsung division. CX_07208-CX_7217, SEA0014504-SEA0014513.

166. In response, on August 20, 2020, Ms. Harris emailed Ms. Fernando a list of invoices that ZIM had determined to be valid, representing total D&D charges that were significantly less than the charges ZIM had previously invoiced. CX_07204-CX_07206, SEA0014500-SEA0014502.

167. During the Finance Hold No. 1, ZIM assessed the additional demurrage amount (“Demurrage on Demurrage”) of \$705 and detention and handling charge of \$19,295 for a total of \$20,000. CX_01570, ZIM0085708.

168. SEA’s financial damages from Finance Hold No. 1, by ZIM’s own calculation, was \$20,000, which represents those damages amounts that could have been avoided had ZIM not implemented the Finance Holds, employed them less, or not charged Demurrage on Demurrage and detention and handling charge during Finance Hold No. 1. CX_05810, BRG Report ¶ 53.

b. Finance Hold No. 2

169. Finance Hold No. 2 was instituted on May 27, 2021 and lasted until June 30, 2021. CX_01570, ZIM0085708; CX_5809, BRG Report ¶ 49; CX_05945, Ex. 10 thereto.¹⁵

170. Mr. Yaacoub’s note provides that at the time Finance Hold No. 2 was instituted, the alleged overdue balance owed to ZIM by SEA was \$857,914.64, and SEA paid \$510,975 to lift the hold. CX_01570, ZIM0085708.

¹⁵ ZCSU878021-7, ZIMUSEL200220432, ZCSU860232-3, ZIMUSEL200220431, TEMU677367-8, ZIMUSEL200220430, TCNU543546-5, ZIMUSEL200220429, TCNU252347, ZIMUSEL200220428 DRYU964979-7, ZIMUSEL200220123.

171. Inconsistent with Mr. Yaacoub's note, ZIM's US CFO testified that the alleged overdue balance owed to ZIM by SEA at the time Finance Hold No. 2 was approximately \$158,000. CX_05344, Rosenberg Dep. Tr. 41:15-22.

172. On June 15, 2021, Peter Kim of SEA continuously asked ZIM to provide copies of the invoices so he could remit payment and remove the containers on Finance Hold. CX_07276-CX_07283, SEA0052726-38.

173. On June 16, 2021 Maria Aurora P. Dacumos of SEA continuously asked ZIM "to provide the invoices ASAP for the SEA approved charges" so SEA could get the containers on Finance Hold out of it. CX_07248, SEA0021772.

174. On June 29, 2021, Mr. Kim contacted ZIM's Dedicated Service Group again to inquire about any remaining containers on Finance Hold. CX_07274, SEA0052729.

175. The next day, Ms. Stacie Payton of ZIM's Dedicated Service Group replied that the SEA containers are still "on demurrage hold" and that "[t]ruckers must [be] scheduled [for] cntrs and [SEA then] advise the pick up dates." Once those steps are completed, only then "demurrage invoices [representing the Demurrage on Demurrage during Finance Hold No. 2] will be sent to Samsung team to remit payment PRIOR to removing hold. Note, ZIM cannot cover costs and must be completed by your team." *Id.*

176. On May 24, 2021, PBI, one of SEA's trucking companies, made an inquiry of ZIM regarding the last free day for container DRYU9649797, which ZIM indicated was May 27, 2021. CX_07306, SEA0052844. On May 27, 2021, PBI noted that the containers were on hold at the Port of Savannah. *Id.*

177. ZIM initially invoiced SEA for 25 days of demurrage at the Port of Savannah, starting on May 29, 2021, during the hold period, and ending on June 22, 2021, totaling \$7,540. CX_07487, SEA0047014.

178. Subsequently, ZIM invoiced SEA \$5,440 for an additional 17 days of demurrage through July 9, 2021 (just nine days after the hold was released). CX_07488, SEA0009008. In total, ZIM's hold led to \$12,980 in total demurrage charges for container DRYU9649797.

179. During Finance Hold No. 2, according to Mr. Yaacoub's note, ZIM assessed demurrage on demurrage of \$1,323,654, detention on detention of \$181,161, and additional rail storage of \$502.331 for a total of \$2,007,147. CX_01570, ZIM0085708.

180. Accordingly, SEA's financial damages from Finance Hold No. 2, by ZIM's own calculation, was \$2,007,147. *Id.*

c. Finance Hold No. 3

181. Mr. Yaacoub's note states that Finance Hold No. 3 was instituted on September 27, 2021 and lasted until October 16, 2021. CX_01570, ZIM0085708.

182. Mr. Yaacoub's note also provides, and ZIM U.S. CFO corroborated, that at the time Finance Hold No. 3 was instituted, the alleged overdue balance owed to ZIM by SEA was \$943,708.14, and SEA paid \$638,870 to lift the hold. CX_01570, ZIM0085708; CX_05349, Rosenberg Dep. Tr. 46:13-19.

183. On September 27, 2021, Samsung SDS emailed Ms. Payton of ZIM, informing her of Samsung SDS's payment plan in place for the containers on Finance Hold and asking her to therefore release the containers. For the next few days, Samsung SDS repeatedly requested ZIM to release the Finance Hold, which request was not accepted by ZIM. CX_7328-CX_07366, ZIM0014187-14225.

184. On September 27, 2021, ZIM separately emailed SEA noting that “Samsung was placed on credit hold.” When SEA followed up and asked for the reason and details of the invoices that needed to be processed, ZIM responded: “see below from Collections manager,” referring SEA of the original Finance Hold notice. CX_07322-CX_7327, SEA0053421-426.

185. On September 29, 2021, Ms. Martin of ZIM U.S. Finance team provided “the account statement,” which, upon review by Mr. Peter Kim of SEA, lacked “the detail BL, container, charge type, starting and end [date] if charge[s] are for demurrage/detention.” Mr. Kim further noted that the containers on hold “are not for [SEA].” *Id.*

186. On October 6, 2021, even when Finance Hold No. 3 was authorized to be lifted, that process was not immediate because ZIM required “some time for holds to be removed.” Further ZIM made it clear “if any cntrs are in demurrage [i.e., demurrage on demurrage while Finance Hold No. 3 was in effect], Samsung will be responsible for remitting payment to get the cntrs moving.” CX_07367, SEA0018177.

187. As of September 29, 2021, container ZCSU2745374 was being held at the port of New York due to Finance Hold No. 3. CX_07372-CX_07373, SEA0018182-83.

188. Data produced by ZIM indicates that SEA paid \$18,560 in demurrage for this container. CX_01850, CX_01938, ZIM0024082.

189. The ZIM data does not indicate the date through which the demurrage was assessed, but the container was moved off terminal between November 5, 2021 and November 11, 2021. CX_05944, BRG Report Ex. 9 (Invoice date was November 5, 2021 and activity date was November 11, 2021).

190. During the Finance Hold No. 3, according to Mr. Yaacoub's note, ZIM assessed demurrage on demurrage of \$190,998, detention and handling charge of \$27,917 for a total of \$218,915. CX_01570, ZIM0085708.

191. Accordingly, SEA's financial damages from Finance Hold No. 3, by ZIM's own calculation, was \$218,915. *Id.*

192. SEA's damages expert calculated, based on SEA's payment data obtained through SAP system, demurrage demurrage during the Finance Hold No. 3, as \$755,472. CX_05945, BRG Report Ex. 10.

d. Finance Hold No. 4

193. Mr. Yaacoub's note provides, and ZIM U.S. CFO corroborated, that Finance Hold No. 4 was instituted on January 11, 2022 and lasted until March 17, 2022. CX_01570, ZIM0085708; CX_05809, BRG Report ¶ 49; CX_05945 Ex. 10 thereto; CX_02778-CX_02782, Frigo Dep. Ex. 10 (noting the Finance Hold was still in effect February 2022).

194. Mr. Yaacoub's note also provides that at the time Finance Hold No. 4 was instituted, the alleged overdue balance owed to ZIM by SEA was \$1,538,200.64. CX_01570, ZIM0085708.

195. On February 17, 2022, PBI was attempting to arrange inland transport for container JZPU8028363. CX_7328-CX_07366, ZIM0014187-ZIM0014225.

196. ZIM initially invoiced SEA for \$10,180 of demurrage for the period from February 15, 2022 (during the hold period) to March 18, 2022. CX_07490, SEA0023289.

197. Subsequently, ZIM invoiced SEA for three more days of demurrage, through March 21, 2022 totaling \$1,005, yielding total demurrage charges of \$11,185 for this container. *Id.*

198. During the Finance Hold No. 4, according to Mr. Yaacoub's note, ZIM assessed demurrage on demurrage of \$2,287,561, detention and handling charge of \$668,646 for a total of \$2,967,207. CX_01570, ZIM0085708.

199. Accordingly, SEA's financial damages from Finance Hold No. 4, by ZIM's own calculation, was \$2,967,207. *Id.*

200. ZIM would charge demurrage to SEA even for those containers on store-door move, whose inland transportation was provided by ZIM's in-house trucker, but could not be completed due to SEA's customer's lack of capacity to receive the cargo. CX_04591, Cleva Dep. Tr. 62:6-24.

201. Additionally, during Finance Hold No. 4, ZIM held cargo on the basis of outstanding payments for which SEA was not responsible. CX_07395, SEA0118706.

202. In an internal email sent on February 9, 2022, Ms. Fernando noted that SEA was "still on hold from ZIM" and that "per ZIM we owe them \$635K," but that "[f]rom the last statement, there's \$500K that belongs to SAMSUNG but not for SEA." *Id.*

e. Overall Financial Impact of Finance Holds

203. According to ZIM U.S.'s internal chart, the exact amount of the total damages SEA suffered due to Finance Hold Nos. 1-4 are \$5,213,270, comprised of \$3,802,918 in demurrage, \$502,331 in rail storage, and \$897,019 in detention and handling charges. CX_01570, ZIM0085708.

B. ZIM U.S. Resorted To Indiscriminate Use Of Finance Holds To "Clean Up" Its Overdue Balances As Directed By ZIM HQ

204. ZIM defends its Finance Hold practices because, in its view, it queries what else is it supposed to do? It incentivizes the movement of cargo as the customers are forced to "clean up"

D&D charges and move containers out. CX_04629, Cleva Dep. Tr. 100:9-12; CX_05330, Rosenberg Dep. Tr. 27:10-20.

205. ZIM's C-Suite level, senior executives at ZIM's global headquarters ("ZIM HQ") gave express instructions to ZIM U.S. employees to collect significant D&D charges from U.S. consignees such as SEA or all container movement will stop. CX_05330, *Id.*.

206. On November 17, 2021, ZIM's global CEO reviewed "overdue balances in the US" and decided to "implement[] the process for holding cargo and blocking shippers for customers with overdue demurrage and detention in the US." CX_05651, Rosenberg Dep. Ex. 12 at 5, CX_05662, Rosenberg Dep. Ex. 14; CX_05685, Rosenberg Dep. Ex. 18; CX_05685, ZIM 0035600-ZIM 0035603 Jan. 4, 2022 Email from Yael D'angeli, Head of Strategic Account ("Team, Following a meeting with our CEO regarding SA overdues, mainly in US, the CEO instructed us clearly to reduce dramatically the overdues within 3 weeks. Otherwise, he will stop the service to SA with overdues . . .").

207. ZIM's sharp collections practices, consistent with the C-Suite edits, were prevalent during the pandemic. For example, on August 5, 2020, ZIM employee, Ms. Elizabeth Harris stated in an email to ZIM Collections Manager, Adrienne Martin to "Hold their cargo!!! ☺ ☺" when referring to SEA cargo. (emphasis added) CX_07222, ZIM 0011377.

208. The use of two smiling emoji by ZIM-trained personnel is juxtaposed with SEA in the email chain simply trying to get proper "email threads for [ZIM] invoices . . . for obtaining approval" before a pandemic hold was employed. *Id.*

209. ZIM's response was non-responsive: "ZIM has provided all invoices and documents according to our standard process" and refused to confirm that all the invoices were sent in the proper format to SEA. CX_07199, ZIM 0011377.

210. Despite SEA's efforts to receive clarity on invoice charges in and out of the context of Finance Holds, ZIM's testimony often contradicted its operational personnel actions. CX_04597, Cleva Dep. Tr. 68:13-69:1.

C. ZIM's "Hold First, Fix Issue Later" Approach With Any And All Samsung Entities Wreaks Havoc

211. Solely focused at collecting D&D charges at all costs, ZIM frequently and repeatedly put a Finance Hold on containers belonging to other Samsung entities that were otherwise unrelated to SEA.

212. On January 21, 2022, Jonathan Park, a Manager of the SL Operation Group, Samsung SDS America, Inc. (which is separate and distinct from SEA) wrote to ZIM concerning "Samsung SDS container hold issue." CX_05727, Rosenberg Dep. Ex. 26.

213. Mr. Park noted that: "the [] containers [indicated below in the email] belong[] to Samsung SDS America, and ZIM Line ha[s] overdue balances with [SEA]. We are totally different affiliates and nothing involved with Samsung Electronics[.] I am saying that ZIM is holding the containers for the wrong company." CX_05723, Rosenberg Dep. Ex. 26 at 1.

214. The same day, ZIM's US CFO forwarded the email from Mr. Park to Mr. Yaacoub and Ms. Martin, noting that "Let's see how we can resolve the 2 separate entities issue once and for all" because "[i]t's happening every time we hold Samsung." *Id.*

215. On February 25, 2022, Ho Dong Seo (EVP at Samsung SDS HQ, head of logistic services) wrote to ZIM's U.S. CFO, advising that because of "the DEM pending issue" during the Finance Hold No. 4, "ZIM US had held 10 CNTRs containing several molds and raw material for Home Appliances Factory at Newberry [which] is a separate business legal entity and is NOT related with DEM pending issue." For that reason, Mr. Seo asked ZIM's US CFO to "release 10 CNTRs immediately." CX_0535-36, Rosenberg Dep. Ex. 27 at 4-5.

216. At first, ZIM's U.S. CFO disputed Mr. Seo's description of the containers at issue and noted that "[t]he 10 containers detailed below were consigned to Samsung Electronics (not SDS)." *Id.* at 3.

217. On March 3, 2022, however, ZIM U.S. CFO noted that "[a]fter further view, we understand that the 10 cnts below belong to a separate entity, [Samsung] C&T...[and] [f]ollowing that understanding, we will release the 10 cnts immediately." *Id.*

218. The day after, March 4, 2022, Mr. Seo made two (2) additional requests to ZIM U.S. CFO that ZIM (1) "contact right persons based on Consignee" and attached "the list of Samsung Contact"; and (2) "take [] action based on Consignee [because] every single Consignee [of Samsung affiliates] is the separate legal business entity and should be treated as separate one." CX_05733, Rosenberg Dep. Ex. 27 at 2.

219. ZIM U.S. CFO decided not to communicate further with Mr. Seo directly, but instead ask Ms. Martin to "take this directly with him [and] remove me from the emails." CX_05747, Rosenberg Dep. Ex. 28 at 1.

220. On March 11, 2022, Mr. Seo followed up on his March 4, 2022 email, advising ZIM U.S. CFO of full payment related to "SEA cargo that ZIM US is holding" and renewing his request that ZIM U.S. "contact right persons in Samsung based on Consignee." CX_05779, Rosenberg Dep. Ex. 29 at 1.

221. ZIM U.S. CFO chose not to respond to Mr. Seo directly, but instead directed Mr. Yaacoub and Ms. Martin to "Pls remove me from their emails!" *Id.*

222. On August 2, 2022, Mr. Park of Samsung SDS America again wrote to ZIM U.S., noting that it is "facing a serious issue with [its] customers" because "ZIM [is] not releasing numerous containers which belong to [its] customers" as "ZIM was placing a hold due to [SEA's]

old aging payment.” Mr. Park reiterated that “Samsung SDS is a totally different entity and separately operated company from Samsung Electronics.” CX_05779, Rosenberg Dep. Ex. 30 at 1.

223. ZIM U.S. CFO did not respond to Mr. Park’s request, but instead asked Ms. Martin “Is it again the SDS vs. Electronics issue?” and directed her to “check and release if it’s not the right entity.” *Id.*

224. SEA was similarly flummoxed by ZIM’s remittance of D&D invoices to the wrong departments at SEA. ZIM would put the onus on SEA to explain why ZIM’s own mistake could not be resolved by SEA internally by forwarding the information to the right people at SEA. CX_02401, Fernando Dep. Tr. 81:16-82:7; CX_02470-71, Fernando Dep. Ex. 8 at 1-2.

VII. ZIM’S DEMURRAGE AND DETENTION PRACTICES WERE UNTETHERED FROM THE SHIPPING ACT AND THE INCENTIVE PRINCIPLE

225. ZIM’s practices with respect to D&D did not take into account the FMC’s May 2020 Interpretive Rule’s requirement that D&D charges be levied only when they will encourage the flow or fluidity of cargo through ports and storage facilities, which was implemented as an effort to prevent ocean carriers from profiteering.

226. ZIM U.S. Finance team assessed demurrage on the understanding that it “is a fee charged to the customer [] based on the time that the customer is using the container beyond the free time that’s on the terminal.” CX_05326, Rosenberg Dep. Tr. 23:16-22.

227. Mr. Yaacoub, ZIM US’ Director of Finance) has been in charge of instituting Finance Holds. CX_04007, Haynie Dep. Tr. 295:18-24 (Finance Hold “is completely Yaacoub’s department”). Mr. Yaacoub unequivocally testified that finance holds *do not promote cargo fluidity*:

Q. Okay. Do you think implementation of cargo hold incentivize[s] the movement of cargo or containers?

- A. No.
Q. Okay. How about credit suspension?
A. The same. No.

CX_03204, Yaacoub Dep. Tr. 147:17-21.

228. ZIM U.S. CFO Rosenberg also testified that the limited utility of ZIM's Finance Holds was to motivate customers to pay D&D charges ("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_03797, Rosenberg Dep. Tr. at 179:9-12.

229. Multiple ZIM deponents, assisting collection of D&D charges, confirmed that they themselves personally did not know about the Incentive Principle or that ZIM's D&D decisions were made without considering the Incentive Principle. CX_02800, Speight Dep. Tr. 208:8-15; CX_03797, Michalski Dep. Tr. 98:23-99:9; CX_05087, Shpitzer Dep. Tr. 173:11-174:2; CX_04379, Ramage Dep. Tr. 24:18-21; CX_04807, Weingartner Dep. Tr. 61:7-24.

A. The Determinative Factor Of The Demurrage Committee's Consideration Of A Waiver Or Discount Request Is The Degree Of ZIM's Net Profit

230. In September of 2022, Kevin Ware (Director of SA, North America of ZIM U.S.) wrote to the "Waiver Committee," noting a waiver request by another customer who happened to have "experienced a cyberattack on February 20th [2022] which left the[] company paralyzed for months." CX_05721, Rosenberg Dep. Ex. 25 at 3.

231. Mr. Ware further noted that he "want[ed] ZIM to take note of the Savannah port due to the huge difference and profit we have made off this demurrage." *Id.*

232. Specifically, "[r]egarding Savannah port, [Mr. Ware] was advised that ZIM billed [the customer] \$947,350 ... of demurrage when the port only billed ZIM \$371,421." *Id.*

233. Mr. Ware also pointed out that the customer in question "is speaking with FMC." *Id.*

234. In response, ZIM’s US CFO noted: “Z[IM] cost is a confidential data, and should not be exposed to or used by sales or any party outside of operation and finance (I can only hope this type of discussion is not taking place with the customer).” CX_05730, *Id.* at 2.

235. Forwarding the above response to Mr. Yaacoub and Mr. Thomas Weingartner (Director, Financial Control of ZIM U.S.), ZIM’s US CFO requested Mr. Yaacoub to “provide [] d&d analysis from payment side- what was billed and was is open [sic]” with “the bottom line – total billed; total time-bared [sic]; total [out of pocket]; *Net profit.*” CX_05719, *Id.* at 1.

236. SEA requested ZIM to “[p]roduce all Documents relating to Z[IM]’s cost, pricing, revenue or profit from freight for U.S. destination for Store Door Container moves versus CY moves....inconnection with Demurrage and Detention Charges.” CX_08518, SEA’s First Set of Discovery Requests to ZIM, Document Request No. 9.

237. ZIM has not produced any cost-related or cost-based justification for any D&D for SEA containers.

B. During the Pandemic, ZIM Enjoyed Unprecedented Level of Profits Stemming from D&D Charges

238. During the pandemic, ZIM saw the growth of its revenue and net income at an unprecedented level.

239. Between 2016 and 2019, ZIM’s revenue remained stagnant, and its net income was always in the negative. CX_08563, McCown Report ¶ 54 (ZIM’s revenue compiled based on publicly available and filed information with the Security Exchange Commission).

	<u>2016</u>	<u>2017</u>	<u>2018</u>	<u>2019</u>	<u>2020</u>	<u>2021</u>	<u>2022</u>
Zim:							
Revenue	2,620	2,978	3,248	3,300	3,992	10,729	12,562
Net Income	-168	11	-120	-13	524	4,649	4,629
% Margin	-6.4%	0.4%	-3.7%	-0.4%	13.1%	43.3%	36.8%

240. In contrast, during the pandemic (between 2020 and 2022), ZIM saw its revenue skyrocket and net income dramatically turning to the positive, reaching approximately \$4.6 billion of net income in the past two years. *Id.*

241. According to ZIM's Q3 2020 report, the company reported an "all-time record" net profit of \$144.4 million in Q3 2020 compared to \$5 million in Q3 2019, an increase of 2,818.4%. CX_000000, ZIM Q3 2020 Results, November 18, 2020, (<https://investors.zim.com/news/news-details/2020/ZIM--Q3-2020-Results/default.aspx>).

242. The following year ZIM reported yet another record net income of \$1.46 billion for Q3. CX_08272, ZIM Reports Record Financial Results for the Third Quarter of 2021, November 17, 2021, (<https://investors.zim.com/news/news-details/2021/ZIM-Reports-Record-Financial-Results-for-the-Third-Quarter-of-2021/default.aspx>).

243. D&D charges invoiced to customers do not necessarily equate to ZIM's actual costs, i.e., ZIM makes "profits" off many D&D charges. CX_08578, McCown Report ¶¶ 87-96; CX_04767, Cleva Dep. Ex. 9 at 7.

244. For example, D&D is a profit center for ZIM "because there's no real cost associated with demurrage and detention. It's pure – for the most part, almost all of it, whatever the number, drops all the way to the bottom line, 100 percent profit margin." CX_08800, McCown Dep. Tr. 208:16-24.

245. Prior to the pandemic, for instance, from 2017 to 2018, ZIM saw an increase in income from demurrage of \$27.3 million. CX_07542, ZIM Registration Statement (Form F-1) (December 30, 2020).

246. From 2021 to 2022, ZIM saw an increase of \$242.9 million in income from demurrage. CX_07542, ZIM 2022 Annual Report (Form 20-F) (March 13, 2023).

247. Based on the publicly available figures filed with the SEC, SEA’s liability expert, Mr. McCown, estimates ZIM’s income from demurrage since 2017 to 2022 as follows:

	<u>2017</u>	<u>2018</u>	<u>2019</u>	<u>2020</u>	<u>2021</u>	<u>2022</u>
Demurrage	252	275	286	355	976	1,170

CX_08568, McCown Report ¶ 69.

C. ZIM’s Pernicious Use Of Finance Holds Is In Violation Of ZIM’s Own Service Legal Agreement Concerning A Strategic Account Like SEA

248. ZIM’s SA team “is responsible for a list of roughly 70 customers that, through an internal process, are considered strategic for ZIM.” CX_04550, Cleva Dep. Tr. 21:8-14.

249. The SA team’s primary goal was described as not “growing revenue,” but “[t]o maintain, foster, and develop the relationship globally with these normally quite large and global customers.” CX_04550-51, Cleva Dep. Tr. 21:20-22:4.

250. ZIM claims that while “[a]ll of our customers are vital to us, [SAs] do have an extra layer of coverage, management-level commercial coverage.” CX_04560, Cleva Dep. Tr. 31:14-32:7.

251. ZIM’s internal document called Strategic Account Service Level Agreement (“SA”), which was current as of January of 2020, mandates that in dealing with SAs, ZIM should take a “Top VIP” approach, such that “[t]he way we speak to SA should be different!” and “[b]efore we say “NO” you approach the SA TEAM.” CX_04747, Cleva Dep. Ex. 3 at 11.

252. In addition, the SA makes it clear that “the following actions must be coordinated and agreed with the SA team prior [to] taking action:

- ✓ Not to hold SA’ containers (Samsung example)
- ✓ Restricting credit terms
- ✓ All local VIDs for SA customers should be approved by SA unit prior agreement with customer

CX_04757, Cleva Dep. Ex. 3 at 11.

253. By the “Samsung example,” Mr. Cleva clarified that it refers to “a case where there was monies owed by Samsung and ZIM may have used a tool to incentivize Samsung to clean up their statement of account before consulting with the strategic team to do so.” CX_04577, Cleva Dep. Tr. 48:13-18.

254. Mr. Cleva further testified that “actions such as [holding Samsung’s containers] for strategic accounts [customers] need to be coordinated with strategic accounts.” CX_04577-78, Cleva Dep. Tr. 48:19-49:1.

255. On December 7, 2021, Ms. Martin of ZIM U.S. Finance team emailed the SA team that certain SAs “will be suspended and held this week and next week.” CX_04797, Cleva Dep. Ex. 12 at 3.

256. In response, Ms. D’angeli noted her surprise by saying “[t]his is a huge list!” and that “[w]e have to work together, in an organized manner [and] [w]e shouldn’t hold cargo before we spoke to customer and also cross checked our number!” CX_04796, *Id.* at 2.

257. Mr. Cleva testified that he understood Ms. D’angeli’s exhortation to mean that ZIM U.S. Finance team should “follow a particular process between SA and finance that no finance actions are taken without consulting us [at SA] and having our agreement to proceed as well.” CX_04683, Cleva Dep. Tr. 154:18-25.

258. On December 7, 2021, Ms. Savannah Carmack, ZIM Strategic Account Analyst, wrote to Ms. D’angeli, summarizing “SA overdues issues and resolutions.” CX_07377, ZIM0012753-ZIM0012754. Specifically, Ms. Carmack noted that “[t]he [Strategic Account Managers (“SAMs”)] in the US are spending on average 25% of their time on collection issues with SA customers.” CX_07377, ZIM0012753. Ms. Carmack further noted that the issues contributing to the current situation were as follows:

- “Collectors not researching actual root cause of past dues or disputes received by customer. SAMs are having to chase customers for information that Finance should be collecting themselves”;
- “Placing credit holds without notifying customers”;
- “Invoices continuously being sent to wrong address even though it has been addressed previously”;
- “Action items from bi-weekly meeting not being followed up on”;
- “Major delays or no response at all from Finance when requesting additional information about past dues and remittances received by customers”; and
- “Invoicing old per diem that cannot be collected from customer[s].”

CX_07377-78, ZIM0012753-ZIM0012754.

259. On December 1, 2022, after having imposed four Finance Holds on SEA equating to \$5.2 million in charges, Ms. D’Angeli wrote to Mr. Yochai Nissim (ZIM U.S. President) and ZIM’s US CFO, advising ZIM should change its Fiance Hold practices because they are having a negative impact on ZIM business generation. The email advised that Samsung was “not inviting us to the tender since we held their cargo as well as the D&D dispute. We have an internal rule for SA in ZIM that we don’t hold SA cargo without SA team approval. I know that in last 2 years we allowed it in US, due to severe situation. Now, I would like to ask to go again to the old practice – pls don’t hold SA cargo without our approval.” CX_07484, ZIM0014530.

260. Likewise, a primary function or responsibility of the SA team is not to collect outstanding D&D charges from SAs, including SEA. CX_04606-07, Cleva. Dep. Tr. 77:17-78:3.

261. The primary function or responsibility of the SA Team, including Mr. Cleva, is not to collect outstanding D&D charges from SAs, including SEA. *Id.*

262. However, Mr. Cleva and his team often were relegated to assist ZIM U.S. Finance with its collection efforts when disputes over invoices are raised, primarily through discussions with the customers about reaching resolution. CX_04606-07, Cleva. Dep. Tr. 77:24-78:13.

263. Mr. Cleva questioned ZIM U.S. Finance’s handling of SAs with large overdue amounts in certain instances, including a decision to place an SA on a finance hold a day earlier than what was agreed upon. CX_04706-07, Cleva. Dep. Tr. at 177:11-178:5; CX_04798, Cleva Dep. Ex. 15 at 1.

D. ZIM’s *Ex Post* Justifications for The Finance Holds and D&D Practices Lack Any Factual Basis In The Evidentiary Record

1. SEA Did Not Pose a Credit Risk

264. ZIM raised for the first time in the FMC proceeding as an issue that “[Dun & Bradstreet (“D&B”)] assigns SEA as a high risk of severe payment delinquency” as an attempted justification for employing Finance Holds against SEA and other Samsung entities. CX_08793, McCown Dep. Tr. at 201:21-202:9.

265. But extensive discovery exchanged in the case does not reveal a single internal or external email from ZIM or ZIM U.S., justifying or explaining the rationale of implementation of Finance Holds against SEA on the basis of its creditworthiness or credit risk. Out of the 22,700+ documents produced by ZIM, not a single document references SEA as a credit risk. CX_00031, Joint Status Report dated May 22, 2023; CX_08863, Cleva Dep. Ex. 7 (“we are threatening to hold one of our most profitable customers”).

266. SEA’s expert John McCown, former CEO of ship owning company Trailer Bridge, when asked about the D&B report rejected any notion that SEA posed any credit risk by testifying that “I would never have requested a D&B report on Samsung or any part of it. And this notion that somehow that SEA is somehow a credit risk is ludicrous. It’s ludicrous on its surface.” CX_08793, McCown Dep. Tr. 201:21-202:9.

267. The concept of challenging the credit-worthiness of a company like SEA, who would be cautious before making payments based on its D&D experiences, was foreign to the

former shipowner, who testified, “If there’s any D&B report that says that, you know, the SEA or any affiliate of Samsung is in risk of scooting out of town overnight, and, boy, you better arrest their assets. I don’t believe that exists.” CX_08794, McCown Dep. Tr. 202:10-203:25.

268. Despite the alleged credit risks posed by SEA, and the resulting necessity of Finance Holds, ZIM kept on taking more and more of SEA’s cargo for putative store-door moves. CX_05931, BRG Report, Ex. 2 (Summary of D&D charges by Quarter Invoiced, tabulated based on “the data produced by SEA...extracted from its SAP system,” ¶ 31).

269. The more SEA cargo transportation business ZIM took on, the more demurrage charges followed between 2020 and 2022 (until Q3 of 2022, following the passage of OSRA):

Q1, 2020	Q2, 2020	Q3, 2020	Q4, 2020	Q1, 2021	Q2, 2021	Q3, 2021	Q4, 2021	Q1, 2022	Q2, 2022	Q3, 2022	Q4, 2022	Total
\$ 1,400	\$ -	\$ 5,550	\$ 2,920	\$ 1,175,296	\$ 79,033	\$ 979,648	\$ 1,017,976	\$ 1,722,375	\$ 2,392,727	\$ 80,020	\$ -	\$ 7,458,145

Id.; see also CX_05802, BRG Report ¶ 30.

270. ZIM did not produce any documents related to D&B reports in this matter before, during, or after the deposition of expert Mr. McCown, and simply raised the issue in the deposition in a *deus ex machina* of sorts to relieve ZIM of its behavior.

2. ZIM Attempts to Justify Excess D&D Charges Based on CNT Usage

271. In connection with this litigation, ZIM now takes the position that if SEA recommended a preferred carrier or a CNT on store door moves, ZIM’s typical store door move responsibility was somehow alleviated or that store door moves were converted to a container yard (“CY”) move and any delays and associated D&D charge would be the shipper’s responsibility. See, e.g., CX_04589-90, Cleva Dep. Tr. 60:18-61:9; CX_03054, Speight Dep. Ex. 6; CX_05087, Shpitzer Dep. Tr. 125:3-12.

272. ZIM’s litigation position is at odds with SEA’s day-to-day experience with ZIM where the use of a CNT did not relieve ZIM of its responsibility for store-door moves. CX_002121-23, Choi Dep. Tr. 72:12-74:24; CX_02238, Rapske Dep. Tr. 66:7-19; 82:8-84:15.

273. ZIM-produced emails address services that ZIM was obligated to provide under store door terms. For example, in a February 24, 2021 internal email to multiple parties, Matthew Frigo, ZIM’s US Intermodal Manager, addressed the trucker issues at a macro level by noting that “there are multiple trucker availability issues in most markets” and in emphasizing ZIM store door responsibility continues by noting there are “66 door moves where we can’t find any vendor to accept.” CX_02790, Frigo Dep. Ex. 13.

274. In an email dated July 12, 2021, a trucker on a ZIM move emphasized the lack of availability of containers which ZIM would release, something he has highlighted each day for more than two weeks. In the email, he states, “this has nothing to do with capacity. We have had drivers willing to pick up multiple times.” CX_002729, Frigo Dep. Ex. 7.

275. In an email dated January 31, 2022, ZIM Dedicated Service Group Customer Service Manager Barbara Speight places the trucker onus on ZIM when noting that the issues with SEA shipments were due “to **ZIM** trucker availability” CX_03044, Speight Dep. Ex. 5 (emphasis added).

VIII. INDUSTRY PERSPECTIVES REGARDING LIABILITY AND DAMAGES

A. Industry Views Regarding Expert Liability

276. SEA’s expert to liability, Mr. John McCown, has “over four decades of operating and investment experience in the container shipping industry” and holds “two patents on maritime processes related to cargo handling and vessel propulsion.” CX_08534, McCown Report ¶ 2.

277. Mr. McCown attested that, prior to the pandemic, “ZIM followed industry standard practices for store-door terms on SEA shipments, where ZIM was responsible for demurrage,

detention, and other accessorial charges except in limited circumstances where a delay in shipment was directly and obviously caused by the consignee.” CX_08537, McCown Report ¶ 13.

278. Industry standard practice prior to the pandemic was for an ocean carrier such as ZIM to be responsible for D&D for store door moves. *Id.*

279. Based on Mr. McCown’s experiences as a shipowner and industry thought leader, he had never “encountered an ocean carrier unilaterally deciding that store-door terms became inapplicable if a consignee nominated a preferred trucker.” *Id.*

280. Further, the container shipping industry historically considered “free days . . . typical and reasonable.” CX_08539, McCown Report ¶ 19.

281. Mr. McCown does not recall, in his decades of experience, “demurrage rates on containers ever being more than \$3 per day.” *Id.*

282. Mr. McCown has experience with store door moves and CY moves. CX_08540, McCown Report ¶ 20. When he was the CEO of the ocean carrier, Trailer Bridge, any CY move had a much “lower rate than store-door rates.” *Id.*

283. Mr. McCown further stated that the “shipping industry as a whole was generally profitable up until the financial crisis of 2008,” or, until “[c]arriers were faced with chronic excess capacity beginning around 2008.” CX_08540, McCown Report ¶ 22.

284. At this time, it became more common to amp up accessorial charges, including D&D, as a “creative revenue-enhancement practice[.]” *Id.*

285. After the 2008 recession, the pandemic began to transform carrier practices with D&D. Due to the competitive nature of the shipping industry, “revenues from streams beyond core shipment rates have become notable and important to the shipping sector’s bottom line.” CX_08542, McCown Report ¶ 23.

286. Until the pandemic, “[t]he industry reported overall losses in the majority of the quarters between 2016-2019.” In fact, “the overall cumulative bottom line for the container shipping industry for the four years from 2016 through 2019 was a deficit of \$8.5 billion.” *Id.*

287. ZIM’s rebuttal expert to SEA’s liability expert is Mr. Lee A. Clair. CX_06760, Clair Report Cover Page.

288. Mr. Clair, with a rail background having worked at UP, never worked at a ship-owning company and provides general consulting work in the supply chain to companies involving toys and dog products. CX_06938, Clair Dep. Tr. 149:11-153:17; CX_06762, Clair Report ¶ 1.

289. As an example of the gap in Mr. Clair’s shipping expertise, when asked about the depth of his ocean carrier knowledge and industry position of carriers, he opined that ZIM is comparable to Hanjin Shipping Lines (a shipping line that went bankrupt in 2016/17 and no longer conducts business) in terms of size/capacity as a “Top 15” ocean carrier comparable. CX_06996-97, Clair Dep. Tr. 207:17-208:1.

290. Although Mr. Clair’s resume depicts limited experience with ocean freight, he asserts that his consulting experience gave him a sufficient background to understand ocean terminology and general information. CX_06963-64, Clair Dep. Tr. 174:4-175:2; CX_06784, Clair Report App. A.

291. Despite that, he has never conducted a case study on ocean carriers, worked for an ocean carrier as an employee, nor has he done work related to ocean demurrage and detention policies. CX_06923, Clair Dep. Tr. 134:18-20, CX_06492, 153:15-17, CX_06945, 156:7-12, CX_06947, 158:10-14, CX_06961, 174:24-175:7.

292. Mr. Clair focused on attacking Mr. McCown’s knowledge of the shipping industry by calling it “out of date” and yet had to admit that he himself had never worked for a shipowner

whereas Mr. McCown was a CEO of a ship-owning company. CX_06959-62, Clair Dep. Tr. 172:12-175:15.

293. ZIM's approach in both the Clair report and in his deposition was to not delve into the specific evidentiary record and instead relied heavily on documents provided by counsel and references to supply chain ensnarement articles on websites. CX_06787, Clair Report App. B, CX_000000, Clair Dep. Tr. 168:1-169:6.

294. Mr. Clair was retained about six weeks before his deposition and he admitted his project manager and junior analysts did the bulk of the work for the report because he often referenced that the project manager would have all the files and/or access to certain information. CX_06816, Clair Dep. Tr. 27:19-28:6, 199:18-20.

295. He also stated it was "hard to answer specifically" who wrote more of his report between him and his project manager. CX_06829, Clair Dep. Tr. 40:12-20.

296. When questioned on why he only reviewed a few select samples of fact witness depositions whereas Mr. McCown reviewed the eleven available to him at the time, Mr. Clair stated that he did not "view there being anything useful or directly related to anything that we were trying to do with the rebuttal report." CX_06832, Clair Dep. Tr. 43:3-10.

297. Mr. Clair later confirmed that he did not find the SEA witness testimony relevant to making his rebuttal report. There were many other gaps in his testimony indicating that he did not determine lost opportunities, pre-Covid behavior, utilization rates of empty containers, or review data related to no sails/delayed vessels. CX_06832-33, Clair Dep. Tr. 43:24-44:15, CX_06868, 79:12-19, CX_06882-83, 93:24-94:23, CX_6893-94, 104:23-105:1, CX_06896, 107:10-16.

298. When approaching ZIM, Mr. Clair himself described his analysis as “superficial” and did not independently verify any of the information he received nor did he consult with ZIM regarding the importance of the trade lanes he used to base his rebuttal. CX_06967, Clair Dep. Tr. 178:9-179:8.

299. However, he similarly refused to admit that ZIM should be responsible when there is no designated trucker. CX_06845-45, Clair Dep. Tr. 56:20-57:25.

300. Mr. Clair admitted that under typical store door terms, ZIM was responsible if it did not execute the move the way they were directed to by the shipper. However, Mr. Clair continually obfuscated his answers when it came to who should be responsible for various obligations under store door moves when questioned on different hypotheticals. For example, he said in a situation where ZIM should provide a house trucker, it would depend on specific facts whose responsibility that is. CX_06853, Clair Dep. Tr. 63:4-66:1.

301. Mr. Clair also stated that in a store door move situation where SEA does not designate a preferred trucker, there are still reasons that ZIM may not be at fault, like if the warehouse refused delivery or failed to give a delivery appointment. CX_06843-CX_06844, Clair Dep. Tr. 54:3-55:23.

302. Mr. Clair would not acknowledge that delays caused by ZIM would shift responsibility back to ZIM. He repeatedly disclaimed these scenarios and argued that a timely return of equipment was not always possible but would not say there would be a need for consequences otherwise. CX_06849, CX_06856-CX_06858, CX_06977-CX_06978, Clair Dep. Tr. 60:6-18, 67:18-69:21 188:10-189:14.

303. Mr. Clair argued that D&D is not used as a profit center, but admitted carriers treat “all their accessorial charges, demurrage detention, the rest, in a different way.” However, he

admitted he had done no independent research to determine if ZIM had in fact been using D&D/accessorial charges in this way. Once it was clear he did not know, he would not opine on whether ZIM should be doing it that way. CX_06855-CX_6858, Clair Dep. Tr. 66:23-69:21.

304. Mr. Clair lacked knowledge regarding OSRA 2022 and the Incentive Principle. CX_06858-CX_06863, CX_06909-CX_06910, Clair Dep. Tr. 69:22-74:12, 120:15-121:12.

305. Although Mr. Clair lacked familiarity, he maintained that the purpose of demurrage and detention charges is to “assist in fluidity and the network running in the way in which it was planned to run” but in a way that was not backed by evidence in the record or specific industry examples. CX_06855, Clair Dep. Tr. 66:6-13.

306. Mr. Clair did not review ZIM’s D&D policies, nor was he prepared to opine on the efficacy/robustness of ZIM’s dispute procedure. CX_06899-CX_06900, CX_06918, Clair Dep. Tr. 110:16-111:7, 129:2-18.

307. With his focus on it being a rebuttal report, Mr. Clair testified that he believed his report being a rebuttal report relieved him of doing any other kind of analysis or pulling from personal knowledge of the shipping industry. CX_06918, CX_06957, CX_06967, CX_0687, Clair Dep. Tr. 129:2-10; 168:13-21, 178:9-15.

308. He contended that a container-by-container analysis needed to be done to verify charges in paragraph 19 of his summary opinions but stopped short of actually requesting additional information from ZIM, or undertaking this analysis on which he and Mr. Zayas opined would be necessary to analyze the merits of this case. CX_06909, CX_06986-CX_06987, Clair Dep. Tr. 120:2-13, 197:19-198:25.

309. Mr. Clair testified that he could have potentially performed this work as he was contacted in the first quarter of 2023 to be a potential affirmative witness (as opposed to purely

rebuttal) but then ZIM “went dark” as to retaining him until his retention six weeks before his rebuttal report. CX_06989, Clair Dep. Tr. 200:4-23.

310. One of the few examples of Mr. Clair commenting on evidence in the SEA / ZIM record concerns perceived warehousing delays justifying D&D charges. CX_06780-CX_06781, Clair Report ¶ 58; CX_07127-CX_07133, Clair Dep. Ex. 10 (SEA0028098).

311. There, Mr. Clair references “SEA 28098” at footnote 34, an April 14-15, 2021 “email string between SEA, ZIM and SEA’s agent UPS [which] outlines an Orville Appliance Warehouse being unable to accept a shipment for at least 6 more days, at least 9 days after the last free day,” as support for warehouse delays issues that are the responsibility of SEA and justified D&D charges. *Id.*

- Mr. Clair testified at the end of his deposition concerning this particular shipment marked by container ZIMUSEL200217834. CX_07127-CX_07147, Clair Report Exs. 10-13; CX_07073-CX_07082, Clair Dep. Tr. 287:2-293:9.
- Exhibit 13, the bill of lading, references container ZIMUSEL200217834 in the booking number on the top right, which matches the email chain in Mr. Clair’s report. In the middle part of the bill of lading it shows the final destination is USA NY Lancaster, an inland destination showing a store door move. CX_07146-CX_07147, Clair Dep. Ex. 13.
- In Exhibit 10, reviewing the bottom of the email chain, the first email in the chain, sent on April 14, 2021 at 10:36 am, states, “Carrier advised the soonest the warehouse can accept is 4/20 at 7 am.” The “carrier” is a trucker ZIM was in contact with on a store door move. CX_07127-CX_07133, Clair Dep. Ex. 10.
- The next day ZIM writes again to SEA demanding a response. CX_07127-CX_07133, Clair Dep. Ex. 10.
- In another email that same day, ZIM states, “I need a response on this please. Re-sending below message ... The LFD was 4/11 storage needs to be cleared for the pre-pull. ...” CX_07130, Clair Dep. Ex. 10 at p. 4. The reference is to the last free day on April 11, 2021 with ZIM writing an urgent message to SEA for information three and four days after the LFD has already expired. *Id.* On a store door move, where ZIM was coordinating with the trucker, the first time this container was raised to SEA was three days after the last free day when ZIM had already started to collect demurrage based on its business. *Id.*

- At the top of the email chain, ZIM, after demanding SEA pay all demurrage before the box would be released, states, “Cntr is at Cleveland ramp. Let me check with Dispatch to confirm trucker will still be able to pick up.” CX_07127-CX_07133, Clair Dep. Ex. 10. This again shows ZIM is responsible for handling the truck arrangements.
- Right at the top, at the end of the email chain cited by Mr. Clair, ZIM responds and states “dispatch has not received a response from the trucker as of now.” CX_07127-CX_07133, Clair Dep. Ex. 10. In it, ZIM is advising SEA it has no ability to confirm if a trucker is even available to deliver this one box to the customer.
- Although that one document was the end of Mr. Clair’s inquiry, SEA produced documents followed container ZIMUSEL200217834 on its journey. Exhibit 12 is a separate email chain dated April 19, 2021 from ZIM to SEA stating: “Trucker was unable to out-gate cntr on Friday” and demanding SEA clear more demurrage by saying “please clear rail storage through today”. This demand is made despite ZIM being responsible for trucker availability and delays on store door moves. Mr. Clair confirmed he did not receive this email chain from ZIM to assess when making his warehouse opinion statement. CX_07080-CX_07081, Clair Dep. Tr. 291:12-292:4; CX_07142-CX_07145, Ex. 12 thereto.
- At Exhibit 12, in another email with the same box reference number (*i.e.*, ZIMUSEL200217834), in an April 23, 2021 email, ZIM wrote to SEA, “Dispatch advised the cntr is rescheduled for Monday due to trucker availability,” highlighting that trucker availability on a store door move remained ZIM’s responsibility. CX_07143, Clair Dep. Ex. 12 at p. 2.
- In reply, SEA asked ZIM to confirm delivery on April 26; however, on April 28, 2021, SEA wrote to ZIM that “[d]ispatch has advised the trucker had a family issue and could not deliver on Monday. Cntr rescheduled for 05/03.” This remained a trucker availability issue on a store door move and ZIM’s responsibility. There is no reference to warehouse availability issues in this email chain. CX_07142-CX_07145, Clair Dep. Ex. 12. Mr. Clair confirmed that he did not receive this email chain from ZIM to assess when making his warehouse opinion statement. CX_07080-CX_07081, Clair Dep. Tr. 291:20-292:4.
- Mr. Clair’s warehouse unavailability defense of ZIM’s actions, when assessed in the full context of a container move when assessing Exhibits 10-13 is indicative of the incorrect premise that a container by container analysis will result in salvation for ZIM’s D&D practices (as opined in paragraph 19 of Mr. Clair’s summary of opinions). CX_07127-CX_07147, Clair Dep. Exs. 10-13; CX_06765, Clair Report ¶ 19.

312. The industry perspective on liability provided by Mr. McCown provided insight into both shipowner and industry trends over the past four decades, whereas the report and

testimony of Mr. Clair did not encompass a shipowner perspective or the same length of experience. CX_08534-CX_08535, CX_08537-CX_08538, CX_08540-CX_08541, McCown Report ¶¶ 2-3, 15, 18-20; CX_06762-CX_06763, Clair Report ¶¶ 1-6.

B. Industry Views Regarding Expert Damages

313. SEA’s expert as to damages is Mr. Greg Smith, a “Certified Public Accountant, a Chartered Global Management Accountant and a Master Analyst in Financial Forensics” with significant experience “analyzing financial and economic issue related to the operations of companies participating in the transportation industry.” CX_05786-CX_05787, BRG Report ¶ 3.

314. During the pandemic, the container shipping industry was affected by various issues such as “chassis shortages, trucker shortages, inclement weather, and port and terminal congestion matters.” CX_05794-CX_05795, BRG Report ¶ 20; CX_00008, Compl. ¶ 39.

315. This had an impact on US ports, “resulting in elevated dwell times, landslide bottlenecks, and continued chassis shortages well into 2022.” CX_05795, BRG Report ¶ 21; CX_08282-CX_08293, Jason Price, U.S. 2022 Ports Update, [cushmanwakefield.com, https://www.cushmanwakefield.com/en/united-states/insights/north-american-ports-report](https://www.cushmanwakefield.com/en/united-states/insights/north-american-ports-report).

316. Mr. Smith outlined how these industry-wide issues led to SEA having to “build out capacity to receive cargo at the port or container yard and manage the inland transportation itself.” CX_05795-CX_05796, BRG Report ¶ 22.

317. This industry shift led to SEA having to “develop [new] infrastructure . . . including . . . off-dock storage facilities and processes for contracting for the movement of containers to their ultimate destinations.” CX_05795-CX_05796, BRG Report ¶ 22.

318. Mr. Smith further outlined the industry standard for compensatory damages based on the Reference Manual on Scientific Evidence from the Federal Judicial Center, stating that damages should:

- “Be based on the assumption that the harmful act did occur”;
- “Translate the legal theory of the harmful event into an analysis of the economic impact of the harmful event”; and
- “Analyze the difference between the plaintiff’s actual economic position and what it would have been if the harmful act had not occurred.”

CX_05796, BRG Report ¶ 23; CX_08328, Federal Judicial Center, Reference Manual on Scientific Evidence (3d ed.) at p. 432.

319. Mr. Smith analyzed ZIM-produced documents and found that “demurrage and detention charges paid by SEA prepared by ZIM shows that only 0.0% and 0.2% of charges were related to shipments for which ZIM’s responsibility ended at the marine terminal/container yard.”

CX_05799, BRG Report ¶ 28; CX_01571-CX_01948, ZIM0024082.

320. ZIM’s rebuttal expert to SEA’s damages expert (Mr. Gregory Smith) is Mr. Ricardo Zayas. CX_06500, Zayas Report Cover Page.

321. Mr. Zayas did indicate he had knowledge of the industry standard for compensatory damages based on the Reference Manual on Scientific Evidence from the Federal Judicial Center. CX_06630, Zayas Dep. Tr. 108:5-12.

322. Mr. Zayas was charged with a “limited” role to see if there are any theoretical holes to Mr. Smith’s damages report without conducting any independent analysis. CX_06551-CX_06553, Zayas Dep. Tr. 29:18-31:1.

323. In connection with his rebuttal expert report, Mr. Zayas did not request any documents from ZIM; he did not conduct any interview of ZIM employees; and he only had his associate conduct two interviews in which he did not participate. CX_06544, CX_06559-CX_06560, CX_06569-CX_06570, Zayas Dep. Tr. 22:16-18; 37:6-38:5; 47:21-48:3.

324. Mr. Zayas admitted none of his “conclusions” are definitive and malleable, subject to an in-depth “container-by-container” analysis (which he did not perform), but rather they are

“rudimentary” curiosities following his review of only a select, counsel-curated set of documents. CX_06615-CX_06616, CX_06623-CX_6624, Zayas Dep. Tr. 93:18-94:12, 101:11-102:17.

325. Mr. Zayas admitted that he did not address or rebut any of the impacts of Finance Hold as opined by Smith. CX_06724, Zayas Dep. Tr. 202:3-14.

326. Mr. Zayas repeatedly admitted that Finance Hold was not within the scope of his rebuttal expert report; nor was he testifying about it in his deposition. CX_06724, CX_06725, Zayas Dep. Tr. 202:3-14, 203:6-16.

327. Mr. Zayas had no opinions on the topic and did not know anything related to dates or circumstances involving Finance Holds. CX_06711, CX_06725, Zayas Dep. Tr. 189:3-13, 203:12-16.

328. ZIM’s counsel provided Mr. Zayas with two emails, which he claimed “revealed” instances of where SEA should properly be assigned responsibility because SEA somehow “converted” two containers bound for Auburndale, Florida around August 2021 into CY terms. CX_06706-CX_06707, CX_06709-CX_06710, Zayas Dep. Tr. 184:24-185:12, 187:17-188:25.

329. Based on the foregoing, Mr. Zayas questioned the integrity or foundation of Smith’s report. CX_06605, Zayas Dep. Tr. 83:8-16.

330. However, Mr. Zayas agreed that the two emails only showed that in the midst of ZIM’s inexplicable rejection of SEA’s preferred trucker and ZIM’s non-responsiveness and unhelpfulness to arrange inland transportation, SEA only tried its best to arrange same on its own. CX_06695-CX_06696, Zayas Dep. Tr. 173:10-174:3.

331. To the extent that those examples shed any light, they revealed that around that time period, ZIM unreasonably charged over \$1.5M on containers that ZIM admitted remained store moves, but were still subject to Finance Holds effective at the time. *Id.*

332. Realizing that these two emails did not tell the “whole” story, Zayas did not bother investigating further because that’s “outside the scope of his engagement.” CX_06725, Zayas Dep. Tr. 203:4-16.

333. Mr. Zayas acknowledged on multiple occasions that under store door moves, arranging for and paying for inland transportation are ZIM’s responsibility. CX_06565, CX_6567, CX_06713-CX_06714, Zayas Dep. Tr. 43:7-22, 45:14-24, 191:2-10, 191:15-192:8.

334. Despite claiming that the general transportation matters comprise around 20% of his work in the past six years or so, Mr. Zayas did not exhibit any grip on even the basic definitions and concepts related to store door vs. CY moves, e.g., he could not answer who the responsible party is for returning equipment under store door moves. CX_06536, CX_06660-CX_06661, Zayas Dep. Tr. 14:17-20, 138:11-139:25.

335. Mr. Zayas admitted he could not speak competently about OSRA as he had only heard of it. He did not have a handle on the fact that OSRA maintains that just because an ocean carrier issues an invoice, that does not automatically make it valid. CX_06620-CX_06621, CX_06666-CX_06668, Zayas Dep. Tr. 98:24-99:12, 144:12-146:2.

336. Mr. Zayas insisted that all the invoices, even the ones issued before the passage of the OSRA, serve as ZIM’s definitive explanation as to the propriety of the charges therein. CX_06618, CX_06625, Zayas Dep. Tr. 96:9-25, 103:2-20.

337. Likewise, Mr. Zayas also claimed that if SEA did not want to pay these charges, then it should not have paid them, but rather engaged in an invoice-by-invoice dispute process with ZIM, CX_06626-CX_06627, Zayas Dep. Tr. 104:16-105:8.

338. Mr. Zayas did not review ZIM's D&D policies, nor was he prepared to opine on the efficacy or robustness of ZIM's dispute procedure. CX_06541, CX_06627, Zayas Dep. Tr. 19:8-12, 105:13-17.

339. Mr. Zayas admitted that none of the service contracts he claims were governing the relationship between ZIM and SEA were executed by, much less refer to, SEA anywhere. CX_06583-6585, Zayas Dep. Tr. 61:20-63:13.

340. With regard to Mr. Smith's analysis, he considered data provided by both SEA and ZIM, and looked at specific charges at issue under store door terms, including demurrage, detention, line and equipment detention, driver detention, pier pass, rail storage, rehandling, diversion, expedite, yard storage, chassis usage, chassis split, and prepull. CX_05799-CX_05802, BRG Report ¶ 29.

341. With regard to Mr. Zayas' analysis, it is challenging to discern any independent analysis with regard to demurrage, detention, line and equipment detention, driver detention, pier pass, rail storage, rehandling, diversion, expedite, yard storage, chassis usage, chassis split, and prepull, besides his "rudimentary analysis" of the two containers. CX_06500-CX_06522, Zayas Report ¶¶ 1-73; CX_06615-CX_6616, Zayas Dep. Tr. 93:18-94:12.

C. Examples Of ZIM's Preferred "Container-By-Container" Analysis Paradoxically Confirms SEA's Position

342. It is ZIM's position that it is on SEA to show the impropriety of D&D charges on a container-by-container basis. CX_06626, Zayas Dep. Tr. 104:16-20.

343. In an effort to bolster this stance, Mr. Zayas confirmed that he performed a "rudimentary container-specific analysis" of two containers related to Lowe's shipments, FCIU8925202 and ZCSU7709338 ("Two Containers"). CX_06615-CX_06616, Zayas Dep. Tr. 93:18-94:12.

344. Mr. Zayas noted that ZIM provided him with “email correspondence that causes us to believe that the [T]wo [C]ontainers were converted at a point in time to container yard from store door.” CX_06617, Zayas Dep. Tr. 95:14-17.

345. However, Mr. Zayas stated methodology-wise, he did not actually follow his own recommended steps necessary to make a full analysis on the two containers. He stated that he would need “to assess how that comes or how that plays out in terms of charges, when should they be apportioned, to whom should they be apportioned. Is the first month somebody’s problem? Is the last five months somebody else’s problem” but then admitted “I don’t know any of those answers.” CX_06617, Zayas Dep. Tr. 95:18-23.

346. He further stated that his analysis was based on “rudimentary container-specific analysis” but admitted “there may be something out other that we’re not seeing seeing” so he could not “preclude an in-depth container-specific analysis may change his analysis and conclusion.” CX_06622, Zayas Dep. Tr. 100:9-24.

347. ZIM’s own rebuttal expert did not even perform the analysis putatively necessary to determine whether the two containers were properly assessed D&D charges, in contravention of ZIM’s stance that a container-by-container analysis is necessary to determine the validity of charges. CX_06639-CX_06640, Zayas Dep. Tr. 117:22-118:2.

IX. SEA’S DAMAGES AND PRAYER FOR RELIEF

348. SEA’s direct damages in the nature of the inland transportation charges were excessive and should not have been passed on to SEA by ZIM under store door terms total \$10,807,038. CX_05805, BRG Report at p. 20, ¶ 40; CX_05816-CX_5930, Ex. 1 thereto; CX_06503, Zayas Report ¶ 7.

349. In regard to the \$10,807,038, SEA’s damages expert confirmed the data process involved in collecting the verifying the data from SEA: “[t]o aid in determining damages,

SEA provided and produced to ZIM three electronic files detailing all of the above-referenced inland transportation charges incurred, posted, and paid in connection with SEA containers transported by ZIM during the period from 2019 through 2022. In Exhibit 1, I have detailed these inland transportation charges, including relevant fields from the SEA data production. All data contained in Exhibit 1 is taken directly from the SEA dataset without alteration, other than formatting. The column titled ‘SLCC Subtotal provides the total for each category of inland transportation charges.’ The footnote to this paragraph, in relevant part, provides: “[t]he data includes all charges posted (recorded) by SEA to its SAP system during the period from January 1, 2020 to December 31, 2022” CX_05802, BRG Report ¶ 30.

350. SEA’s consequential damages in the nature of (i) additional expenditures SEA had to incur because of ZIM’s failure to provide store-door delivery of SEA shipments and (ii) lost revenue total \$1.4 million. CX_05813-CX_05814, BRG Report ¶ 59 & 62; CX_05946, Ex. 12 thereto; CX_06507, Zayas Report ¶ 21.

351. SEA seeks an order requiring Respondent to pay Complainant reparations for the unlawful conduct described above, along with interest and Complainant’s attorney fees and costs as described in 46 U.S.C. § 41305 (in due course), a cease and desist, and any other relief FMC deems just and proper.

Dated: August 23, 2023

Respectfully Submitted,

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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:

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